THE SENATE EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS COMMITTEE

INQUIRY INTO THE FAIR WORK (TRANSITIONAL PROVISIONS AND CONSEQUENTIAL AMENDMENTS) BILL 2009

SUBMISSION BY

SHOP, DISTRIBUTIVE & ALLIED EMPLOYEES' ASSOCIATION

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Joe de Bruyn
National Secretary
National Office
6th Floor
53 Queen Street
Melbourne 3000

PH: (03) 8611 7000
FAX: (03) 8611 7099

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INTRODUCTION

1. The SDA is Australia's largest trade union with approximately 220,000 members. The majority of those members are young people and a majority are also women. The SDA has coverage of areas including retail, warehousing, hairdressing, pharmacies, mannequins and models, and fast food.

2. The SDA has over 95% of its membership working under terms and conditions of employment set by enterprise agreements negotiated between the SDA and employers. As each enterprise agreement is underpinned by the award system, the SDA has been a major player in maintaining fair and effective safety net awards for all workers in broad retail industry.

3. The SDA has made detailed submissions to this Committee on each occasion that the Committee has inquired into workplace relations laws. This submission addresses those issues of greatest concern to the SDA. We note that the ACTU has made detailed submissions on other aspects of the Bill.

RECOMMENDATIONS

The SDA urges the Senate to amend the Bill in a number of critical areas.

RECOMMENDATION	**PARA NO.**
R1 The SDA strongly urges the Senate to remove reference to franchise systems from the definition of an "enterprise award-based instrument" and from similar definitions in clauses 8(2), 8(6), 26 (in relation to the proposed new S.143A(2)(b) and 143A(6)(b)), 27 (in relation to the proposed new S.168A(2)(b)) of Schedule 6 of the Bill relating to modern enterprise awards.	14
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MODERN ENTERPRISE AWARDS

4. The SDA welcomes the provisions of Schedule 6 of the Bill which provides for a process to modernise or terminate existing enterprise awards.

5. The anomaly which was created by the passage of the Workplace Relations Amendment (Transition to Forward With Fairness) Act 2008 in March 2008 was that the award modernisation process initiated by that Act did not apply to "enterprise awards". Whilst that Act defined "enterprise award" the approach adopted by the Australian Industrial Relations Commission in carrying out the award modernisation process was not to embark on any examination of which awards were "enterprise awards' and thus not subject to award modernisation. As the Commission said in its Statement of 12 September 2008, [2008] AIRCFB 717:

> ***"[7]*** *At this stage we have not listed employers to whom an award does not apply. Whether an award applies to a particular employer will depend, among other things, upon whether the employer is an employer within the meaning of the Act and whether the employer is bound by an enterprise award as defined in the Act. We have adopted the relevant definitions in each draft. We do not think it is desirable to embark on a series of cases to decide such questions as whether an employer is a constitutional corporation, whether an employer is bound by an enterprise award, etc. Such questions could in any event only be finally decided by a court."*

6. Schedule 6 of the Bill now addresses the subject of "enterprise awards" and permits their modernisation.

7. The SDA is very concerned, however, with the approach adopted in the Bill to the definition of an "enterprise award".

8. The Workplace Relations Amendment (Transition to Forward With Fairness) Act 2008 inserted new provisions into the Workplace Relations Act in relation to award modernisation and these included a definition in S.576U of "enterprise award" in the following terms:

"enterprise award" *means an award that regulates the terms and conditions of employment in a single business only (being the single business specified in the award).*

9. Whilst S576U did not define 'single business' there was at least strong guidance in other parts of the Workplace Relations Act as to what was a single business as the concept of a 'single business' was well established in relation to workplace agreement making..

10. The approach adopted in various decisions of the Commission and of the Workplace Authority was that fast food franchise systems did not constitute a single business.

11. The SDA notes that the Bill contains a more expansive definition in Clause 2(2) of Schedule 6 of the Bill of an "enterprise award-based instrument" as follows:

"2(2) An ***enterprise award-based instrument*** is an award-based transitional instrument that regulates the terms and conditions of employment in:

(a) a single enterprise (or a part of a single enterprise) only; or
(b) one or more enterprises, if the employers all carry on similar business activities under the same franchise and are:

(i) franchisees of the same franchisor; or
(ii) related bodies corporate of the same franchisor; or
(iii) any combination of the above."

12. The Bill now proposes to treat awards that specifically apply to franchise systems or parts of a franchise to be enterprise awards. Franchise systems predominate in the Fast Food Industry and the Fast Food Industry has the most Franchise Brand Specific Awards.

13. Quite clearly the Fast Food Industry has sought to protect itself and its awards from the ordinary award modernisation process. AIG has openly claimed credit for this extended definition on behalf of Fast Food Industry operators.

14. **R1** The SDA strongly urges the Senate to remove reference to franchise systems from the definition of an "enterprise award-based instrument" and from similar definitions in clauses 8(2), 8(6), 26 (in relation to the proposed new S.143A(2)(b) and 143A(6)(b)), 27 (in relation to the proposed new S.168A(2)(b)) of Schedule 6 of the Bill relating to modern enterprise awards.

15. The inclusion of franchise system awards in the definition of an enterprise awards is clearly at odds with the provisions of the Fair Work Act which treat collective agreements made in relation to a franchise system as Multiple Employer Agreement making.

16. The Fair Work Act contains a specific process to allow multiple employers operating under a franchise system to gain authorisation to make a single collective agreement on the basis that they all have the same interest.

17. Division 10 of Part 2-4 of the Fair Work Act is entitled, "Single interest employer authorisations" and S.248 and 249 provide, relevantly that:

> ***248 Single interest employer authorisations'***
>
> *(1) Two or more employers may apply to FWA for an authorisation (a **single interest employer authorisation**) under section 249 in relation to a proposed enterprise agreement.*
>
> *Note: The effect of a single interest employer authorisation is that the employers are single interest employers in relation to the agreement (see paragraph 172(5)(c)).*
>
> *(2) The application must specify the following:*
>
> *(a) the employers that will be covered by the agreement;*
>
> *(b) the employees who will be covered by the agreement;*
>
> *(c) the person (if any) nominated by the employers to make applications under this Act if the authorisation is made.*
>
> ***249 When FWA must make a single interest employer authorisation***
>
> *Single interest employer authorisation*
>
> *(1) FWA must make a single interest employer authorisation in relation to a proposed enterprise agreement if:*
>
> *(a) an application for the authorisation has been made; and*

(b) FWA is satisfied that:

(i)the employers that will be covered by the agreement have agreed to bargain together; and

(ii)no person coerced, or threatened to coerce, any of the employers to agree to bargain together; and

(c) the requirements of either subsection (2) (which deals with franchisees) or (3) (which deals with employers that may bargain together for a proposed enterprise agreement) are met.

Franchisees

(2) The requirements of this subsection are met if FWA is satisfied that the employers carry on similar business activities under the same franchise and are:

(a) franchisees of the same franchisor; or

(b) related bodies corporate of the same franchisor; or

(c) any combination of the above.

18. Clearly the Government in putting the Fair Work Bill to Parliament and Parliament in passing the Fair Work Act accepted that franchisees and franchisors may want to have a common collective agreement even though they were all separate employers running their own businesses. S.248 and S.249 provide a specific mechanism for a group of separate employers to band together for the purpose of making a single collective agreement. Employers in a franchise system are clearly recognised as being separate employers and the nature of a single collective agreement is that it is a multiple employer agreement.

19. S.248 and S.249 simply provide a simple and effective mechanism for multiple employers to make a collective agreement.

20. The Explanatory Memorandum to the Fair Work Act at Para 1032 and 1047 made clear that franchisees and franchisors were multiple employers but often with a single interest when wanting to make a collective agreement.

1032. The types of employers that may apply for a single interest employer authorisation are franchisees, and, where approved by a Ministerial declaration, employers such as schools in a common education system and public entities providing health services.

and

1047. Franchisees specified in a single interest employer authorisation will be single interest employers for the purpose of making a single-enterprise agreement. This is intended to clarify any uncertainty arising from the jurisprudence about whether franchisees are engaged in a 'common enterprise'. The AIRC has previously found some franchisees to be engaged in a common enterprise (see, e.g., McDonald's Australia Ltd v Shop, Distributive and Allied Employees Association (2004) 132 IR 165) and others not to be, in apparently similar circumstances (see, e.g., Re Bakers Delight Holdings Ltd (2002) 119 IR 20).

21. Having a single interest or being engaged in a common enterprise for the purpose of making a collective agreement is a long way removed from the concept of "single enterprise" for the purpose of being an "enterprise award.

22. The SDA also strongly opposes the extension of the definition of enterprise award in Clause 2(2) of Schedule 6 of the Bill because the awards which the Fast Food Industry now seeks to be considered as enterprise awards were never intended to be awards in the usual sense of that term.

23. Each of the existing Fast Food Industry Brand Specific awards was made as an enterprise agreement.

24. In the early 1990's when the SDA was making collective agreements with Retailers and Fast Food Brands the National Wage Case Principles of the Commission permitted a collective agreement to be processed either as an Enterprise Agreement under the Agreement Making provisions of the Act or as a Consent Award Giving Effect to an Enterprise Agreement under the Award making provisions of the Act.

25. The standard approach adopted by the SDA and the employers it made collective agreements with was to process the collective agreement as a Consent Award Giving Effect to an Enterprise Agreement under the Award making provisions of the Act.

26. These Consent Awards were converted into non consent awards (against the active and strong opposition from the SDA) by operation of the Award Simplification process in the first round of the Howard Governments Workplace Relations Act.

27. Some employers in the Fast Food Industry have now prevailed upon the Government to give them additional protection in relation to these former collective agreements.

28. At face value the argument over the inclusion of Fast Food Brand specific awards being 'enterprise awards' or being normal awards has all the hallmarks of being a storm in tea cup.

29. However the reason that some employers in the Fast Food Industry want to hold onto their Brand Specific Awards as long as possible is that Brand Specific Awards have a package of wage rates and terms and conditions of employment which are **lower than** the same package in the Fast Food Industry Modern Award created by the Commission.

30. In the case of some Fast Food Brands, the existing Brand Specific Award is **substantially below** the existing State Awards or NAPSA's or Federal Awards that apply to the rest of the fast food industry.

31. **R2** Should the Senate intend to permit awards applying to franchises to be treated as being 'enterprise awards' then the SDA makes the very strong submission that the definition of "***enterprise award-based instrument"*** be amended so that only those existing awards which apply to the whole of a particular franchise should be considered to be an enterprise award. Existing awards which only apply to a part of a specific Fast Food Brand should not be considered to be 'enterprise awards'. At the very least, if a franchise is to be an enterprise, then it is only fair and reasonable that only those existing awards that apply to the whole of the franchise should be considered to be an enterprise award.

32. Schedule 6 of the Bill provides for the possible modernisation of an enterprise award.

33. The SDA is very concerned that the modernisation process does not guarantee that any Modern Enterprise Award will be at least equal in value to the Modern Award for the Industry.

34. Whilst Clause 4 of Schedule 6 provides a set of criteria that Fair Work Australia must take into account, none of those criteria require that the modern Enterprise Award which may be made by Fair Work Australia is, in

relation to each employee who may be covered by the Modern Enterprise Award, of equivalent value to the Modern Award that would apply to the employee if there was no Modern Enterprise Award.

35. As one of the criteria that Fair Work Australia must take into account is whether the modernisation of the enterprise award will have an impact on the ongoing viability or competitiveness of the enterprise, it appears that the Bill intends to permit some Fast Food Franchises to argue for the retention of their substandard brand specific awards. Even though the Fast Food Brand Specific awards may contain a package of wages and conditions which is well below the package of wages and conditions in the existing industry awards and in the Fast Food industry Modern Award, Senators should already be able to hear the cries of anguish from some employers in the Fast Food Industry that any variation to their sub standard Brand Specific awards will impact on their ongoing viability and competitiveness.

36. The Deputy Prime Minister's original statements that 'enterprise awards' would not be subject to award modernisation was made in the context of the mining industry enterprise awards which contained very different conditions from the general mining industry awards but where the package of wages and conditions in the mining industry enterprise awards were equal to, or in most cases, superior to the package in the general awards applying to the mining industry.

37. Whilst Clause 4 of Schedule 6 causes no difficulty in relation to the modernisation of enterprise awards in the mining industry, it does cause serious difficulties in trying to ensure a level playing field in the Fast Food Industry where some of the major Fast Food Brands have Brand Specific Awards whilst others don't, and where none of the smaller operators and only some of the larger operators in the Fast Food Industry have access to the potential benefits of substandard Brand Specific Awards.

38. **R3** The Senate should include a specific extra provision in Cluse 4 (5) of Schedule 6 as follows:

> *"A modern enterprise award must, on balance, provide for wages and terms and conditions of employment for employees which are at least equal to the wages and terms and conditions of employment of employees covered by a modern award that would, but for the modern enterprise award, cover those employees."*

39. Such an extra provision will enable Modern Enterprise Awards to contain wages and terms and conditions of employment which are different from the general Modern Award for their industry but at the same time ensure that Modern Enterprise awards do not fall below the total value of the safety net package of the relevant Modern Award for the industry.

40. **R4** Similarly Clause 6 of Schedule 6 which provides for the Modern Enterprise Awards Objective needs to be amended by including an additional provision as follows:

> *"(3) In applying the modern enterprise awards objective FWA must ensure that, on balance, the wages and terms and conditions of employment for employees covered by the modern enterprise award are at least equal to the wages and terms and conditions of employment of employees covered by a modern award that would, but for the modern enterprise award, cover those employees."*

41. The key to each of the proposed amendments is the use of an "**on balance**" test.

42. This reflects the original NDT in the Workplace Relations Act and the "**on balance**" test permits some wages or terms or conditions in the modern enterprise award to be less than the equivalent in the modern award so long as the total package of the modern enterprise award is at least equal to the total package of the modern award.

43. There is a large amount of case law on this "**on balance**" test.

44. The approach to the test has been to consider not only the money value equivalent of matters but also the non-monetary value attached by the parties to the term or condition which varies from the modern award terms of conditions. The decisions have shown flexibility in applying an "**on balance**" test.

45. The '**on balance'** test will enable Modern Enterprise Awards to contain "*enterprise-specific terms and conditions of employment"* (as mentioned in the modernisation test in Clause 5 of Schedule 6) whilst at the same time providing a package of terms and conditions of employment which is at least equal to the Modern Award for the relevant industry.

46. The extension of the concept of an 'enterprise award' to include an award which applies to part of a franchise system is objectionable but even more objectionable is the provision in Clause 8 of Schedule 6 which permits Fair Work Australia to extend the coverage clause of a modern enterprise award to include franchisees or other businesses which were never covered by the original 'enterprise award'.

47. Clause 8(6) specifically permits a Modern Enterprise Award to express the coverage clause as applying to a franchise name.

48. A Modern Enterprise Award can be made so that the coverage applies to any business trading under the franchise name.

49. The effect of Clause 8 is that a Modern Enterprise Award can have a coverage clause which is far broader than the coverage clause of the existing 'enterprise award'.

50. Every award that currently applies to franchises in the Fast Food Industry applies to only some of the franchisees and each of these franchisees is specifically named as being covered by the Brand Specific Award. Franchisees not specifically named in the Brand Specific Award are covered by the relevant industry award or NAPSA.

51. The operation of Clause 8 will permit franchisees who are currently covered by industry awards or NAPSA's to be taken out of the Modern Award for the Fast Food Industry and be placed in the Modern Enterprise Award for the Brand.

52. As some of the current Brand Specific Awards have a package of terms and conditions of employment that is lower than the package of terms and conditions of employment of the Modern Award for the Fast Food Industry, then Clause 8 will be used to move employees onto awards with lower terms and conditions of employment.

53. Employers will clearly assert that '*the ongoing viability and competitiveness'* of their business will be assisted if they can get access to the Modern Enterprise Award rather than apply the Fast Food Industry Modern Award.

54. Clause 8 permits employers to misuse the modernisation process to pick which award they want to be covered by.

55. Whilst the above discussion concentrates on the known fast food franchise brands, e.g. McDonalds, Pizza Hut and KFC the concept of “franchise” in the Bill is much broader than the formal franchise systems which operate in the fast food industry.

56. The Explanatory Memorandum to the Bill explains that the concept of ‘franchise’ is to be read in the same way as the concept is defined in the Corporations Act.

57. The definition in S.9 of the Corporations Act is as follows:

> *“franchise means an arrangement under which a person earns profits or income by exploiting a right, conferred by the owner of the right, to use a trade mark or design or other intellectual property or the goodwill attached to it in connection with the supply of goods or services. An arrangement is not a franchise if the person engages the owner of the right, or an associate of the owner, to exploit the right on the person's behalf.”*

58. This definition is quite broad and will include:

- a fast food franchise such as McDonalds or Pizza Hut,
- a group of independent supermarkets all trading under the common banner of IGA or FoodWorks, or,
- a number of independently owned and operated Community Pharmacies using the common branding of My Chemist or AMCAL.

59. Merely using a common branding should not be sufficient for a group of independent business to be considered as being an “enterprise” and then to have an award which applies to them being treated as an ‘enterprise award.

60. In the Community Pharmacy, Hardware and Supermarket sectors of the retail industry, businesses will move between Brands depending upon the deals that may be offered by competing Brands.

61. For example a Home Hardware store today could become a Thrifty Link Hardware store tomorrow. Equally a My Chemist community pharmacy could

become a Terry White community pharmacy or a Food Works supermarket today could become an IGA tomorrow. It is clearly much harder to move between competing Fast Food brands because of the different style and layout of stores.

62. The dual problems of (1) the broad definition of "franchise" in the Corporations Code and (2) the ability of the award modernisation process to permit Modern Enterprise Awards to specify their coverage as applying to all employers trading as the Brand name, will permit employers, in some sectors of the retail industry, who currently have no relationship whatsoever to the franchise to gain the benefit of the Modern Enterprise Award for that franchise simply by moving to that franchise system.

63. The entire structure of the Bill in relation to Modern Enterprise Awards is such that it will promote an uneven playing field for businesses in the retail industry.

64. This should not be permitted.

65. **R5** Again the SDA urges the Senate to amend the Bill to remove franchises from the concept of existing enterprise awards and from Modern Enterprise Awards.

DEALING WITH COLLECTIVE AND INDIVIDUAL AGREEMENTS MADE BEFORE THE FAIR WORK ACT COMMENCED

66. The Bill provides a range of measures for dealing with the continued operation of agreements both collective and individual, made before the commencement of the Fair Work Act.

67. The SDA made a detailed submission on this issue as part of our Submission in relation to the Fair Work Act. We now repeat the essential argument.

68. The Deputy Prime Minister announced during the process of preparing the Fair Work Act that agreements, both collective and individual, which were made prior to the commencement of the Fair Work Act would not be subject to a "drop dead date" at which all old agreements would cease to operate.

69. This statement reflects the standard practice in previous legislation amending the Conciliation and Arbitration Act, the Industrial Relations Act and the Workplace Relations Act that an agreement validly made under one Act would be allowed to continue to operate under a new Act.

70. This practice (and it has never had any higher status than a simple practice) operated reasonably when changes to the law were themselves incremental changes.

71. Work Choices, however, was not an incremental change on earlier IR legislation but was in fact a deliberate exercise of creating an environment in which employer interests predominated and employees were made to suffer through the removal of award rights and the being able to be pressured into collective and individual agreements which significantly reduced employees' take-home pay.

72. The most important part of the Government's election campaign and the whole rationale for the Fair Work Act was to kill off and bury Work Choices.

73. Whilst the Fair Work Act has created a new and fairer industrial relations system, the current Bill retains the worst features of Work Choices.

74. The Bill should not be predicated upon a continuation of the practice that what was done under Work Choices was legal and therefore should be allowed to continue.

75. Work Choices was a bad law!!

76. What was done under Work Choices was bad!!

77. Workers deserve to be protected against the continued operation of a bad law!!

78. Employers who used Work Choices only did so because they knew they could legally reduce workers' wages and entitlements and, that they could pressure workers into AWA's or non union collective agreements.

79. No employer should continue to be rewarded for having used Work Choices against their employees!!

80. Yet that is what the Bill intends to do – to reward employers for having used Work Choices to strip wages and conditions of employment from workers.

81. This Bill rewards unfairness by employers!

82. Work Choices AWA's can continue to operate indefinitely.

83. The Government's promise to kill off Work Choices does not appear to have been fulfilled if Work Choices agreements can continue to operate and, in doing so, deprive workers of entitlements that the AIRC and/or Fair Work Australia have deemed to be essential safety net conditions.

84. There are clearly circumstances where a government will require all industrial instruments to accord with the provisions of a new law even where the industrial instrument is an agreement which was validly made under an earlier law.

There is currently a group of workplace agreements which should not be allowed to continue to operate simply because they were validly made at

some earlier date. This group of workplace agreements offends against both the former Howard governments Fairness Test and the current Government's No Disadvantage Test.

85. The following chart provides a snapshot of the Test (if any) for workplace agreements over the last 15 years.

Act	**Time Frame**	**Test**
Industrial Relations Act	1993 to December 1996	No Disadvantage Test
Workplace Relations Act	December 1996 to March 2006	No Disadvantage Test
Workplace Relations Act (Work Choices)	**March 2006 to May 2007**	***No Test Disadvantage specifically permitted***
Workplace Relations Act (A Stronger Safety Net)	May 2007 to March 2008	Fairness Test
Workplace Relations Act (Forward to Fairness Transition)	March 2008 to present	No Disadvantage Test

86. The odd group out are those workplace agreements made between March 2006 and May 2007.

87. The Howard Government in introducing the Fairness Test said quite clearly that it was never the intention of the Work Choices legislation to permit workplace agreements to operate to the disadvantage of workers. Yet that is exactly what was allowed to occur under Work Choices between March 2006 and August 2007.

88. If "Fairness" or "No Disadvantage" is a critical element of a modern operating workplace agreement system, then workplace agreements which specifically permitted the employer to disadvantage employees and which created real and substantial disadvantage to employees should not be allowed to continue to operate.

89. Once the legislative system under Work Choices permitted employers to make workplace agreements that did in fact disadvantage employees, then it was inevitable that some employers would do so.

90. Information released by the former Office of the Employment Advocate showed that many of the workplace agreements made under Work Choices removed 'protected award conditions' from employees and this was able to be done without any need for the employer to fairly compensate the employees for the loss of conditions of employment.

91. If these Work Choices workplace agreements are permitted to continue operation up to their nominal expiry date and then onwards ever after, then a large number of Australian workers will be condemned to working under grossly sub standard conditions of employment indefinitely into the future.

92. The fact that these workplace agreements were made in the first place and were made with employees who would be clearly worse off under the workplace agreement is reasonably conclusive as to the total lack of bargaining power of those employees. The likelihood that such employees will be able to simply terminate their workplace agreement once it passes its nominal expiry date is extremely farfetched and fanciful.

93. Every workplace agreement should be required to pass some form of no disadvantage test.

94. There are numerous agreements operating in the retail industry which provide terms and conditions of employment which are significantly inferior to the safety net set by the Fair Work Act and Modern Awards. Yet this Bill aims to protect those agreements. The protection given in relation to such agreements is very one sided. It is a protection given to the employer at the expense of the employees.

95. Whilst much of the concern over Work Choices agreements is in relation to the sub standard contents of those agreements, the Senate should also recognise that Work Choices established a system of agreement making which permitted employers not only to ignore the basic procedural rules about making an agreement with their employees but which also permitted

employers to lie to workers about the content and operation of a proposed agreement in order to get workers to approve the agreement.

96. In the retail industry, the SDA took one such case to the Federal Court, *SDAEA V Karellas Investments P/L [2008] FCAFC 42*, where both a Single Judge and a Full Court found that the employer had made false and misleading statements to employees as part of the process of getting them to vote for a new Work Choices agreement. Notwithstanding both the fact of the false and misleading statements and the non compliance by the employer with the requirements in the Work Choices legislation for making an agreement, the Federal Court found that the agreement was valid and operated validly.

97. The Federal Court noted that Parliament's intention in making Work Choices was specifically to provide that a Work Choices agreement would operate even where an employer failed to comply with the requirements of Work Choices in making the agreement with its employees.

98. Work Choices actively encouraged employers to breach the law when making an agreement, knowing that even when they did so their Work Choices Agreements would still continue to operate.

99. The very structure and underlying philosophy of Work Choices is so abhorrent that no agreement made under Work Choices should be permitted to continue to operate both without review and indefinitely.

100. Whilst the concept of a 'drop dead date' is not supported by the Government, there are a range of less drastic measures which would give certainty to both employers and employees as well as giving greater weight to the new and fairer industrial relations system created by the Fair Work Act.

101. **R6** The SDA urges the Senate to amend the Bill by providing a practical yet fair approach to the continued operation of old agreements.

102. **R7** Firstly, there should be a presumption that any agreement made before the commencement of the Fair Work Act will be terminated if the agreement has already passed its nominal expiry date. In order to give

employers and employees a reasonable opportunity to make a new agreement, the termination date should be 30 June 2010.

103. **R8** Secondly, even where an agreement has passed its nominal expiry, date the employer and employees may wish to have the agreement continue to operate without the need for the employer and employees to negotiate a completely new agreement. This should be accommodated. The Bill should provide that an existing agreement that has passed its nominal expiry date may continue to operate beyond the 30 June 2010 where a party to the agreement applies to Fair Work Australia for approval for an extension of the agreement and Fair Work Australia can extend the operation of the agreement if the agreement passes the BOOT.

104. **R9** Thirdly, existing agreements that have not yet reached their nominal expiry date should only continue to operate after the Fair Work Act commences if they have passed a NDT or Fairness Test.

105. This means that agreements made under Work Choices and before the Howard Government introduced its Fairness Test should be required to pass the BOOT before the 30 June 2010, and if they fail the BOOT, then they should terminate on 30 June 2010.

106. A clear example of the undesirable consequences of protecting the continued operation of Work Choices workplace agreements which actively disadvantage employees is given below.

107. Enterprise Initiatives, an industrial relations consultancy business which has heavily promoted both AWA's and non union agreements set up a new company in March 2007 known as HRO Initiatives P/L.

108. In May 2007 HRO Initiatives P/L made a collective workplace agreement with its employees. The workplace agreement applies to any employee of HRO Initiatives P/L employed in <u>any classification and at any location anywhere in Australia</u>. The HRO Initiatives P/L Employee Collective Agreement guarantees to pay nothing more than the minimum wages and minimum conditions under Work Choices. Every 'protected award matter' is specifically excluded from the workplace agreement.

109. In early 2008 a supermarket in Queensland was sold by its owner to a new owner/operator.

110. The former owner and his employees were covered by a workplace agreement negotiated with the SDA.

111. The new owner who took over on 1st April 2008, acting under advice from Enterprise Initiatives, has arranged for all of his workers to be employed by HRO Initiatives P/L.

112. Enterprise Initiatives has advised the SDA that the new owner is not bound by any transmission of business arrangements that apply to the workplace agreement which bound the former owner as the new owner of the supermarket only owns and operates the supermarket and that HRO Initiatives P/L, which is the employer of the workers, has nothing to do with the supermarket business.

113. In this environment the workers at the supermarket were working at the supermarket on 31st March 2008 and still working there on the 1st April 2008.

114. Nothing in their job changed.

115. Nothing in the supermarket changed: groceries are still the same.

116. What changed **was** the owner and normally this would not lead to a change in the terms and conditions of employment.

117. However on 31st March 2008, workers were covered by a collective agreement which contained a reasonable set of terms and conditions of employment appropriate to a small supermarket.

118. On the 1st April **2008**, the employees were covered by a Work Choices workplace agreement which guarantees them only the Australian Pay and Conditions Standards.

119. The workers at the supermarket have no possibility of setting aside or terminating or varying the Work **Choices** workplace agreement. As the employer is HRO Initiatives P/L, the workers at the Queensland supermarket wouldn't know or even have any way of knowing how many other workers in

Australia are covered by this Work Choices workplace agreement or where those other workers are located.

120. Until the HRO **Initiatives** P/L Employee Collective Agreement is set aside by legislation, Enterprise Initiatives has a very strong marketing tool where it can promise new businesses a way to avoid the current No Disadvantage Test and to avoid the protections promised to Australian workers by the Fair Work Act.

121. With no geographic or occupation limitation on the extent of coverage of the HRO Initiatives P/L Employee Collective Agreement, this Work Choices sub standard agreement can be used by any business in any industry. All the business owner has to do is contract with Enterprise Initiatives who can and will have HRO Initiatives P/L become the legal employer of the workers.

122. What Enterprise Initiatives has done is to use the 'Labor hire' concept but to use it in a way where Enterprise Initiatives is not a traditional 'Labor hire' operation but merely provides a vehicle to allow businesses to get the advantage of a Work Choices workplace agreement.

123. If Work Choices workplace agreements were required to pass the new BOOT in order to continue operating, the HRO Initiatives P/L Employee Collective Agreement would fail dismally and workers at the Queensland supermarket would at the very least be entitled to the terms and conditions of the new General Retail Industry Modern Award.

REGISTERED ORGANISATIONS

124. Schedule 22 makes some consequential amendments to the registered organisations provisions of the Workplace Relations Act.

125. However, the prime purpose of the Bill in relation to registered organisations is to slip in under cover of a Bill relating to Consequential and Transitional matters a far reaching and significant alteration to the industrial relations laws of the Commonwealth.

126. The Government, under cover of this Bill, has reintroduced one of the odious Bills of the Howard era and a Bill that met with strident opposition from the Labor Senators when in opposition.

127. In 2001, the Howard Government introduced the Workplace Relations (Registered Organisations) Bill and a key aim of that Bill was to separate the law regulating registered organisations from the law dealing with workplace relations.

128. In the face of very strong opposition from unions and from the then Labor Opposition in both the House of Representatives and the Senate, the Howard Government backed down on its ill thought and ideologically driven agenda.

129. An examination of the House of Representatives Hansard shows the strength of feeling amongst Labor members to the Howard Bill. In particular the SDA draws attention to the following:

House of Representatives Hansard
Tuesday, 21 August 2001
Page: 29866
Mr BEVIS (Brisbane) (6:01 PM)

I want to refer at the outset to a threshold question for Labor in relation to this. It is the decision the government have taken to establish a separate act. There are two levels at which this bill should be dealt with. One is the conceptual decision to remove these things from the existing legislation and put them in a separate act. The second tier is the detail: how they have gone about writing the detail of the bill, how they have gone about trying to change the provisions that presently exist.

We do not support the establishment of a second act to deal with these matters. The second reading amendment which I will be moving makes it clear that this bill should be withdrawn and redrafted so that whatever amendments the government believes are necessary to the administration of registered organisations are done within the Workplace Relations Act.

This is more than a symbolic issue. In the same way that the government was keen to change the name from industrial relations to workplace relations, in the same way that the government is keen to talk about removing third parties

from the industrial relations or workplace environment, this too is part of that agenda. This is the government's effort to remove any reference to unions—any reference to registered organisations—from the industrial relations laws of this land. They will be taken out of that legislation and dropped into a discrete bill. This has not been done for the convenience of those practitioners who would rather carry around a 200-page document than a 400-page document. This has not been done for those reasons. Governments do not take the time of the parliament and legislate for those sorts of considerations. This has been done as part of that global plan.

Hose of Representatives Hansard
Tuesday, 21 August 2001
Page: 29887
Ms HOARE (Charlton) (9:19 PM)

The issue of having a separate act for the regulatory provisions to regulate the registered organisations, including the trade unions, and specifically aimed at trade unions, is just another example of the ideological obsession by the government to marginalise the role of organisations in the system. They view registered organisations as external to the industrial system, and by placing their regulation in a separate act this is seen to diminish their role within that system.

House of Representatives Hansard
Tuesday, 21 August 2001
Page: 29895
Ms ROXON (Gellibrand) (9:59 PM)

I am concerned that, as its primary focus, the legislation separates out the conditions and provisions that relate to the regulation and internal regulation of registered organisations from those that deal with the regulation of industrial matters generally. The argument is that it will make it simpler, but again that shows the minister's lack of understanding and grounding in the portfolio that he is responsible for. The shadow minister and I know that the issues are inextricably linked. The ways in which a registered organisation such as a trade union is given rights that relate to the conditions that are negotiated, to the way the arbitration system works, to the way awards are developed, to issues dealing with rights of access, rights to negotiate and a range of other things, are inextricably linked. Anyone who is going to practise in this area, whether as a lawyer, an industrial official or an adviser to an

employer association, will only have to carry two pieces of legislation to every negotiation, every industrial relations hearing and every other matter. That will not make it any simpler. It does not alter the fact that these two pieces of legislation will have to rely on each other to be understood. For some reason, the government thinks that it is a noble aim to put so much energy and attention into separating out the pieces of legislation.

House of Representatives Hansard
Wednesday, 22 August 2001
Page: 29919

*Debate resumed from 21 August, on motion by **Mr Abbott**:*

That the bill be now read a second time.

*upon which **Mr Bevis** moved by way of amendment:*

That all words after "That" be omitted with a view to substituting the following words: "the House:

(1) condemns the Government for further entrenching unfairness and bias in the industrial relations system;

(2) condemns the Government for excising provisions of the Workplace Relations Act 1996 and placing them into a separate Act; and

(3) calls upon the Government to withdraw the Bill and redraft it to provide for:

(a) the retention of provisions concerning registered organisations in the one Act together with all other industrial relations matters and including necessary improvements; and

(b) improvements to be reflected in amendments to be moved by the Member for Brisbane during the consideration of the Bill in detail".

130. The Labor Senators, when reporting on the Workplace Relations (Registered Organisations) Bill, said:

"1.66 Amongst the obviously necessary and commonsense amendments are to be found provisions that reflect a contentious and ideologically driven Government agenda in relation to trade unions. These include:

- *providing for a separate Act…"*

and further,

"1.67 There is broad objection to the idea of removing such provisions as are to be found in the bill from the body of the Workplace Relations Act. Unions believe that clear links between workplace relations and the role of organisations in the system need to be emphasised within a single act.

1.68 The Shop Distributive and Allied Employee's Association (SDA) has submitted that the bill is nothing other than a device to separate the statutory control of organisations from the key federal workplace relations legislation. "

131. Whilst the current Government has said on many occasions that it has buried Work Choices it appears that the Labor Government is quite happy to now resurrect one of the more ideologically driven failures of the Howard government in this Schedule to the Bill.

132. The SDA continues to hold the same view in relation to this Government's attempts to separate the statutory control of organisations from the Fair Work Act.

133. **R10** The Senate should repeat the views expressed by Labor Senators in 2001 to the current Government in relation to Schedule 22 of the Bill.

134. The SDA expresses its very strong opposition to a Labor Government doing exactly what it condemned the Howard Government for attempting to do.

135. The role of trade unions has been recognised within the new industrial relations system established by the Fair Work Act. Yet this Bill undermines the potential value of the Fair Work Act through a deliberate and ill conceived notion of separating trade unions from the very legislation which spells out the roles of trade unions.

136. **R11** The Senate should reject the Government's attempt to create a separate stand-alone law for registered organisations and insist that the law regulating registered organisations be made an integral part of the Fair Work Act.

AGREEMENT MAKING AND AWARD MODERNISATION

137. The Bill provides for specific rules in relation to the BOOT for enterprise agreements that are made after 1 January 2010 in circumstances where the underpinning award has not yet been modernised.

138. These provisions are contained in Part 4 of Schedule 7 to the Bill.

139. The effect of the provisions is that if the underpinning award has not been modernised then the award "as it is" is used for the purposes of applying the BOOT.

140. There will be few areas where the main industry award has not been modernised as the whole of the Award Modernisation of industry awards will have concluded before the 1st January 2010.

141. However the modernisation of enterprise awards cannot start until after 1 January 2010.

142. Not only will the enterprise awards not have been modernised but there is no requirement in the existing legislation that existing enterprise awards that have been updated or maintained as relevant industrial instruments will meet the same safety net minimums as the relevant industry awards.

143. The Bill fails to consider the situation of unmodernised enterprise awards which may be sub standard in nature.

144. The Bill permits an enterprise agreement to be tested against unmodernised awards without regard for the actual contents or status of the unmodernised award.

145. **R12** The SDA would urge the Senate to amend the Bill to require that where the underpinning award had not been modernised then Fair Work Australia should designate a Modern Award for the BOOT. All of the industry awards will have been Modernised by 1 January 2010.

146. This recommended amendment is consistent with the underlying intention that enterprise agreements made under the Fair Work Act are tested against Modern Awards. The recommended amendment also prevents workers being locked into Fair Work enterprise agreements that contain wages and terms

and conditions of employment lower than the Modern Awards because the specific award used for the BOOT has not yet been modernised.

ITEA'S AND THE BRIDGING PERIOD

147. The SDA is opposed to the concept contained in Division 7 of Part 2 of Schedule 8 of the Bill which continues to allow employers to make ITEA's during the period from 1 July 2009 to 31 December 2009.

148. If the Fair Work Act is to commence operation in relation to enterprise agreement making on 1 July 2009 then there is no room whatsoever for the continued ability to have new ITEA's.

149. ITEA's are as bad as AWA's and ITEA's were created to give employers an opportunity of continuing to use individual instruments whilst the Fair Work Act was being prepared and implemented.

150. Now that the Agreement Making provisions of the Fair Work Act will commence on 1 July 2009 the Government should, consistent with its commitments to stop individual agreement making, make clear that ITEA's cannot be made after 1 July 2009.

151. **R13** The Senate should amend the Bill be deleting Division 7 of Part 2 of Schedule 8.

LOW PAID WORKPLACE DETERMINATIONS

152. The Fair Work Act at Part 2-5 permits a bargaining representative for employees to apply to Fair Work Australia for a low paid workplace determination. Once granted the low paid workplace determination permits the employees to engage in multi employer bargaining for a single agreement to cover a number of employers where all of the employees are in a low paid environment.

153. The key restraint on granting a low paid workplace determination is that S.263(3) of the Fair Work Act provides that none of the employers can previously have been covered by an enterprise agreement under the Fair Work Act.

154. The Bill now seeks in Clause 22 of Schedule 7 to extend the restraint on granting low paid workplace determinations to exclude any employer who has ever been covered by a "collective agreement based transitional instrument".

155. The SDA strongly opposes Clause 22 of Schedule 7 of the Bill.

156. The definition of "collective agreement based transitional instrument" in clause 2(5) of Schedule 3 of the Bill is very broad and clearly includes Work Choices employee collective agreements and old S.170LK non union agreements under the Workplace Relations Act and even collective agreements which may only apply to an employer because of transmission of business rules.

157. The history of non union collective agreement making under the Howard Government is replete with examples of workers having no effective choice in agreement making and of employers using non union agreement making to disadvantage workers, notwithstanding the presence of NDT's or Fairness Tests when they existed.

158. The SDA would prefer the complete deletion of Clause 22 of Part 5 of Schedule 7 as this would provide the neatest and simplest outcome.

159. **R14** The SDA would urge the Senate to either,
delete Clause 22 of part 5 of Schedule 7 to the Bill, or,
amend Clause 22 of Part 5 of Schedule 7 to provide that where S.263(3) of the Fair Wok Act would be triggered solely on the basis that the employer had previously been covered by a "collective agreement based transitional instrument" then Fair Work Australia had a discretion to either grant or refuse the making of the low paid workplace determination, after having considered all of the circumstances in relation to the making, operation and contents of the "collective agreement based transitional instrument".