



Australian Government
Productivity Commission

PRODUCTIVITY COMMISSION

**INQUIRY INTO WORKPLACE
RELATIONS FRAMEWORK**

MR P HARRIS, Presiding Commissioner
MS P SCOTT, Commissioner

TRANSCRIPT OF PROCEEDINGS

AT METRO HOTEL, IPSWICH
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INDEX

	<u>Page</u>
QUEENSLAND COUNCIL OF UNIONS:	
JOHN BATTAMS	
MICHAEL CLIFFORD	
JOHN MARTIN	602-624
TEYS AUSTRALIA:	
JOHN SALTER	
SARAH TAYLOR	624-636
CHAMBER OF COMMERCE AND INDUSTRY	
QUEENSLAND:	
NICK BEHRENS	
KATE WHITTLE	
JASON WALES	636-653
NATIONAL RETAIL ASSOCIATION:	
TREVOR EVANS	653-663
QUEENSLAND NURSES UNION:	
BETH MOHLE	
JANET BAILLIE	
LIZ TODHUNTER	663-681
LORETTA WOOLSTON	681-689
COMMUNIST PARTY AUSTRALIA:	
DAVID MATTERS	689-700
ALAN BYERS	700-702
STEVE FRANKLIN	702-704
AGED CARE, ECEC, UNITED VOICE:	
WAYNE PORRITT	
KAREN MORAN	
SAMARAH WILSON	
SHEILA HUNTER	704-718
AUSTRALIAN BREASTFEEDING ASSOCIATION:	
RACHEL McDONALD	718-729

5 **MR HARRIS:** Good morning. Welcome to the seventh public hearing on the Productivity Commission's national inquiry into Workplace Relations frameworks. We released a draft report in August 2015. The purpose of this inquiry is to take comments on all the recommendations and information requests in that, and anything else frankly in submissions as well.

10 I'm Peter Harris, I'm Chairman of the Productivity Commission, and with me today is Patricia Scott, who is Deputy Chairman of the Productivity Commission, and we are the Commissioners for this inquiry. Following this hearing in Ipswich, we will have a final hearing in Melbourne, our eighth, and then we will be working towards a final report for the government by November 2015.

15 Participants and all those who have registered their interest in this inquiry will be advised by email of the final reports released by the government, which may be up to 25 parliamentary sitting days after we complete our report. For the benefit of everybody, that means possibly early next year.

20 We like to conduct all hearings in a reasonable informal manner, but I remind participants a full transcript is being taken and for this reason we won't be taking comments from the floor, but at the end of proceedings for the day, I will make an opportunity for persons who wish to do so to make a brief presentation. I would also remind people that it's best not to defame anybody, because we're recording all of this. Anyway, we have to do that.

30 Participants are not required to take an oath but should be truthful in their remarks. Participants are welcome to comment on the issues raised in other submissions, as well as raised in inquiries. A transcript will be made available to participants and will be on the website following the hearings today. Submissions will also be available on the website. While we do not permit video recordings or photographs to be taken during the proceedings, social media, such as Facebook or Twitter may be updated throughout the day, however we do ask members of the audience to ensure their mobile devices are all switched to silent, please.

(Housekeeping matters)

40 I think we have the Queensland Council of Unions. Could you guys please identify yourselves for the record?

MR BATTAMS: Yes, John Battams, President, Queensland Council of Unions.

45 **MR CLIFFORD:** Michael Clifford, Assistant General Secretary, Queensland Council of Unions.

MR MARTIN: John Martin, Research and Policy Officer, Queensland Council of Unions.

MR HARRIS: Do you guys want to make an opening statement?

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MR BATTAMS: Yes, I will make the opening statement to give some general comments around our position and also to comment specifically on penalty rates.

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MR HARRIS: Sure.

MR BATTAMS: Mr Clifford and Mr Martin will add. The QCU is a peak body of the trade union movement in Queensland. There are about 475,000 members of the union movement in Queensland and, in fact, the union movement over the last 12 months grew in numbers in Queensland. We see our role not just representing union members in this State, but particularly in the case of this report, wider society, because many of the workers that will be affected by some of these proposals are not union members.

20

We appreciate the opportunity to provide submissions on the areas being investigated and we appreciate that some of the recommendations which support long held views of the trade union movement. However, we are very quick, as people would be aware, to identify and impose measures which firstly either increase the bargaining power of employers, for example, in the issue of enterprise contracts, or secondly, purport to reduce the conditions of workers in Queensland and Australia.

25

Despite media and conservative views of the world, that is, that unions have too much power, perpetuated by the media in particular, the reality is the vast majority of workers' bargaining power is significantly less than that of the employer, even to the extent in recent months we have seen very high profile cases of large companies, or groups of companies, flouting the law and paying less than what was legally entitled to thousands of employees.

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In terms of penalty rates, the Productivity Commission has determined that penalty rates for specific occupations, in short, the retail and hospitality areas, would be reduced to the equivalent of penalty rates on Saturdays. Our response to the Commission's report on page 9 details the exact effect of that in terms of reductions in take-home pay for an eight-hour shift. In fact, there are 24,000, in our estimate, employees in this city of Ipswich which would be directly affected by this reduction in Sunday penalty rates. From our point of view, there is much to be said about this particular recommendation.

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Employer groups would have everyone believe that thousands of jobs would be created through the introduction of this recommendation. Many of these claims are underpinned by so-called surveys of employer groups own

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constituency, the business people who stand to personally be given increased profits through reducing wages and penalty rates.

5 There is hysteria attached to each holiday period; for example, in
Queensland where employers claim that businesses will be closed over
Christmas and Easter. One newspaper report in 2014 read, “Cafes and
restaurants across the Sunshine Coast have done a roaring Easter trade,
defying predictions that penalty rates, exorbitant penalty rates, would force
them to close their doors. Chamber of Commerce and Industry General
10 Manager, Nick Behrens, sounded the warning bells last week saying he
expected two-thirds of hospitality businesses would close on Good Friday,
Easter Sunday and Easter Monday, but the reality was very different, with the
vast majority of businesses in areas open and doing a roaring trade.” This is
15 from the Noosa News. “It was a similar picture along the Mooloolaba and
Caloundra tourist strips, where cafes, coffee shops and restaurants were run off
their feet.”

20 The point to be made is we have been subjected to hysteria around the
issue of penalty rates for many years, which is highlighted during holiday
periods, none of which has to be proven true. The sharp end of their argument
is that many businesses actually close on Sundays because of penalty rates.

25 Let’s look at one review by one of their own, the Restaurant and
Catering Industry Association’s research involving a survey of a thousand
restaurant and café business owners in April, May of 2015. The survey results
indicated that 90 per cent of those surveys - this is the employer organisation’s
own survey - 90 per cent of those surveyed opened on Sundays and public
holidays. Of course, they don’t acknowledge that even with the 10 per cent
that weren’t open, they weren’t open largely because of business reasons; for
30 example, cafes and coffee shops in the CBD, where business wasn’t available
because in fact most people actually work Monday to Friday.

35 Amongst all of this posturing, there is only one inescapable,
indispensable fact, that is cutting penalty rates will cut workers' take-home
pay. That is the only proven fact not very often mentioned when these
arguments are made publicly. In our submission following the report, we
detail those cuts, as I said, on page 9 of our response. Such a reduction,
particularly for low income workers, jeopardising providing the basics of life
such as food and clothing and shelter. We are talking here about people who
40 earn least in our society.

45 It’s also noted that highly unionised areas of employment where penalty
rates are paid, such as nurses, paramedics, fire-fighters, police officers, are
excluded from the current recommendation. We support the current status quo
for penalty rates to be paid to all occupations where they currently accrue. The
decision to pick on the most defenceless to remove their penalty rights has
been rightly criticised as economic apartheid, attacking those who can least

afford it. To suggest that it's related to skill is nonsense. The base rate of pay would relate to skill. Penalty rates are paid for other reasons and those reasons accrue to workers, regardless of where they work.

5 It is noted the Productivity Commission suggests that the Fair Work Commission should undertake a review of other occupations' penalty rates in light of this report. Of course, this sounds warning bells for all other occupations that aren't included in this recommendation.

10 The Productivity Commission's suggestion that perhaps we can look at preferred hours' clauses in awards or individual contracts also requires examination. We have had a recent case at the Capalaba Sports Club in Queensland where a labour hire firm used this tactic and the tactic was, of course, to establish the preferred hours and those days and hours on which
15 penalty rates accrue. Workers who don't have much bargaining power, won't be the ones who really nominate the preferred hours; it will, in fact, be the employers.

20 I turn to the effects of working weekends for employees and their families which begins at page 499 of the Commission's report. There is a huge debate around this issue. The union movement contends that working on weekends is a sacrifice that some workers have to make and this has a negative effect on their family and their community and their social activities, and indeed, the Commission acknowledges this generally on page 499, "The
25 overall evidence suggests that people prefer weekends for pleasure, not work". Again, in relation to Sundays, on page 514, "Sunday work does more adversely affect outside activities and relationships, compared with Saturday work".

30 In fact, the Queensland Government's submission to the original Productivity Commission investigation, which opposed any reduction in penalty rates, identified the relatively small number of people who must make this sacrifice in comparison with the majority and I quote from their submission. "Overall, 17.22 per cent of working Australians usually work
35 Saturdays, and 10.1 per cent usually work Sundays. Allowing for people not in the labour force, we can extrapolate that around 10.5 per cent of Australians aged 15 and over usually work Saturdays and 6.2 per cent usually work Sundays.

40 With less than 11 per cent of Australians at work on Saturdays and Sundays, it would be difficult to mount an argument that there is no social disability associated with working weekends. Family and extended family gatherings, socialising and special occasion celebrations, all tend to be centred on weekends because this is when the majority of people are available." I
45 emphasise that fewer people work on Sundays than any other day of the week.

5 The Commission contends, “That in particular segments of the service sector, cafes, hospitality, entertainment, restaurants and retail, Sunday work is now inherent in the job and therefore penalty rates should be reduced”. This is despite the fact that, according to the Commission, similar work patterns in other industry do not justify a reduction in penalty rates.

10 In our view, workers in the areas identified should not be discriminated against in terms of penalty rates, simply because of the job they do or the skills they have. They have personal needs. They have families. They have social needs. They are the same as everybody else. They are not second-class citizens. The fact that Saturday, Sunday work is a fact of life in some occupations does not diminish the effect of working these days on the employees and their families, and it should not diminish their rights in relation to penalty rates.

15 In conclusion, in relation to the issue of employment, ad hoc, self-serving surveys of members of industries affected by employer associations do not constitute evidence that cutting penalty rates will increase employment. The Fair Work Commission has found no link between reducing penalty rates and increasing employment. In terms of the macroeconomic situation, it’s very hard to drive an argument that reducing penalty rates from employees, who have a high propensity to consume, in other words consume most or all of their income and therefore reduce demand in the economy, will actually increase employment.

25 We are here to represent in excess of 400, probably about 420,000 of the 700,000 employees in Queensland who will be directly affected by a reduction in Sunday rates. We will fight this to the end because we don’t believe it is socially fair, but we also believe it is economic madness.

30 Thank you.

MR HARRIS: Thanks for that. Do your colleagues want to speak now?

35 **MR BATTAMS:** Yes.

MR HARRIS: I should tell everybody too, we’ve got quite a thick program today back-to-back, so we’ve got you guys down for 45 minutes. So leave us about 15 to at least ask you questions, if you could.

40 **MR CLIFFORD:** Thanks, Chair. There’s four issues I wanted to very quickly speak to; one is enterprise contracts; one is unfair dismissals; one is the regulation of labour hire and casuals; and finally, right of entry.

45 Just on the enterprise contracts, to start with, the Productivity Commission has sought feedback on the concept of enterprise contracts. It’s an industrial tool that we are very concerned about for a number of reasons.

One is that one of the primary objects of the Act as it currently stands is to encourage collective bargaining. We see enterprise contracts as a way of undermining collective bargaining for a number of reasons. There is no bargaining required. It's a document that's unilaterally drawn up by the employer and offered to employees.

It can be used to vary both an award and an enterprise agreement. In that respect, it's of concern to us that parties could sit down and negotiate an enterprise agreement and the very next day the employer could turn around and offer a different set of conditions to workers which would frustrate bargaining, and I think would be the cause itself of disputation in the workplace. It would undermine collective bargaining also, because there is no bargaining involved in this. It is a unilateral offering by the employer. There's no right to representation for employees which is a further concern to us.

We think that the "opt in", "opt out" arrangements, whilst providing - the Commission stated that provided some form of safeguard, we think it comes with a range of complications. For employers who do genuinely offer an "opt in", "opt out" arrangement, it means they're operating with different sets of conditions in the workplace for those who opt in, and those who don't opt in. We think if a contract is offered to employees, and throughout the report the Commission makes reference to the inequality of power in the workplace, we think that that inequality would come into play in this regard as well. We think that there would be pressure on people to opt in. We think that if people did opt out, there would be constant pressure on those people, particularly in light of the fact that enterprise contracts could be offered to new employees as a condition of employment. That, in itself, would place a great deal of pressure on employees who decided not to accept this contract in the workplace.

One of the other things that's of great concern about the enterprise contracts is the lack of scrutiny around them. In that respect they reflect the arrangements that existed for Australian workplace agreements. In fact, we see these as collective Australian workplace agreements. Whilst there would be a "no disadvantage" test and we're yet to know what the Productivity Commission would recommend about that "no disadvantage" test, except that we have a fear that it would be a lower test than the "better off overall" test. Notwithstanding the fact that there would be some sort of safety net, what we say with Australian workplace agreements, where there was no scrutiny by the Fair Work Commission of those agreements to see if they actually met that test, was that in fact most Australian workplace agreements went below the established test at that time.

In 2008 there was an analysis of 1,748 AWAs, and 89 per cent of those AWAs that were approved between April and October 2006, when there was a range of what was then called "protected conditions", that was the established

safety net, 89 per cent of those AWAs removed at least one so-called protected award condition. So we think it's a real concern that when you don't have that scrutiny that in that case nine out of 10 of the documents that were submitted eroded the safety net and we think that's the result of a lack of scrutiny.

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When you look at some of the sorts of things that were removed, again following on from John's submission, we think this is a further threat to penalty rates. When we look at what happened with those AWAs, 70 per cent of them removed shift work loadings, 68 per cent of them removed annual leave loadings and 65 per cent of them removed penalty rates and half of them removed public holiday payments. So that's of tremendous concern to us around the enterprise contracts.

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Moving on to unfair dismissal, a recommendation of the Productivity Commission is that reinstatement should be removed as the primary object of the unfair dismissal provisions. We have concerns about that. We acknowledge that reinstatement is fairly low as a remedy in the unfair dismissal jurisdiction, but we think that it is the best form of remedy for an employee where it's found that they have indeed been unfairly dismissed. The best thing that can happen to an employee when they have been unfairly dismissed is to have security of income, and therefore to have their employment back.

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Now there's a range of reasons why we think that reinstatement is such a low remedy in the unfair dismissal area, not least of which is that many employees, by the time they go through the process of arbitration and conciliation, they themselves don't particularly want to go back into that employment. That would continue to be the case. Employees will make that decision about whether they think they can re-establish a relationship with an employer where they feel like they've been treated badly, but that should remain their choice. We think that if you don't have reinstatement as the primary remedy, then we really miss the point about unfair dismissal cases.

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The other thing is about procedural fairness. The Commission is recommending that employees should not be able to receive compensation in instances of procedural unfairness, if you like, to put it clumsily. Again, we think that it's an important part of the unfair dismissal area that there should be an emphasis and an incentive for employers to act fairly, both procedurally and in terms of the way - so that goes to the processes that are put in place leading up to a dismissal, as well as the way that people are dismissed.

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So just a very recent example of that, in the Hutchison's case where people were sacked by text and email in the dead of night, there was fairly widespread community outrage about that. There was outrage in the media about that and we think quite properly because there are certain standards and certain expectations that the community has of employers in the way that they will act in something as devastating as dismissing somebody and somebody

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losing their livelihood. We know for a fact that the way that people were dismissed has had a tremendous impact on them personally and we think it's only right that the people who wear the consequences of that sort of behaviour from employers should be able to be compensated in some way where dismissals have been harsh and unreasonable procedurally.

Finally, we think that if there is no compensation to employees on the basis of procedural fairness and if it's not a factor which is considered when considering whether somebody should be reinstated, we think that that actually encourages bad behaviour. We think that there needs to be a very firm process on ensuring that people act fairly to give people the best opportunity to hang on to their jobs, and we don't think it's particularly onerous. In the union movement I have been in the position where I have been defending people who have been unfairly dismissed, but in management positions I have also had the unenviable task of having to performance manage people. In each of those occasions, putting in place procedures which are fair means that sometimes you can actually turn around the behaviour so that people do stay in employment and actually succeed in their employment. At times where it doesn't work out, it means that people walk away at least feeling like they have been treated fairly and been given a fair go and it's not something which prohibits employers from actually dismissing employees who just aren't up to the task.

On recommendation 20.1 there is a recommendation that labour hire, independent contractors, and regulation of casual employment should not be allowed as part of enterprise agreements. The first thing I would say is that we're a little unclear about what's meant by prohibiting the regulation of casual employment in enterprise agreements. Taken literally it would appear that an enterprise agreement, if it can't regulate the terms of casual employment, couldn't even state things like a minimum terms of engagement, for example, that a casual employee should at least have two or three hours employment. Taken to its logical conclusion, it couldn't even regulate the pay of casual employees, so we think that that's an area that's a little unclear at this stage.

Notwithstanding that, we think that regulating labour hire and regulating independent contractors is not unreasonable in a bargaining context. We think it's entirely reasonable that workers should be able to have a say on things that affect their job security and on things that will affect their terms and conditions of employment, because ultimately those things can lead to loss of employment. John has just talked about the Capalaba Sports Club here where at least - well, we know of a couple of people who have had to leave their employment because of that labour hire arrangement, because it has resulted in a huge reduction in their pay. These things have a very real impact on people's job security and livelihood and we think that workers should be able to have a say in those things and that they shouldn't be excluded from bargaining.

5 The final point I would like to speak to is the right of entry provisions. At recommendation 19.8 it suggested that unions should only be able to visit a workplace where they have no agreement or no members twice in a 90-day period. We think that's problematic for a couple of reasons, or a few reasons actually.

10 One is that where you have no members is often a place where you want to be because the union's business is, in part at least, to recruit people to the union and we shouldn't be distinguishing between places where you do have members and where you don't have members. Part of the union's role is to make sure that we have members everywhere.

15 A second issue is about the size of the employer. I have been responsible for teams that organise in places that have over a thousand employees and in those places you need to be in there quite regularly talking to people. There's a lot of different departments, a lot of different areas to restrict unions to only being able to go into those places where you have thousands of employees a couple of times in a 90-day period. It would make
20 organising a workplace extremely difficult and extremely problematic.

Finally, there's the issue of actually demonstrating that you have members. If we're saying that you can't go into a workplace any more than
25 twice in a 90-day period where you don't have members, then you're going to have disputation around whether or not you have a member. So if you have a single member - and we have seen this in other areas around bargaining, we have seen it in situations where there is right of entry to investigate a suspected breach of an agreement where you need to demonstrate membership, you will often get into arguments about whether there's members or not.

30 It's unfortunately sometimes the case that employees are fearful of saying that they are a member of the union, which means that you will inevitably end up in the Commission with some sort of processes where the union will need to demonstrate that you do indeed have a, or one or more,
35 members of the union in that particular workplace. So again, it's time consuming in other parts of the Productivity Commission's report; there's queries about the costs involved under the Fair Work Act for unions and employers. This would simply add to the costs and add to the red tape for unions and employers, when we get into arguments about whether or not we
40 have a union member. Then finally on that, if it is demonstrated that you have a union member and you have a particularly anti-union employer, again that means that that employee who is a union member might have cause for concern that there would be some sort of witch hunt to find out who the member is.

45 So for those reasons we oppose those recommendations. Of course, I have only been able to touch on a few of the recommendations in that

submission but the rest of the issues raised in the report I covered off in our written report.

5 **MR HARRIS:** You've got quite a long written report.

MR CLIFFORD: Yes.

10 **MR HARRIS:** That will go up at the same time, so people will be able to read your transcripts for this point. Would you like me to make any - - -

MR MARTIN: No, I think - - -

MR HARRIS: That will pick you up anyway.

15 **MR MARTIN:** Okay. I think that largely the issues have been raised. Perhaps the only other one which you can read in our submission is with respect to tenure of tribunal members, which is obviously of some concern to us. Anything that would be perceived as weakening the independence of the Fair Work Commission or suggesting that the members thereof might be
20 beholden to the government of the day would be cause for concern.

MR HARRIS: Okay. Thanks very much for your submission and for your attendance here today because this all helps us frame a better final report.

25 First off if I could comment, John, on your Easter examples. You will note, of course, that we haven't recommended any change to penalty rates on public holidays. We have recommended a change to public holidays, but we haven't recommended any penalty rates on public holidays. In fact we've said retain them. I think in your submission, and quite a lot of the other comments
30 that have been made, have been designed for the purpose of defending penalty rates per se, rather than our translation of Sunday to Saturday.

I did note your comments where you specifically got on to Sunday employees. In particular, I am quite interested in the estimates, although you
35 say they came from the Queensland Government, so it's hard to ask you about this, but the number of affected persons is something we would like to get a better handle on. So the numbers you quoted are generic numbers for people who regularly work Sundays and, of course, ours is a subset of people who work Sundays in terms of the affected parties in the recommendation that we
40 put forward.

I have asked every union representative so far this. If you have any information on the affected parties in the subset of employees, we would be
45 interested in trying to get hold of those numbers because we will probably try and do some analysis for the final report about exactly how many people are affected and what the prospects are for that being, as you say, offset by employment gains, because it's a difficult proposition.

MR BATTAMS: We can follow that up with the government, I think.

5 **MR HARRIS:** That will be great. You also say the Fair Work Commission has found no link between reduction in penalty rates and employment gains, but I think it would be fair to say, would it not, the Fair Work Commission hasn't actually done any analysis of its own on this subject.

10 **MR BATTAMS:** Well they haven't seen fit to actually draw that link. There's no evidence from the Fair Work Commission that they've actually made decisions based on the fact that they believe employment would go up as a result of cutting penalty rates.

15 **MR HARRIS:** Yes. I think we got a submission the other day which referred to some advice from some academics on this matter and we will look closely at those as well.

20 **MR MARTIN:** Could I just add to that the issue of penalty rates within the Fair Work Commission and its predecessors has been regularly investigated by those tribunals as a result of applications made by employer organisations, probably for about 30 years now on a regular basis. We would suggest that, in most cases, those applications from employer organisations have been unsuccessful, based on the sworn evidence that's before that tribunal.

25 **MR HARRIS:** Yes, but that's our proposition as per the question I just asked the President. They haven't done any analysis of their own. They have taken the propositions that are put to them by the competing parties and have made a judgment on what the competing parties have done, as you would know, because you have read our recommendations in relation to restructuring the
30 Fair Work Commission.

Our proposition is they should do their own analysis and become a well-informed judging party, rather than a party that simply takes the evidence that's put in front of them and says, "I must choose". Moreover, there is
35 statements from former Presidents of Fair Work Commission saying they currently see themselves - not the current President, but former Presidents of the Fair Work Commission, saying they see exactly that as their role, to decide between the competing submissions put in front of them, rather than to do any independent analysis. Our proposition is in the future, which is what we're
40 trying to design a workplace relations system for, in the future they're going to have to undertake a better analytical function in their own right.

MR BATTAMS: In response, I would just have to say we could probably accept then a recommendation that the Commission do that. Our problem is
45 predeceasing that with a recommendation, before the Fair Work Commission has an opportunity to assess that evidence or get its own evidence, a recommendation by your Commission that Sunday penalty rates be cut.

MR HARRIS: Our recommendation is to the Fair Work Commission to decide that.

5 **MR BATTAMS:** Well it is a recommendation, after investigation by a substantial organisation, that penalty rates - - -

10 **MR HARRIS:** We are trying to give them the evidence that we would hope that they would actually, in their own right in the future, that they would undertake the work that we have undertaken to date. While you can dispute, as you have in your submission and others will, undoubtedly, if Fair Work Commission does what we have suggested, dispute its own work. The bottom line is that's a better and more comprehensive basis for making our decision in the future, than the one which simply says, "Employers shall assert this. The employees shall say this", and it's my job to just go, "I can't see any reason for change". We're suggesting we must do better in the future and that's simply because this - your comment about the 30 years, the problem is not going to go away being regularly served up. Somebody needs to analytically decide this.

20 **MR MARTIN:** You would think they would have got it right if that was the case because your assumption, I would say with respect, is that they've got it wrong. You naturally assume, by the comments that you've made, that these tribunals have erred.

25 **MR HARRIS:** No, no, no. I don't think that's right. I am trying to - I am at pains to say they have chosen not to put their minds to anything other than the information in front of them.

30 **MR BATTAMS:** With due respect, the Productivity Commission does not operate in a political vacuum. What we see in this - - -

MR HARRIS: Productivity Commission or Fair Work Commission?

35 **MR BATTAMS:** The Productivity Commission.

MR HARRIS: I see. Okay.

40 **MR BATTAMS:** A recommendation, such as you have made, gets a life of its own and will be used by employers and conservative politicians to push their barrow that the penalty rates would be reduced, should be reduced. That's the context in which we're operating. Whether it's right or wrong, that's the context we have to operate.

45 **MR HARRIS:** Which is why I think we have tried to provide the evidence that would enable someone to then counter-analyse just that evidence. So we do expect - anyway, I was just trying to explain the proposition.

MR BATTAMS: Sure.

MR HARRIS: Because this is not a campaign therefore against penalty rates. This is a campaign in a specific sub-sector, if you like to use that term
5 “campaign”. I just wanted us to have the next round of questions based around those because I was going to ask you. You actually cited, without referring to them, the reasons for paying penalty rates, and I am interested in the reasons for paying penalty rates. Can you give me your analysis, just commentary on why you believe penalty rates are paid and, therefore, why Sunday is so much
10 more expensive, as your own page 9 shows, than Saturday? Why? Why is Sunday so much more expensive than Saturday?

MR BATTAMS: Well there are a whole, I guess, a raft of reasons why penalty rates are being paid. Our arguments mainly centre around the fact that
15 penalty rates are a reality and penalty rates form a very important part of low-paid workers' take-home pay. From that respect, we believe the ill effects - and I will deal with Sunday in a moment, but the ill effects of somebody suddenly recommending that penalty rates should be reduced, the direct result of that is employees, and in our case we think of 400,000 employees' take-home pay will be reduced. Regardless of the reasons around why they were
20 originally paid, that is an inescapable fact and particularly in the context of these people being low paid. We cannot see any reason why that should occur.

Now, in dealing with the difference between Saturdays and Sundays,
25 firstly, there are fewer people work on Sunday than on Saturday. The impost is on fewer than the more. Secondly, we believe that Sunday results in greater social dislocation than does Saturday. Sunday more traditionally is a day at home. It's a day with your kids. It's a day to socialise. It's a day to go to church, all of those reasons.

30 So from our context - and not forgetting there are workers in a whole range of other industries who will retain their penalty rates if your recommendation is accepted; these workers will not. Not forgetting that, we believe there are good reasons why the social dislocation and inequity that
35 occurs on Sunday is, in fact, greater than Saturday, and I think I quoted at least one excerpt from your report which acknowledges that.

MR HARRIS: No, no, but I was asking you in the context of why you
40 thought we have penalty rates, because we do acknowledge that Sunday is different to Saturday, which is why we said to the Fair Work Commission you should look at this transition and that there will probably be different outcomes for different sectors. But they hopefully will be based on some substantive evidence, rather than just simply the fact that we're not persuaded that anything has changed. That's the important element in this, that there will be
45 some kind of analytical basis. Anyway, that was a useful - - -

5 **MR BATTAMS:** You may use an analytical basis and you may emphasise an economic basis or a rational basis. What I am saying is these decisions have real effect on real people, and regardless of the genesis of penalty rates in this country, the real effect of reducing people's penalty rates is reducing their take-home pay, the same as a teacher or a nurse earning an annual salary perhaps. Someone somewhere decides to reduce their take-home pay. It makes little difference to the employee who regularly works Sunday as to the cause of that. What they know is they won't be able to pay the bills, that is the effect of it.

10 **MR HARRIS:** Which is why we're interested in the numbers and so you noted a number of 400,000 there. Anyway, I would appreciate any - even it doesn't have to be fully comprehensive information. It's just - - -

15 **MR BATTAMS:** The 400,000 has been taken from the ABS stats which detail employment by industry and we've identified those areas in Queensland and the employment numbers by statistical district in Queensland to come up with the excess of 400,000. Our estimate is over 700,000 in penalty rates per se, and of those about 400,000 work in the industries identified in Queensland.

20 **MR HARRIS:** That's what we would like to break down further because it will be, I think, a subset of that group anyway, but it's a useful basis and we may exchange with you further on that if that's acceptable. I only have one more question on penalty rates before I switch to Patricia.

25 You mentioned a concern and this is part of my reason for asking you about the reasons for paying penalty rates, you mentioned a level of opposition that you have to variations related to skill. Now, as far as I am aware, we haven't actually talked about that in our report.

30 **MR BATTAMS:** No.

MR HARRIS: But I am curious and I wanted to find out what that referred to. It was in John's original submission.

35 **MR MARTIN:** I think the suggestion is within the report, as far as I understand, there was reference to - now, I am paraphrasing here, so this won't be - - -

40 **MR HARRIS:** Sure, sure. No, we're all doing that. We're all doing that.

MR MARTIN: This won't be precise, but when we look at what potential rationale you've come up with this number of - or the occupations who will be most adversely affected if your recommendation is adopted. They are in a low-skill - well, a relatively low skill occupation.

45 **MR HARRIS:** I understand.

5 **MR MARTIN:** So there is I think a throwaway line within your interim report that goes to say that's one reason why it wouldn't be too bad to take money from them, whereas we say that the base rate is that which is determined by skill and the disadvantage to which penalty rates accrue is identical for - it doesn't matter what you are. The words we - - -

10 **MR HARRIS:** I do understand what you're saying now and I think we're quite aware of the sensitivity in that. It was intended to be a discussion about the amount of flexibility that's available in this workplace and it applied to both employer and employees.

15 **MR MARTIN:** So the supply of labour would be less affected because of the lower entry rate.

20 **MR HARRIS:** A much higher turnover rate and things like that, although we're very conscious as well that there are careers in each of these sectors too, so no one is diminishing that. But I just didn't understand what you meant when you made the - and I do understand what you mean.

MR BATTAMS: We're fundamentally - we're basically saying the level of skill is replicated in the base rate. It should be affected - well, the level of skill should affect whether you're paid penalty rates or not.

25 **MR HARRIS:** Yes, fair enough. Did you want to - - -

30 **MS SCOTT:** I would like to go to the issue of the Capalaba Sports Club that you mentioned, Michael. I've read a couple of press reports. I know we're going to have other people presenting that case to us as well, but I wonder whether you are in the position because you're talking about existing law. You're obviously looking at existing law. Could you comment on what you see as going wrong in the existing arrangements, because this situation has arisen not because of our draft report, but we offer it how people present it to us? From your perspective, what's happened? What are the facts in this matter? What is your Council's attitude towards it and what do you see as the rectification of it and how do you see that rectification occurring? If there is someone else that we should direct our questions to, I would be happy for you to tell me. I just want - you just did raise it in your testimony.

40 **MR CLIFFORD:** Yes, and John might like to comment on this as well because he also raised the issue of the Capalaba Sports Club. When you say what's happened, again I think United Voice is speaking later today and they will probably be able to give you the best answer on this. They're closest to it. But my understanding is that that agreement that exists at the labour hire company at the Capalaba Sports Club was struck with eight employees in
45 Sydney under different arrangements to the rostering arrangements that exist

as the Capalaba Sports Club. So when the test is applied, it's applied to a different set of circumstances.

5 It did go through the Commission and pass BOOT. Our view is that it shouldn't have and this may be a reflection on how well applied the current test actually is and how closely it's scrutinised. So we think that there are existing problems. It goes to the other point that I talked about, a lack of scrutiny on agreements. We think that what actually needs to happen is that there needs to be better scrutiny of agreements than there currently is, not less
10 scrutiny or no scrutiny as is being proposed with the enterprise contract arrangements.

The preferred hours arrangements, again, John touched on this and also United Voice will talk about this as well, but I understand that there are these
15 preferred hours arrangements in that particular agreement. Our further concern about the preferred hours' arrangements is that - and it goes to the issue of why do penalty rates exist. Penalty rates exist, and I think as you touch on in your report, to create communal time. It is, in part at least, a mechanism, a market mechanism to create communal time.

20 I know that in conversations we've recently had with faith groups as well, it's very important to them too that weekends are kept for people to engage in their communities in a whole range of ways that, again, John has just touched on. The concept of preferred hours erodes that communal sense
25 of time and the way that we engage with each other as a society, and we think that's a particularly important aspect of penalty rates. John, I don't know if you want to add to that.

MR BATTAMS: Yes. To put it simply, I guess, what happened at the
30 Capalaba Sports Club is you had an existing group of employees who were subject to the award and therefore the normal penalty rates. The management of the Club decided to outsource employment arrangements to an outside organisation who had a different set of employment arrangements. The employees who were subject to the award were confronted with signing a
35 piece of paper which said they would now be subject to the new arrangements, which resulted in significant reductions in their take-home pay.

So our contention would be that employees employed at an institution should not be disadvantaged, simply because a management decides
40 fundamentally to hire a labour hire firm. That is, the existing arrangements applicable to that firm, whether it be an award or an agreement, should apply, and if a labour hire firm wants to take over arrangements, then those arrangements apply to them, because this is nothing more than outsourcing in a way to get cheap labour. So that's basically what happened and as you so
45 correctly say, it's the subject of the existing arrangements. We are not here to say the existing arrangements are the Holy Grail, and you've acknowledged

that, and we've acknowledged, I think, your support for a whole range of arrangements which currently exist.

5 We obviously appreciate your support for the concept of penalty rates in general but, you know, we believe that the Capalaba situation just highlighted the fact that even under the existing arrangements, the same as 7-Eleven and Grill'd burgers and those other national chains, even at the moment with the current arrangements, people are trying to get around with and have done so, in terms of paying penalty rates.

10 **MS SCOTT:** Just on that though, if I may follow through, it seems to me there's a distinction between businesses that are not paying as they are required to under the award or as they have agreed to under an EBA and those areas where - so I might put 7-Eleven in that category if it turns out that after investigations that proves to be the case, and other instances where practices occur under existing arrangements and are found to be valid, although they may in fact still arouse great concerns. I think Michael was saying that the Capalaba Sports case had already passed through Fair Work Commission and had passed the BOOT test. So there seems to be a case where I thought you'd be advocating a change in the law or a change in arrangements.

MR BATTAMS: We are.

25 **MS SCOTT:** You are. So what are you advocating there?

MR BATTAMS: Well there's a range of things. The labour hire industry, for example, in Australia is largely unregulated. You can start a labour hire company with an ABN and a telephone. As you have just seen from the explanation from Michael of the Capalaba situation, labour hire companies are now actively being pursued to replace permanent employees with labour hire sourced employees. So what we're advocating is a regulation of labour hire firms in the first instance. That, in part, has to be a State, Federal sort of issue because some of those areas fall under the State jurisdiction.

35 Secondly, that if there are conditions implicit in the workplace, either through an award or an agreement, that those conditions should prevail, regardless of whether a labour hire company is used to source labour. We're seeing situations now where labour hire companies are not just being sourced for temporary labour, they're being sourced for significant proportions of previously permanent employees. So that whole area of labour hire, and particularly the use of labour hire to undermine conditions, is something we are trying to deal with, both at a State and a Federal level.

45 **MS SCOTT:** So I haven't read every page of your submission, but will I find in here a recommendation that relates to addressing your concern about Capalaba Sports Club. I looked through fairly carefully but I didn't see it.

MR MARTIN: Yes. No, one in particular you will find is your recommendation that we ought not be able to bargain about such matters as the outsourcing or use of casuals or independent contractors. I'd say - - -

5 **MS SCOTT:** Yes, but that relates to a change in the law, not existing arrangements.

10 **MR MARTIN:** No, no, but that would be a matter that we would say could be reasonably dealt with in a collective agreement, that one of the ways in which the Capalaba scenario would be avoided would be if an employer had an obligation to in fact talk to its workforce and their representatives before they sought to outsource. In this case we have - you know, clearly the labour hire companies' business model is by reducing conditions of employment and rates of pay, that that's sort of one way in which this can be combated. You won't find a specific recommendation in terms of changing the existing law, but I am happy to provide one.

20 **MS SCOTT:** It would be useful, I think, given that a number of people are going to be raising this with us.

MR MARTIN: Yes, I think that that's - - -

25 **MS SCOTT:** I see it as an indication, a bit like Hutchison's are seen, as in Hutchison's case is sometimes raised with us and we've had a variety of people advise us on what law it relies on. It would just be good to get it on paper.

I might go back, John, I think to your first presentation and your concern about both - well, your concern about surveys of businesses when it relates to opening hours on Sundays and Saturdays and so on. In our report we did, draft report, we did refer to the need to be very careful about these sorts of surveys, so we've probably echoed some of your concerns. But when it got to penalty rates on Sundays for, say, cafes and restaurants and other areas like retail, we tried to use as many different available sources of analysis as we could find and we also undertook some new work ourselves. For example, we looked at the longer weekend opening hours in relation to retail and what had happened to shopping patterns in various States and also looked at longer opening hours in New Zealand cafes and restaurants. It's around page 518.

40 **MR BATTAMS:** Yes, I remember reading that.

45 **MS SCOTT:** I won't bore you with it now, but I would be interested, having agreed with you in part about your reservations you have for surveys, I think we have gone a long way to find other analytical underpinnings for our recommendation about Sundays. Now could you comment on that? I know you have already made the comment on the record about regardless of the reasons; it's the impact that counts. But I guess when you look at the variation

in rates that already exists, we tried to find some rhyme and reason in them and it is hard to find some of these rhymes and reasons. Could you comment on New Zealand evidence or the evidence we have presented on retail transactions, because both of those things suggest in fact that there will be more employment arising from a reduction in the penalty rates on Sundays?

MR BATTAMS: Far be it for me to be an expert on New Zealand, but I would say this is a matter of balance. New Zealand has an - now has an entirely different industrial relations system than does Australia, and I suspect Australians don't yearn for a change to the New Zealand system. I think it's a matter of balance. There's no evidence in our view that cutting penalty rates will increase employment. If there is empirical evidence available in Australia, I would like to see it. If you're using the evidence in New Zealand, then I think you need to weigh that up against other evidence around social equality, full-time jobs, other indicators as to whether the overall effect of this has been a positive or a negative, not just in terms of employment in those industries.

You can go to all sorts of evidence in terms of the growth of businesses in the café and hospitality area. The most recent stats from '13 and '14 indicate that it's secondly only to health and services, for example. So we have a growing, burgeoning industry in this area in Australia under the current regime. In fact, many people would say it's over-servicing. There's a big problem in that industry and it's not necessarily the penalty rates.

So I can't be an expert on New Zealand. What I do know is it's a matter of balance, and Australian society has put great effect on to ensuring we have a fair society, and our basic argument is there is no evidence that this change will create jobs. We believe that there is evidence, undisputable evidence that this change will reduce hundreds of thousands of workers' take-home pay, and in that context we oppose it. But if you would like us - we're going to respond in a couple of areas here, but we're happy to respond in that area if you wish.

MS SCOTT: That would be good. That would be very much appreciated. Thank you, John.

MR HARRIS: You've mentioned Australian society expects certain things. The Australian society expected something quite different back when penalty rates were established for these industries in the 1940s and '50s, than Australian society expects today from these industries, in terms of work on weekends. That would be correct, wouldn't it?

MR BATTAMS: I am not saying it's correct. I am saying that society was certainly different. But surveys have consistently shown, for example, and you've identified the difference between Saturday and Sunday, surveys have consistently shown that over 80 per cent of Australians support the concept of penalty rates. I suspect, and we haven't had time to do that, if you did a

survey around Sunday penalty rates, you might get a very strong result from that as well. So yes, we do have a different society. Whether society's expectations around equality, fair go, family time, common use of certain days of the week for socialising and community activity and interaction, whether that's changed I don't know. I suspect it hasn't.

MR HARRIS: No, but I think evidence that does exist, objective evidence, shows that we are shopping on Sundays, whereas we previously weren't. We are eating at restaurants on Sundays and in hotels when I can remember this as a boy - you mentioned Capalaba, going down to the Redland Bar Hotel and being told you couldn't eat at certain hours or you had to eat at certain hours before you can drink, all these kind of things. So some are regulation and nothing to do with the workplace relations system and some are, so society has definitely changed and we have a price for labour on a Sunday which is very significantly different from the price on a Saturday. Saturday was, in these same periods we're talking about, a regular day of work, going back 40 or 50 years. Sunday was a day when the system discouraged work, deterred work. Less so in these industries today; less so society deters work on a Sunday.

MR BATTAMS: That is true, shopping patterns have changed. What is indisputable is only a very small proportion of the workforce have to work on Sundays. What is indisputable is that certain social interactions, family interactions and community interactions, occur on Sunday, which don't occur on Saturday or other days of the week. Given that, the fact that economic patterns have changed doesn't, in our view, substantiate the need to actually reduce people's take-home pay for doing without those societal sort of conventions.

So the difference between I guess your recommendation and the union movement's position is this. The economy has changed, in your view, therefore, people who are the subject of that, that is those who work on Sundays, need to take a hit. Our view is the economy can change but our society still demands certain conventions occur and if you can't actually access those needs, then you need to be compensated and that's where the difference lies.

We don't see Sunday as being the same as any other day, including Saturday. The fact that employers have campaigned, for example, in the retail sector, to change economic patterns in this country, it's been at their behest that we have Sunday trading, albeit consumers have picked that up, yes.

MR HARRIS: They would be substantially behind. It's not just opening - - -

MR BATTAMS: No, no, but we're not going to cop an argument which says please extend shopping hours and don't worry about the employees getting compensated. We've got the shopping hours now. They don't need to be compensated any more because it's regular, norm. We're not going to cop that

argument. Our argument is, yes, you can give evidence that Sunday in some areas is now a regular area of economic activity. That does not take away from the fact that the small proportion of employees who work those days shouldn't be adequately compensated.

5

MR CLIFFORD: Can I just add and reinforce something that John raised earlier in reference to the Noosa article. The other part of that is we don't see that there is this great restriction on people being able to access facilities or cafes, shops, et cetera, on a Sunday. So if the economy has changed, then people can still access those things. I don't find it too difficult to get a cup of coffee on a Sunday and that's under the existing penalty rates regime. So I don't think that there's a strong argument to say that the existing penalty rates regime is stifling consumers' ability to access restaurants and cafes and shops.

10

15 **MS SCOTT:** Well that's where you might find the New Zealand evidence that we presented interesting.

MR BATTAMS: Can I just make one last point, because you did refer to the Noosa News article. I use that only as an example of how for years now the employer groups have been warning that businesses will go to the wall because of penalty rates and the things they've said about Easter and Christmas have equally been said about Sundays. Our office overlooks South Bank in South Brisbane. I tried to get a cup of coffee there yesterday and was flat out finding a seat in an economy which, yes, has changed, because South Bank wasn't there 30 years ago, but where business is actually booming in the current context where people get adequate compensation for doing without on Sundays.

20

25

MR HARRIS: Yes, that's true, but where consumers' attitudes do change, we tend not to try and say to them, let's make these services as expensive as possible. We tend to say should the system vary to adjust in light of consumers' needs.

30

MR BATTAMS: This economy is about people and you may argue that. My argument would be with giving effect to your argument means that low paid workers can't feed their families or can't pay their way through university, then the answer is no.

35

MR HARRIS: I understand and I think you've said that multiple times. I understand your position, and basically commenting on the fact that you can get a cup of coffee at a particular time doesn't indicate the system is right. It just says you can get a particular - - -

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MR BATTAMS: It indicates to me it's not broken. It indicates to me it is doing very well.

45

MR HARRIS: I wanted to ask you while we have a bit of time about unfair dismissal. So you particularly seem to be keen to retain the provision that is, as you acknowledge, rarely now used to restore someone's employment. Isn't it quite misleading to have this as the preeminent objective of unfair dismissal, when it's most likely that if a dismissal has been in fact ill-advised, the employment relationship has broken down, and yet we are setting and leaving in place a law which says to people, "You can get your job back".

MR CLIFFORD: Well, I am not sure having that as the primary objective actually signals to people that that's what's going to happen, that you're going to get your job back. I think that it's the primary objective because it's the best remedy. If you have been unfairly dismissed, the best thing that can happen to you is to have continuing employment and therefore a continuing livelihood. That's what we should be striving for.

MR HARRIS: Even in a workplace where this level of misbehaviour has occurred, as in by an employer in this case, where an unfair dismissal has been first.

MR CLIFFORD: I think that's the fact of it that is often taken into account by the applicant. If they feel like they have been treated very badly, sometimes they will make the choice that they don't want to go back to that workplace because they can't work with that employer, but that choice should be open to them to make. My point is if we're talking - - -

MR HARRIS: No, no, we're not taking away the choice.

MR CLIFFORD: Yes, yes.

MR HARRIS: We're just taking away the appearance that you can get your job back, when the reality shows almost certainly you won't.

MR CLIFFORD: But what we are going to is the mindset of the decision maker, in this case being the Commissioner. The Commissioner should have at front of mind that what they are striving for is reinstatement. If you take away that as primary objective and all you're left with is compensation, then all the unfair dismissal area will become is an argument about three, four, five, six weeks' pay. Already employers decry unfair dismissals as being sort of, you know, having to pay "go away" money. This will exacerbate that. It won't fix that problem.

What we would say if there is a low number of reinstatements, what we should be doing is looking at why that is the case. How can the Commission, the Fair Work Commission, work better to ensure that there are more reinstatements occurring? How can we work better to make sure that we are repairing relationships between employers and employees to give people the best possible remedy if it's found that they have been unfairly dismissed?

5 That certainly in large workplaces can happen much more readily than it can in smaller workplaces, but that's what we should be striving to fix. I don't think we should look at some figures and say because there's a certain low percentage of reinstatements, that we should just scrap it. We should look to fix it.

10 **MR MARTIN:** Could I also add that that irreparable breakdown is often a convenient argument and perhaps in a smaller workplace I could understand that it's got some validity. With a larger employer, I think it's largely fictitious because if it's been one manager and one particular employee, that's easily resolved in terms of getting someone back into that workplace.

15 The other thing that I think that it would demonstrate is how manifestly low the compensation in this jurisdiction is by comparison to anything that's in any way comparable. The six-month cap means that it's quite often a very cheap way out, which may give it some explanation as to why so many are resolved by a financial settlement, rather than reinstatement.

20 **MR HARRIS:** Do you have anything else?

MS SCOTT: No. We're over time.

25 **MR HARRIS:** I think we have just reached our deadline, in any event, so unless there's anything else specifically you would like to get on the record, I would like to thank you for your submission in anticipation and we may be in touch further about data, if that's - - -

MR BATTAMS: Thank you.

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

MR HARRIS: Thank you very much.

35 I think we have Teys Australia. Once you guys have settled, if you would like to identify yourselves for the record.

MR SALTER: John Salter, General Manager Workplace Relations, for the Teys Australia group of companies.

40 **MS TAYLOR:** Sarah Taylor, Workplace Relations for Teys Australia.

MR HARRIS: Thanks very much for coming along today. Would either of you like to make some opening remarks.

45 **MR SALTER:** We will make some brief opening comments. I understand Mrs Taylor has forwarded to you a supplementary submission, but only very recently. You may not have had time. We won't be going to it verbatim.

MR HARRIS: I read the original submission.

5 **MR SALTER:** There is a supplementary submission in response to your draft report. We won't be going to that in any detail. If we could just make the opening comments that Teys Australia is a very large employer. We employ 5000 people directly and the flow on effects of that would be obvious to you people dealing with economics, as you do, but there's some particular features of that employment which I think are important.

10
15 Firstly, we operate almost exclusively, with one major exception, in regional and rural Australia. We are very labour intensive and we show no signs of that lessening in the foreseeable future, at least the next decade. It's highly arguable that we will become more labour intensive and that is because we are big suppliers to the domestic supermarket industry of value-added beef products, in particular the Aldi organisation and the Woolworths organisation, both of which have large expansion plans in the future.

20 In addition, those clients are wanting from companies such as ours, a lot more value-added product and shelf-ready product, which has not been a feature of the past, say in the last decade. So we are going to have to operate longer. We are going to have to have more sophisticated food processing equipment and different rostering arrangements, almost certainly are going to have to operate in those areas on a 24/7 basis, so it is a time of change, even though our major clients are in the export market. But the domestic side of it is growing. So we are facing significant change in the business.

25
30 We are also a very big user of the government's resettlement program in terms of those unfortunate souls who find themselves having to come to Australia on humanitarian or refugee visas. So we play an important role in that and that's obviously highly topical as we speak in terms of the increased intake of refugees that's coming to Australia.

35 We acknowledge that your job is a very difficult one. It's got a lot of competing interests that you've had. You only have to read the submissions. When you want to take a complete overhaul or look at the possibility of a complete overhaul of a complex workplace relations system, we acknowledge the difficulty that you have. We can only make recommendations and report on our own knowledge and experience and we accept that that is as a large food manufacturer.

40
45 We are not in retailing. We are not in the services industry largely and we would accept a criticism that some of the things that we have proposed and recommend are in suit, and we would accept that criticism from employer associations, from unions and Aboriginal employees. But when we're looking at the whole of the system and the rural impact of it, we can only make recommendations from where we sit and that's exactly what we have done.

We acknowledge that some of those recommendations may not sit well with other players in the system.

5 Having said that, we just want to focus on a few of the things. The two major items that I want to speak to is in fact the minimum conditions of employment, EBAs and the associated thing with penalty rates. In terms of the awards, we propose in the original submission a transitional removal of awards but a significant expansion of the national employment standards, to set the proper springboard for bargaining because we don't believe, and have never
10 believed, that the award system is the proper springboard for that.

15 In that area, we note that what you've said and we have read the submissions of very many stakeholders that don't advocate, including employers, don't advocate the removal of awards. So we're not going to belt our head against the brick wall about that. But what we do say is the submissions of the Business Council of Australia, whilst we don't agree with all of them, perhaps provide the best solution of reducing the number of awards and we would say, reduce them in line with the ABS definition of industries, call them sector awards - that breaks them down into about 22
20 awards - and have a comprehensive small business award, that covers small business, no matter how they operate. We say that there's significant advantages of that.

25 Firstly, the mammoth task that the Fair Work Commission took to get all the Federal awards back to 122, which created enormous and, in your report, says created additional costs. If it brings it back to the industry sector awards, then they have far less work to do in that regard and they can probably concentrate on things that they're better able to concentrate on. It removes all doubt about the continuing lingering arguments about which award applies to
30 which employer, in respect of which employees. Employees can still find themselves, as we do, actually respondent to three base awards. Even that we have 22 comprehensive enterprise agreements which we manage, that can still be a problem. Probably most importantly, the BCA submission, if it were to come into place, or our submission about reducing it to sector awards, makes
35 the "BOOT" or the "no disadvantage" test a lot easier to apply.

40 Now in terms of the minimum rates of pay, we also agree with the BCA. Take that out of the awards system, make it into a minimum wage order and make the awards simply about the minimum things, the redundancy, the hours of work and all that sort of thing that should be there. We say that also in acknowledgement that the current Act is designed to promote enterprise bargaining and if that is continued to be a focus of the Act, then reduction of those awards will provide a greater impetus, in our submission, towards enterprise bargaining.

45 In terms of the penalty rates, we understand and acknowledge and I have been listening to this from the Queensland Council of Unions some very valid

- your very valid questions about society's changing and so forth. We see it that the penalty rates conundrum can probably be overcome with a limited amount of controversy. There will still be controversy, we understand that. We have operations that generally operate from 5 am on Monday to approximately 2 am on Saturday morning. That is the general focus or the general period when we operate in terms of production of beef products. However, we have people working 24/7 because of the significant amount of maintenance that must be done with our technicians, an onerous cleaning regime which is required to be - - -

10

MR HARRIS: I am a former abattoir employee.

MR SALTER: So you're well aware of it. We say that the Fair Work Commission should still set the penalty rates but should be confined to determining what is unsociable hours. The whole argument about penalty rates really exists only in the awards sector. There doesn't appear to be any great argument about those employees and those employers who have enterprise agreements. It's all about the minimum standards of penalty rates and that's interesting too, because that means that the argument is that the major impact are in employers who don't have enterprise agreements, yet that is the focus of the system.

In circumstances where very many of your employer submissions, I read with note, advocate that enterprise bargaining is not for them. In fact, Clubs Australia says the vast majority of Australian employees are not interested in enterprise bargaining. I found that with interest. So we would advocate simply that if it is going to be a penalty rate for unsociable hours, it be a fixed dollar rate for everyone that works in those hours. It be based around an appropriate percentage factor of Australian average weekly earnings, average ordinary time earnings, and that the Fair Work Commission's role be confined to what is the unsociable hours in each of the sectors and what is the appropriate factor that will apply to the ordinary time earnings rate.

MR SCOTT: May I just interrupt there. Why do you argue for a flat rate for penalty?

MS SALTER: Because it's equitable to all employees.

MS SCOTT: Right.

MR SALTER: Employers complain about penalty rates a lot, about the compounding factor, so it's a penalty on a penalty on a penalty in some circumstances in some awards. So it gets rid of all of that and, most importantly, it's equitable and it applies to everyone who is working an unsociable hour, be it our technician that's working at midnight on a Saturday night or someone that's working in a movie theatre at midnight on a Saturday.

MR HARRIS: Can I just ask you then on that, and you will from our - or you may not have read the chapter, so we use the example of night work versus a Saturday versus Sunday where, roughly speaking, the penalty for night work which has clear health disability if you persist in it over years, is paid at a 15 to 25 per cent maybe premium. Saturday is 50 and Sunday is up to 100 and that's the core of our argument about how anomalous penalty rates should be. If you have a single rate, there's a fair chance, is there not, that the 15 or 25 for night work will go up quite significantly, even if the Sunday rate goes down. In your industry, in particular, as you said, you don't work Saturdays and Sundays. You work until 2 am Saturday but that might actually see penalty rates going up, would it not?

MR SALTER: Possibly. You can't have it all ways if you want to change the system. If you want to change the system for anything, there's winners and losers. I accept that.

MR HARRIS: No, I am just trying to clarify to make sure I understood what a flat rate was, particularly because you've also recommended that this be done by the FWC and this is important to have on the record because otherwise you will find yourself potentially mischaracterised. You're not proposing this to be done by black letter law and imposed by the government. You're proposing that the factor or the outcome that you're interested in be determined per award, per a revised set of awards by the FWC, rather than by the law.

MR SALTER: By the FWC, with significant guidance, and that is that the concept be put to the FWC that it is a flat rate, that it's based on a percentage of whatever you want with the Fair Work Commission's - - -

MR HARRIS: They might establish the rate but the principle of having such a rate would be established for them.

MR SALTER: Correct, and they would also in each award determine what is unsociable hours, if the concept that penalty rates need to be paid to those who work unsociable hours, which your report says should happen.

MR HARRIS: Yes.

MR SALTER: We acknowledge that and Australian society probably, we would acknowledge, does accept that principle, but it would be with significant guidance.

MR HARRIS: Have we stopped you from completing your comments?

MS SCOTT: Yes, I think we did.

5 **MR SALTER:** Yes. The only other comment we would make and we had
some notoriety, unwelcome notoriety over the last two years, about a particular
agreement that applies to our plant that operates halfway between Brisbane
and the Gold Coast. It is in suburbia, it is not in a regional area. That resulted
10 in recently a dismantling of an agreement that's been in place for two years
that we say is ground breaking and it's to everyone's benefit and it's worked
spectacularly well. That has recently been dismantled and two pay periods
ago, at the end of August, its 2010 predecessor was reinstated, at significant
infrastructure cost to us, but generally with a 12 to 10 percent reduction in
15 weekly earnings for the employees.

15 Now we have made in our submissions very clear how that occurred. It
was of a signification revocation. It is a blight on the current system. We are
not proud that we were involved with it and we are extremely disappointed
with the outcome. We believe that we have made significant
20 recommendations which could overcome that in the future and we hope it will.
Of course, when you look at - the Commission was faced with a whole heap of
different submissions regarding pattern bargaining and also asked for
comments about pattern bargaining.

20 We simply say that we think there should be the widest range of
agreements that are available, including individual agreements and multi-
employer agreements. If you're going to bring awards back to the 22, then
25 there are very many employer associations, by their own submissions to you
and evidence, like the South Australian business with the SDA, who do want
multi-employer agreements. There are others who say it's anti-competitive
and so forth. The only real way to stop that is collective resistance, in our
view, by the employers themselves.

30 I do understand because I have personally worked in the construction
industry before. I do understand the smaller business being impacted with
that. It's a difficult problem. Perhaps the only answer in that is to give the
ACCC standing within the Commission if there is a complaint or it feels that
35 pattern bargaining, anti-competitive or destructive pattern bargaining, then it
should be able to go to the Commission to try and implement that. That's our
suggestion.

40 **MR HARRIS:** So you agree at least with the grounds which is where we
were alluding to that it is competition which determines whether a pattern
bargain might or might not be adverse to the public interests?

MR SALTER: Yes.

45 **MR HARRIS:** So we were trying to think of a circumstance in which you
could probably have the ACCC determine that in certain industries it just
wasn't an acceptable form of behaviour, but in all other industries it would
become an acceptable form of behaviour that would enable, as you say,

employer organisations to put forward a model, which we informally understand they do anyway, but they don't call it a pattern. The question is, is there much value in this or are we fiddling here with something which is terribly small and not really worth the legislative effort to reform?

5

MR SALTER: I don't wish to make further comment on that.

MR HARRIS: That's fair enough. I ask everybody this because as you could tell from the nature of the way we described it, we weren't sure ourselves. On the face of it, it looks - frankly, it looks like what happens but - which is why in terms of our earlier comment on unfair dismissal to the Queensland Council of Unions I was asking the same thing. Reinstatement seems such a rare option. Is the law actually describing a circumstance which is improbable and misleading people? Nevertheless, we won't do that.

15

Do you want to ask some questions on that, or I can - - -

MS SCOTT: You go ahead. I wouldn't mind finishing with right to entry.

MR HARRIS: Right to entry, yes, if we can ask you about right to entry. I see you've got something down here, it should be better controlled but we will come to that.

20

So 22 awards based around ANZIC standards. Who would do this? Who would impose the new 22 awards?

25

MR SALTER: Fair Work Commission.

MR HARRIS: Right. So when you said it would be simpler for them and they could get on with life doing other things, you're saying after a transition from 122 to 22 it would be simpler for them and they can get on to do other things?

30

MR SALTER: One of the greatest difficulties the Fair Work Commission had when it collapsed the hundreds of awards into 122 - - -

35

MR HARRIS: Thousands.

MR SALTER: Thousands of awards into 122, was the raft of organisations, because of their history, who turned up at each of those things. If you say the sector awards are just as defined in the ABS, excuse me for being simplistic, but all of that is overcome because it's already defined in the ABS of what is each of the industry sectors in manufacturing, agriculture, services and so forth. It's already unambiguously defined.

40

45

MR HARRIS: What if they just take the 122, change the heading, retain all of the conditions so that you end up with a manufacturing industry award but

instead of being, I don't know, 200 pages, it's 2000 pages because it's just included a set of awards.

5 **MR SALTER:** That would be a waste of time and energy, in my opinion.

MR HARRIS: It would be pointless, wouldn't it?

MR SALTER: Pointless.

10 **MR HARRIS:** To practice what you're saying is they've got to not only shrink a multiplicity of awards that affect manufacturing into the manufacturing industry award. They've not only got to combine them, they've got to actually shrink them.

15 **MR SALTER:** Yes.

MR HARRIS: They've got to actually alter conditions so that there is - that seems a repeat of the four-year modernisation process.

20 **MR SALTER:** With less of the controversy and ambiguity and so forth I would assert, because most of the rules about which arguments existed previously have been set, particularly the scope and the application of the awards.

25 The other comment you're making there, there are still occupational awards which don't sit at all with a system that is focused on enterprise bargaining. I stress, if the system is to be changed in the way we're recommending it, we're still assuming that the government and the players want to focus on enterprise bargaining. If that is true, then there is no place for
30 occupational awards.

MR HARRIS: Okay. You've talked about minimum standards for non-monetary aspects included in these revised awards. So I will take that to mean the transition to safety net for awards has yet to reach its final point, as far as
35 you can see, that these numbers are not minima in all cases, and this is not monetary we're talking about. Can you give me an example of the sort of thing that you were thinking of then? I mean we tend to think in terms of, say, rostering or something like that, as a non-monetary sort of issue but there may be better examples, just to get the concept clearer.

40 **MR SALTER:** Consultation processes.

MR HARRIS: So this is really in terms of the BCA's argument. This is about things which alter the prerogative of management?

45 **MR SALTER:** Yes. I can't add anything else, other than directing your attention to the BCA's submissions on that. They mirror our thoughts.

5 **MR HARRIS:** You're going to get a revised version from the BCA because for this very reason. The proposition in general sounds very attractive, but we have to describe in our report how to achieve that proposition or we will achieve very little in net effect for alteration of the workplace relations system. So descriptive detail becomes particularly important in this, and that's what we have asked the BCA for. We need them to say what they actually mean when they say, "Remove intervention in the prerogatives of management". We need to get it to a point where we can describe that for the purposes of identifying who will do that and how they will do it. How is probably our proposition, our work, but the who, we really need to know that and we need to know what they're aiming at.

15 **MR SALTER:** The BCA is far better placed than we are to advise you on that.

MR HARRIS: I will accept that from you and the BCA.

20 The final thing I want to ask you about before we go on with permit holders and other things is, so the history of this celebrated enterprise bargaining - was it Beaudesert, the one at Beaudesert, was it?

MR SALTER: Beenleigh.

25 **MR HARRIS:** Beenleigh, the celebrated argument at Beenleigh. The legalism that is now accompanying enterprise bargaining, of which I think your case is an astonishing example of, is impediment to people taking up enterprise bargaining amongst the small and medium enterprise sector, so we think, based around our report. Even though you're not a small enterprise, would you care to comment on the degree to which enterprise bargaining is becoming entrenched with deep-seated legalism?

35 **MR SALTER:** Once again, I think you need look no further than our submission that it has caused a great deal of disenchantment with the system within our organisation. I say in our submission that whilst the general thrust of the employer body submissions to the Productivity Commission inquiry supports continuation of bargaining at enterprise level, after 20-odd years, and that is Teys' experience, 20 years, there are many employers who now regard the ritual of enterprise bargaining as little more than an unproductive chore which comes around all too frequently, and I am sorry that our recent experience at Beenleigh has accelerated our views to that point. We're as astonished - we're even more astonished that we have been inflicted with the outcome we have.

45 **MR HARRIS:** We put forward with the enterprise contractor a sort of putative model for small to medium enterprises to consider to dipping their toe

in the water towards enterprise bargaining. In other words, a way to learn the exercise without having to go through the legalism of the process.

MR SALTER: Towards enterprise bargaining?

5

MR HARRIS: Well basically if you pick up an enterprise - if you're sitting on an award at the moment and you're looking for some flexibility, your choice is effectively to go down the common law contract route or to go down the enterprise bargaining route, if you want to vary from the award. Enterprise contracts would be a third way of varying from the award. They would be a proposition whereby an employer puts forward a proposal for employing people in the future as a variation against the award. It doesn't require going into the enterprise bargaining system to do it. It has to be lodged. It has to be therefore available for public scrutiny but can then proceed.

15

That's for small and medium enterprises, so I don't know that really it's relevant to you, although as we point out in the draft report, it could be made available to enterprise agreements as well. But I think we had in mind basically being driven by the fact that there were limited take ups from small and medium enterprises in the enterprise bargaining field. They have remained out of it, unlike your experience.

20

MR SALTER: We had experience in the period before the Fair Work Act where AWAs' individual statutory agreements were available. They were not scrutinised by the Fair Work Commission. We didn't have a great deal of trouble when they were assessed in an administrative process, where they controversially raised and became more controversial than it needed to be about individuals, et cetera, is when the government removed the "no disadvantage" test against them. That's when it all blew up and, with hindsight, that was a foolish move. As long as there's an appropriate "no disadvantage" test, we would say, rather than "BOOT", there should be no issue with individual statutory agreements as but one choice of agreement, of a wider range of agreements than exist now.

25

30

35 **MR HARRIS:** Thank you.

MS SCOTT: Rights of entry, I appreciate that you've given us some advice on what we should consider but could you give us some background to this if you're feeling comfortable, because you suggest that lack of familiarity with your circumstances means that our recommendation is naive. Could you talk about how you see your proposal arrangement of having almost like a predetermined contractual arrangement between the employer and the union on rights of entry would overcome the problems that you've encountered?

40

45 **MR SALTER:** Because there's so much aggro and dispute about the current provisions, in particular, the default right of unions to enter lunch rooms in circumstances where inarguably they don't have 100 per cent membership. In

fact, they're lucky to have 25 per cent. There's also a range of employees having their work break there who aren't even entitled to be a member of the union. You know, there's a lot of different unions in our workplaces that are entitled to cover people. So it is an inconvenience to the employer. It is an
5 inconvenience to very many employees who don't want to be interrupted and in terms of a particular workplace, if there is going to be a regime of entry of union officials, then the union should be required, in our view, to put forward a reasonable proposal of how that's going to work and it should be scrutinised by the Fair Work Commission.

10

It is not appropriate to have rights of entry provisions that apply equally to all workplaces as it currently does about the default lunch room and so forth. It's just not something that can be unilaterally imposed consistently and work. That's the major argument for that.

15

We would also say that unions indicate that they must have right of entry and access to people that are not currently members. We don't object to that. We don't disagree with it, but we say in 2015 there are so many forms of communication with people other than actually physically coming along and talking to them. Well you can't possibly in our situation. We've got 1000
20 people all with staggered lunch breaks. You can't possibly talk to them all. There are much better, more effective and available forms of communication. We just don't see in 2015 why those right of entry provisions, as they currently are, have any place in the modern workforce.

25

MR HARRIS: Sorry, can I just on that, how could a union which still does carry in the system - and it's a little surprising given the paucity of coverage, but nevertheless still does carry the right to enter a workplace to look for safety breaches or to respond to a potential safety breach, how do they manage
30 a safety breach in the circumstances where they would have to write to the relevant employer seeking a discussion?

MR SALTER: Sorry, I am misleading you. Our suggestions are only about the right to discussions. We don't have any problem with the current
35 provisions about entry for safety under the State legislation and so forth, not an issue for us. Neither do we have any problems at all with the current provisions regarding suspected breach of industrial incidents. Our comments, and they should be clarified, that we're only talking about section 484 which is the right of entry to hold discussions with members or potential members.

40

MR HARRIS: Okay. I understand. Thank you.

MS SCOTT: I just wondered whether it's the case that if there are areas of very active friction between the employer and employee, whether getting them
45 out of black letter law or getting them in to black letter law or getting them in to a signed agreement beforehand, versus using black letter law, whether in fact it just transfers the point of conflict, because now you have in fact - I can

imagine in a situation with tensions running high, reaching a settlement about how you're going to approach the next three or four years of right of entry, could equally be a source of conflict as current arrangements. Am I making myself clear to you?

5

MR SALTER: Not completely. Could you just - - -

MS SCOTT: Okay. I will try again. Under this proposal - - -

10 **MR SALTER:** Sorry, are we talking the right of entry?

MS SCOTT: Yes, the right of entry.

MR SALTER: Yes, okay.

15

MS SCOTT: Under this proposal, you enter into discussions and you reach an agreement on all matters for those arrangements, including frequency of visits, then on occasion officials, and so on and so forth. I am thinking of a situation where there's been friction in the past and you think, well the advantage of this is we will have more certain arrangements. But if, in fact, there has been frictions in the past, you can imagine that reaching those agreements, especially on where discussions occur, the lunch room or not the lunch room, the times of entry, who's able to enter, could be just a source of tension at the time of reaching the agreement because it's got to be forward looking, allowing for all sorts of other possibilities, as relying on section 484. So could you comment on that, please? I hope I have been clearer this time.

20

25

MR SALTER: Yes. In our circumstance, particularly at the Beenleigh plant, that is likely to occur. I can't deny that. But if you look at the second dot point, in the end there's an arbitration that is determined by Fair Work. Yes, I cannot deny that there would be potential for friction at the point of you trying to determine what the arrangements are, but I would imagine if it gets determined by Fair Work, then at least everyone knows where they stand.

30

35 **MS SCOTT:** Okay, but for a whole stack of employers - - -

MR SALTER: Employers?

MS SCOTT: Employers, a whole stack of employers that really don't have a problem with rights of entry - I appreciate there are hot spots clearly, we have identified those in our report - this would actually be more work for them, rather than less work.

40

MR SALTER: Only if the union wrote to them and said, "We want to enter". I would imagine that with numerous places they wouldn't get any correspondence from them.

45

MS SCOTT: Thank you.

MR HARRIS: I didn't have any other questions. Is there anything that you guys would like to add on the record?

5

MS TAYLOR: No.

MR HARRIS: Can I thank you for making both the initial submissions and the effort to appear today and the subsequent submission. I think given that, it's a bit surprising, people often don't realise meat processing is a manufacturing industry - - -

10

MR SALTER: Yes.

MR HARRIS: - - - and I guess the iconic significance that some people give to manufacturing. And yet the way the agreement that certainly you've described in your initial submission had to proceed, just seems to be - well, it's only one example but it's a very unusual example.

15

MR SALTER: It is.

20

MR HARRIS: Thank you for putting it on the record.

MS SCOTT: Thank you very much for your time.

25

MR HARRIS: All right. We're going to take five or 10 minutes, I think.

MS SCOTT: Five or 10?

MR HARRIS: I don't know. Hang on, I've got to see what I am - I am supposed to be back here at 10.30. We're supposed to be back here at 10.30. Thanks a lot.

30

ADJOURNED [10.23 am]

35

RESUMED [10.36 am]

40

MR BEHRENS: Mr Nick Behrens, Director of Advocacy at the Chamber of Commerce and Industry, Queensland.

MS WHITTLE: Ms Kate Whittle, Senior Policy Advisor, Chamber of Commerce and Industry, Queensland.

45

MR WALES: Jason Wales, Senior Employer Assistance Advisor, Chamber

of Commerce, Queensland.

MR HARRIS: Thanks very much for coming along today. Do you have an opening statement of some kind you'd like to make?

5

MR BEHRENS: Yes, please.

MR HARRIS: Please proceed.

10 **MR BEHRENS:** The Chamber of Commerce and Industry, Queensland, wishes to thank the Commission for the opportunity to participate in this inquiry, and a significant opportunity to what will hopefully see the preparation of government policy to be considered as part of the next Federal election. The Chamber's advocacy work within the area of workplace relations is ongoing and is in response to calls from employers all over the State for real and meaningful change to the current workplace relations regime. Indeed, since the introduction of the Fair Work Act in 2009, Queensland businesses have been telling CCIQ that they have experienced real difficulties.

20

The Chamber believes our economic prosperity is contingent on a balanced workplace relations framework that meets the needs of contemporary Queensland workplaces. CCIQ is unashamedly small business and looks at issues particularly with the lens of small business. This is so because small business and their employees are the heart of the Queensland economy and a driving force behind our local communities. Small business provide for societal inclusion and community prosperity by offering a livelihood to one million Queenslanders through providing a secure, ongoing job.

25

30 Workplace relations impacts on every business in every industry and in every region of Queensland. They significantly impact on the productivity and competitiveness of Queensland small business, and the current framework needs adjustment to better deal with the changing economic, social and demographic trends facing Australia's working landscape. At present, the workplace relations regime seeks to protect employees against the worst case of employer to the detriment of the vast majority who do the right thing by their workers. It is unsurprising that most businesses feel that the balance within the Act is no longer there.

35

40 Owning a business should be a rewarding experience and finding great employees is a big part of that experience. Ultimately, CCIQ believes that Australia's workplace relations framework should make it easier to provide a job and not the reverse as it is unquestionably doing at present. CCIQ consider that through the Fair Work Act, employers should be encouraged to hire. The State and Federal economy depends on them having the confidence to do so. At the moment, however, CCIQ knows that small businesses in particular do not feel that the Fair Work Act takes account of their special circumstances.

45

5 This impact has been particularly hard-felt by certain industries, with
retail and hospitality in particular reporting that the Act has impacted on them
severely, and at present, there are 160,000 Queenslanders out of a job, with the
existing workplace relations system seen by employers as a significant barrier
to their employment. I wish to quickly speak to three major issues. CCIQ
strongly believes that more needs to be done to restore the balance between
employers and employees and prevent employers from having to go to the
time and expense of defending themselves against baseless or vexatious unfair
dismissal claims.

15 The capacity to make decisions about staffing arrangements goes to the
heart of an employer's ability to run their workplace, and we do not consider
that such decisions, in the ordinary course of things, should require the
payment of go away money or the interference of the Commission. Small
businesses, in particular, struggle with unfair dismissal provisions as they
generally lack the resources available to larger enterprises. When small
businesses lack certainty, lack time and money, go away money replaces the
overly-complex procedures and processes as part of the Fair Work system.
20 This, in our view, is unjust.

Penalty rates are one of the major issues affecting Queensland businesses
when it comes to industrial relations. In the modern 24/7 economy,
Australia's workplace relations laws need to reflect the dynamic nature of the
25 new working week and allow businesses to tailor their staffing arrangements to
respond to peak demand periods. The current penalty rates regime inhibits
economic growth by providing a disincentive to employers from having longer
trading hours or offering staff additional hours. Queensland small businesses
accept penalty rates as a legitimate labour cost, however, want to see
30 alternative approaches for specific industries.

Finally, flexibility is key in small business. A modern workplace
relations system must allow employers and employees to negotiate individual
arrangements that meet both parties' needs. The ability of employers to put in
35 place flexible working arrangements has been one of the greatest casualties of
the Fair Work Act. In closing, CCIQ is pleased that many of the
recommendations and points made in our original submission to this process
have been so thoroughly taken on board by the Productivity Commission. The
draft report clearly shows that based on all the evidence before the
40 Commission, the time for sensible workplace relations reform has arrived.
Thank you.

MS SCOTT: Thank you. Kate or Jason, do you wish to make comments?

45 **MS WHITTLE:** No, not at this stage, thank you.

MR WALES: No, thank you.

5 **MS SCOTT:** Well, that you very much for your submission, and also thank
you for including in your survey some areas of questions that we were
interested in. We appreciate your cooperation in that matter. Let's go to
unfair dismissals, if you might. You're clearly disappointed with where we've
got to there, relative to some other areas where you comment favourably on
the report. I appreciate the sentiment at the outset of your statement that
sometimes the law looks like it's written for the worst employers rather than
the average employer, but we do know that there can be bad employers and
10 that workers can be unfairly dismissed.

15 At the moment, there's already the 12-month period of probation
effectively for small business employers relative to six months for larger
employers. Why isn't that sufficient time for an employer to establish that this
is all going to work out or it's not going to work out? Why do you want such a
blanket exemption for small business in relation to unfair dismissals? And
why don't the other changes the Commission recommend satisfy you in this
regard, because we've made quite a number in the space of unfair dismissals.

20 **MR BEHRENS:** Okay, thank you. Look, one of the benefits today that the
Commission has is that we've brought along Jason Wales, and he's one of our
senior employment assistance advisors. On average each month, the employer
assistance line takes 600 calls from small businesses, asking questions about
their obligations under the Fair Work Act, and on average, Jason takes about
25 11 calls a day in relation to small business and its interaction. Accordingly, I
will ask Jason to step in, but before I do so, I think the general experience from
small business is that they are prepared, because of the emphasis has over
process as opposed to substance of claim, there's a great deal of frustration
that small business has with the process.

30 Indeed, one in two businesses who have had an unfair dismissal claim
have said that, yes, they're not comfortable with the fact that their claim has
been dealt with fairly or efficiently by the Commission, and as stated, because
of the lack of resourcing that small business generally has in respect to unfair
35 dismissal claims, they generally apply the rule that economics should rule out,
and accordingly, they're prepared to reach deep into their pocket to see the
matter go away so they can get on with doing what it is that they do.

40 Now, in respect of why is a six-month probationary period not sufficient,
which I think was one of the questions that you asked?

MS SCOTT: Yes.

45 **MR BEHRENS:** Well, there's a richness of comments in the qualitative data
that we've received as part of both the surveys and what that really emphasises
is that on occasions, employees do do the wrong thing, they do disregard
process or instruction particularly when it comes to workplace health and

5 safety. They do unfortunately not always have the interests of the business at heart, and a very rare instance, sometimes they actually even break the law. So not all of those behaviours become evident in the first six months and that is why small business in particular are very keen to see the Commission recommend a true unfair dismissal exemption for small business.

10 Again, Jason might care to outline some of the shortcomings that small business have with the unfair dismissal code that's underway at the moment, particularly the degree of the reverse onus on small business.

MS SCOTT: I might come back to you, Nick, but let's go to Jason now.

MR BEHRENS: Yes, Commissioner.

15 **MR WALES:** Well, I guess six months, people's behaviour - - -

MS SCOTT: No, it's actually 12 months.

20 **MR WALES:** 12 months, yes, 12 months is a good term, but small businesses are finding that employees change over a period of time and it's hard to document and actually put a finger on desired behaviours in a short period of time. Employees are actually well-attuned to regulations these days and they understand what they can and can't get away with. Determining if your employee is of suitable skills and is going to contribute to your overall business outcome, employees can actually take advantage of that and change
25 their behaviour within a timeframe. Then if an employer then decides to go and dismiss them and they get taken from their dismissal - they have problems with the process around defending themselves.

30 That can implement a process of performance management or corrective behaviour that is not well documented, but is something that they've gone through in terms of a conversation here or there or an email, but getting the finer details documented, such as following a performance improvement plan, having a three warning system, corrective actions, sometimes is not feasible
35 for small businesses and they don't have the understanding to go through that process. So when they do get served with an unfair dismissal case, they ask themselves, "How did I get here? I did A, B, C and D, but now I've been told that's not good enough." So the process in itself is too complicated for them to understand or they don't have the resources to defend themselves in that
40 case.

MS SCOTT: So Jason, I'm not sure how familiar you are with the draft recommendations, but we made a number, including - and some were firm draft recommendations and others were sort of information requests, but
45 anyway, in the space of unfair dismissal we suggested that the Commission could settle, rule out effectively, some matters on the papers because while it's true that they can do things with vexatious cases now, we thought that matter

could be strengthened. We could also have more merit consideration in the conciliation process, because it seemed to us that the phone conciliation process is really an articulation of one person's side to another person's side.

5 **MR WALES:** Yes.

10 **MS SCOTT:** We also thought, getting back to your comments, Nick, that a focus on substance over process could mean that some of the cases, celebrated cases where it appears that there had been a case of severe under-performance or theft or violence in the workplace and someone had been dismissed, that the fact that the employer may not have observed every fine piece of process would not rule out the case that the dismissal was appropriate and that the substance of the matter would weigh larger than the process itself. You didn't find those changes satisfying in terms of addressing small business concerns?

15 I mean, it's a big step to go to give a complete blanket exemption for small businesses on the basis that they're small and they have trouble documenting things. Our suggestions about looking more at the merits of the matter I thought might have satisfied some of your concerns, and I just wanted to check out why you're not satisfied. I don't mind who answers.

20 **MR BEHRENS:** One of the things that we're really proud of in terms of both the surveys that we've provided to the Commission is the richness in comments that we have received from businesses who have actually had the misfortune of having had an unfair dismissal claim. Equally, part of that is I think you will sense a lot of faith in the Commission itself to fairly and efficiently handle the claims and there is an overwhelming perception by small business in particular that the Commission is no longer - the actual composition of the Commission itself - balanced. There is general reticence to, I guess, have a recommendation by the Productivity Commission that goes back to the Fair Work Commission that says, "Look, you need to embrace the issue of substance over process", because we're not convinced, based on the recent track record of the Fair Work Commission itself, that that would achieve the intended outcome that the Productivity Commission wants to see.

35 The general feedback is that over recent years, to try and tweak arrangements, try and tweak current arrangements, even at the periphery of the Fair Work system, have proven to be enormously difficult and it really requires political intervention to reframe how things currently operate and that's why we do see the absolute key opportunity that exists at present from the Productivity Commission recommendations hopefully ultimately being embraced by the coalition to take to the next Federal election.

40 **MS SCOTT:** Okay. So let's just pursue this a bit more, unfair dismissal. When you go to some of your survey results, this seems that they don't get justice out of the system, I'm going to look at your question 28: "If your business has had a case, was the matter dealt with fairly and efficiently by the

Fair Work Commission.” That’s question 28. About half said “yes” and about half said “no”. Now, I appreciate the comments are pretty damning underneath that. They go to say, “I never thought I was ever going to get an even chance” and so on, but it’s not sort of wholesale condemnation of justice from the Commission, I guess. So I’m trying to - - -

MR BEHRENS: It’s not wholesale condemnation of the Commission, but gee, I mean, for one in two businesses to not be happy, I mean, I wouldn’t be proud of my record running at a 50 per cent approval rating and I think the sense of feedback here is that businesses really have embraced what they feel is their ability to meet process and yet - and they know that substance is on their side, but for whatever reason, the Commission has a mentality that things should be resolved before they actually go too far and that that resolution should occur through the small business reaching in their pockets to see the matter go away. I think that’s generally, a lot of businesses aren’t comfortable with that approach.

MS SCOTT: In terms of businesses reaching into their pocket, I’m very pleased to have this data in front of us, but of course, 75 per cent did report that they didn’t pay any go away money.

MR BEHRENS: That’s true.

MS SCOTT: So in fact, in a system that was maybe even more obviously transparent and more focused on substance rather than process, you may well find that employees would get greater confidence that they don’t need to resort to go away money. I might leave that there.

MR HARRIS: Have you done the - - -

MS SCOTT: I’ve only done unfair dismissal.

MR HARRIS: Unfair dismissals, okay. So this general question of penalty rates and increased employment, so we appreciate the efforts you’ve gone into, to get a survey although we do note, we note in the draft report and in response to preview evidence, surveys are what they are, but yours appears to be quite a comprehensive piece of work and so they’re all, as it were, straws in the wind, if not comprehensive demonstrations of something, and so I want to thank you for the effort that you’ve put in to conduct that. You’ve got a quite strong response which some other employer groups in other States have got as well for specifically testing the recommendation that we put in place.

So rather than generically responding to the question of elimination of penalty rates or not, you’ve done a set of questions on Sunday rates reducing towards Saturday rates, and got quite a reasonable employment-based response. Now, I’m sorry, I haven’t read all the detail of the survey. Did you have that by industry group, by particular sectors, and if so, can you comment

a little on which sectors are most likely to be beneficiaries as far as that survey was concerned?

5 **MR BEHRENS:** Yes, I can. There's been two sets of data provided to the Commission. One was in February this year and the origins of that data were that the Chamber of Commerce and Industry, together with the Queensland Tourism Industry Council, Queensland Hoteliers Association, Motor Traders Association of Australia, Franchise Council of Australia, we all recognise that there really needed to be a consensus position put to the Commission on what
10 was wrong with the Fair Work Act at present. Other organisations joined the industry round table such as HIA, Master Builders and AI Group. They recognised that they would provide representations to this inquiry through the national organisation, but the six organisations that I originally mentioned thought that it would be good to do the one survey amongst our memberships.

15 You can see there that there's a heavy emphasis on retail and hospitality in those associations. One thing that I really do wish to point out is that the role of industry associations is to act as a voice of business and to be true to that rationale, we go out, we ask the questions, we listen to what the answers
20 are. We then package it up into an accessible and digestible format and then give it to those individuals who have the privilege of making decisions back on, that hopefully impact them beneficially. So short of doing surveys of our membership, I'm not sure necessarily, apart from bringing people like Jason along today, what we can bring to this process.

25 So I'm very disappointed that the unions choose to discount and discredit the surveys when I think you have recognised that getting 1100 businesses to fill out a survey, both in terms of quantitative and qualitative data, has been proven to be enormously useful to the Commission. At the
30 request of the Commission, we have de-identified the data. We have sent the raw data to the Commission so they can do their own analysis on it, so there really is a degree of transparency around the data that we've provided on both occasions that you can form your own views on.

35 To go to your question, the second survey, which we thank the secretariat, they assisted us with the actual questions that were asked, so the questions that we asked are actually the secretariat's questions. One of the first questions that we asked is, "Is your business in the hospitality and retail sector?" For those businesses that said "yes", we then said, "Well, do you
40 open on a Sunday?" The majority of them said, "Yes, we do", the minority of them being about 25 per cent said, "No, we don't." "Why do you not open on a Sunday" was the next question. Again, the majority said it's because of their own reasons and not penalty rates.

45 So we then, for those businesses who do not open on a Sunday and said that it was because of penalty rates, we went on to ask the question, "If you were to take the Commission recommendation of merging the Sunday and

5 Saturday penalty rates, would you then open?" Well, 80 per cent of those businesses said that they would. So we think that it's very good, indicative information and confirmation of our hypothesis that business are choosing to reduce their employment hours as a result of penalty rates. Now, I just wish - - -

10 **MS SCOTT:** So, Nick, that's answer to question 7, "If your business does not currently open on Sundays and Sunday penalty rates were set at Saturday rates, you would open on Sundays", yes, but the number of respondents there was unfortunately pretty low, wasn't it?

15 **MR BEHRENS:** Indeed. I mean, if you look at the hospitality and retail businesses as a subset of the overall response rate, I mean, yes, we're talking - we're getting down to some low numbers and that's why a key term I used was "indicative", I don't think it's telling, but in the absence of any other data, in a way that we - through the initial survey, the overwhelming confirmation was that businesses weren't reducing their employment hours, and it's warts and all, so those businesses came back and they said, the majority are actually choosing to open their doors and I never like to be misquoted out of context, which I think I was this morning, and just to provide some background on that, 20 in 2013, we got Senator Eric Abetz, the then Minister for Employment, to come up to Noosa to sit down with restaurateurs from Hasting Street and Gympie Terrace which are the two main entertainment precincts.

25 Two-thirds of those businesses indicated that they closed on Easter Monday because of penalty rates. Now, the following year, in 2014, the sun was shining, the beaches were firing and it was one of the best trading periods that the Sunshine Coast had experienced in recent memory. So we don't shy away from the fact that most businesses open on a Sunday and we've always 30 said it's about employment hours, not necessarily operating hours.

35 **MS SCOTT:** I think in relation to question 7, probably what's more interesting, and I draw the chairman's attention to the answer to question 9, "If your business does currently open on Sundays and Sunday penalty rates were set at the Saturday rate, would you increase your staffing while open", and that got a larger overall response than the relatively small number of respondents to question 7, sort of getting higher numbers there, and interestingly, two-thirds said, yes, they would actually. I think that's not inconsistent with the evidence that we've gleaned from New Zealand. Businesses open longer and they 40 engage more staff.

45 **MR HARRIS:** I was trying to clarify question 4, really, so I was back that far. I think, if I've got it right, you've got 80 out of 270, roughly speaking, businesses that work in the sectors that we're talking about that were respondents.

MR BEHRENS: So the sample base was 420 businesses.

5 **MR HARRIS:** 420, okay. I'd worked out from question 4, 262 answered and 30 per cent said, yes, I am in these relevant - I went down to that being roughly 80 businesses and worked onwards that there were about 80 businesses giving you this - - -

10 **MR BEHRENS:** I suspect that in your briefing kit, what you have there is there's actually two surveys that we did concurrently. Same questions. One was to the original respondents to our February 2015, so the secretariat could do some longitudinal analysis and so for that, I think we got about 140 responses. To the other survey, same questions, same time, we got about 270 responses, and so the 270 plus 140 I think gives you - well, it ended up being about 420 all-up, and the analysis that we've included in our submission proper that we lodged on Friday, it's for the whole 420.

15 **MR HARRIS:** For the whole 420? Okay. So it was a larger group in terms of - - -

20 **MR BEHRENS:** There is.

25 **MR HARRIS:** I was just trying to establish that it was a substantive kind of response rather than - we've had some surveys that have given us - I mean, also interested, as I said, there's straws in the wind, but the more substantive the response level, the more relevant you can attribute some of the conclusions potentially. So you've quite a large number. I was jumping from that question 4 and then over to the pretty pink and purple sort of thing. You get quite a high employment level proposed and you get some quite - you get quite a lot of specificity about the levels of employment. You have 3.8 hours, according to your thing, as being a likely increase in operating hours on a Sunday - - -

30 **MR BEHRENS:** Yes.

MR HARRIS: - - - if the Sunday rate fell back to the Saturday rate.

35 **MR BEHRENS:** Yes.

40 **MR HARRIS:** So I'm saying, well, I'd attribute some weight to an estimate like that if I thought you had a good level of respondents, but if you've got a relatively small level of respondents, I'd probably say, well, I'd weight it less. That's why I was trying to establish the level of respondents that really had given you that answer.

45 **MR BEHRENS:** Yes. So to clarify, based on the 420 responses, 28 per cent said they were in retail/hospitality, and 72 per cent said that they actually open on a Sunday and so those numbers around the operating hours are 28 of 420 and 72 of - 72 per cent of 28 per cent of 420, which gives you - it was close to 100, so I think you could have reasonable confidence, but it's indicative and

that median number in particular in terms of additional employees, which was two, really does highlight that there is a trade-off between penalty rates and employment levels, which economic theory has always held that to be true - -

5 **MR HARRIS:** And probable - - -

MR BEHRENS: - - - and we think that that starts to shed light on that there is accuracy in that statement.

10 **MR HARRIS:** Yes. The number was quite useful because I don't think we've had a specific number before, in terms of additional operating hours, and that presumably implies some kind of judgment being made by the individual business about where they are currently constraining their hours to, and presumably they're constraining their hours to the area of greater
15 profitability scope, but that can involve shutting down in areas where they're just not sure about profitability.

MR BEHRENS: That's right. Look, it is warts and all. I mean, we would like that median of two to be higher, but it's not, and at the same time the
20 overall message that came back to us is businesses would want to test the market and see what the level of patronage that was there to really make the firm decision about how many additional hours they're going to open for and how many additional employees that they would put on. The irrefutable evidence here, to our mind, is that they will open longer, they will give their
25 existing employees more hours and they will potentially put on additional employees.

We've said that if you adjust penalty rates to take account of the 24/7 economy, we're actually growing the pie and we're actually going to increase
30 the overall employment hours offered. Now, we think that that's a win for individuals ultimately because we're hopeful that their pay packets end up being higher than what they otherwise would have been.

MS SCOTT: I was going to now go to the issue of flexibility in current
35 arrangements and the issues that are most important to businesses, so that's question 14, "What aspects of flexibility are most important to your business" and then employers were given a range of options including wages, overtime, penalty rates and rostering scheduling, and I note with interest - and this has got a large number of respondents, 208 respondents - that rostering scheduling
40 just edged out wages as the issue that they're most seeking flexibility about. We're very interested in this aspect, it's been raised to us a number of times about rostering and we've had a variety of quite different presentations given to us on rostering and scheduling.

45 A survey can only tell us so much and I have read the comments also provided, and thank you for that, but could you talk a little bit more about rostering and scheduling as opposed to penalty rates now, and what do you

think lies behind this number, from your experience, or maybe Kate and Jason want to chip in as well, but could you talk about rostering and scheduling and then I might, if Peter's agreeable, take us then to the enterprise contract as an issue.

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MR BEHRENS: To my mind, the majority of the issue in relation to rostering and scheduling really comes to minimum engagement periods for our members, and Jason, we had a conversation on Friday where you see this on a daily basis, business frustrations with the existing enterprise agreements, IFAs and general perception of lack of flexibility. You want to shed some light on that?

MR WALES: I guess in terms of flexibility and IFAs and what employers can and can't do, they don't understand what they can and can't do when it comes to rostering and how they can maximise their opportunities to the current hours that they have. For example, if you were going to enter into an IFA, there's an assumption you must know minimum entitlements and what can be traded off in the first place, and most small businesses don't understand that generally. So when talking about rostering and scheduling and minimum engagement periods, yes, there's standards placed out in the relevant awards. Most of our members are awards-based, so they refer to the awards quite often, but they still don't understand the complexities around how to negotiate a change in someone's roster and how to trade something off, such as penalty rates or overtime and leave loading and so forth, how do you get around those issues and what's going to be best for the business, I guess.

It's all about process once again. For me, on the front line answering the phones every day, I get a myriad of questions and most of them have to do with the complexities around process, process with IFAs and so forth. Yes.

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MS SCOTT: Jason, has that ever been the case that you thought that there would be a role for your organisation to provide a template IFA? We were taking testimony in Hobart as part of this current round, where a coach line company put to us that in fact many of their - I think they have an EBA, that many of their workers actually have sought IFAs as a means to taking into account what happens with their hours over the course of a year. They have a fairly standard template. Now, the hours nominated are not all the same, it's not a cookie-cutter arrangement for every worker, but they have got something that seems to be working out quite well, there's ultimately no concerns.

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Given that you receive so many calls, and it seems to be an issue in the survey, rostering and scheduling, wouldn't there be a role for your organisation to come up with something that would sort of meet all the conditions and say, "Well look, you're definitely covered by this award and this is what you can do"?

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MR WALES: Yes. We do have resources available to our members to assist

- them with decision-making processes. The depth of those resources is something that Nick and the board of management team need to decide on, because we could go further than what we have. So we do have the ability to provide members with resources and tools to ensure they are compliant with legislative requirements. Could we have more? Yes, we can, and I could go on for days about what I can do and what I need to do to help our members, but it's also in the context of time and energy and of course finding out what the members would want from us in the first place.
- 10 **MS SCOTT:** Sure. In terms of minimum shift periods, the awards that you're talking about in the main, which ones are they? The hospitality - - -
- MR WALES:** Hospitality and restaurants, I would suggest.
- 15 **MS SCOTT:** On the hospitality awards, is the minimum shift three hours?
- MR WALES:** Three hours.
- MS SCOTT:** In the restaurant one?
- 20 **MR WALES:** I think it would be three hours. I can't quote that.
- MS SCOTT:** That's what I understood, too.
- 25 **MR WALES:** Yes, three hours, is the general sort of - - -
- MS SCOTT:** It is the general one and I've been able to find that out on the website. So I'm sort of still a little mystified that we've got this marked gap. We haven't exactly got a legal firm filling it, we haven't got a smart IR firm filling it, we haven't got necessarily associations filling it. Look, one thing that could fill it, I guess, is an enterprise contract so that's why I'm now going to turn to responses on enterprise contracts, and I think it's question 16. So just for - - -
- 30
- 35 **MR HARRIS:** If I can just note, I'll be mentally doing it to the comment under question 15.
- MS SCOTT:** All right.
- 40 **MR HARRIS:** You've got a really good example there of something that might be pertinent to the enterprise contract, which is one of the comment responses. Anyway, we can do it in the one place.
- MS SCOTT:** Let's go to question 16, I'm going to try and be listening to your answer and looking back at questions 15 at the same time now. So in question 16, for the purposes of the transcript and for our audience today, "The Productivity Commission has recommended a proposal for a new enterprise
- 45

contract, termed the 'enterprise contract' employment contract called the 'enterprise contract'. The Productivity Commission has stated there is scope for a new form of agreement to fill the gap between enterprise agreements and individual arrangements. This would offer many of the advantages of enterprise agreements without the complexities making them particularly suitable for small businesses."

Then your organisation asked the survey question, "Would such an arrangement provide additional flexibility for your business to make employment agreements." 216 firms answered and - - -

MR HARRIS: Half of them.

MS SCOTT: - - - 50, about half, said they would be interested. Now, they'd need to know a lot more, but could you talk a little bit more about that response, and I guess Peter will have a few follow-up questions on that.

MR HARRIS: Yes.

MR BEHRENS: Yes. Indeed, questions 14 and 15 were quite similar. One was the perceived benefit and then question 15 was, well, would you use it. Just before I answer that, you've honed in on a key point about industry associations. The absolute majority of our members choose to be a member of our organisation because of the industrial relations advice that we provide through the employer assistance line and we really are a bit of an insurance policy for them. If the Fair Work Act was operating perfectly, in some respects our organisation would not have a need to exist, but the reality is, there are significant shortcomings that have been cited extensively.

Our view is that in respect to the enterprise contracts, there is significant interest in it. The feedback also was, though, that businesses wanted to see how the rubber hits the road, so to speak, in terms of what are the practical illustrative examples of how this could benefit my business, which I really think is your point about there needs to be a range of education and awareness materials to assist small business to understand how this would benefit their business and is this actually appropriate for their business. We think that, yes, there is a role for our organisation to play, as there would be for the Commission.

The feedback generally, though, is irrespective of what education and awareness materials are there ultimately goes to the point that small business operators are time-poor and lack the resourcing, and it really would be something for them to pursue in their evenings, if they were going to do it, yet, they're not an expert in this area and they really want their hand held. So it's really streamlining. I think what you've identified is a lot of this issue would be addressed if we were to streamline how business could take up this opportunity.

5 **MS SCOTT:** So if I went to your website now - I haven't - but if I went to your website now, would I be able to find quite clearly the minimum shift under the hospitality award is three hours and under the restaurant award it's three hours and how I could vary it if I needed to?

10 **MR BEHRENS:** Through the members' only portal, yes. They have access, and so in a way, we've gotten quite technologically advanced through MYP. You get your award allocated to your business, you get access to that award, and we try and break down the complexity of that award through providing practical advice in relation to it.

15 **MS SCOTT:** So it wouldn't be impossible for your organisation to, say, go the next step and have a template IFA, for example, or a template enterprise contract. Maybe I should pass over now to Peter on enterprise contracts. Let's go down the direction of enterprise contracts.

20 **MR HARRIS:** I think the reason we put forward the proposition is because of this clear gap that small business hasn't taken up the primary flexibility option that has been put forward for 20 years under our workplace relations system. So it's been questioned why have we identified this, is this a solution looking for a problem, or we've identified the problem. We clearly say the largest single number of employers are small to medium enterprise in this country, not the largest employment base, but the largest single number of employers, and they don't appear to be able to take up our primary flexibility option.

30 So what are the reasons for that, and it's intimidation in relation to the complexity of the sector, it's not intimidation necessarily based on any particular party, it's just that it looks complex and horrible. So put forward a proposition which was designed to balance the protection for employees as well as an option for employers, but no one put it to us, we made it up, so now we're road-testing it. You know, bureaucracy making things up is not actually the best way to go about developing public policy. We should ask some people who actually do it, "Will this work for you?" That's what we're doing, we're asking the unions and we're asking the employers the same thing.

40 You've got this great example, I thought, under question 15, and I'll read out for everybody's benefit a little bit of this. This is a cleaning award arrangement, so it's quite pertinent, I think. "The cleaning award we are covered by doesn't quite fit our business model, but we can't afford to have an enterprise agreement created given the cost, so we just have to use the award. We have permanent and non-permanent cleaning hours which makes even what we have to pay our staff difficult to know sometimes, but it's not full-time work and it doesn't fit either part-time or casual, it's somewhere in between. It makes me cranky that I know 80 per cent of the cleaning businesses around me in my area set up their businesses with subcontractors who are in fact employees, yet we do the right thing, because it is the right

thing and we get better staff that way, but it would be nice to know I'm working on a level playing field within my own industry, and I am not. These cleaning companies can undercut us every step of the way because I'm paying the award."

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So I guess the model is, as this commentator says, "The cleaning award doesn't quite fit our business model", so what's the option for varying it, and the answer is, it looks all too difficult to vary it and so I have to stay in a reasonably uncompetitive circumstance and the respondent also talks about their staff being unhappy with it, them having limited hours as a consequence of all this. I guess that was the idea, that the enterprise contract would enable a tweak to an award, which is you can take down the bulk of the award, you can vary this condition, you have to lodge it with the Fair Work Commission, who can show it to the Fair Work Ombudsman, who can decide that your tweak is not going to pass a no disadvantage test, can ring you up before you try and apply the thing and tell you, "Don't do that, it's not going to work."

But our question on templates was, where they do work, these things could be published and promoted as if you want to vary the award in the cleaning industry, this is a legitimate way to do so, and over time, either the Fair Work Ombudsman or yourselves, somebody, could put up examples of how to vary awards without the complexity of enterprise bargains.

MR BEHRENS: That's right, and look, two things there. I think to some extent the Queensland Council of Unions are not wrong in that the Capalaba example that was cited this morning is essentially labour hire, who are able to achieve the critical mass economies of scale, where they negotiated an enterprise agreement for their workforce, but then come in and basically would lead to a no-brainer decision for a hospitality establishment to transition their workforce over to this arrangement or see you later. So I think that's a really good example of whereby the complexity of enterprise agreements is now undermining direct employment of individuals which I think is a key societal expectation.

Just in relation to the IFAs, however, it's not only the templates that are in issue in terms of their take up, there are some rigidities in IFAs in terms of an employee has to have been employed for six months?

MR WALES: Twelve months.

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MR BEHRENS: Twelve months.

MR WALES: Before you can enter into an IFA.

MR BEHRENS: Right. They can be terminated at 13 weeks' notice, can't be offered as a condition of employment, so there are some real major impediments to IFAs being broadly adopted outside of just the streamlining

simplicity and ease of a small business to be able to put one in place.

5 **MR HARRIS:** So we try and address - IFAs are quite separate to enterprise contracts, we try and address some variation to IFAs to give a better term in the draft report. The enterprise contract is about making variations to awards in a relatively simple fashion. It probably won't suit larger businesses, who if they want to do this will go down the path of common law agreements, things like that, or they'll get the resources together and they'll run an enterprise bargain and the majority have chosen to go enterprise bargain and that's
10 probably suiting them, although we do get testimony now saying it's not suiting them, but this is for the group of firms that have not, as an industry, chosen to take up the primary flexibility option that we offer and the design of our report is all about flexibility for the future.

15 Increasingly, there's going to have to be means of being flexible, but you want to have safeguards, so the enterprise contract is an attempt to have both safeguards and flexibility for smaller businesses, just like this example here. Anyway, I found that commentary - I mean, again, it's commentary by anecdote, so not to say this is a foundation for making a public policy change,
20 but we're very interested in the fact that you seem to have got a reasonably positive response to this.

MR BEHRENS: We saw it as a green light to the Commission's recommendation. There was considerable interest there.

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MR HARRIS: I didn't have any more on this specifically, but I'd like to thank you for putting the effort in to do the survey because we have asked everybody for data and evidence and I've got to say we got a lot of support from individual - both we've got commentary and useful data from the unions
30 and we've got commentary and useful data from you guys, and I'm just hoping some of the larger employer groups will also be able to help us with a bit more of that in the future too. Anything else you wanted to add on the record while we're still - - -

35 **MR BEHRENS:** Only in that there were a few additional questions that we did canvass on behalf of the Commission, particularly in the area of apprentices and trainees. The major point that we highlight is a business decision to take on an apprentice and trainee is primarily a function of economic activity. So if the economic activity and demand is there for that
40 business, they're inclined to take on an apprentice and trainee. However, there are other influences to that function, being the availability of Commonwealth and State employer incentive payments which have - there's been a cessation of those in recent times.

45 But unquestionably what those questions did confirm, although whilst it's not, for the majority of instances, there is a percentage of businesses who have discontinued or moved away from apprentices and trainees on the basis

that first and second-year apprentice rates have been loaded up by the Commission and there's been a couple of other things that have happened in that area that have led to apprentices and trainees being more expensive for an employer to take on board. All that we highlight is, it is essential that there be
5 an entry point for Queensland and Australian youth into the workforce, and if we're making it harder for an employer to have an apprentice and a trainee, then ultimately we're setting ourselves up to fail in future years, and I think some of the data that we've provided to the Commission highlights that concept.

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MS SCOTT: Okay, thank you.

MR HARRIS: Thanks very much. So I think the National Retail Association would be next. Could you identify yourself, please, for the record? Once you
15 settle.

MR EVANS: Trevor Evans, Chief Executive, National Retail Association.

MR HARRIS: Thanks for coming along today, Trevor. Do you have
20 opening comments you'd like to make?

MR EVANS: Yes, I certainly do, thank you, and thank you for the opportunity to speak with you here this morning. So, broadly speaking, the National Retail Association and its members support the findings and the
25 recommendations made in your draft report. Your draft report certainly does cover a lot of ground, so congratulations on your work so far. The concerns and the interests of the retail and fast food sectors are particularly focused around three of the policy areas where findings and recommendations have been made in the draft report. Those are penalty rates, flexibility, in particular
30 around enterprise agreement making, and also in the space of small business arrangements.

So if I may, I may concentrate some of my initial comments in those spaces initially and if there's time, or you've got questions around policy
35 areas, other than that, I'm certainly willing to try to tackle them at the end. It's also worth probably noting that we have obviously made a written submission which went in on Friday, so that's got some detailed responses in it to some of the other policy areas as well.

MS SCOTT: Trevor, we're competing against an industrial strength air
40 conditioning system, so I might ask if you could just speak a little louder.

MR EVANS: Yes, sure.

MR HARRIS: Don't look at us, look at the audience. We're good at hearing,
45 but people will probably want to get your comments.

MR EVANS: No worries. I'll do my best. Is this working?

MR HARRIS: You'll get on the transcript without any trouble. No one else will be able to hear you, I'm afraid.

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MS SCOTT: It doesn't amplify, it just records.

MR EVANS: All right. I might start off by making some comments more broadly about penalty rates and some of the recommendations and findings that you've made in your draft report. There's certainly no doubt in our mind that penalty rates in the retail sector and their impacts can't be underestimated. When it comes to business viability and employment outcomes and even on consumer welfare grounds, there's huge costs to the Australian economy at the moment at the moment as a result of how penalty rates are operating in the retail sector.

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So the impact of penalty rates would be the number one top issue now raised with me by our members right around the nation and by businesses right across the retail fast-food and personal services spaces. There is certainly an ongoing stream of qualitative statements made to us by our broader membership right across the country and I've tried to honestly reproduce some of those in a de-identified way in our most recent submission, and those are just the ones from the last few weeks. It just gives you a flavour of the ongoing commentary that we receive around this topic and some of the anger and the frustration there is out there, particularly in the small business side of the retail community.

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So there is certainly no doubt in our mind at the moment that penalty rates are currently causing retail shops to close on Sundays and public holidays and that means obviously that customers, consumers, are going begging, that retail businesses are underperforming in terms of their viability and profitability, and that employment is simply not occurring in a lot of the times when it should be, and that's whether penalty rates are paid or not at those times. Essentially, the view of our industry is that penalty rates are penalising retail businesses at the moment for opening their doors and employing people at the times when consumers in the modern world are indicating that they now most want to shop.

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That might have been a zero sum game a decade or two ago when we had an economy where the consumer product market was essentially closed to international competition and where consumers might then be forced to shift their shopping to the next Monday or weekday or whenever was available, but we're living and operating in a different world now and technology advancements and the Internet and online shopping basically mean that we now live in a global international consumer product marketplace and that operates essentially 24/7 and if we do shut the shops here locally in Australia, and whether that's by regulation or indirectly by virtue of making it too

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expensive for them to open, then Australian consumers these days won't wait until Monday in a lot of cases anymore.

5 They will use their computer or their phone or their tablet and they'll purchase many different products and that sale will be lost to offshore, and the portion of that sale that would ordinarily have gone to an Australian worker will be lost. So that's how the modern economy is operating now. We need to do everything that we can, obviously, to break down the barriers, to allow our retail sector to compete and to keep growing and to keep providing employment. That employment piece is something that I'd really like to touch on, to close my opening comments.

15 The retail sector in Australia is 1 in 10 jobs. More than 10 per cent of the workforce in Australia is employed through the retail sector, and our labour force has a couple of really notable characteristics. There is high employment of youth, of mothers returning to work, of secondary income earners, even of seniors whose first jobs or other industries have been subject to change and find themselves jobs in retail sector well before retirement age. It is the sector that gives most Australians their first foot in the door in terms of getting a job, building those initial workforce participation skills, and more than that, it's the sector that gives most people their first touch, their first skills and experience when it comes to management, supervision, leadership.

25 So from that point of view, we are very, very conscious about the concept that there is inherently a trade-off between penalty rates and between the amount of employment that can and should be occurring in the retail sector. Now, I think it's really worth noting that we do have a relatively high level of base wages here in Australia compared to other nations around the world and that's a fact that we're very, very proud of and something that we really want to preserve. We basically want to be able to continue to grow retail wages from where they are and into the future and every year, of course, in the annual review of wages levels, we do advocate for pay rises.

35 The tricky part when it comes down to setting these things is specifying how much those pay rises and those pay rates should be and how much we can afford before we actually start to hurt our own industry and our present and future workforce. So when it comes to penalty rates, at the moment in terms of retail, it's hard to see how double time on a Sunday is explainable in the context of how consumers, our customers, are treating Sundays, or indeed, how the workforce considers Sundays and why retail, particularly, has a higher rate of penalty rates now than most of the other services sectors around the Australian economy and how that might be sustainable or not into the future.

45 So I might just wrap up my introductory comments there and throw it open to questions, unless you want me to start talking about some of the other issues of concern for us.

MR HARRIS: No, I think that's fine. So you have a commentary in the submission, as long as I'm on the right submission, this is your most recent one, September 2015 - - -

5 **MR EVANS:** Yes.

MR HARRIS: - - - about Sunday trading being the day when Australians most like to shop. An increasing proportion of people indicate that Sunday is the day that people most like to shop.

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MR EVANS: Sunday is the day that has the biggest increase in the proportion of shopping. So Saturday is still by far and away the largest shopping day in total, in terms of the number of transactions, the number of visits and the volume of trade that occurs, but Sunday is the day of the week that's currently experiencing the highest growth.

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MR HARRIS: Yes. That's what I thought I'd probably get that on the record and you've done it better than I tried to do. So we've got increasing growth on Sunday which means, ultimately, if you follow through on standard business practice and standard economics for that matter, if demand continues to increase and labour is expensive, then other means will be found by employers, by retailers, to provide the service that people want, which means ultimately in the end you'll get some form of capital substitution, some form of technology or something like that, if labour is maintained as expensive.

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Do you have any even indicative evidence to that effect, of decisions being made by retailers to use technology? I mean, we know there are technology advances in retailing at the moment, but they're presumably being undertaken for other reasons, but I guess I'm asking because I don't know, is there any indication that you might see technology otherwise replacing labour in these areas?

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MR EVANS: Yes. Certainly, there is. I mean, there's no doubt that the retail sector right around the world is currently undergoing huge structural upheaval and a change brought on by some of the technology changes that I talked about, and digitisation of some products and so on. It depends a little bit in the Australian market which category of goods you're talking about and which format of retail. So the most typical example that you'd see very obviously as a shopper in your everyday life would be self-checkout in a number of the big box in supermarket formats, and that no doubt is one step of many that those businesses could take in terms of the capital versus labour input methods.

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But I think you're going to find that it's going to play out a little bit differently in some of the other categories of retail in Australia because while that might work for some product categories where we're purchasing things in bulk and we might be engaging in a regular sort of habit of shopping, when it comes to some of the discretionary products, and I'm thinking things like

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fashion and apparel, fashion accessories, clothing, some of the department store products, retail isn't just about a transaction whereby you hand over a good and complete a transaction. At the front end, there is a lot going on in terms of customer service and product knowledge and so on. There's no amount of capitalisation or capital investment that can sometimes replace the labour force in those sorts of spaces.

Indeed, I would say that the retail sector is currently a really tough place for retailers who haven't yet been able to make that decision about whether they are competing on price against the rest of the world on commodity-type products, in which case it is a race to the bottom on cost where capital investments instead of labour might be the way to go, versus the other approach which is to accept that you can't compete in price in some of these instances. It is all about making investments in your people, getting the best customer service that you possibly can, the best product knowledge and providing your customers with a really great shopping experience.

In that second category, that's where a lot of Australian retail has to go to survive and thrive in the modern age and there's no amount of capital substitution that will allow you to get around the fact that the times that your consumers today are most wanting to shop in those categories are the times when you're being penalised for having your best people and your most knowledgeable people on the floor in the hours that those customers want to shop.

MR HARRIS: Fair enough. Do you want to ask anything more on this particular aspect of things?

MS SCOTT: No. Perhaps you'll go to EBAs, enterprise agreements.

MR HARRIS: That's fine. I was just wanting to discuss technology briefly because it comes up occasionally.

MS SCOTT: I'd be interested in your commentary now on flexibility in enterprise bargaining agreements and the enterprise contract proposal in the draft report.

MR EVANS: Broadly speaking, we do support the recommendations of the Commission in the space around enterprise agreement. I think what I would add on top of the written submission that we've already made is that there are probably a particular set of circumstances and concerns that play out in the small business space compared to, say, medium and larger enterprises, and that's all around the cost of the process versus the potential benefits of going down the path of an enterprise agreement. In practice, what we are definitely finding as small and medium businesses attempt to put enterprise agreement-making into place is that it is actually much harder in practice in front of the Commission to make some of the trade-offs between wages and entitlements,

penalties, overtime, you know, you name it, that appear to be possible by virtue of the way that the Fair Work laws are worded, but in actual fact, are much, much more difficult to obtain in practice.

5 So I can think of some examples, although the provisions themselves aren't top of mind, sorry, where there are examples actually worded into the Fair Work laws where it says, "Here's an example of a trade-off that's possible" and in fact, what we're finding is that commissioners, as individual
10 decisions are made in the Fair Work Commission, are making decisions that are contrary to the examples that are specified there. So that the achievement, the attainment of flexibility is actually a much harder thing for us to achieve in a lot of instances. So our view is, you know, in the retail sector - you talked a little bit about individual contracts and enterprise contracts and so on - you don't see that individual agreement-making play out, and indeed you haven't, I
15 don't think, in previous iterations of our nation's industrial relations system.

 It is much more about the award versus enterprise agreement-type solutions and there's probably a number of reasons for that. You do see a little bit of it in some of our members and businesses around the country, but you
20 tend to see it more in head office functions, maybe managerial levels, but not necessarily in the broader workforce. So our experience with small businesses in particular is that, for them, the current opportunities to achieve trade-offs are very uncertain. They are relatively costly in order for them to achieve, and certainly now we are past the transitional period in terms of the modern awards
25 coming into place. Most small businesses now do not see it adding up in terms of cost benefit analysis, of going down the enterprise agreement-making road.

 Now, in terms of what the solution for that is, I would actually probably be - from the perspective of the retail sector - more drawn to some of the
30 recommendations that you've made around the decision-making process and the governance of Fair Work than I would be in terms of going down the road of enterprise contracts, and I'll give you some great examples of that. Now, obviously pattern bargaining is not something that's currently allowable in a headline sense. Nonetheless, it is very, very typical in the retail space for
35 small businesses these days to be taking advantage of some scales, either through a buying group or through a franchisor, or something similar.

 I certainly wouldn't name them on the public record, but I'm very happy to provide things in confidence to the Commission if it would assist. We've
40 got instances where we have franchisees of exactly the same franchise system that have both put up very similar, if not almost identical terms of enterprise agreements to the Fair Work Commission and different commissioners, in fact, in some instances the same commissioner, have allowed one to be passed and the other to be rejected, for various grounds. Now, that makes it a very, very
45 uncertain space for our small businesses to invest their scarce resources into trying to make themselves an IR system that would help their businesses to flourish.

MR HARRIS: Just before you go on with this, that's documented, we could get access to that?

5 **MR EVANS:** Correct.

MS SCOTT: I think we'll take up your offer and approach - I'm hoping my colleague down the back takes note of that and we'll follow that through. Thank you very much, Trevor. Please proceed.

10

MR EVANS: Yes. So, in terms of the solutions, I think it's much more about the governance of Fair Work, I think it's much more about how appeals are made possible and enforceable through that system and probably trying to bring sort of a little bit more weight or precedent into some of the decision-making processes there that would give a little bit more confidence to going down the path and engaging in some of the agreement-making and the flexibility outcomes that clearly the Act is designed to try to encourage.

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MS SCOTT: So this is very useful. So in relation to institutions, I see that you basically support, in your written testimony, the proposal we have for renewal of the organisation and increase focus on specialist appointments, analysis, but you're also keen to have people who have got 10 years' experience working in employment law. Would you like to talk about that?

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MR EVANS: So some of the broader economic knowledge we see as very, very important in the space of reviewing and amending the modern awards over time, and certainly in the space of the annual wage review as well. One of the huge disappointments that we've had with the way that the Commission's decision-making processes have borne out so far is that, fundamentally through its decisions, you can see that there is still basically a view within the Commission that there is no provable link between the amount of employment that occurs in the economy and the price at which wages levels are set, and I can tell you as an absolute fact that that is not the way that retail businesses operate.

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They start on a - you know, as soon as you move into the medium and large retail formats, you are starting on estimates around what your revenue looks like and you tie your labour costs very, very closely to a percentage of that expected revenue and whether that gets you three bodies on the ground that are giving customer service or whether you can get five bodies on the ground is absolutely determined by how wages levels are set, and so there is a real trade-off in that space, and yet, by and large, we have not seen that trade-off accepted in any way in the Commission, and that's not to say that we accept any sort of view that wages or labour is just some sort of commodity in a marketplace, where it's here talking because labour deserves and warrants its own set of specialist regulations in terms of protection and so on.

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Nonetheless, the closest that we've seen I think in recent times with the Fair Work Commission's decision-making process has been in the space on appeal where they allowed some reductions in penalty rates in the space of restaurant and catering, in very specific circumstances where they could see not a trade-off between the total amount of labour and the wage rates there, but in the more specific set of circumstances where they could see an industry dominated by owner/operator businesses where those owners preferred to step into the businesses rather than to employ people during those times. Now, retail is a little bit more - it's got a much broader range of business models within it. We have a huge and vibrant small business class, but we also obviously have a lot of large, publicly-listed and private businesses as well where they don't typify an owner/operator sort of model.

Nonetheless, those trade-offs are just as real and just as important to consider in the retail sector as they are in other sectors and services.

MS SCOTT: So with that proviso about technical specialists having some experience in employment law, am I right in characterising it that your association is supportive of the draft recommendations regarding institutional change?

MR EVANS: Yes, that's right. I don't think we've probably got as strong views around the appointment processes as we do around some of the areas where recommendations are made. Nonetheless, on balance, I think we do support that approach. It has obviously been a matter of conversation and discussion in the retail sector, as I'm sure it is in other sectors, that there is a broad view that the current appointments do not necessarily have the range of different world views and experiences that might be necessary to make economy-wide decisions in the best interests of the nation as a whole. Probably out of all of the recommendations that you've made, they're probably the strongest view that we would have would be around our support for the idea that you would need some different areas of specialist expertise in the areas of modern award-making or reviewing and that annual wage review compared to the other skills that are necessary for dispute resolution and the like.

MS SCOTT: That's very clear. Thank you. Your association's views, I guess, are in contrast to some other employer groups; I'm just cognisant of that. In relation to this issue of inconsistent outcomes or even outcomes that appear to be different to what might be in explanatory memorandum or examples that are cited as to the flexibilities, does this relate to just one or two commissioners, as some other people have suggested, or do you think it's a more widespread issue - commission?

MR EVANS: I think it is - there are certainly some notable instances which are top of mind, but I think there's a broader issue there around the legal and employment skills that are required in order to assess an agreement in

conceptual terms, versus the very real, I suppose, gritty and mathematical calculations that have to be done around things such as the better off overall test. Our view is that one of the reasons why I think it would be great to have some additional skill sets and so on within the Commission is that I think when it comes down to making that final assessment, in terms of how the better off overall test applies in the instance of an individual proposal agreement, there is sometimes I think a need, fairly uniformly across the board, for commissioners to need to rely on some additional resources because that's probably the space where we're seeing the greatest not just inconsistency, but factual errors made about how things are playing out in practice.

MS SCOTT: All right.

MR HARRIS: So previously, about five minutes ago, you talked about a preference for making bargaining processes simpler and more effective, rather than adopting an enterprise contract. So given that your association covers both large and small employers, and we've had quite a bit of support for the enterprise contract from some organisations that represent small employers, yours is an interesting perspective, so can you tell me what you find uncomfortable about the model of the enterprise contract?

MR EVANS: We're certainly not uncomfortable with it. I guess it's just a case of priorities and where we see the most likely or practical benefits flowing in terms of what solutions there could be drawn up. I think in our submission we have broadly supported going down the path of enterprise contracting and seeing how that works out, subject to a no disadvantage test or similar. So, broadly speaking, we support that. Just in terms of our knowledge of how this space has played out in the past and under previous IR regimes in Australia, we get the sense that retailers, by virtue of the way that they negotiate their industrial relations arrangements would probably be less inclined than other sectors to take advantage of these sorts of opportunities.

MR HARRIS: Perhaps it's not a relevant thing, but under the former CEO of Myer, Bernie Brookes, advocating quite strongly 18 months or so ago for the ability to vary the award and pay performance, but saying he was unable to put forward such an arrangement. Now, it was only a media article and obviously he's not the CEO any longer, but I recall thinking at the time - at that time, we hadn't started this inquiry, but I was doing some of my own backgrounding on relevant perspectives, and I was struck at the time by the view that apparently this was not an easy proposition to negotiate and I wasn't quite sure why that was the case, and perhaps it's a Myer exclusive arrangement and you wouldn't want to comment on that, but I did think, when we ultimately designed this, that there is some possibility that large employers might be interested in it, although we do note, I think, that for large employers, they have the resources to undertake enterprise bargains and historically have chosen to do so and there's no reason why they shouldn't continue to do so if that flexibility option

suits them.

MR EVANS: Yes. So probably a couple of things to talk about and to draw out of all of that. There is absolutely no doubt that the majority of major or
5 national retail chains are utilising an enterprise agreement. It's a different question to suggest that they are able to achieve the sorts of things that they would want to achieve in their industrial relations arrangements in order to grow and to employ more people. It is definitely the case that we have issues in practice increasing enterprise agreements or any other solution that would
10 allow performance-based bonuses and pay for shop assistants on the floor around sales numbers.

That's probably somewhat a function of how inflexible the current system is for trade-offs in various ways, but it's also partially a function of
15 how high our base rates are. Without naming names, I am aware of a major retailer, for instance, that attempted to go down this road a few years ago and in fact found that it was having to essentially give bonuses at the end of the reporting period to its worst-performing staff on the basis of the fact that in order to put an incentive structure like this in place, you need to be able to
20 have room within your sales figures to provide for that.

But you know, if sales figures aren't just not met, but there is dismal underperformance in such a structure, the risk is that you end up achieving something that's less than base rates. I'm certainly not going to advocate for
25 any sort of reduction in base rates or wages. As I said before, we're quite proud of the fact that we're able to sustain some of the highest base rates around the developed world.

MR HARRIS: I didn't have anything else on your submission.
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MS SCOTT: No.

MR HARRIS: Is there anything you'd like to get on the record whilst here today?
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MR EVANS: Yes, a couple of other things that I just might mention on the way through. There is an information request in your draft report around the space of junior rates and whether that's an appropriate solution or whether there are better solutions for achieving an outcome broadly in that space. So
40 junior rates were introduced a long time ago with a fair bit of sort of, I suppose, bipartisan or broad support right across the industrial relations and political landscapes because we were, at that time of their introduction, faced with high unemployment and in particular, high youth unemployment. Now, I've got to say, we are broadly sympathetic to the view that youth is not a
45 perfect proxy for experience, and in fact, just the other week we celebrated our Young Retailer of the Year Awards, where we try to highlight how great the achievements are of some very, very young people in the retail sector

compared to other sectors.

5 Nonetheless, there are probably three or four options available to
employers who want to pay great-performing young people more. Without
something like junior wages, there is nothing to give somebody their foot in
the door who might be looking for their first job and has no relevant
experience or work history or similar. So we would actually love to be a part
of a conversation where that was reviewed in the context of maybe substituting
age-based requirements there around experience-based requirements. Having
10 said that, it's worth noting that in the retail sector, unlike a lot of other
industries around the economy, we have never linked years of experience, or
indeed, accredited qualifications or similar, to getting a foot in the door,
getting your first job or getting promotions.

15 So it might be a slightly more complex conversation in the retail space
by virtue of that, compared to how it might play out more easily in other
sectors.

20 **MR HARRIS:** Okay.

MS SCOTT: Thank you. That's clear.

MR HARRIS: Thanks very much. Thanks for your submission and your
attendance today and for your help with some earlier analysis, too.

25 **MR EVANS:** Pleasure.

MR HARRIS: Now I think we have the Queensland nurses. Hello, Peter
Harris. Are you guys okay? There's apparently a film crew that wants to do
30 some footage, with the sound off, so you're the lucky recipients at the table
right now. Are you okay if they just film us without sound?

MS MOHLE: Absolutely.

35 **MR HARRIS:** If we can get it over with reasonably quickly, it would be - it
does a lot for our gender diversity that you're at the table, you see. It's all a
cunning plan.

40 (Background discussion while setting up film crew)

MR HARRIS: Can you please identify yourselves for the record?

45 **MS MOHLE:** Yes. My name is Beth Mohle, and I'm Secretary of the
Queensland Nurses Union, and with me is Janet Baillie, a member of the
QNU, and our research and policy officer, Dr Liz Todhunter is with us today
as well.

MR HARRIS: Will you be making an opening statement?

MS MOHLE: Yes, if we could, please.

5 **MR HARRIS:** Please proceed.

10 **MS MOHLE:** The Queensland Nurses Union thanks the Productivity Commission for the opportunity to respond to the workplace relations framework draft report. As I said, my name is Beth Mohle, I'm Secretary of the Nurses Union and with me today is our member, Janet Baillie and Dr Liz Todhunter, our research and policy officer. The QNU made a detailed submission to the inquiry and also made a submission in response to the draft report, so we won't deal with those in any great detail. Although we cannot accept many of the Commission's recommendations, we recognise the significant effort the Commission has made in compiling such an extensive report. We have addressed some of these recommendations in our response, including unfair dismissal, general protections, enterprise bargaining, industrial disputes and right of entry and alternative forms of employment.

20 We have also responded to the Commission's request for further information on compliance costs in our submissions.

MS SCOTT: Thank you very much for your contributions.

25 **MS MOHLE:** Yes. And of course, we would like to address an important issue potentially affecting nurses and midwives' weekend penalty rates. Although there is a view that workers should now be available to work around the clock, the exception remains that work outside the standard weekly hours should be duly compensated. The payment of penalty rates has never been justified on the basis of availability of labour; its primary rationale lies on the grounds that it acts as compensation to employees for the inconvenience of working non-standard hours. Indeed, the argument that we now operate in a 24/7 global economy means that it is even more important that workers find balance in their lives.

35 Social norms, such as weekend sport, shopping or dining are activities that enrich the population. Those who work in hospitality or retail do so to enable the lifestyle of the rest of us. We cannot accept any moves to water down the current penalty rate regime. Janet has prepared a statement that will give further weight to our arguments around this matter and highlight the importance of protecting these payments for all workers. Today, we would like to discuss more broadly the type of industrial relations system we believe will lead to enhanced working relationships between employers and employees and better outcomes for everyone.

45 Employers and employees do not have the same motivations and capacity for control within the employment relationship. This is not a

relationship between equals. There is an inherent imbalance in power of the two parties to bargain directly with each other and this leads to conflict. Since 2005, the QNU has been involved in enterprise bargaining discussions utilising an interest-based, problem-solving approach, especially in Queensland Health.

5 This method requires the parties to identify shared interests and then work towards achieving them through enterprise bargaining. Although we have had to find our way through some major issues, this has been an important method of not only achieving and maintaining the long-term employment relationship, but also identifying and advancing shared interests, and therefore enhancing

10 service provision, productivity and quality of care.

I have handed up to you today some materials that you might find of interest. One of those is an extract from our current enterprise bargaining agreement with Queensland Health that goes through the objects of the

15 agreement. I think if you have a look at those, they are unlike just about any other objects of an agreement that you would see elsewhere. Also included is an A3 spreadsheet that goes to the type of information that we were seeking to capture in the agreement. It's not only about productivity, it's about skill mix, sustainability, productivity and efficiency, but most importantly, for healthcare

20 quality of care.

This is actually a spreadsheet that's been developed collaboratively. We were involved in identifying these issues. Unfortunately, and I'll get to this in a second, there was a change of government at the time that this agreement

25 was negotiated and we were then out in the cold for many years in relation to its proper implementation, but it goes to the point that there are other ways of doing industrial relations business and we would strongly recommend that the Commission looks more closely at this approach. The last document that I've handed up is a case study from the Fair Work Commission's annual report; it's

30 most recent annual report, that talks about a case study with Sydney Water where they've used a similar approach. So I've just included that for your information as well.

But as I said, when the LNP came to power in Queensland in 2012, these

35 relationships were all but destroyed by its relentless attack on workers in order to restore managerial prerogative. We witnessed a loss of more than 4000 jobs in health alone and a workforce that currently has seen an increase in contingent forms of employment with more than 25 per cent of employees now in non-permanent employment in Queensland Health, something that was

40 unheard of before the change of government.

MS SCOTT: So just to confirm that, Beth, you're saying 25 per cent - just want to check the classification of - - -

45 **MS MOHLE:** More than 25 per cent of Queensland Health employees are now on either temporary, casual or contract work.

MS SCOTT: Just checking, are they nurses and midwives, or are we talking cleaning staff - - -

5 **MS MOHLE:** That's rounded up. That's all Queensland Health staff, but just this afternoon, we're going to request the information relating to nurses and midwives specifically. That information was contained in an issues paper that's been released for the Queensland Industrial Relations Act Review. Issues paper 1 has that information for all of the government departments, but it's rounded up to cover all employees. I think there's about 88,000 employees
10 employed by Queensland Health.

MS SCOTT: That's good, but in terms of the message I should take away, has there been an increase, or do you know what the percentage now and before is of nurses and midwives who are casuals under the Queensland - - -
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MS MOHLE: We can provide a comparison once we've got that information from Queensland Health, but it was surprising when I saw that it was well over 25, closer to 30 per cent. It was nowhere near that in 2012 with the change of government. It would have been, I'm estimating, about 10 to 15 per cent.
20 There are always some who are on casual and temporary employment, but it's just really exploded, that growth in contingent employment. But as we see, the Queensland political history shows us the following of such a pursuit.

25 Unfortunately, many of the draft report's recommendations appear to lead us down a similar adversarial path where the contested space of employment relationships will again find power reverting back to employers and we say that there's an alternative path and it is through adopting an interest-based problem-solving approach. Employers do not need further regulatory enhancements to control their workforce. This is not the way to
30 greater productivity or improved quality of care and safety, nor is it the way to build trust with the employment relationship.

35 We seek a fair and equitable industrial relations system, one that provides secure, permanent, well-paid jobs. The secure low-wage so-called flexible workforce that the draft report foreshadows may serve the interests of employees in the short term, but will inevitably disadvantage all Australians in the future. I'll now - - -

40 **MS SCOTT:** I think I'll probably for the record say I certainly wouldn't agree with that characterisation of the report. We make it pretty clear in a number of places that we don't see any particular merit, in fact, we say quite clearly that we don't think any country aspires to be a low-wage - - -

45 **MS MOHLE:** Go down the low-wage track.

MS SCOTT: So I don't think I would want anyone reading the transcript to think that I thought that was a fair description of our report. It might be your

perception - - -

MS MOHLE: That's our fear that that's what it will lead to - - -

5 **MS SCOTT:** I see. It may be your fear, but I don't think you'll be able to find words in the report where we state that, and certainly that's not our intention. But anyway, please proceed.

10 **MS MOHLE:** I'll now pass over to Janet, who will give you a brief snapshot of the life of a shift worker.

MS BAILLIE: I'm a registered nurse employed by Mater Health Services, which in partnership with Mater Projects, a community-based organisation, deliver healthcare to homeless and vulnerably-housed people throughout
15 Brisbane. Each time I start work, it is 5 pm. As an after-hours service provider, I am in the midst of a shift when most people have finished for the day, are eating dinner or enjoying the weekend uninterrupted by going to work. I work four or five shifts a week with a street-to-home outreach team that provides nursing care and support services 365 days a year.

20 Our clients are rough sleepers and those who have moved from homelessness to housing, but remain at risk. Rostered to finish at 11 pm, it is around midnight before I am home safely. All four members of my immediate family are shift workers. Everyone able to be present for dinner or around a
25 table to share a meal at the same time during weekends is rare. For celebrating special occasions, it is challenging to organise a time when work is not impinging upon one of us. Friends and extended family are able to plan months or years in advance regarding what they will do, where they will go on any weekend, including the long weekends.

30 In contrast, shift workers make roster requests a month or so in advance that may or may not be met, wait for rosters to be published a couple of weeks ahead, if needed, seek to swap a shift, and only then are able to commit to plans. To avoid resentment, it is necessary to choose ongoing acceptance for
35 hours of work that are disruptive to family and social life. For various reasons, we all elect to pursue work that is of interest, available to us and provides an income. At different stages throughout our lives, night-shifts and weekend work with indispensable penalty rates have enabled members of my family to work less number of hours, affording time and energy needed to care for
40 children and to pursue tertiary studies and community interests.

It is entirely unfair to remove financial compensation from any worker who is serving others during evenings, overnight and/or on weekends and public holidays, regardless of whether or not their role is deemed essential.
45 Nearly finished, only one more short paragraph.

MR HARRIS: No, no, keep going.

5 **MS BAILLIE:** Financial compensation is valid for those younger or older who work when most people are free to be at home, whether they are employed in essential services or retail or hospitality or manufacturing or the tourism industry. Without extra payment, there is no incentive for anyone to work a roster with unsociable hours on any day of the week, especially Saturdays, Sundays and public holidays.

10 **MR HARRIS:** No, we'd agree. We'd agree. It's been a continuous thematic as we go around that the general perception that's been given back to us in comments from the union side of things is we're proposing to abolish penalty rates, which we're not, and in fact, we've been quite - we've made some quite, we think, significant comments on the record about evening and overnight work in particular, which didn't result in a recommendation, but I guess we
15 had expected that perhaps groups such as your own might have actually looked more closely at that and come back on commentary on that, rather than the generic question of penalty rates, which as I said, we haven't opposed.

20 In fact, in some cases, we've been quite explicit to support the existence of penalty rates. So I guess that's the start of my first question. We did note that the rates particularly for, say take nurses working overnight, the penalties appear to be about 15 per cent or thereabouts, a number of that magnitude. Way, way less than what, for example, a retail worker would get for working a Sunday - - -

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MS SCOTT: During the day.

MR HARRIS: - - - and 100 per cent, and this we call an anomaly, and we call it that and we're yet to get a response on the record from anybody who is
30 prepared to tell us why it is so, and so we asked the Council of Unions this morning why penalty rates are the way they are and I think conceptually this is becoming quite a problem for the debates we're having because we're getting commentary about a proposition we haven't put forward and no commentary on one that, particularly the case, I would have thought, nurses, you guys are
35 in a position where of course you're expected to be there - - -

MS SCOTT: You don't have a choice, it's 24/7.

40 **MR HARRIS:** - - - and not just your particular example of the streets, which is obviously a terribly important task, but we didn't go as far in the chapter as we could have gone, but we thought we would get commentary from groups saying, "Look, actually, the anomaly works in both directions." The Sunday rates may well be now deeply anomalous by comparison with the historical rationales, but overnight rates might equally be somewhat anomalous and I
45 guess I just note with a bit of surprise that we've yet to get even a submission on the subject.

MS MOHLE: In terms of the Sunday rates, I can let you know that Janet is paid, for example, time and three-quarters on a Sunday and similar to the public sector rate, and most nurses would get paid that, and time and a half on a Saturday, and there's difference in terms of afternoon and shift penalty rates on top of that as well, so it's compounded. So I guess it is a function of the history in the negotiations that have happened over time and every industry is different in that regard and it goes to the difference in bargaining power and the history. Liz might want to comment on that in particular.

DR TODHUNTER: I think the reason why, as you say, I think the Commission did tread lightly around penalty rates in general, but I think what has sparked the response from unions and from workers, if you start with retail and hospitality, well, who next? Do you start with Sundays? Okay, Saturdays and Sundays become the same. Well, okay, that's just the start of it. What next? So we - - -

MS MOHLE: And that's actually been the response from our members, is slippery slope, that sort of - - -

DR TODHUNTER: That's right. So that's our concern, that you start - - -

MR HARRIS: No, and it's quite a natural human reaction.

DR TODHUNTER: You start eroding the whole notion of penalty rates, and then where does that lead to?

MR HARRIS: Well, we tried not to. We actually put quite explicit language in there saying - - -

DR TODHUNTER: No - - -

MR HARRIS: - - - at no point did we propose to expunge a penalty rate.

DR TODHUNTER: No, no, you didn't, but you did also notice - you did mention that extra payments were awarded for things like overtime and shift allowance. Okay, so we start on penalty rates and so then we think, okay, if that all gets sorted out and that all gets to, I guess, one base rate or one type of penalty, then we start looking at overtime, then we start looking at allowances and so we end up, potentially, one flat rate of pay for all workers. That's where this could go. That's why we are so - - -

MS MOHLE: That's why we're concerned.

DR TODHUNTER: Yes.

MR HARRIS: And assuming that the institution, the Fair Work Commission, is happy to take things down that path, historically wouldn't you say that they

are actually - - -

5 **DR TODHUNTER:** No, historically they're not. They've resisted it very strongly. There's been a number of test cases, particularly in the hospitality industry.

MR HARRIS: So why the fear?

10 **DR TODHUNTER:** Well, the fear has to - could I just say that this is only one recommendation out of 46, and we have to look at the report as a sum of all its parts. I think there's probably maybe two or three of those recommendations that specifically seem to advantage workers.

15 **MR HARRIS:** That's right, but - - -

DR TODHUNTER: The vast majority of them don't, so why would we not want to defend our territory?

20 **MR HARRIS:** Well, because it's our job to look at the anomalies within the system and look at the - - -

DR TODHUNTER: But are there anomalies in the system?

25 **MR HARRIS:** Well, we would say 100 per cent versus 50 per cent versus 15 per cent is deeply anomalous.

DR TODHUNTER: Well, look, I would argue otherwise. As a researcher, and sorry if I'm being a bit confrontational.

30 **MR HARRIS:** No, no, go. That's why you're here. You're here for this. But you're here for this.

35 **DR TODHUNTER:** As a researcher, and I can look at this report and think, "Gee, look, what a great job the Commission did in getting all that information together and extracting such - be able to make sense of so much." But I'd also say that as a researcher, you go into any research with some hypothesis, and I think the hypothesis here was this system is broken, we have to look at fixing it. As economists, you have a certain number of ideas I guess that you take into any sort of modelling you do, and so if you come at it that way and think
40 it's broken, of course you're going to find repairs and I think there's some argument in the first place, if you took a different hypothesis into it, you might get a different lot of outcomes.

45 **MS MOHLE:** That's why we were seeking to actually reframe the discussion around, what we need to be doing in any industry, is having discussions about what's the importance - the important issues there, and healthcare, we've been able to do this, with Queensland Health in particular, with focusing on

identifying the shared interests. As nurses and midwives, we've got a shared interest with Queensland Health in providing high-quality, safe health services to all Queenslanders, right? So you identify what the issues are that we have a shared interest in and it's not easy work, it's hard work, and anything worth
5 doing is hard work, but that's the way that we think it would be more beneficial looking at this as a framework for reforming the economy, rather than taking sort of like a residualist approach, if you like, in terms of trying to get the lowest common denominator, because there's such a richness in the difference of sectors, they're all very different, but this approach in terms of
10 identifying shared interests is one that we have found most beneficial and we think that unfortunately, the adversarial - the traditional adversarial industrial relations system doesn't lend itself to this sort of approach and I think there's a lot of training and development that needs to occur to facilitate this occurring on a more widespread basis.

15 **MS SCOTT:** I would be keen to get on to the data, but if you could identify for me one place in the report where we recommended the lowest common denominator, I'd be quite interested.

20 **DR TODHUNTER:** Well, you know, obviously it wouldn't be described in those terms, but - - -

MS SCOTT: Well, an example, that you might be able to help me.

25 **DR TODHUNTER:** No, I couldn't give you an example of that because those terms aren't used, but it's the sum of its parts, as I'm saying. There are a significant number of recommendations that seem to work against workers and favour employers. That's not an unreasonable conjecture and something to take away from the report.

30 **MR HARRIS:** I'm not going to try and convince you because I did notice this in your submission, but just for the purpose of the record, I think you presumed that we approached this on a basis, and in fact, you assert so, that to increase productivity and increase profit margin is our objective. It has not
35 been the case, and indeed, if you read our issues papers, I think you'll find that we've done everything we can to say we start out from the proposition of saying what is the system likely to need in the future, and we find what it was likely to need in the future by looking at the trends in employment and the failures that appear to be occurring.

40
Some failures we decided can't be dealt with by regulatory reform; some we think can be dealt with by regulatory reform. I don't think at any point, in fact, you won't see anything in our report, about modelling with assumptions inside it. We know that's a tradition for some inquiries. This inquiry hasn't
45 really - that's not a very relevant or suitable approach. But I'm not going to try and convince you of that, but I did notice your own, I think, presumptions are made in the introduction to your statement. We should perhaps just

concentrate on the individual recommendations that you've got problems with.

5 Unfair dismissal; so we've put forward the proposition that where unfair dismissal occurs, it would be preferential for the Fair Work Commission to be able to look through the form of how that has taken place and deal with the substance of dismissal. We do so not because we think the unfair dismissal system is actually working very poorly, but the perception is that it's working very poorly by a number of cases that are continuously are used against us. So can you give me a sort of feel for your preference for unfair dismissal?

10 **DR TODHUNTER:** I think on that one, we had said that we felt at that point, if the Commission did make a decision, if they looked at the papers on the first instance, that the employee or the union may not even have had a chance to put forward a case or to be able to argue anything. So that was, I think, our concern on that. The other one was the notion of reinstatement where a - - -

MR HARRIS: Or that we remove reinstatement as a priority, yes.

20 **DR TODHUNTER:** Yes, an option, right.

MR HARRIS: Yes. So I think I understand on that, but just on a preceding one, perhaps I misunderstood the point, but would you object if we persisted with this recommendation that said look at the substance first and decide on the structure, if there was a clear-cut opportunity for advice to be given. I think, because we've had so many hearings now, but I'm pretty sure that we had a discussion in Adelaide about this, but it might have been in Melbourne, and so on the record we've got some advice from people about how we could improve the information provision mechanisms that are available to people who believe they're unfairly dismissed and through an electronic lodgement system, ensure that people do know the grounds under which they should proceed, if they're going to proceed, which will both help inform them and also help them get advice, obviously, by instead of lodging an unfair dismissal campaign, triggering the whole of the system, gaining this perception that there's a lot of complaints and then in reality, if they'd solicited advice, they would know whether they actually had a case or not.

35 **DR TODHUNTER:** Yes. Yes, look, I think that would be something that we'd have to discuss probably a bit more, but on the face of it, I think that would be - - -

40 **MR HARRIS:** It's in one of the transcripts. I'm sorry, I wish I could remember which city it was in, but it was actually, I thought, quite a useful piece of advice because it seemed to be, in your term, how to create common ground between the parties. If we can ensure there's a better advice system available and sometimes technology can help - it won't solve all the problem, but could help the problem. I thought that was worthwhile. What else did I want to ask in relation to yours? Minimum wages was all right. We've done

penalty rates. Pattern bargaining - sorry, do you want to go - - -

MS SCOTT: I need a couple of minutes to talk to their - - -

5 **MR HARRIS:** Their data?

MS SCOTT: Yes. Just keep going.

10 **MR HARRIS:** I was going to ask you, so were you present earlier when we were discussing pattern bargaining? This has been a good session in Queensland. We haven't got a lot of attention to pattern bargaining in others, but today, we've had a reasonable number of comments from people that suggest that pattern bargaining isn't necessarily the work of the devil, and that it could be used, although no one is quite certain what the right solution is for
15 reviving it. Would you consider that in the industries that you're most familiar with, that informally at least, employers do use patterns themselves? I don't know how far you go into sort of aged care and that sort of area, but - - -

20 **MS MOHLE:** We are subject to hundreds of enterprise bargaining agreements across all sectors, public, private and aged care.

MR HARRIS: Would you say there is quite a lot of similarity sometimes between employers' propositions?

25 **MS MOHLE:** There is. We've just finished a round of bargaining in private hospitals, for example, whereby there wasn't that much difference in terms of the approach, but we haven't got enough hours in the day to go back to our general problems we've got with enterprise bargaining, full stop, for services such as healthcare. We think that it really is very problematic, the whole
30 concept of enterprise bargaining. In a system that's largely reliant upon government funding, you get the government wages policy and even that's why an approach like interest-based problem-solving, we think, has got a lot of disadvantages for sectors like health and aged care because it's focusing on the nature of the work and the service delivery.

35 So, yes, we have noticed some employers actually do approach things in a similar way, but as I said, we've got, going right back to when enterprise bargaining first started, we've had significant difficulties with it because it's disturbed relativities. Once upon a time before EB, a nurse who worked in
40 aged care versus private hospital versus public sector were all paid the same amount of money and had the same conditions of employment largely, and they've been ripped asunder because of enterprise bargaining. So we think that - and we've put past submissions to the Productivity Commission on that particular issue in past inquiries, so we've got a fundamental concern about
45 enterprise bargaining and the impact that it's had on our members just generally.

MR HARRIS: I just wanted to note that you have actually said something reasonably positive about pattern bargaining and it's the third we've had today, so - - -

5 **MS MOHLE:** Yes, yes.

MR HARRIS: - - - it's a sort of - - -

10 **MS MOHLE:** We just sort of think there certainly is merit, it isn't the work of the devil, as far as we're concerned.

MR HARRIS: I had one other but I can't remember because I haven't written it down. Do you want to go to data perhaps?

15 **MS MOHLE:** Was it about the data that we provided?

20 **MR HARRIS:** I think Patricia is going to ask you about the data. I had another question, but I'll try and remember it, because where I was reading this, I didn't actually have a pen so I couldn't write down next to it, "Must ask question about this", so I'll see if I can come back to it.

25 **MS SCOTT:** I might get you to speak to the pieces of paper you gave us. You've given us the example of Sydney Water, and I imagine that you're drawing to our attention this approach of the particular role the Commission is playing, and I guess I'd like to have some better sense of this common approach and the data that you gave us and how you envisage that.

30 **MS MOHLE:** Yes, it was since about 2006 we determined that our approach that we were taking to enterprise bargaining, particularly with Queensland Health, but we have gone down this path in other sectors as well, wasn't working. I mean, even under a then Labor government, we'd had a significant dispute where we'd ended up in arbitration and so both sides realised that we probably need to be looking at the approach that we take to bargaining, and hence the approach of interest-based problem-solving which involves
35 facilitated negotiations of an agreement, but most importantly, it doesn't stop at negotiating the agreement, it goes through to implementation of the agreement.

40 **MS SCOTT:** So just on the interest-based approach - - -

MS MOHLE: Problem-solving.

45 **MS SCOTT:** Interest-based problem-solving, thank you, and you said a facilitated approach to enterprise - is a third-party facilitator brought in?

MS MOHLE: Yes.

MS SCOTT: Independent?

MS MOHLE: Yes.

5 **MS SCOTT:** Independent?

10 **MS MOHLE:** Who is acceptable to both parties, so that's what happened. So in this particular instance, it was CoSolve that we'd used and indeed, Booth DP, the case study that I provided from Sydney Water, has been involved in that. We had worked with Anna Booth since EB6 in relation to this, so she had worked very intensively with us and it was the first significant example of that in Australia, really, in terms of going down this track. We have been through three agreements up until the negotiation of EB8, so EB6, EB7, then EB8, and then there was a change of government, and as I said, then it all went awry, if you like. We were no longer at the bargaining table as a partner, if you like.

20 But what we were able to achieve through this approach was significant enhancements to models of care and significant enhancements in productivity and quality of care, and new models. For example, there's the greatest number of nurse practitioners, I think, per capita, in Queensland than any other State in the country. Significantly also, midwifery models of care, continuity models of care, and privately-practising midwives, we've got the largest cohort in Queensland compared to other jurisdictions, and this is, we believe very firmly because we have identified the shared interest, what we need to do to transform the health system so that it's more patient-centred, it's safer, but also more productive and efficient.

30 So we don't shy away from evidence in any way, shape or form. We're very evidence-driven as a union and so we agreed to come up with this framework and if you could keep this information confidential to yourself, this is actually Queensland Health's information.

35 **MR HARRIS:** The document itself?

MS MOHLE: This document itself is Queensland Health information and I haven't sought that we share that, but I knew that there wouldn't be an issue with showing you the framework, as such.

40 **MS SCOTT:** That's very good you said that, Beth, so we won't go into individual detail.

MR HARRIS: Specific.

45 **MS SCOTT:** That's fine. In fact, I might even hand mine back.

MS MOHLE: No, they'll be happy for you to have it, but it's just that it

would give you a sense of - we're now going back to trying to recapture where we took off at the beginning of EBA, because we're about to negotiate a new agreement.

5 **MS SCOTT:** So let's see if I've got it right. You've got now considerable experience in negotiating these EBAs as an organisation, you've hit a number of roadblocks along the way and there's things that you find suboptimal in the process, but the difference of having an independent facilitator made - it was a breakthrough and I guess you're drawing attention to Anna Booth's worth with
10 you and then Anna Booth's work with Sydney Water in her role as a commissioner, and now moving on, the work that you've done collectively with Queensland Health to develop a set of - are they commonly agreed performance indicators?

15 **MS MOHLE:** The broad framework was commonly agreed, but then I said, when it came to implementation, we were frozen out of the picture with the change in government. It was much more of an ideological approach, even though we've got over 90 per cent density within Queensland Health. There was very much a view that we weren't welcome at the table. We're now
20 welcome back again with the change of government and we're really - because what was disappointing to us was we were on the cusp of doing some very, very significant work in terms of transforming models of care and healthcare.

25 **MS SCOTT:** That's good, and just to help me, without going into the particulars of any of the indicators, the advantage with the approach that you had as an agreement was all these things were important to both parties.

MS MOHLE: Yes.

30 **MS SCOTT:** They were all seen as performance indicators, you were all going to report against them - - -

MS MOHLE: Yes.

35 **MS SCOTT:** - - - and so on. This was a means to address the objectives that you gave us separately - - -

MS MOHLE: Yes.

40 **MS SCOTT:** - - - including, interestingly, the objective first off to promote an effective, efficient and productive health system.

MS MOHLE: Yes.

45 **MS SCOTT:** So this all seems - - -

MS MOHLE: We've all signed up to those.

MS SCOTT: All commonality of interests, why don't we go this approach this way.

5 **MS MOHLE:** Importantly, too, for that particular agreement, 2.5 per cent, from memory, of the pay increase was funded - 0.5 was to be funded from productivity enhancements and we well-exceeded the amount that was required in terms of that 0.5 per cent in productivity enhancements by a country mile.

10

MS SCOTT: Because of the improvements you achieved?

15 **MS MOHLE:** Yes, and we were able to capture the data. It's contingent upon having the information systems to do that, and unfortunately, Queensland Health hasn't always invested in that or done so in systems that work, quite often. You might have heard about the payroll disaster up here.

MS SCOTT: We did.

20 **MS MOHLE:** So but this time, going forward, there has been a commitment to invest in the systems that will make gathering this sort of information much more easy to do and not of a manual bases.

25 **MS SCOTT:** Without going to anything that is confidential, so outgoing to that, you talked about the fact that the agreement led to a productivity gain that was measurable. What would be an example of a change in agreed practice that led to a productivity gain?

30 **MS MOHLE:** Well, we've got a workload management tool called the business planning framework within Queensland Health. Now, that hasn't always been properly applied consistently across, but where it has been applied appropriately, it led to a significant decrease in the use of casual nurses which are much more expensive to employ. So that's significant, and it's also better to have continuity of care. You're got continuity in terms of nurses who are well-familiar with the patients and their care. So that's just one example. Similarly, in terms of continuity of care models, maternity is another example where there's continuity of a midwife caring for someone all the way through to birth.

40 **MS SCOTT:** I got the midwifery example, but going back to the earlier one, could you tell us a little bit more about that instrument? Was it something that led to consideration about caseload or workload? What - - -

45 **MS MOHLE:** The business planning framework, you're talking about?

MS SCOTT: Yes, yes.

MS MOHLE: The business planning framework was a tool that was developed around about 2002, actually. We've had it for a very long time, and as I said, we've had difficulty in having it applied across the board, which is why in Queensland we're now going to having minimum ratios to underpin that and the government has agreed to legislate that and they're going to be doing that from 1 July next year to underpin that, but this was again a jointly developed tool. The union and Queensland Health got together and it works out what is required in terms of the skill mix, staffing numbers and what they do is they work up a service profile, so for a particular ward or unit, they say this is what we've had in terms of past occasions of service, for example, this is what we anticipate is being entered into in terms of service agreements at the hospital and health service level, for going forward for next year. We needed so many increase in occasions of service, or throughput through elective surgery and the like, and you plan accordingly.

It's a tool for matching resources, demand for supply. That's what the business planning framework is, and it's very rigorous. It's finance, everyone has been through it like you wouldn't believe, and it's been validated repeatedly as being a very appropriate tool for matching supply with demand for services. Again, that was a tool that was developed collaboratively. So our experience has been the architecture of the system doesn't really - is neither an impediment nor a facilitator if you've got the right attitude and if you've got good, robust relationships and if you can identify shared interests and work towards achieving those, that's the most important thing, is the relationships and the culture.

MS SCOTT: That's very good to get that on transcript, so thank you very much.

MR HARRIS: Although I hadn't the benefit of all this, this morning when I was reading your submission, the additional papers you've tabled, my other point that I was going to ask you about was, in reading your submission, it struck me that you are a pretty good set of potential commentators on our chapter on public sector employment because we haven't, again, had a lot of commentary back on that. We have had the CPSU because it's naturally in their bailiwick, but the proposition inside that chapter, again without proceeding to a recommendation, but we were hoping to get, by writing a whole chapter on it, more people contributing to this topic, is that centrally directing pay levels does seem to have some effect on individual agencies and their ability to negotiate agreements of a kind that might suit their workplace, so it being somewhat different to enterprise agreements, at least in principle, and now today you've brought along a very substantial document which, notwithstanding I did note earlier, not very happy with the bureaucracy perhaps or the regulatory structures of enterprise bargaining, you nevertheless believe as a tool it's a pretty good tool, by the look of it. Would that be right?

MS MOHLE: Well, enterprise bargaining is the only mechanism by which

we can get pay increases for our members. It's the wage-fixing system, so we've made a silk's purse out of a sow's ear, if you like. We are led to a certain extent, we've just sort of said, well, what is it that we need to do? It's in the best interests of our members, of course, to have their compensation for the work that they do, but for nurses and midwives, what's really important to them is the intrinsic value of their work and they want to be able to feel that they are delivering the quality of care that they know they're capable of if they have the resources. So the quality of care, patient safety is really central for our members.

10

So that's why this approach, where we can identify a significant number - indeed, I can't think of too many, thinking of the last two lots of interest-based problem-solving negotiations where there were any areas that were no go, that were not areas of agreement, once we actually sat down and worked through them between the parties. There's significant commonality here. As I say, what is needed in this system, I think, is the skills and the culture and the aptitude to actually go down this track because it does actually take a fair bit of time and resources and a different approach. It's not the traditional adversarial approach, it's a very different approach where we're focusing on identifying and addressing shared problems.

20

MR HARRIS: Enterprise bargaining, though, notwithstanding some problems, gives you the chance to do this.

25

MS MOHLE: It is a vehicle, but our experience has been, with the exception of Queensland Health, and we've had another large private sector aged care provider where we dipped a toe in the water with interest-based problem-solving a few EBs ago, and we found that that was very good as well, but then they abandoned it, it didn't suit their purposes. So with the exception of Queensland Health, that's the only place that we have had significant advancements through this approach, and again, it is because it depends what really is the motivating factors. If we can get within the room, and as I said, we can identify shared interests and put the effort into doing that, we believe it pays off, but I believe really - and we've had some discussions. I attended a conference a couple of years ago where we were trying to advance this concept more broadly for the Australian economy and there was some interest in terms of looking at this approach, but there was a view that probably we would need to do a lot more work in terms of developing, as I said, the skills and interest in going down this path because it does take a different mindset and a different approach to actually achieve the outcomes that we've achieved in Queensland Health.

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35

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Now, as I said, it only took a change of government coming along where there was not an acceptance that there was - a partnership approach was no longer wanted and we lost three years, effectively, of momentum which we're now really trying to achieve again, as trying to fast-track that with the next lot of negotiations.

45

5 **MR HARRIS:** And I guess, so Queensland Health but you have a variety of other parties, so in our chapter, as I said, on public sector employment, we did express some doubts about the degree of central management that could be plausibly applied to developing more efficient workplace conditions over time. This was much more likely to be effective in the hands of agencies. Now, we didn't go to a point of recommendation on that, but by the sound of it, your experience is a very strong one in support of that.

10 **MS MOHLE:** Yes.

15 **MR HARRIS:** You've effectively negotiated these kinds of reforms, ones that you're proud of and have brought along today, with Queensland Health rather than with the Queensland government, as it were?

15 **MS MOHLE:** Within the parameters of a wages policy.

20 **MR HARRIS:** Yes, within the parameters of a wages policy, but with a lot of - - -

20 **MS MOHLE:** That's a problem. It's not enterprise bargaining in the public sector, it's not, because effectively - - -

25 **MS SCOTT:** A wages policy - - -

25 **MS MOHLE:** Wages policy said, really, you know, so - - -

30 **MR HARRIS:** But you could set in wages policy the ability to have flexibility around negotiating how you deliver gains, even if the general objective of what gains - you know, in terms of budget, for example, in terms of fiscal realities, governments could set fiscal realities, but let agencies determine how better to negotiate outcomes that deliver them?

35 **MS MOHLE:** That would indeed be possible, absolutely, as long as it's a balanced scorecard approach. You know, it's not only about the productivity and efficiency, though that's very important and we signed up to the fact that we want to have an effective and efficient - - -

40 **MR HARRIS:** Have it here, yes.

40 **MS MOHLE:** Yes, we have done that, but it is also in the context of providing safe care, equal access to care, so it's a balanced approach to that.

45 **MR HARRIS:** Fair enough. A worthwhile point to note. I didn't have anything else out of the submission. Did you have anything else, Patricia?

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

MR HARRIS: Once again, I'd really like to thank you for coming along and for offering us the template model that you've used here for these indicators, so - - -

5

MS MOHLE: Yes. If you want any more information on that, we're more than happy to provide that to you.

MR HARRIS: Thanks also for your discussion about your own experience, that was very useful.

10

MS MOHLE: Thank you

MR HARRIS: Now, are we going to lunch? How far off lunch are we? 12.42, only two minutes behind. I'm told that, because we've had one submitter who has pulled out, we're going to have quite a long break now, so for those of you who have managed to persist and hang out here, according to my program, we're not going to start again until 2 o'clock, but I might just start at, say - - -

15

MS SCOTT: We might just check. Do we have any submitters that are going to be presenting this afternoon in the audience? Yes, we have one.

20

MR HARRIS: Could you go now?

25

MS SCOTT: We could bring Loretta forward and then, yes, we could do Loretta.

MR HARRIS: Loretta, would that save you from sitting here otherwise all through this afternoon? Okay, we'll bring you up now and save ourselves a little bit of time.

30

MS SCOTT: And no other presenter for this afternoon who is here now?

MR HARRIS: Do you want to identify yourself for the record, please?

35

MS WOOLSTON: Loretta Woolston.

MR HARRIS: Loretta, do you want to make some opening remarks?

40

MS WOOLSTON: I'm here to discuss my experience with unfair dismissal processes.

MR HARRIS: Yes.

45

MS WOOLSTON: Also the context of bullying because that I think that comes under what you're looking at.

MR HARRIS: Yes.

MS SCOTT: Yes, that's correct.

5

MR HARRIS: So I've just got a summary version here of points that you wanted to make. I'm not sure I've got a written - - -

10 **MS WOOLSTON:** Am I able to add questions or points that have been generated?

MR HARRIS: Yes. You can comment, as we say, on others' submissions, or indeed, anything you see - - -

15 **MS WOOLSTON:** I'd just like to - can I start?

MR HARRIS: Yes, you're on.

20 **MS WOOLSTON:** I'd just like to reiterate what I spoke to yourself, Peter, and the other gentleman, an idea came to me as to why we're not utilising our supers to fund a person like myself going for unfair dismissal, to give me more equal standing when I am financially taking on a larger entity such as an employer. The community funding was pretty much non-existent. My experience was, though excellent, I believe the community people are
25 excellent, but we were politically ransacked by the LNP and I think that's something - I don't think employment should be infected politically at all. I think they should be removed from the - they should provide, but they should not be part of the conversation, and I think by utilising our supers, we help to remove that dependency of funding and we become more self-determining on
30 how we do that.

That would lessen our fear in an imbalanced situation and perhaps as the nurses were saying, and I do sort of come - I come from aged care, I had a lot of agreement with them about we are reasonable people when we are treated
35 reasonably, and if we all want to move on collectively, perhaps that's the way, to remove the fear and political stuff often leads to fear.

MR HARRIS: Okay.

40 **MS SCOTT:** So can you tell us, without going into any detail that you might find awkward or that it's subject to defamation, could you just tell us what happened and why you thought the imbalance happened, because one of the propositions that is put to us is that the conciliation process, you know, a 90-minute telephone call, people put their positions, people don't have to be
45 represented by lawyers, but you clearly didn't feel that you - - -

MS WOOLSTON: It was a strategy for me.

MS SCOTT: Right, okay.

MS WOOLSTON: Using my intellect.

5

MS SCOTT: Yes, could you just step us through just your experience of the process to protect people from unfair dismissal and why you felt at a disadvantage?

10

MS WOOLSTON: The funding?

MS SCOTT: Well, you said that you wanted to have legal representation - - -

15

MS WOOLSTON: Because I didn't - I'd never been there before. I think it's like selling a house or buying a house, how many times are you going to be unfairly dismissed?

MS SCOTT: Right.

20

MR HARRIS: Your problem is, if I understand from our brief - but Queensland Government defunded institutions that might otherwise have helped you?

25

MS WOOLSTON: The nurses just spoke quite extensively. They had three years' worth of work wiped out. That tells you what happened in Queensland, and that affected us on a small scale, too. Yes.

MR HARRIS: Specifically, though, community legal - - -

30

MS WOOLSTON: Can I tell you word-for-word what they told me, on the phone? "Monday morning, once a fortnight, we have our employment law appointments. Ring quickly because in eight to 10 minutes, they'll be all gone." That was the limit of their funding, and I was told that they were overwhelmed.

35

MR HARRIS: The data doesn't actually show a large number of lodgements, but I guess your proposition would be that's because a lot of people are deterred because they can't get advice. Would that be right?

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MS WOOLSTON: I would believe there's a large - personally, I think there's a large silent majority. People that give up, people that just go and find something else and scrape by.

MR HARRIS: So I think - - -

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MS WOOLSTON: Can I also point out, I believe when you're dismissed, there's probably a reasonable potential that you're in crisis.

- MR HARRIS:** And can't make a decision in the 21-day period that's allowed?
- 5 **MS WOOLSTON:** Well, my situation, I could identify as being over a year and a half's worth, and - excuse me a moment.
- MR HARRIS:** That's fine. Take your time. How long has your case been running?
- 10 **MS WOOLSTON:** I haven't even got the final Fair Work thing. I've actually taken on the Commissioner.
- MR HARRIS:** The Commissioner?
- 15 **MS WOOLSTON:** The Commissioner, yes.
- MR HARRIS:** I see.
- 20 **MS WOOLSTON:** I believe it wouldn't have been recommended by legal people, but I am doing my best to represent myself.
- MR HARRIS:** So you're going to the Federal Court?
- 25 **MS WOOLSTON:** No, I challenged her in a complaint and she's now investigating herself.
- MR HARRIS:** This is an internal complaints process with the Fair Work Commission?
- 30 **MS WOOLSTON:** Yes, but we had to have another little - so I believe the employer would feel bereft because it would be more cost because they are legally represented, so therefore, it stigmatises me more in the process, I think, because it means that you're annoying, but what you're trying to do is your
- 35 best interests.
- MR HARRIS:** Did you at any point then get any advice before you started this process?
- 40 **MS WOOLSTON:** Yes, I did. You have very short appointments. I was told I was very lucky because they had a solicitor that had actually worked for the other side sitting in with us, and after speaking - listening to them, I was highly disgusted and I stated that - and I carried out that I wouldn't do mediation because it gave the Commission control over my final process and I wasn't
- 45 going to have that happen.
- MR HARRIS:** But then how else could they resolve the matter?

5 **MS WOOLSTON:** Potentially, they could have stopped me from having access to all the things. If the mediator - I was told that the mediator could influence whether or not they felt I had a case. And now that I've actually been in the case, I've actually - even though I'm very unskilled - sighted documents that have actually, I think, literally destroyed their internal investigation and reviewing of the actual process, which in my understanding means it renders their grounds of reasonable kind of questionable. So that mediator could have actually gone against me and I would have lost that opportunity.

10 **MR HARRIS:** Did you get a final decision from them on whether you were unfairly dismissed?

15 **MS WOOLSTON:** No, it's still all pending.

MR HARRIS: So effectively, you're in a process at the moment where - - -

20 **MS WOOLSTON:** She's made it, but she can't release it yet until she decides if she's done what I said she did.

MR HARRIS: Has she been fair and reasonable.

25 **MS WOOLSTON:** Yes. I said she did a Tim Carmody. I said she'd formed an opinion.

MR HARRIS: She formed an opinion before she was considering the facts?

30 **MS WOOLSTON:** Yes, and I presented why, and she's deciding on that.

MR HARRIS: Well, it's probably a bit hard for us, as sort of third parties, to do any more than give you the chance to talk about this, but you mentioned, or I've got notes here, which suggest you also mentioned bullying and in the bullying process. So you're involved in an unfair dismissal rather than a bullying process; that's correct, isn't it?

35 **MS WOOLSTON:** The bullying is where it all came from and then - yes, and even the Fair Work Commission, on their website, you'll see an explanation that reasonably describes it, where the dismissal can actually be the outcome of the deterioration of matters. So even though the bullying starts with the workers, going through the processes, if the processes aren't actually being meaningful and purposeful, the relationship between the staff starts to get into the hierarchy and in the end, you're the stigma, you're the scapegoat, you're the - they need to - - -

45 **MR HARRIS:** In order to resolve the problem, they have to get rid of somebody?

5 **MS WOOLSTON:** Well, they're just over it. They were pretty much over it pretty quickly, and that's what I identified. I tried to protect myself within my work space because I identified that they were disinterested and I stayed on for - maybe that's why I was there for a longer time, because I managed to sort of protect myself, but an incident happened with people who were involved but it was an incident that was separate to me, and that sort of initiated it all again.

10 **MR HARRIS:** Well, I think all I can do is hope that there's some rapid solution to this. A year and a half is an extraordinarily long process.

MS WOOLSTON: Well, I'm not there anymore, and I'm quite happy, about that.

15 **MR HARRIS:** No, no, but by the sound of it, you haven't really mentally moved on from the circumstances either.

20 **MS WOOLSTON:** Well, I'd like to thank you for recognising the damage because that's exactly right, and that's why I bother to come to these things, because most people - and I think you were trying to comment on that before - is that people go away and they're silent and they suffer in silence, whereas I decided that it needs to be told because nothing will change without the stories, and it's not that I want money or my job back, because I'm happier out now, it's about meaningful change. I have a daughter that's in the industry. I want young people not to have to go through these things, and that's why we share. Yes, I just - the complaints process, the investigation and the reviewing, if they had have been of a higher standard, this would never have got to this level.

30 Like I said, I saw documents at the Fair Work that I just shot holes in, and I'm not even very good.

MR HARRIS: Yes. So you're actually commenting as well on the need for better skills within the Commission as well?

35 **MS WOOLSTON:** I couldn't even see how they could call it an investigation - well, no, not Fair Work, I mean the HR people.

MR HARRIS: I see.

40 **MS WOOLSTON:** Which has been designed to - - -

MR HARRIS: Not the Fair Work Commission, but the employer, is that what you're saying?

45 **MS WOOLSTON:** Yes. I mean, right at the start, at the grass roots of it, we could have avoided - there's lot of places where you see things could have

been done better, so - but yes, like I said, I have this idea now that perhaps if there was some sort of insurance with the supers, then a person like myself could have had the resources to have a legal person go in and it might have been a lot easier.

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MR HARRIS: Yes. So you are discussing this idea of what is effectively like a small levy arrangement which would enable a person who is - - -

10 **MS WOOLSTON:** Well, I've seen what you've done with the NDIS, the Productivity Commission, and because I'm involved a lot in that area, and the things about self-determining, they belong to everyone, not just a disabled person. In every phase of our lives, these are the important things. Injustice is about people not being - people are generally constrained, restricted, et cetera. Even if I lose, I feel better if I've been self-determining, feel like I've had my shot, you know what I mean?

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20 **MS SCOTT:** I just want to check, Loretta, because I think Peter and I might be at cross-purposes. When you suggest the super stuff, you're suggesting that you might have access to your super to be able to hire a lawyer to fight your case, or are you suggesting, as I think Peter was interpreting just then, that there could be a levy to enable people then to have sufficient funding to fight these things? Which of the two, or are you interested in both options?

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25 **MS WOOLSTON:** Well, personally, I was thinking of an insurance, because the only experience I can grab hold of is what I saw in the NDIS, and the insurances that are already attached to a super.

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MR HARRIS: We talked about it briefly - - -

30 **MS WOOLSTON:** An economic person could come up with something better. It's just an idea. Super is all about work.

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MR HARRIS: But your idea, really, is driven towards having representation to ensure you get a fair hearing as a consequence of this rather - - -

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MS WOOLSTON: And to remove the political influences.

MR HARRIS: That otherwise can limit the availability of what otherwise is community legal advice?

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45 **MS WOOLSTON:** Yes, yes. The other thing, too, is in your submissions and that, I was interested to know if - there was the submissions from the counselling people, the charity people, who would speak to the health and wellbeing of the community on these issues, and then also I thought about shouldn't we hear from the insurance people because, again, they would give expertise if something like that was possible, and then the nurses mentioned it, too. Perhaps this would, like the productivity thing, the NDIS or something,

perhaps it would drive more jobs in the fact that we could have neutral people, more neutral people in the system. Like, why do I have to have my workplace investigate themselves? It doesn't work with cops, it doesn't work with banks.

5 Like, we know the human response. Why are we still doing it? Why can't we create independent - you know, the nurses called facilitators. They had a positive story. Why can't we involve more of that? Why can't we make it more robust and equal outside of Fair Work so that limited people have to go to Fair Work?

10 **MR HARRIS:** Yes, that's right. It has been raised separately in the case of bullying, how much of this is a question of better education and advice for employers about how to deal with these problems at the outset in the workplace, rather than see them proceed on and trigger - well, whether it's
15 unfair dismissal or whether it's some other activity - - -

MS WOOLSTON: I think early intervention, preventative stuff. All the terms I think of come from what a care plan would be to look after a person, and you just apply it to the system that you're trying to build.

20 **MR HARRIS:** Yes.

MS WOOLSTON: If you underpin everything with wellbeing and health, generally it points towards a more robust, healthier outcome for everyone, plus
25 that's a fiscal winner.

MR HARRIS: Yes, okay. I'd like to thank you for making the effort to come along today.

30 **MS WOOLSTON:** Thank you.

MR HARRIS: And get your story out onto the record, where it will appear when the transcript goes up, and we'll pay attention to, I think, the
35 circumstances that you've put out. Thank you very much, Loretta.

MS WOOLSTON: Thank you.

MR HARRIS: We'll adjourn for lunch and start again at a couple of minutes to two.

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ADJOURNED

[12.59 pm]

45 **RESUMED**

[2.04 pm]

MR HARRIS: Could you identify yourself for the purpose of the record?

5 **MR MATTERS:** I'm David Matters. I'm currently the Vice-President of the Communist Party of Australia, National Vice-President and State Secretary Queensland. I provided a submission to the Productivity Commission in relation to the inquiry into the Fair Work Act and other matters about it. In that submission, I provided a number of arguments which I actually don't think have been taken up properly by the Commission, although they were written in language that may not have been as formal as the Commission is used to.

10 I will go to some of the points that are being made. One of them in particular is the proposal to remove the Sunday penalty rates in retail, hospitality, I suppose. If I use old terms to describe industries, I apologise. I think that such a removal is actually - it's presented, in the basis of the original proposal of this inquiry - Joe Hockey's view, where he was arguing, I think, a rather - about a cup of coffee, the price of a cup of coffee. I don't think that was in his argument that he put to you.

20 **MR HARRIS:** I don't remember.

MR MATTERS: That's the argument he's been putting publicly. I think that the basis and premise of his argument was wrong and the understanding that would attack a Sunday penalty rate is wrong. It attacks some fundamental principles that have been inscribed in the Australian law for quite a period of time.

25 The first thing is, I would suggest you need to look at the gift that you'd be giving to two major - to what I call a duopoly of Coles and Woolworths. In the last decade, their ownership in industries related to gambling and related to hotels has increased massively and their monopoly, or duopoly, over the retail of food products has increased dramatically. That would provide them as a major employee and, having looked at the number of employees they claim, you come to at least 400,000 employees. Were such a reduction in penalty rate to occur, it's actually a gift. If you estimated that gift, and it's only an estimate, attempting to be a conservative estimate, of \$50 per employee, that's around about a \$20-million gift to that duopoly, without any real community benefit.

30 It is an industry where people have survived despite the fact that there are monopolies that are driving at them. I know it's the Commission's intention to assist the small businessman but I believe that it would actually result in assisting the duopolies to further drive the small businessman out of the industries that they - currently found a niche. Yes, they do use a lot of self-labour or family labour on a weekend and that gives them an edge but, if you remove the edge that they have by removing the penalty rates for the major employers, then you will bring them to their knees. That's occurred in

5 other industries where Wesfarmers went into the hardware industry through Bunnings and many of the hardwares - it would be very rare - I think I saw something very rare the other day, an actual - down at Wynnum Manly, an actual hardware shop that's survived but there are hardly any that have survived. I would suggest that further increasing the competitive edge of those industries against the small proprietors would be the actual result of removing the Sunday penalty.

10 It's further that I have a look at the fact of how the Sunday penalty comes to be - and, in fact, the seventh day off - in an industry I've been involved in, having the seventh days off almost has a religious overtone. In fact, it does have some bearing on the Christian creation myth or, if it's not a myth for some people, that Jesus was supposed to - or God was supposed to have rested on the seventh day. When you're looking at religion, in, often, companies under tyrannical regimes - place where people place their humanity to protect it from the tyranny, though we had the situation where Southern Baptist music, in the United States, grew up out of the slave owning society that existed in the United States.

20 The concept of humanity that involves having a seventh day rest is an enshrinement that affects the Christian law that we have as a basis. You might say, "Why is a Communist talking about Christian law?" I live in a Christian country, in its basis; yes, a country that also is secular, very strongly, and recognises other religions and the right to religious freedom. I have had to deal with, as a union official, the difficulties that occur when other religions talk about the Sabbath being a different day, and many of our laws are enshrined with the concept of a seventh day off. The significance of the penalty that's provided on the Sunday is that that has, by circumstance, been historically our day that we have off. Yes, I note that you made some comments about the lowering of religious observance but it's still our day and it's still a day that most workers enjoy. To sacrifice that - - -

MR HARRIS: Then why do they work?

35 **MR MATTERS:** They work because they need the money and they work because they can because their families are different.

MR HARRIS: So the principle has gone at that point, hasn't it? We're just arguing the practice.

40 **MR MATTERS:** The principle is not gone because the fact is that, because they get extra remuneration for that day, they find another day on which they celebrate it.

45 **MR HARRIS:** You can be paid not to religiously observe. That's what that sounds like.

MR MATTERS: No. You can be paid to reserve your religious day or your day off on another day but compensated for the fact that it stands outside the social norm.

5 **MR HARRIS:** Is there much evidence that that actually happens?

MR MATTERS: There is. In most industries there is another day off.

10 **MR HARRIS:** No, I was thinking about the religious observance.

MR MATTERS: The religious observance - there are people that observe the Sabbath on a Saturday. Seventh Day Adventists, I think, can't work from sundown on the Saturday. A lot of what we do is enshrined in these laws and they're things that we're touching that effectively have been built up over years of working out these issues day by day in the workplace. The minute you touch something that's in that era - I've had people to argue to me, particularly in the bus industry, that we shouldn't pay the Saturday and the Sunday at a higher rate or we should pay another day off in the week. So your argument might be that, in compensating them as well for that day, you should pay them a higher rate for the other days, but, in effect, you've been compensated for the day by either being paid a higher rate for the day or being given that day off as a guaranteed day. The minute we start to change an effect with that, we would raise the argument that there should be further compensation for these other particular religious observances.

25 It seems like a small gain for some people. It doesn't fix the problem for those small businessman who it's aimed at. In fact, it increases their problems. On top of that, they open up a range of other issues relating to the religious preferences of people.

30 **MR HARRIS:** Why do you think small business doesn't think that? They're advocates generally for this change.

35 **MR MATTERS:** People think that money is made by money, and that's not actually true. Unless money actually goes into the productive enterprises and reproduces, there's no real extra value created and eventually we run into games where we end up with bubbles in the economy. It doesn't make it any less real that people think things that are not true. The fact is that I think that quite often a small businessman is just looking in their business day-to-day at an issue that they think is their problem and they don't look outside of the other issues that impact and effect and give them protection.

40 **MR HARRIS:** Some of these bigger enterprises - you instance Coles and Woolworths and then, more latterly - - -

45 **MR MATTERS:** By way of example, not just - - -

MR HARRIS: Yes - and Bunnings. Don't they have enterprise bargains, though, that spread these rates across a longer period? Haven't they effectively already, in part, contracted themselves out of the current penalty rate differential between Saturday, Sunday?

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MR MATTERS: They've made some basic deals that impact and were affected because of the existence of that additional payment, so, in effect, by them doing that, they're trying to be more competitive but at the same time they're overcoming a community problem. I think that it still doesn't add for the argument to attack the Sunday penalty rate. It in fact says that, "Look, industry will work it out where it can work it out."

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MR HARRIS: In part that's true, isn't it? Even if the statutory rate, which is what I'll term for the award - even if the award varied back towards where we are recommending, every business will still decide whether or not that's going to attract enough labour to stick with the statutory rate. We have over-award payments now for a good chunk of the hospitality, entertainment, restaurant, catering sector - over-award as in higher. Historically, some of the employers in that area are at least used to paying more than the award, so there will be some prospect, won't there, of them continuing to do that if they need to do it in order to attract the labour to work on those weekends?

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MR MATTERS: I think what in effect you're offering is a downgrading of the wage because, irrespective of what you might think about the Sunday penalty, those of us that look at ways and conditions understand that it's part of the overall pay rate and, effectively, by removing the Sunday penalty rate, you're imposing a wage cut, and, if you impose a wage cut at this particular juncture, where I believe the government and others are expecting us to be heading towards a crisis, then you've got some real difficulties coming. You may increase and exacerbate these crises.

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MR HARRIS: You're talking about disposable incomes potentially falling and, as a consequence, demand falling.

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MR MATTERS: Disposable incomes will fall if you reduce the wages; it's as simple as that. It was done very crudely during the 1930s depression. An overall 10 per cent wage cut was administered and it was administered on the basis of the theory that if you reduced wages it would increase employment. It didn't work; in fact, it deepened the crisis. Most economists now come to the argument that that was an absolute mistake and Keynes came along and offered some corrections to that thinking. It's the same thinking that leads to the concept that by lowering the wages on the Sunday you will increase the labour. More than likely what you will do is increase the unpaid component of labour, which means, in effect, you'll increase the profitability within that sector, possibly, because there are other factors that might come into being because automation is a big issue at the present moment.

MR HARRIS: I asked that this morning, actually, about the degree to which, if labour rates remain relatively high and yet consumers clearly want services on Sundays in this sector, this set of industries, won't we see technology substitute for labour in due course?

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MR MATTERS: We're seeing technology substitute for labour in those industries if we go to those where they - for instance, in the poker machines that are run by Coles and Woolies, they've automated the pay-out systems, which means they're reducing the labour they need for that particular enterprise.

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MR HARRIS: Or the self-service checkouts that - - -

MR MATTERS: Self-service checkouts is another.

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MR HARRIS: Over time, it is a contest, isn't it, between labour rates and technology? In consumer-facing industries, there's been, probably, a period where you might have suggested that consumers favour people - and I think that will be a pretty strong argument - but in the end, if labour costs remain high, demand keeps increasing and then technology becomes an effective way of substituting for additional labour.

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MR MATTERS: A conundrum that employers are courting is that each employer increases their robotisation or their automation, they increase the amount of cost they've got to recover. The argument that I was putting is that you don't actually make - this is something of an economic argument, that you don't actually make an increased value from adding previous labour. What you actually have to do is return that in your product and, by doing so, you're actually lowering your ability to make profit on each individual article. You have to produce more, there's no doubt about that, but if the market saturates, then, you're in a problem.

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I gave examples in the car industry in the submission because the car industry is familiar as I've been a car worker, myself - about the industry but it has become so automated that jobs that I used to perform in this country are no longer performed by anything other than a robot - spot-welding, painting, cutting back the paint - but the actual process has meant that the amount of units of production that need to be made to make a profit have increased.

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MR HARRIS: Quite. That's what our report actually said too, (indistinct) is essential nowadays.

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MR MATTERS: It's the nature of capitalism. It's the nature of capital, I think, from - the comrade to - Communist Party have a great deal of respect from - Marx made quite a bit of submission on that issue in the 19th century and it's coming to be more since then and it's the problem that we face by the great progressive nature of capitalism as it increases the capital and increases

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the production and provides the opportunity for a great life - but at the same time, because of the nature of it relying on living labour to produce new value in the exchange process, it creates contradictions, which we're trying to deal with all the time. This is the problem we face if we reduce the weekend penalties.

Australia has been very democratic in the sense that it has, through its laws, provided for the fact that people have weekends and days off. There are those that argue against it and we hear them and some of them are extremely reactionary people whose focus on profit is such that they can't see that there needs to be a social value as well. These are the things that we're looking at and we're having to deal with in this world that we live in. That's quite a brave new world, if we coined another person's book.

MR HARRIS: Fair enough. I probably interrupted your flow a bit there.

MR MATTERS: No, that's fine. I'm used to that. In my previous career I was a union secretary for the bus drivers and they - - -

MR HARRIS: Surely no one interrupted the bus drivers' union. I used to deal with the RTBU in Victoria, I used to run public transport down there, and I wouldn't dare interrupt the secretary of the RTBU.

MR MATTERS: We ran a very democratic process in the buses in Brisbane. A lot of the ideas we came to were as a result of collective thinking, which is a very useful position.

The other aspect that I will go to - I think that needed to be explored while we were there - is the question of fines in the current legislation. I believe they're undemocratic and unfair.

MR HARRIS: Which fines in particular?

MR MATTERS: If you take a fine for taking so-called - what's called - I'd better not use my feeling of it but what is called unprotected industrial action, the new concept, for some of us - you know, like, it's - the original industrial relations system was geared towards shortening disputes. You tended to move towards avoiding orders and the Commission moved you towards reaching a resolution. The current industrial setup moves you towards having a dispute later on that's even worse than the dispute you had, so you face the prospect where workers who may have had an issue which caused tempers to fray, which they had some justification for, in most moral senses, then find themselves involved in other actions by the Fair Work Commission coming in, or the Ombudsman coming in, and providing - and asking why they shouldn't be fined for taking action that they felt at the time was justified and which may have resulted in a moving-forward and in a rough democracy - is a good thing. The fines that are proceeded with are small fines. You're better off, from our

point of view, threatening us with large fines because we end up broke anyway but the object seems to be to bankrupt workers and to bankrupt unions. If you do that, then you are attacking one aspect of our democracy because you force those organisations - you may force them out of existence, or you force
5 workers to accept situations that are not acceptable. It is not always that justice exists on one side or the other but it often exists in the process that's created, and the process that's created by continuing to fine workers is one where people live and work in fear, and then you can end up with an increase in industrial accidents.

10 One of the reported results of the rise of the Nazi regime in Germany was the massive increase in industrial accidents and death rate within industry, and that's before they started the slave labour system. If we are to have a better industry and a better fro, as we have had over the last century, where we've
15 been able to have the to and fro and, yes, the larrikin spirit that exists in Australia - is that we've created a better society and a better workplace. By continuing, as some of the ideologues have pushed, to suppress one side of that struggle, we are preventing workers from finding a way to air their grievances, and they get bottled up, and they continue to bottle up.

20 One of the aspects, again, being able to talk from a Communist Party point of view, is we're aware of the changes that occurred in Russia after the Tsarist regime. Two of the aspects of the Tsarist regime was the extreme punishment metered out on striking industrial workers, which led to a massive
25 sense of grievance and I think we know the history after that was quite solid. If we want to keep bottling up grievances until they come to a point where people say, "I can't live with this anymore," then we continue to drop fines on people, we continue to drop the situation that keeps these things getting worse.

30 **MR HARRIS:** We don't have a lot of examples in the data of that. We've had 20 years of protected industrial action as a consequence of enterprise bargains and we've just had a decline in strikes and general disputation. We're not bottling anything up, it would appear from the data.

35 **MR MATTERS:** I think you're bottling quite a bit up because the general approach at the moment is to try to avoid the fines, the general approach is to avoid the industrial action, which you're saying is a benefit.

40 **MR HARRIS:** I'm just saying it's not observable, bottling-up isn't observable, but you're saying people are consciously disadvantaging themselves by not taking industrial action for fear of fines.

MR MATTERS: They are finding some quite expressive ways, which I think you've come across - - -

45 **MR HARRIS:** Yes.

5 **MR MATTERS:** - - - and you're recommending to close down, such as one-minute stoppages. As a former union official, I find that useful, it's a way of presenting a grievance without too much harm to your members, but you're saying that, because that harms the employer, who they're trying to make their point to, there should be an extra fine imposed on it, a quarter of the wages.

MR HARRIS: It's not a fine if they're doing it in a protected bargaining period.

10 **MR MATTERS:** If they don't carry it out, you still want to fine them a quarter of the wages.

15 **MR HARRIS:** But the idea is to get, as you were pointing out earlier, towards a solution, so incremental pain and trouble is not really incentive towards a negotiating solution, is it?

MR MATTERS: It's not a solution when you're punishing workers. It just gets them angrier. You're taking a quarter of their wages off them.

20 **MR HARRIS:** You'd hope that the incentives must be, on both sides, a little more even, so they might decide to agree, rather than decide to go to industrial action.

25 **MR MATTERS:** They'll head towards more wildcat-type actions because the union officials will try to explain to them that "These actions will lead you down certain paths." My own experience has been, you can continue to explain that to workers but eventually they think you're having a go at them and you're taking away their rights and you're just as much trouble as the government, so they'll walk past you and into the firestorm. Then you end up
30 with even more of these issues.

I know the statistics at the moment are such that - with the mining boom and wages moving the way they were, people weren't inclined to a lot of industrial action but we're moving to a period where the economy is shifting,
35 the gears are shifting, and, whether we like it or not, we seem to be tied very strongly to China and they're intensifying their economy rather than making extensive development. So we're dealing now with some issues where some of the areas that we're affecting we need to give some good thought to.

40 If we set as the norm, for instance, that we don't provide penalty rates out of a range of industries, then, when service industries or tertiary industries, which are going to become the main prop of our economy, start to move into longer working hours, we won't provide protections that need to be protected because we'll have wiped them out in other industries or left them to be what
45 we consider to be a relic in industries that currently have them. At the present moment, one of our major exports is education. We don't think of it as an export because it happens here but we're changing the nature of that industry.

5 We're making the situation now where we're casualising university professors. Most of them would hate for me to tell them they're being proletarianised, as they think that would be beneath their tenure, but the reality of the fact is that they're certainly being casualised and their labour is being used in the same way that the labour of a factory worker is being used.

10 The same may go to many other industries that we currently regard as professions and, as we further commercialise them, we're going to further expose them to these forms of exploitation which the community has an obligation to protect them from. I think, at the present moment, the way you're approaching these questions - and I know it's because I can't see things from certain points of view but when you're coming at this you're coming at it from a legal point of view that strikes are illegal or strikes are undesirable. I come at it from the point of view that strikes are a means towards unifying workers around their cause and working out what is acceptable and what's not acceptable, what's real and what's not real. That's a different attitude.

20 **MR HARRIS:** Not to overemphasise it but we did actually have some quite explicit statements in support of the right to strike in the report.

25 **MR MATTERS:** I'm sure there are some but the right to strike, dare I say, was severely hampered by a comrade from supposedly my side of politics, I think, a federal industrial relations minister, who gave the right to strike but then introduced the concept of protected industrial action, which is a constraint on the right to strike.

MR HARRIS: Prior to that, strikes were all illegal.

30 **MR MATTERS:** They were illegal but they were supported - - -

MR HARRIS: No one was prosecuted for them.

35 **MR MATTERS:** They weren't prosecuted. They were supported also by the United Nations conventions on the ILO, so it was a contradictory situation. By coming down in that particular way, it made a law of the land which put an exemption on the right to strike. In effect, if you're arguing a point of view from a simple point of view to say - it got rid of the right to strike because previously, whilst the strikes were tolerated or allowed to reach their conclusions, parties negotiated during the process without resorting to going too far with each other.

MR HARRIS: There are not too many people, though, advocating a return to that situation.

45 **MR MATTERS:** I don't think anyone can advocate a return to any situation; we can only go to new situations.

MR HARRIS: A new situation which replicates that old situation where strikes were illegal but allowed any time you like. We haven't seen any submissions advocating that.

5 **MR MATTERS:** I don't think you would see them, except you might see some submissions from us that you allow the resolution of just issues and not impose fines, and that the fines that are put in place in relation to industrial action should be more like a traffic fine than a - if they are found to be an unjustified action but not from a point of view of attacking and trying to
10 bankrupt one side or the other.

MS SCOTT: We're right on time.

MR HARRIS: Are we? Sorry. I was quite enjoying this. We're going to run
15 out of time in a sec. Are there things that I've failed to prevent you - - -

MR MATTERS: I'm just looking but I've got to find - my computer went to sleep while we were talking, so that shows you how good I am. We're pretty close to it. I just would argue that one of the aspects you seem to find useful in
20 the Fair Work Act was its ability to restrict wages in other sectors of the economy while the mining boom was on. I think your report sort of took some note that it was effective in that area. We just find it remarkable that, if you've been appointed by a government that argues free market, they can take some value that workers weren't able to get a free market on their wages in the sense
25 that the rise in the wages that should have occurred was restricted by legislative means; so, in effect, you were holding back wages. We're not advocating, as the Communist Party, for a free market on wages, by the way, but we certainly think it's a contradictory point.

30 **MS SCOTT:** There's probably more than one market; I think that's the thing. There's a market for mining workers in Western Australia and there's a market for physiotherapists in Melbourne, and they're not the same, and as a consequence you can get wage movement in one and not the same wage movement in another.

35 **MR MATTERS:** Our experience with employment in industries was that people who had never been employed for quite a long period of time were beginning to be employed, so you'd actually begun to dip into a section of the unemployed that hadn't been touched by any booms before, so it was quite a
40 boom and the labour shortage was such that anybody that walked near any employer was often offered a job in that period. There wasn't anything like it since 1972, when the economy - we know that you argued for - and we think that some of the measures that are being taken are to pressure down wages, rather than measures to increase employment. It's interesting that every
45 argument has always said it will increase employment. Yet, when we had a boom that caused a massive increase in employment, the planning that have gone on by governments, including the previous state government, was to

increase unemployment as quickly as they could. They went into sacking campaigns and that's been going on now in industry, where what we've going on is that industries are being encouraged to sack people.

5 We think there needs to be more - and we did submit in our submission, there needs to be more done to protect labour in this country and to educate labour in this country. Youth unemployment is extremely high but there are no proposals within this productivity report for there to be industry provisions to provide for training in industry. We hear people complaining about lack of
10 skills but, when you talk to young people going for jobs, the first thing they say is they want someone as a first starter but that's got all the skills they need. You can't meet that unless you're prepared to train people.

15 **MR HARRIS:** I think there are things in this report on training and on youth wages and variations to wages, not just based around age but also experience, there's a request for an investigation by us of the current apprenticeship system, which appears to be in a downturn phase at the moment, there are our suggestions on the minimum wage and consideration of the position of the unemployed in downturns. I notice you've made comments against most of
20 those things but, when you say there are none, I don't think I could let that go by. There are things; you just don't support them.

MR MATTERS: I don't agree with - yes, we think you're going in a wrong direction in respect of these things.

25

MR HARRIS: Yes.

MR MATTERS: The other issue that's there is the take-it-or-leave-it approach that's been - that's how I've coined it, where you're saying that a
30 small employer can tell someone "There's a job for you and these are the conditions," and you've introduced a proposal for what I'd call a collective individual contract. That is, where you say to everybody in an enterprise, "These are the wages and conditions I'm offering as the employer and this is what you should take."

35

MR HARRIS: It's for new employees. Existing employees would stay where they are.

40 **MR MATTERS:** What starts for new employees ends up for all employees because, over time, you all become old employees.

MR HARRIS: That's correct. If there's a high turnover rate, that would probably be the case.

45 **MR MATTERS:** Yes. So, effectively, what you're offering is an employer to be able to set the wages and conditions. That goes contrary to the idea and objective of the community in finding things that are acceptable for Australia

and acceptable to employ labour in Australia. You are effectively going to lower the conditions down. We've had some examples where a lot of companies, big companies, get around the idea towards small employers by franchising their businesses. It's a means of turning someone who would have normally been an employee into a contractor, that is, the manager, and they think they own a business when in reality they're just the manager, at the same time, giving them the ability to getting under your laws and take the opportunities, appearing to be a small employer, and reducing wages and conditions.

This is a dangerous thing in this country which is relied on. Being able to hold up a decent standard of living for working people - we don't have a commonality where workers live in trailer parks, like they do in the United States. Culturally in Australia we've had a strong view of support for workers and a respect for people who do the work. These things that we're doing now are trying to introduce alien cultures, so I'd urge you to step back from that.

One final point, as the person who proposed this inquiry is not with us any more, we'd argue that he's not with us because the community took significant objection to his economic analysis and that the inquiry was founded on a view that reducing the wages of workers by reducing penalty rates would somehow lead to a massive economic boost, and we think that he's been proved wrong because he's been thrown out of Parliament and we think you should take, likewise, to his ideas and start to look more seriously at these arguments we're putting.

MR HARRIS: I'd like to note that you're the first to make a purely and final political statement on the record but you may not be the last.

MR MATTERS: I've enjoyed seeing the change that's occurred. I think there has been a significant amount of community pressure and a severe worry that was in the community about the direction of the government in sabotaging Australia's economy and I think that it got to the point where even those that would be considered not exactly the people that the Communist Party would support have seen that things are too critical and that they need to change some things, so we'd urge you to make some changes.

MR HARRIS: Thanks very much for your testimony here today.

MR MATTERS: Thank you.

MR HARRIS: Would you like to identify yourself, please, for the record?

MR BYERS: Alan Byers, North Ipswich. Do you want to know any more?

MR HARRIS: No, that's fine.

MR BYERS: Madam Chair and Mr Chairman, the title of this paper “The Communications Gap”. The essence of democracy is balance. The enemy of that balance is political popularity. There is such a gap between that which is popular and that which is responsible that a political position some way
5 between the two is really what we could call good management. This paper is an attempt to fill some of that gap.

There is a limit to what governments can do without some level of electoral mandate. We know that reform on taxation and industrial relations is
10 slow, proposals can be lost in the media and blocked in the Senate. Now that the mining boom is over, the weakness in our economy is obvious; that is, the decline in our manufacturing industries. There is little hope of lifting employment levels and, therefore, balancing state and federal budgets without a strong manufacturing sector.

At the present rate of reform, changes in global trading patterns will pass us by and the decline will continue. If this happens, we’ll betray the sacrifices of our grandparents, and our grandchildren will want to know why. The
15 answer that each of us gives to this question when the time comes will depend on how we respond in the coming debate.

Competition for votes, as with competition for profit, brings out the best in marketing. The value of the product depends upon the level of awareness of a customer or the voter. We need more people to look behind the headlines
20 and vote for their country.

The present situation is that general unemployment is as high as at any time since the Great Depression and youth employment is higher than it was during the Great Depression, so something needs to be done.
25

What contributes most to the communications gap is the long-held belief that, without unions, workers would be still living in the near slave conditions of the 18th century. This is not quite true. Improvements claimed by the labour movement which cannot be absorbed by the economy do more harm
30 than good by pushing up the cost of employment, and, if governments are expected to compensate employers, this pushes up the cost of government, which flows back onto the cost of goods.

What does improve workers’ purchasing power, of course, is improvements in productivity, which allows competition to reduce the time price of goods; that is, the time taken by the consumer to earn the money to buy the goods. To begin closing the gap between belief and economic reality, we need to measure the costs of goods in time price, apart from dollar price. The time price of almost all goods has been falling since the beginning
35 of the industrial revolution, around 1800. The best example of this is the motorcar. Based on the average wage, or a tradesman’s wage, the FC Holden in 1950 was 73 weeks’ pay. The Kingswood in 1970 was 33 weeks’ pay,
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about half. So, while the 1970 car, the Kingswood, was \$2400-odd, quite a lot more than the \$733 of the 1950 model, the time price was half of the 1950 price. Therefore, workers' purchasing power doubled on that product by 1970.

5 Until this factor is part of our economic debate, we will not be able to close the gap between belief and economic reality. We should be measuring the cost of goods in the time price as well as the dollar price. The labour movement over the years has been able to claim the high moral ground by using the CPI, which measures the cost of goods in dollar terms and which
10 almost always shows an increase. If we had a CPI based on the time price as well as the dollar price, the labour movement would lose its high moral claim and would have to debate on economic realities.

 Thank you, Mr Chairman.

15 **MR HARRIS:** Thanks very much for your presentation today. Given we're doing workplace relations here as an inquiry, how would you relate this, though, to the workplace relations system?

20 **MR BYERS:** This needs to be part of our education system; it should have been taught in the schools years ago. I developed this in 1980 and I put it on Sydney radio for about 10 years, I suppose, and it was very effective. By the time I came up here, about 15 years ago, a lot of people already knew about it. I got busy trying to rebuild a manufacturing business and I dropped it for a
25 while but I believe it can be sold. I'm sure we sold it in Sydney, on talkback, and I'm sure it could be sold again - not only could be, it needs to be; we've got to. We don't have much choice, the way the economy is going. As I said, we're not going to lift employment levels without the manufacturing industry and we're not going to rebuild the manufacturing industry the way we're
30 going. We're just living too much on the mythology that, without unions, workers wouldn't get anywhere. That just isn't true. I could talk for hours on that.

MR HARRIS: Sure. Patricia, do you have anything you want to ask?

35 **MS SCOTT:** No.

MR BYERS: No more questions?

40 **MR HARRIS:** No. Thank you very much for your presentation here today.

MR BYERS: Thank you.

45 **MR FRANKLIN:** My name is Steve Franklin. I'm an organiser with the AMWU. Just a finding that I've had in relation to small business and the payment of penalty rates, and it's only happened to me last week, when I was up in Kingaroy, working for the union, obviously, and had the opportunity to

talk to a small shop-owner in the mall up there. She was asking me what the logo was and I told her and it come around to the situation - I knew I was coming here, so I said to her, "We've got a campaign on at the moment about penalty rates and that sort of thing," and she said, "Well, that's great because I'm a shop-owner." So we looked at each other and we thought, "Oh well, we'll have a conversation."

I had a discussion with her around what her costs were. She had a small shop, sold food and coffee. She was quite willing to say to me what her actual costs were and I said to her, "I don't believe that penalty rates are your major concern. I think the rent that you pay is your major concern," and her eyes just about dropped out. She came forward and told me that her rent in that shop was \$10,000 a month. I think that is a huge amount for somebody in a shop to pay for rent. I think a Productivity Commission should be held into the moneys that people pay for rent in certain shops in small industry because I don't think penalty rates are their biggest concern.

Alongside her was Woolworths in that shopping centre. She had to stay open the same hours as them and she believed that they paid no rent. The real difficulty is, you have a big business that pays none or next to no rent while the little businesses pick up the slack. I think that's incorrect and I think that should be sorted out and we wouldn't have to go anywhere near penalty rates.

MR HARRIS: The operating hours in shopping malls have long been a matter of contention, that businesses have to remain open according to the lease terms that you get inside a mall. It does make life quite hard for small businesses and proprietors themselves have to operate, as in they personally have to be present in their business, if they can't afford the labour charges that do apply on weekends, for example. The rent itself, I guess - it's hard to know. Presumably, if it was too much rent, she would not remain in the shopping mall, would she?

MR FRANKLIN: I think there are quite a few shopping malls that have vacancies in their shops but I think it really beggars belief that big business could control that and make it so hard for small business. My brother has a small business as well and he's in the same situation, where employment of people is just not an option because they're struggling to make ends meet.

MS SCOTT: Steve, I'm very pleased to say that the Commission was given some work on retail cost structures and there was a study undertaken by the Commission into the retail sector. The report came down in 2014, so you'll be able to find it on our website. It particularly looked at cost structures of doing business and looked at rent, labour costs and so on, and it did find that labour costs and rent appear to be, as a share of revenue, higher in Australia, relative to that in the United Kingdom and the United States, and then looked at particular retail categories. I won't be able to summarise it well enough today but I do draw your attention to the fact that we have looked at that work, so we

are cognisant of some those issues. We also did an even larger study of the retail trade sector, I think, in 2010, so it's an industry that we've looked at quite a few times, but this is really the first time that we've had a chance to look at workplace relations.

5

Thank you very much for coming along today and sharing that with us so we are aware of those issues. You might be interested to look that report up if you get a chance.

10

MR FRANKLIN: Yes, I would like to see where anybody could say that \$2500 a week for a shop rent or lease is reasonable, taking into account that to rent a house is probably a hugely smaller amount. I do take into consideration what the previous speaker said about the relativity, with cars even. I know, with the price of my house - my first house that I bought was \$24,000 and I was earning about \$240 a week at that point, and you do see, nowadays, the price of a same house in Ipswich is about \$240,000 but I do know that our wages haven't gone up tenfold, I would be taking home \$2400 in my hand every week. I appreciate that fact.

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I thank you for listening.

MR HARRIS: I appreciate you coming along and making an effort to remain in the audience, a dedicated effort.

25

We'll adjourn momentarily while we wait for our next set of arrivals.

ADJOURNED

[2.54 pm]

30

RESUMED

[3.09 pm]

35

MR HARRIS: Can you guys identify yourselves, please, for the purpose of the record?

MR PORRITT: My name is Wayne Porritt, from Aged Care.

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MS MORAN: My name is Karen Moran, from ECEC.

MS WILSON: Samarah Wilson from hospitality.

45

MS HUNTER: Sheila Hunter, Assistant Secretary of United Voice Queensland branch.

MR HARRIS: Is there a spokesperson who wants to make an opening set of remarks or do you want to tell us a bit about personal experiences and things?

Is that the idea?

MS HUNTER: I was of the understanding that United Voice had already made a submission, so that I wasn't allowed to speak.

5

MR HARRIS: Yes, they have. Allowed to speak? This is a Productivity Commission Inquiry. Everybody is allowed to speak, except the audience. I might counsel the audience; you're allowed to interrupt and boo or - - -

10

MS HUNTER: These are members of United Voice Queensland branch, which covers a lot of different sectors, some of the lowest paid sectors in the country. I'm sure you've heard all of that before, so if you want to go straight to getting their stories.

15

MR HARRIS: That'd be fine. Let's do that.

20

MR PORRITT: Thank you for the opportunity to come to the Commission, for a start. I have been following a lot recently of the penalty rate issue, so it's been a struggle for me to even hear the words that we would be having these things thought about removed. I was going to wax lyrical about going back to the 1800s and how it all started and all that, and I thought, "Well, you know that." What I want you to know from me, as a citizen, is the things that matter. This is my family. They matter. If you've got the - this is a WorkSafe program that our company started. They're my children and some of my grandchildren.

25

I have five children. I have seven and a half grandchildren. Out of my five children, the youngest one manages a fitness centre and is a PE instructor. The blonde in the middle is an amusement rides manager. My son is an EN studying to become an RN. The lass on the side here, the mother of those three beautiful little children, is an EN studying to be an RN. They all work in aged care. My other daughter, who lives in Perth with three and a half children, is an RN working in hospitals.

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I understand that the Commission was exempting - or at least the suggestion was that they were exempting nursing in this issue but I haven't seen anywhere that that is not public nursing versus aged-care nursing. When I put the suggestion that penalty rates may be removed or at least withdrawn on Sundays to my kids, I asked them what would that cost them. It was about a third of their income because most of them work late shifts or afternoon shifts to try and get that income to pay for tertiary education or for childcare. So, the thought that a penalty rate would be removed or even lessened puts them in a real position of debt. Their minimum nursing wages as AINs was just enough to keep body and soul together as far as they were concerned, so they worked the odd hours so as to be able to provide better for their families. The thought of a Tuesday being the same as a Saturday or a Sunday, a nightshift being the same as a morning shift, is a frightening suggestion

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because why would anybody want to work - - -

MR HARRIS: You understand that's not our proposition?

5 **MR PORRITT:** That was the proposition that was put forward at the beginning of the process, as I was told.

MR HARRIS: No. Our proposition is not that a Tuesday is the same as a Sunday. Our proposition is that a Sunday becomes similar to a Saturday - - -
10

MR PORRITT: Correct.

MR HARRIS: - - - and a third of your income might be based around some kind of major shift allowance or elimination of penalty rates in their entirety or something, but it would be an unusual person, certainly in full-time work, for whom the Sunday penalty rate becoming the same as the Saturday penalty rate would lose a third of their income. It would be, I would have thought, an extreme example.
15

20 **MR PORRITT:** 25 per cent.

MR HARRIS: Even then, it's a shift of a bringing-back from 100 per cent or 50 per cent of your normal hours to 50 per cent, so it's not a - I don't think it's quite the same proposition. That said, we understand - we're not trying to diminish the fact that there is potential for some individuals to lose income as a consequence of Sunday rates becoming Saturday rates, it would be ridiculous of us to pretend otherwise, but the size of the shift will vary very much, depending on the number of hours people do and, in terms of their total income, whether there are increased hours of employment offered by the employers, although, I agree, that still says you've got to work increased hours. Not to diminish it but to focus on the specific of the proposition here, it is Sunday going back to Saturday for a set of industries.
25
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Certainly in terms of what we might call emergency service workers generally, we put the proposition that there has been no shift in the nature of employment for them that would justify a shift in the penalty rates, whereas we're suggesting, for a set of workers in restaurants and catering and entertainment, that it may have shifted. Anyway, it's still worth knowing these things.
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Your family is primarily involved in nursing but not necessarily in hospitals - some are, some aren't.

MR PORRITT: Correct. One in a hospital.
45

MR HARRIS: Some are in aged care but, if I understand rightly, the award arrangement would still be the same award arrangement for them as it would

be in hospitals. Is that correct, or not?

MR PORRITT: No, that's not correct. The public hospital system is paid better than aged care.

5

MS SCOTT: Are you covered by an enterprise bargaining arrangement?

MR PORRITT: Exactly, yes.

10 **MS SCOTT:** The enterprise bargaining arrangement relates to your particular aged-care facility?

15 **MR PORRITT:** Correct. One of the issues United Voice has been working very hard in with our EB arrangements is to be able to enhance the worker's capability of earning but also protect some of those of what we would consider as non-negotiables about hours. You look in most of the EBs now; a 10-hour day is acceptable, at the same rate of pay, so overtime and penalties are already under challenge through some of the EBs. Certainly with Carinity Aged Care, which is what I'm in, my staff can be asked to work up to 10 hours in a day - as long as they are permanent part-time, they can be asked to work 20 10 hours at no overtime rate. That's part of the EB and that's one of the issues where EBs are failing because they don't meet some of the standards that Fair Work just allows.

25 **MS SCOTT:** Maybe the union rep wants to chip in here but I guess, as part of the EB, people would have gone for a wage rise where some of those longer - effectively, some of the overtime arrangements would have been rolled in, or penalty rates rolled in, so you'd get a higher-per-hour figure.

30 **MR PORRITT:** We've only just agreed to our EB. In the process, the three-years process, where there was no EB in standing, Carinity ended up having to pay some of our staff up, just to get them to the award. So, the EBs aren't dramatically greater than what the award was.

35 **MS HUNTER:** Can I jump in there?

MS SCOTT: Yes.

40 **MS HUNTER:** Carinity is a first agreement. They were all on the award before that. When you say that the hourly rate would be higher to miss out on the extra overtime, it's not. Most aged-care facilities are run by not-for-profit agencies, who cry poor every time we try and negotiate a wage agreement with them. We're looking at probably 1 per cent, 2 per cent maximum, for wage increases. It's very difficult to organise agreements in that sector and it is a 45 very low-paid industry.

MS SCOTT: The Commission has done a major study into aged care, I think,

in 2010, and we commented on wage relativity, especially where it related to nursing and nursing staff in this field, versus nursing in other fields, for example, hospitals, and the difficulty of attracting workers, so I'm cognisant about some of the issues that you've raised, Wayne, and the issues you - but I
5 guess a question in my mind - if people are actually better off with the awards, then why are the union and the workers agreeing to an EB?

MS HUNTER: This was the first agreement.

10 **MS SCOTT:** You see the point I'm making.

MS HUNTER: Yes.

MS SCOTT: Enterprise agreements are meant to have, as a safety net, the
15 award, so terms and conditions should be - - -

MS HUNTER: I will say - when you said "are meant to have" - it's not always the case. Agreements tend to negotiate up and down.

20 **MR PORRITT:** There are wins and losses.

MS SCOTT: Yes. Overall, you're meant to pass a better-off-overall test. Are you saying that workers - I just want to make sure for the transcript. Are you saying - I just want to be clear. Are you saying that the enterprise
25 bargaining agreement that's been settled actually leaves people overall worse off?

MS HUNTER: I can't comment on that because I haven't seen the Carinity agreement as yet. That's not part of my sector. I can get back to you and let you know what they were on at the award and what they're on now. As I say,
30 it's only just been negotiated - - -

MR PORRITT: We are better than the award. We are better off with the EB. The conditions are one of the swings and roundabouts that you argue for and
35 it's those conditions that chip away because a lot of our industry are English-as-a-second-language people, they see a dollar value greater than a benefit value because they have come to understand that, unlike myself - I live - I work so that I can live and a lot of these guys are coming to learn English, they're coming to study, they're coming to do a myriad of other things and so
40 this work, and so - I'm talking not so much from a nursing side but from the support services side, where we have people who are grabbing jobs and will agree to a lot of conditions if a dollar is hung in front of them.

MS SCOTT: Thank you.

45

MR HARRIS: In your statement, Wayne, you've talked about, also, something in relation to non-unionised individual agreements.

MR PORRITT: I'm anxious about EBs, as I've just shared. I have just been considered for a promotion at my work but I had to accept an individual agreement to go into that position, which is a senior management position.
5 Things like - the staff that are currently there are working ridiculous hours, on salary, and I mean really ridiculous hours, 60 hours is a basic accepted norm, and I'm going - every time you work an hour, you are reducing your hourly rate. Some of these guys are earning 19, 20 dollars an hour now and I'm going, "Why would we get involved in an agreement that would offer me \$19
10 an hour and have less benefit than what an EB was?" There are individual agreements being looked at, at organisations, and this organisation is no different to any other, I'm sure, and, when you get those sort of agreements being agreed to, people are starting to go below basic awards, with the recognition that "I'm going to get a car" or "I'm going to get some other
15 benefit", and then be expected to work, to me, ridiculous hours.

MR HARRIS: You said semi-managerial. It's long been a trade-off, as you move from being an employee to being somewhere in management, that you have to make these choices and I'm presuming some people do for career
20 reasons - - -

MR PORRITT: Yes. Absolutely.

MR HARRIS: - - - and some choose not to. I just took the implication of
25 your statement that in some way that was being forced on you as part of - I'm not quite sure of why.

MR PORRITT: It's not a force but it is my career choice. If I want to go up, this is what I accept. If I don't accept it, then I don't go up. It's, as you say, a
30 trade-off. I don't see it as a trade-off; I see it as the other way - it's a carrot being dangled, saying, "You want to move? Then this is what you have to accept."

MR HARRIS: Fair enough. Who wants to speak next?
35

MS MORAN: I'll go next. I've prepared some notes, just because I knew I'd be a little bit nervous, so excuse me if I read a little bit from the notes.

MR HARRIS: That's fine. We take it calm and slow here.
40

MS MORAN: As an early childhood educator, I have a responsibility for developing the minds of children at a time when it most influences the opportunities and life chances of the future generations of Australians. Right
45 now we're struggling on some of the lowest wages in the country and are far below other educators. In fact we get paid 30 per cent less than our counterparts in the school sector. Educators deserve professional wages for professional work, whether they're educating one, three, five, 15-year-olds.

As a mother of a nine-year-old, I know how valuable my child's years in the ECEC sector were. We need workplace laws that make it easier for my industry to earn higher wages and to be recognised for the work that we do.
5 My husband is a tradie. He's a carpenter. He's got a cert III, which was a six-month course. I have an advanced diploma, which is a three-year course, and I'm three-quarters of the way through my bachelor of education, which is a four-year degree. After those seven years, seven long years, of total study, I still won't even reach anywhere near three-quarters of his wage.

10 Like other United Voice members, I'm also concerned by the proposal to cut penalty rates. I don't work weekends but I know what a 24/7 economy would mean for my sector. We would no longer be working just Monday through Friday. My weekends are really valuable and I spend all week
15 looking after people's families and the weekends are the time where I can spend time with mine, especially Sundays. My husband works Saturdays when he can because, when the construction industry is slow, the work dies off, so we have to save for those times. My son has ADHD, so, even when he turns 12, he won't be able to stay home on his own. If we start working a
20 seven-day week, who's going to look after my son while I have to work weekends.

My centre is on the Sunshine Coast, where hospitality is a major employer. If you take away those penalty rates, it will have a massive impact
25 on the families who attend my service and their ability to pay the ever-increasing fees, so an attack on the weekend rates of my fellow members is an attack on all Australians.

Thank you.

30 **MR HARRIS:** You're Samarah?

MS WILSON: I am Samarah. My name is Samarah Wilson. My situation is a bit different to the proposed changes. Sorry.

35 **MR HARRIS:** That's all right, Samarah. You can take any number of deep breaths you want to. We're not going to push you hard; you'll be fine.

MS WILSON: That's okay. It's just - - -

40 **MR HARRIS:** I know. They're confronting these things, aren't they?

MS WILSON: They are a little. I was employed, and still do work in a different company as a bar and gaming attendant, at the Capalaba Sports Club.
45 I don't know if you've heard about the stories - - -

MR HARRIS: We have. The Courier-Mail has written it up; they've had

national media attention.

MS WILSON: We got a proposal. We were told that we were getting outsourced and it was just “It’s happening.” Nothing was spoken to us beforehand, we didn’t even know any changes were going on in management; it was just, “Hey, come in for a meeting about the changes.” I was - like, on the phone. I was, like, you know, “what changes? What’s happening?” They were just like, “It will all be explained.” I turned up to the meeting not knowing what was happening - just a little unsettled. At the meeting we were confronted by a company called Hospitality X, who told us that the club had decided to outsource us and put us on new agreements, that the agreements allowed for penalty rates but gave the club the flexibility not to give us penalty rates if they chose not to. That was conditional on the provision that we would sign schedule 3 of that agreement to say that if we couldn’t work - it was like a voluntary overtime agreement - a voluntary hours agreement, sorry. So, if we could only work weekends, late nights - like me and many other students that pick up hospitality as a job while they’re getting through university, that’s the only time we can work. They said, based on that condition, we weren’t going to be getting any penalty rates for that.

I suppose what I’m concerned about with these changes is that, if that’s already happening now, when we have such a strong stand on penalty rates - if it’s sort of lowered, then it sort of gives these unscrupulous employers more incentive and maybe more power to spread this more rapidly and it could affect millions - not millions, probably thousands of students just like myself. I’d just like to point out the fact that it wasn’t students that this happened to. Mothers, fathers - they could work out - it wasn’t their choice to work weekends. They chose it because it helped them put money on the table and they were available. A lot of these companies say, “You have to be available for our busiest trading days,” which are the weekends. I was shocked that they used that as an argument.

The reality is that weekends are special and I gave up my weekends because I needed the money to put myself through university and help support myself. If we change it - like I said before, if we just change it one little notch and then keep taking notches off minimum wages, I could see a real potential for more students, more families to get affected by this, not just in Queensland but round Australia. I suppose that’s the one reason I didn’t sign the agreement, and, secondly, I wasn’t going to sign something that I didn’t understand, for one. They didn’t give me the time of day to - I was sort of just passed off. I’m just concerned about the repercussion and the power imbalance that this could have for the future.

MR HARRIS: This particular circumstance is different to our proposal for varying penalty rates. Your comments are, I think, relating to, though, a different part of our report - I’m going to suggest this is the case - which is about contract hire arrangements. If I understand it correctly, but I’m more

going on media reports, plus what you've said today, this is really a proposition where your current employer was asking you to join another employer for the purpose of remaining in roughly the same position. That was pretty much - the contract was put in front of you and you were invited to sign it, and that contract would have changed the way that you would qualify, if indeed you would qualify at all, for penalty rates. Is that correct? In other words, was the contract clear that you would never get penalty rates or was it just that you would have to work more or different hours in order to get penalty rates?

10

MS WILSON: Yes.

MS HUNTER: It was a labour hire company called Hospitality X that the club outsourced the hire of labour to. The existing staff were asked to sign over to the Hospitality X agreement, which actually said, "You need to nominate the days that you want to work and we'll pay you the flat rate on those days. However, if you work other days, you will get penalty rates."

15

MR HARRIS: This is relating, then - we had a discussion this morning - you wouldn't have been here for that - in relation to preferred hours clauses.

20

MS HUNTER: Yes.

MR HARRIS: The suggestion was being made that preferred hours clauses, far from being advantageous to an employee, were disadvantageous. I understand in this particular circumstance why they might be because we're talking about weekend work. If you're a five-day-a-week employee, it might not be so bad?

25

MS HUNTER: If you're told that - you pick Monday and Tuesday, and the club is very quiet on a Monday and Tuesday and there are no hours, your hours would drop. Their busiest times are obviously later on in the week and the weekends. So, the fact that they don't get penalty rates for overtime or for weekend work would disadvantage, if not all, most of the staff at that club.

30

MR HARRIS: It's a utilisation of preferred hours for what I'll call part-time employees, although I'm using that phrase loosely, employees who aren't full-time, five-day-a-week, in order that you do indicate what's preferred and, by saying it's preferred, you won't get penalty rates for that, in other words. You're saying the only time you have available to work, Samarah, is on weekends, they are your preferred hours but of course you prefer that because it's got a higher rate, and this would have taken away your higher rate. Is that correct?

35

MS WILSON: Yes.

40

MR HARRIS: So what we have is a question in relation to contract

employment.

MS HUNTER: This agreement with Hospitality X was actually an agreement made with eight workers in New South Wales - - -

5

MS SCOTT: Could you speak up a little bit?

MS HUNTER: The Hospitality X agreement was an agreement made with eight workers in New South Wales.

10

MS SCOTT: Eight?

MS HUNTER: Obviously, the BOOT test done on it was for those eight workers. It was not meant to be spread across the whole of the industry. I know the Capalaba Sports Club took it up, I know that there's another couple of clubs that have taken it up as well but there's been no BOOT test done on these workers. If that's the case, then the BOOT test should be opened up again for a greater amount of workers to see whether they would be better off or not. From the examples that we've done, they're not better off at all.

15

20

MS SCOTT: Sheila, do you know if the union is considering taking further steps in order to test that? We had some evidence this morning, I think, from the Council of Unions in Queensland that suggested that it had passed the BOOT test.

25

MS HUNTER: In New South Wales.

MS SCOTT: Okay.

30

MS HUNTER: With eight workers.

MS SCOTT: Sheila, what's the state of play in terms of United Voices' response to what's happened?

35

MS HUNTER: We're actually going to the Commission, I believe, with the problem. I don't know the exact state of play at the moment, there's been an exchange of letters, but I know we've lodged something in the Commission to say that it's - - -

40

MS WILSON: We got approval to seek records from the club.

MS HUNTER: Yes, time and wages from the club.

MS SCOTT: So something is - - -

45

MS HUNTER: Something is happening, yes. Just on that, further, when you spoke before about the Sunday rates going to Saturday rates, we also looked at

that. If the Sunday rates went to Saturday rates, depending on how much they worked, each worker would lose between 7 and 30 per cent. So, if you're earning \$450 a week, that's \$70 out of your weekly pay. That's a lot of money when you're a low-paid worker.

5

MR HARRIS: Can you explain a bit further, since you've used the example? Is that something just working on a Sunday and nothing else?

MS HUNTER: Yes, if it was changed.

10

MR HARRIS: The \$450. I'm trying to work out where did they earn the \$450.

MS HUNTER: I haven't got that information I front of me but I can get you that information.

15

MR HARRIS: It's important, when examples are used, for us to be able to understand it because otherwise the numbers get a life of their own. I can see a proposition where somebody says, "I'll lose 30 per cent of my pay," that's quite an alarming number, but I would like to know from where - - -

20

MS HUNTER: In Samarah's instance, she will lose \$5000 a year. If she was to continue working, it would be \$5000.

25

MS WILSON: That's flat rate.

MS SCOTT: That's right, with the flat rate.

MS HUNTER: Yes.

30

MR HARRIS: Doing how many hours a week, sorry?

MS WILSON: I took my payslips and I worked it out over a six-month period.

35

MR HARRIS: What are your rough hours a week?

MS WILSON: About 20.

40

MR HARRIS: You do about 20 hours a week. Okay.

MS WILSON: The majority of them are night-time hours, Saturday and Sunday.

45

MR HARRIS: You go for the higher rate.

MS WILSON: Yes.

5 **MR HARRIS:** I understand. There's no criticism; I'm just trying to make sure, when we get the - otherwise the number appears very big and then you examine it - I think Wayne used 30 per cent as well and, when we examine it against the shift in the penalty rate that we're proposing, the numbers don't look that big, unless you're just working pretty much just Sunday or Saturday and Sunday. Once you're a normal, if you like, four-or-five-day-a-week employee, the numbers appear substantially less, so, when examples are used, I always want to ask people, "Where did you get the number from in terms of hours?" That's all.

15 **MS HUNTER:** I think the key to Samarah's case is - and we've heard this not only with Samarah but with some other members as well - that they actually choose those times to work because they're putting themselves through university. So they're not relying on Centrelink on anyone like that; they're working to put themselves through - - -

20 **MR HARRIS:** We understand that, and there's no crime to picking the high-return hours.

MS HUNTER: No.

25 **MR HARRIS:** It's not illegal or bad behaviour; it's more to understand that - as I said, in some cases the numbers can be quite high, in other cases the numbers will be low. We in the end have been asking for information about the number of employees in the affected industries that primarily work just Sunday or Saturday and Sunday, because the data is widely available. We've asked the unions because you guys will have some data. You won't have comprehensive data but you'll probably have better data than anybody else has and we're trying to work out the cost benefit of this. We'll do a trade-off between the number of hours' possible additional employment, versus the cost to people individually. While that won't necessarily convince you, and I'm not expecting it will, we want to do the calculation anyway because that's what our process requires of us.

35 Have I prevented anybody from making a point they really otherwise came to make by asking questions at the wrong point in your testimony? Is there something you guys would like to say beyond this?

40 **MR PORRITT:** There is one thing I wanted to pick up on Samarah, and it's definitely an issue with aged care, and that is contracted hours, especially in nursing homes. You're permanent part-time, so you're offered a minimum, say, 20 hours in a week, as a base rate to start with. If you then have enough hours, that could be increased to 35, or even 76 hours a fortnight. So, you end up - if you're there long enough and you have the availability, you can increase your contracted hours. There was a push two years ago, through our facilities, to put everyone on 30 hours a fortnight, base rate, contract; then

5 anything else was overtime. Then they realised that they wanted to push this 10-hour straight shift, 10 hours, then you started getting overtime, and it all fell apart. Where it fell apart was, staff were on 30 hours a contract and then they could have the ability to work up to 76 hours. They then said, “Well, you’re only going to do 76 hours a fortnight - - -”

MR HARRIS: I’m just trying to work out what this on a daily - - -

10 **MR PORRITT:** 76 hours a fortnight is the maximum contract permanent part-time.

MR HARRIS: A fortnight. Yes, that’s fine.

15 **MR PORRITT:** Sorry, I work in fortnights because that’s our pay schedule. People were being offered 30 hours a fortnight as a base contract. So, “Come on board. Sign this contract, your 30-hours based contract,” and then, after that, anything was available, if it became available. We had a manager come in who pushed everybody back to their base contract and reset the base roster. There were people that were on 76 hours who got pushed right back to their 20 30-hour contract. It created a nightmare for everybody, including the pay office, who was then just - he just stripped everybody back to their base contract and employed a lot more staff.

25 **MR HARRIS:** So they got a lot more 30-hour-per-fortnight employees and took - - -

MR PORRITT: Yes, and pushed all the 76ers right back to 30.

30 **MR HARRIS:** - - - what were full-time, effectively - - -

MR PORRITT: Not quite full-time.

MR HARRIS: But pretty close to it.

35 **MR PORRITT:** Yes.

MR HARRIS: How did that benefit the firm?

40 **MR PORRITT:** They then had more availability of staff, they had more available staff on their books to be able to call in when people were sick or on holidays or whatever, “You’ve done your 30 hours, you go home now and we’ll put somebody else to pick up that extra slack,” or if I’m sick I could be off and they could bring one in to do these many hours and then this one in to do another number of hours to try and compensate. They had more 45 employees, so their call-in base was greater.

MS SCOTT: People were originally taken on on the understanding that they

would only get, generally speaking, 30 hours' work but then they found themselves being asked, a fortnight - on a very regular basis, being asked actually to work 76 hours a fortnight.

5 **MR PORRITT:** Yes, and then got pushed back.

10 **MS SCOTT:** On the one hand, the pushback would have cost them a lot of money, income-wise. On the other hand, some people might have entered into working at that place on the basis that they weren't going to be working 76 hours a fortnight and it might well not have suited them.

15 **MR PORRITT:** Yes.

15 **MS SCOTT:** It's swings and roundabouts, isn't it?

15 **MR PORRITT:** Again. Yes.

15 **MS SCOTT:** All right.

20 **MR PORRITT:** I suppose that raised the whole issue for me of this EB business and individual agreements, the concept that somebody can step up and management are looking for more people to sign these individual agreements, getting us away from the EBs, getting us away from some basic award structure that's global. They want people to be able to be manipulated to suit the business.

25 **MS SCOTT:** Samarah, if you don't mind, you don't have to answer this question if you find it any way awkward, were you able to find alternative work or where are you working now or are you not working?

30 **MS WILSON:** After two months, I found bar work again, just locally, in the area, but it was a stressful time. I was going through uni exams and, on top of that, I was stressing out about not having money for the future. You can ask my parents in the gallery; I kept saying, "I don't know how I'm going to be able to do this." I couldn't have done it without their support. They were like, "We've got your back," sort of thing.

35 **MR HARRIS:** Although it's not 100 per cent pertinent, I think these are all about - your circumstance raises a lot of curious matters.

40 **MS WILSON:** It's good that it does, though.

45 **MR HARRIS:** That's right. We don't ignore any of this; we just try and work out what advantage we can take of it. Sometimes it won't be in this inquiry, sometimes it will be in a different inquiry. Why do you think the sports club did this in the first place, do you know? Were they otherwise under threat, like, were things going bad and - you don't have to answer that

either, by the way, you don't have to answer anything. They're just questions that we're interested in.

5 **MS WILSON:** I know there was a few months - they always say, like, they're going to cut back hours after the Christmas period and that sort of thing but they were doing a renovation on the club - and I don't mean to say that that's the only reason they needed money or whatever but there were obviously rumours that they were in debt, that sort of thing. They got new management in, like, 18 months beforehand. Just as I started there was a new management taking - a new manager, who brought a few staff members in. They're obviously a not-for-profit company, so they're meant to be running things for the community, and the only reason I could think of would be to get money for the renovations because they weren't getting the money but it wasn't like they weren't having patrons. We have 100 pokie machines and I worked gaming and I knew how much money we were pulling out of those machines at the end of the night. I honestly believe they were struggling to pay for the renovations that they had said they were going to do for a year, two years, three years.

20 **MS HUNTER:** There was comment, that we were told of going round to different clubs, that the Hospitality X person that was touting their agreement said, "Go onto this. This will pay for all your extensions." That's only second-hand but that was what we - - -

25 **MR HARRIS:** Yes. We're going to take everything you've said as just being your best assessment of the circumstances, not trying to suggest that you actually know anything first-hand. We had quite a good submission in this inquiry from Clubs Australia back in the first round and one thing it did point out was that the differences between the clubs and how some do very, very, very well and some just hold on, so there's obviously a lot more pressure, and they were describing the circumstances of the industrial arrangements and the flexibility that some of the clubs that are just holding on need to enter into in order to - because they're community-interested, so they're very keen to keep their community with a club and the sort of services, and they - if they're just holding on - come under these kinds of needs to make adjustments to their workplace arrangements. That's not to agree or disagree with anything that's been done here. That's why I was interested in it because we do know there are quite significant differences. Sometimes it's assumed, because clubs have got poker machines, that they're all doing very, very well. That's not necessarily the case, apparently.

40 **MS WILSON:** If they had come up to me and said, "Look, Samarah, we are struggling, we need you to cut back on your" - not that I was guaranteed hours, or "we need you to" - I was quite happy and I was working back after my shifts, that sort of thing, but I honestly was shocked at the fact that management could do this because they were my friends - well - - -

MR HARRIS: They were people you knew really well and - - -

MS WILSON: Yes, exactly, and people I'd come to rely on had done something like this. It wasn't even spoken about, like I said; it was just, "Come in," and at the meeting management was sitting in the back with us and it was Hospitality X at the front who were making all these propositions to us, which I thought was quite interesting as well. It's something I don't want replicated. Honestly, I believe these clubs do make enough money to support themselves. We weren't the busiest club but we had members and customers coming in and I honestly thought it was a great place, but I just can't - Hospitality X is probably the worst thing that happened there. I had the privilege of talking to their general manager on the phone when I was raising concerns and strife and she basically dumbed it down to me being worried about some things that were out of my hands and that, if I had concerns at all, I shouldn't raise them with other employees and I should come to them for - it was really - it was quite - I had all these concerns and I wrote a three-page letter to management, saying - I'm a law student, so I know roughly what to expect, so I wrote out a very clear letter about my concerns and how I couldn't sign it at this point and I'd like them to be addressed before I could sign it, and they were just like, "I can't answer these questions. Talk to Wendy." Then Wendy came up and "Oh, you know, it's all the club. They've decided to do all this." To me, that was just - I was just getting palmed off as, you know, "We'll just shut her up."

I was actually offered a few extra dollars on Saturday and Sunday to - because they were giving it to the good employees that they wanted to keep, but I just believe that was hush money. I do believe that. It was only \$2.50 extra just to work weekends.

MR HARRIS: Fair enough.

MS SCOTT: Samarah, you've been able to find alternative employment. I appreciate it's been a very stressful period and I'm particularly appreciative that you've come along here today and your colleagues attending today because it's never easy to appear at these things but just maybe one last question from me. You've found different work. Does the work pay you - are you covered by an award, are you covered by any enterprise agreement, is it comparable to what you had before, better, worse, the same? If you feel comfortable in answering any of those questions - - -

MS WILSON: At the Capalaba Sports Club, I was covered under the Registered Clubs Award and at this place I'm just covered under the hospitality award and I get paid base rate for that, as a level 3, the same as I was, because I do the same work, at the other club. It's an ALH company - - -

MR HARRIS: ALH, yes.

MS WILSON: Yes. It's all - done it all above-board, they got everything

done, but it's - yes, I found other work but it's hard to sort of build that respect with management - because I had to move jobs, like - and it's 20 minutes away rather than two minutes away, because I was just around the corner from Capalaba Sports Club, and I do find it's hard to - I told them my hours and it's
5 always confronting to be like, "Sorry, I told you I don't work days and you've put me on a day here." I am getting less hours at the other place but I'm also doing more uni, so it's not a bad deal.

10 **MS SCOTT:** All right.

MR HARRIS: I don't have anything more for you guys. I'd like to thank you very much for coming along and testifying here today and giving us the benefit of your experiences, and to United Voice on the organising. Thank
15 you very much.

MR PORRITT: Thank you.

MS HUNTER: Thank you.

20 **MS WILSON:** Thank you for listening.

MR HARRIS: I think, he says, optimistically, we have the Australian Breastfeeding Association. I'll get you to identify yourself before I note my conflict of interest.
25

MS McDONALD: Okay. How interesting.

MR HARRIS: You know I'm big on conflicts of interest.

30 **MS McDONALD:** Good.

MR HARRIS: You can identify yourself and then I'll note mine.

35 **MS McDONALD:** I'm Rachel McDonald. I'm representing the Australian Breastfeeding Association, the national body, and, as myself, I've made an individual submission as well, as a lawyer and a PhD student at the University of Queensland and as a breastfeeding counsellor with the Australian Breastfeeding Association.

40 **MR HARRIS:** I have a daughter who has a premature baby who is breastfeeding at the moment and is quite interested in relation to these sorts of matters. I just want to note that in case anybody says, if I ask a question, which I will ask - having noted my conflict, I've now freed myself to ask any question I want and no one can accuse me of bias.
45

MS McDONALD: Good. I'm glad.

MR HARRIS: Do you want to read into the record anything specifically out of the statements that we've got here?

5 **MS McDONALD:** I've never appeared at a Commission before. I was hoping to see somebody, what they did - - -

MR HARRIS: There's no real process.

10 **MS McDONALD:** No. That's what Anthony told me.

MR HARRIS: What you could probably do is pick out the propositions that you most want to discuss in very simple terms.

15 **MS McDONALD:** All right. The Australian Breastfeeding Association and myself are predominantly interested in there being a legislative guarantee of breastfeeding or lactation breaks, however so described, in the workplace, nationally, so that as most Australian women can access that as possible who are in their childbearing years, whether they're breastfeeding right now or whether they're the mothers of our future, because it may impact on their
20 decision to initiate breastfeeding and for how long, the duration of the breastfeeding.

There have been government initiatives over the last 30 or so years to encourage women to breastfeed. However, with the rising numbers of women
25 returning and performing paid work, there's that conflict where the private sphere meets the public sphere of - breastfeeding is not necessarily in the private sphere but it has been in western society, it's not in other cultures, and many women work around the globe and breastfeed while they work, such as women in rice paddies and that kind of thing; it's all possible. That's the main
30 thing, that we see some legislative guarantee.

In both the submissions, you'll see a reference to Heymann's global comparative study, where Heymann and others found that, of 182 countries, 130 had guaranteed paid lactation breaks and seven had unpaid, and it seemed
35 that Australia was not one of the countries that had either a national policy or legislation to guarantee this. I think that Australia has fallen behind other countries in this area. We do have responsibilities with our UN conventions, the ILO conventions. We've got a responsibility to our women, as citizens, as employees, and also to our babies, who are future employees as well.
40

The Anti-Discrimination Acts in Australia most provides specific protection for breastfeeding as a separate ground, except South Australia, which does not provide it in the work sphere, not under an express provision of breastfeeding. It may under the grounds of sex and it may under the grounds
45 of caring or family responsibilities but it's not expressly protected in the work sphere, and this is the case in the Fair Work Act as well. Section 351 seems to omit mention of breastfeeding. I have wondered whether that was an oversight

that it was not put in because all of the other heads of discrimination seem to be included, pregnancy, marital status, carer or family responsibilities. It's as if, in the 2011 Sex and Age Discrimination Legislation Amendment Act, it was just that someone did not put their mind to it. I may be wrong, and I hope
5 I'm not criticising anybody unduly, but the Fair Work Act should have been amended at that point because other such Acts, such as the Workplace Gender Equality Act 2012 - that was a year later but those Acts were amended to include breastfeeding.

10 **MS SCOTT:** The use of the words "carer and family responsibilities" wouldn't be sufficiently broad to, Rachel, cover breastfeeding?

MS McDONALD: I think it has the potential. However, I think it then rests on judicial decision-makers and, with all due respect, and I do have very great
15 respect for judicial decision-makers, from my research of United States cases and United Kingdom cases, but particularly United States, when Courts were to decide decisions such as "Is breastfeeding covered under sex discrimination," the determination was "No" in some major cases. One major case, General Electric v Gilbert, was decided, I think, in the '80s. The
20 legislature didn't agree with that interpretation, amended the Act, but then the future decisions of cases that came up for it followed Gilbert's case. Sorry to laugh but, yes, they circumvented the legislative amendment and went back to Gilbert's case. In some cases the judicial decision-makers - I don't know if they're embarrassed or - I'm not sure, I haven't looked into it, probably,
25 enough, but they may side-track the discrimination issue altogether.

In a case such as Allen v Totes/Isotoner Corp, a 2009 case, and I've referenced that in the submissions - that case involved a woman who returned to work with a five-month-old baby, said that she was going to need to express
30 and was told - she started work at 6 am, she was to finish at 2.30 in the afternoon. She had an 11.30-am break for half an hour, she had two 10-minute breaks, at 8 am and 1 o'clock, I think it was. She was told that she was not allowed to express during the 10-minute breaks, and she found that she just couldn't wait until 11.30. Many of these women will have breastfed the baby,
35 probably, for the last time - could be early in the morning, then they're dropping the baby off at childcare or with a carer, then they're travelling to work, so, by the time, if it's a long time down the track, their bodies just can't cope with - because this is an autonomous process, lactation, it's not like a tap, they can't just turn it on and off at will, we're not robots, many women start to
40 suffer pain from engorgement - - -

MR HARRIS: They must get mastitis too.

MS McDONALD: Yes. Exactly. Blocked ducts, mastitis, and some of them
45 actually experience back pain with it. One woman I spoke to recently said, "It's not like hunger; I couldn't ignore that pain and the uncertainty of knowing when am I going to be relieved of it." I think it's possibly - I liken it

a little bit to the need for women to have toilets in the days gone by, when women weren't often in the public sphere or work spheres, and providing women with a toilet. That's an interesting study in itself, looking at the United States factory legislation from the 19th century, et cetera.

5

Coming back to your question, I don't have the confidence and I don't know - perhaps I'm speaking for myself here, not the Australian Breastfeeding Association necessarily, but because it comes back to judicial decision-makers, because - if you look at *New South Wales v Amery* [2006], a High Court case, Kirby J was very critical of the other members of the Bench in their narrow, restrictive, legalistic interpretation of the Anti-Discrimination Act, and of his predecessors for the 10 years prior to that case. In the '80s you had very broad application of the Sex Discrimination Act, with *Ansett v Wardley*, and *AIS v Banovic*, but then, from that point, it seems to have got narrow. I don't think we can expect Judges to necessarily comprehend it and - I mean, I think we should. Breastfeeding is in there - and also employers need - they are the ones who are the decision-makers on the shop floor and they are the ones who need clarity.

20 **MR HARRIS:** I have a couple of questions. You quoted here that 130 countries provide guaranteed lactation breaks. From your knowledge, is that legislative in most of those cases or is it - appears to be on workplace arrangements and all that kind of stuff?

25 **MS McDONALD:** The study wasn't as in-depthly reported as I would have liked and it didn't - I think it was more about the policy. Some of those countries, or many, will have legislation but there are some that don't need - apparently, some scholars have said, they don't need amazing legislative provisions because their maternity leave is so much longer, that many women are sort of catered for, being granted perhaps up to a few years off, and those countries pay parental leave for longer periods. We have it for 18 weeks with the Paid Parental Leave Scheme. There was a proposed 26-weeks amendment in the 2009 Fair Work Bill that I've come across on the AustLii search. I don't know the history of that Bill but it did refer to the Maternity Protection Convention, the ILO 183 one that I've referred to there, and also to, I think, the Convention against Elimination of Discrimination - it might have been article 11 - to provide six months paid leave, because exclusive breastfeeding is important. It said that within those objectives but that didn't get passed.

40 **MR HARRIS:** Do you think it's possible that the general level of resistance to this, which you're saying may be something with an accident being left out - - -

45 **MS McDONALD:** I'm open to debate on that.

MR HARRIS: (Indistinct) legislation is drafted - not sure that accidents actually happen very often. Is it possible that this has been resisted, if you can

5 take my presumption that resistance might be evident, because of not a fear of allowing breaks for breastfeeding per se but of having that obligation extended from being breastfeeding to facilities to support breastfeeding and then into on-worksite childcare arrangements? Is it possible that it's like that? Has there been anything that you've seen? Otherwise, on its face, it makes it hard to imagine why you would exclude something like this. I'm just guessing.

MS McDONALD: Of course it's possible, everything is possible.

10 **MR HARRIS:** But nothing you've seen suggests that it's got a sort of cost-impact kind of issue that - - -

15 **MS McDONALD:** If there's anything written on it, I haven't found it yet but then I may not have had the luxury to sort of look into that angle either yet. I'm one year into my PhD studies and I've just written a 10,000-word chapter on the breastfeeding provision in the Sex Discrimination Act, so I've found certain things but, yes, I haven't done enough study on that particular Bill to really - I shouldn't say that was a mistake. I just wondered whether it was because every single other ground - but that's not - I don't mean to say that it was an oversight that lactation breaks weren't legislated, just that discrimination section 351 doesn't mention it.

MR HARRIS: It wasn't translated from one to the other.

25 **MS McDONALD:** I'm not sure why. New Zealand has amended their Act, in 2008, the Employment Act 2008, which I've got a reference there too.

MR HARRIS: We can ask the question.

30 **MS SCOTT:** Rachel, what is the disposition of the major employer groups, the ACTU itself in relation to this issue? Have you ever canvassed them or are you aware of what their public position is?

35 **MS McDONALD:** I haven't canvassed those yet. I'm about to do my chapter on employment law and I don't have an employment law background. I was with the Australian Government Solicitor, my clients were the ACCC, the ATO and the Child Support Agency, and different departments when I was with the Attorney-General's Department in Canberra. I will, hopefully, know more - unfortunately for today's hearing, I'll know more by 30 October, when that chapter is due in. There are some unions who made submissions to the Australian Human Rights Commission last year on their supporting working parents national review to say that they considered that not providing breaks would be discrimination. I can't remember exactly which union that was. I've spoken recently to the Queensland Police Union representative because I was interested in the O'Connell case that I've briefly described there. It's the only case that I've found in Australia dealing with breastfeeding discrimination at work, where Senior Constable Tammy O'Connell considered that she was

forced to wean, to return to work. She asked for reduced hours and apparently was told, "You come back full-time or you don't come back at all." She needed to update her qualifications by doing, apparently, a half-day weapons training update but there was an existing policy against breastfeeding and pregnant women doing that training because of lead in the ammunition.

I rang up the union and she just knew everything about breaks and she was very spot-on; I was quite impressed. No, I haven't canvassed those attitudes but I'm sure there would be some reticence, there would be worry about occupational health and safety of having babies and children in the workplace, but it's also an occupational health and safety issue to have a mother in the workplace who's not expressing when she needs to. Some are forced to the toilet and there is one account in the national review from last year, the Human Rights Commission review, of a woman who had to express on the toilet and her back was aching by the time she finished each time. So, it's got other ramifications. If you're not provided with a comfortable place, if you have no expectation of expressing at some point during a shift, that's a mental distress, as well as lower productivity; you may start to get poor performance reports, you're probably night-waking and night-time parenting - a lot of parents are, whether they breastfeed or not. Then you've got the baby, who may be receiving less nutrition from the mother. Mothers should not be forced or told to use formula. There are health risks with using formula. There are many benefits, reduced risk of long-term health benefits. They are also psychological benefits, according to Nils Bergman's research as well.

MS SCOTT: Rachel, this may be in your submission, I'm sorry, I've (indistinct) - - -

MS McDONALD: That's all right.

MS SCOTT: - - - summary of your work, but, for the record, what's your expectation about what a comfortable place would have to look like or be? Could it be a comfortable chair in, say, a relatively small room, or a comfortable chair added to, say, the sickbay, or it is a place away from work and, hopefully, a little quiet and a little private? What's either your personal expectation or the expectation of the Australian Breastfeeding Association?

MS McDONALD: The Australian Breastfeeding Association has the Breastfeeding Friendly Workplace Program, so they have been advising employers and employees, I think, since 1996, around that time, and it's been federally funded, or partly funded, with extensions, and the 2007 The Best Start report on the benefits of breastfeeding included a chapter on work and breastfeeding and one of the recommendations was to give more funding to that program to continue to help employers and employees. We recommend that there be a chair in a private space. I think a lot of women want a chair rather than a toilet seat.

MS SCOTT: Of course.

MS McDONALD: I've read certain research about a low comfortable chair but everybody is different. Personally, myself, when I was in a low chair, I experienced sciatic pain after a while and was visiting the physio every week, until I bought a proper chair, which was like a specially designed breastfeeding chair - it was just a rocking chair - but something that a woman can feel comfortable in, and maybe consideration of a different size for - because some women are very tall and others are quite small. If they're using a pump, they may need a bit of extra room, so something - we would usually recommend something that's not closed in with side arms. If you are feeding a baby, that can be very hard; their legs stick out and they push against things. It can be very difficult to manoeuvre with certain chairs that are restrictive.

Some women, I've read more recently on some Facebook sites, and this is me talking individually, not from ABA, that some women actually feel lonely and excluded during these times, some don't want a private space, but then it's an issue as to whether other workers; how do you fit that all together? I think some of the things that eventuate, or come, from the national review of the Human Rights Commission is that there can be just so many different options in terms of what kind of space. It could be someone's office; it could be like a section that's closed off with a screen. Where the workplace is very small, some women do feel embarrassment that you can hear the pump, if it's an electric pump, but that may be the best that they're offered. Maybe they can play some music or have headphones on or something. There are all different types of scenarios.

One of the ones in the national review was of a woman who wanted to continue to operate the floor, I think it was in a mechanics' workshop - it was pretty much an all-male, apart from a few female, staff workshop, and this woman called Tegan wanted to continue while she breastfed a small baby. The workplace was just about to renovate a broom cupboard for her and she said, "No, I just want to continue to work" and the workplace decided that, yes, they would accommodate that and they brought the women together - or talked to them about what's acceptable conduct around women who are breastfeeding or expressing, "What would you like to see," et cetera, and then the manager has called all the staff, and - there were a lot of young men and the women said they didn't want to be stared at while they were feeding, things like that. So there was this meeting that they had without those women, and it wouldn't have to be like that, and they all discussed why breastfeeding was important, why they were going to do this, the need for Tegan to do it, what behaviour was acceptable around her and what wasn't, and apparently it was just a very positive experience that's highlighted in that report.

Not every workplace can accomplish that but I think many can and I think that's why there should be this positive duty on employers to try to think of all avenues, rather than to just say, "We don't have a room, so, no." It does

depend. I mean, if it's the KFC shop in a mall, next to Subway, there may not be a room but there may be a parenting room that's 50 metres away, or some kind of shared staff facility. Other big organisations and smaller ones may be able to pool together to lease a room. There are sort of different options. In
5 Banovic, I think it was, Gaudron and Dean JJ talked about that women shouldn't be denied access to workplaces because of a lack of facilities and just be told, "Sorry, there are no facilities."

MS SCOTT: I just note from our summary of your submission that the
10 Human Rights Commission National Review supporting working parents noted that 22 per cent of women have reported discrimination concerning breastfeeding. We'll have to get it behind those numbers.

MS McDONALD: That was of 36 per cent.
15

MS SCOTT: 22 per cent of the 36 per cent.

MS McDONALD: That's right.

MS SCOTT: One in five of the mothers who were breastfeeding or one in
20 five of the 30 per cent who reported discrimination on return to work? We'll have to get on - - -

MS McDONALD: Yes. I'm not sure of - one in five were dismissed. I don't
25 mean to laugh, sorry. That's not funny, and that's why we've got the recommendation on recommendation 5, that women need greater protection because of dismissal or constructive dismissal on return to work. Sorry, just before we do close, I did have a correction to make. I think I referred to 67,000 women reported discrimination while they were pregnant in 2011.
30 That figure, I think, is actually 107,000.

MS SCOTT: 107,000?

MS McDONALD: Yes. Of 567,000 women who had a child under two years
35 and were in the workforce, according to the ABS pregnancy transition survey, 117,000 women reported that they had experienced sex discrimination and, of those, 107,000 had experienced pregnancy discrimination. One of the key things, too, is - and I know that the Commission has had an inquiry into access to justice in the past but without a clear legislated guarantee and without that
40 being in the Fair Work Act, with access to the Fair Work Ombudsman, to unions recognising that it's a workplace relations issue, women are expected to try and change systemic discrimination off their own bat. Not many women have the energy, having had a baby, they may have a few babies - they may have been one of these women who have already been discriminated against in
45 pregnancy and/or return to parental leave, before they returned to work, so exactly how confident are they to then take on their employer, who may have dismissed them outright about accommodating for breastfeeding?

5 The Workplace Gender Equality Agency have a study on women in negotiation. That's very enlightening. I haven't referred to that in the materials but that talks about women negotiate. We shouldn't necessarily think that women will just fall within a victim mentality. They can negotiate but I think these conversations need to start around the time that maternity leave is discussed, and there are some studies to say that that is an effective time.

10 The Australian Human Rights Commission talks about informing employers more fully and doing that at the point of the registration for the Paid Parental Leave Scheme, and that that's a very good time to start to disseminate information, to discuss it, not to put pressure on women to make a decision about are they definitely going to breastfeed or not but to get the potential
15 breastfeeding employee and the employer to start thinking about how they will be accommodated. It can be a bit late when the woman turns up to work and it's just starting to be canvassed at that point and she needs to express today.

20 There is a case in the United States - I haven't brought the reference with me but a woman returned to work with a guarantee that she would have access to a room but then, when she returned, the day she returned, she was informed that she had to fill out paperwork and that was going to take a few days to decide about whether she would be given a key to access a room. At that point she dissolved into tears and her manager took her to a room and told her to fill
25 out a resignation and, yes, she left, within three hours of returning to work. The Court said that she should have fought stronger for her rights and, basically, did not find in her favour, that she should have gone over her manager's head. I don't know many women who - I think many women feel vulnerable returning to work because they've had that disconnection with
30 work and now they're coming back, maybe not so confident because of that break away. Some studies are showing - and some workplace programs are trying to keep in touch with women more in their - and that's probably apparent, it is in that national review, and I think the Fair Work Commission has also recommended that more dialogue and inclusion of employees while
35 they're on leave - of information, such as what's been happening in the workplace - if they want to receive it, I think, emails and things like that - certain back-to-work days, where they go back to work and they work a certain amount of time.

40 **MS SCOTT:** Besides yourself, is there anyone in either Australia or New Zealand, that you're aware of, that has made an extensive study of this area as it relates to workplace law? I'm conscious - in our report we often do comparisons to New Zealand, and New Zealand once again appears to be leading the way here, with lactation breaks since 2008. Is there someone you
45 could tell us about that we might be able to follow up at some stage?

MS McDONALD: The only article that I have read - there is, for example -

there would be policy briefs, I imagine, by - and I have found one from 2003 by Renee Easton. That was focusing on anti-discrimination law and I think that was prepared just prior - in the lead-up to the amendment to the Queensland Anti-Discrimination Act. Kirstie Marshall had been ejected, the
5 former MP, from Parliament for feeding 11-day-old Charlotte because she was a - stranger-in-the-house rule. I think that inspired that report to be written because that Kirstie Marshall case, it featured within that; it's about a 30-page, 36-page report. It's not up-to-date, obviously.

10 **MS SCOTT:** It may be that the Kelly O'Dwyer recent experience may (indistinct).

MS McDONALD: Yes.

15 **MS SCOTT:** You don't have anyone that's looked at the 2008 New Zealand experience?

MS McDONALD: I'm not sure about that. I do have an article, which I haven't brought with me and I didn't reference, which - - -
20

MR HARRIS: The New Zealand Government probably has anyway because they tend to do an analysis - most of the time they actually do do a regulation impact statement. So, if it was done legislatively, there will be an analysis.

25 **MS McDONALD:** Yes. There is a 2007 study but that was just prior to that amendment. Julie Smith is a leading economics academic at the ANU and she has done a lot of research on the economic value of breast milk and breastfeeding to society. She has written the only article that I've found on breastfeeding and the Sex Discrimination Act, section 7AA, and she covers
30 childcare centres, what they understand about that provision - the provision of goods and services. She interviewed a selection of childcare services as well as mothers who used the childcare service. I'm afraid - I am aware, just because I attended, as a guest speaker, an ABA group meeting on returning to work and one of the people who attended told me that their mother-in-law was
35 doing a PhD in breastfeeding and, she thought, the law at Sydney university - I've got her details to contact her but I haven't contacted her yet, so I'm not sure but I think I may be the first to write something on it. It's well overdue.

40 **MS SCOTT:** We wish you all the best and thank you very much for coming along today.

MS McDONALD: Thank you very much.

45 **MR HARRIS:** I think we're adjourned back to Melbourne.

**ADJOURNED AT 4.29 PM UNTIL
WEDNESDAY, 23 SEPTEMBER 2015**