SENATE EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS COMMITTEES

INQUIRY INTO THE FAIR WORK BILL 2008

SUBMISSION BY

SHOP, DISTRIBUTIVE & ALLIED EMPLOYEES' ASSOCIATION

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INTRODUCTION

1. The SDA welcomes the introduction of the Fair Work Bill into Parliament as a key measure in restoring fairness to Australian workers.

2. 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.

3. 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.

4. When the previous Howard Government first introduced the Workplace Relations and Other Legislation Amendment Bill into Parliament in 1996, the SDA actively participated in the review processes undertaken by the Senate.

5. The SDA made a major submission to the Senate Inquiry into the Workplace Relations and Other Legislation Amendment Act and encouraged many of its members in the retail industry to make individual submissions to the Senate Inquiry process. The SDA has made submissions to each Senate Inquiry on Workplace Relations amending legislation since 1996. The SDA again welcomes the opportunity of making a submission to the Senate Inquiry into the new Labor Government's major Workplace Relations legislation, the Fair Work Bill.

6. One feature of every SDA submission to the Senate has been our preparedness to be constructive in our assessment of a proposed Bill and our proposals for amendments to the Bill.

7. We stress this point in the current submission because whilst the SDA welcomes the broad thrust of the Fair Work Bill, and strongly applauds the government for its introduction, we nevertheless make specific comments on,

and propose amendments to a number of provisions within the Bill about which the SDA has very strong views.

8. Wherever we suggest amendments, we do so on the basis that the amendments proposed will make the Bill operate more effectively and will provide a more efficient and effective industrial relations systems for Australia.

KEY RECOMMENDATIONS

9. The following is a summary of the key recommendations made by the SDA throughout this Submission.

RECOMMENDATION	PARA NO.
The SDA urges the Senate to amend the Fair Work Bill and to provide an unequivocal right for employees to be able to access arbitration where they have a dispute with their employer about a matter concerning the operation of the NES, an award or an enterprise agreement. The right to arbitration is so fundamental that it must be guaranteed in the Fair Work Bill.	53
There needs to be a provision within the low paid bargaining provisions which would allow applications to be made which identify an employer by trading name, rather than identifying them strictly by their legal name, and then allowing Fair Work Australia to assist in the process of determining the current legal identification of the employer to be named in the low paid authorisation.	60
In making a low paid workplace determination, Fair Work Australia should be required to consider whether or not the making of the determination will promote an improvement in the terms and conditions of employment of employees.	67
Introduce a new provision into the Fair Work Bill immediately after Clause 178 which will enable a bargaining representative to obtain a certificate from FWA so that the bargaining representative can prove to the employer that they are validly appointed without having to identify the employee who appointed the bargaining representative.	85
The Bill should, at the very least, provide that the process of agreement making should be able to be completed between an employer and a union in relation to a particular workplace.	89
The SDA is strongly opposed to the provisions of Clause 194(c), (e) and (f) and urges their removal from the Bill.	94
The Bill at Clause 228 should provide for the mandatory disclosure of information by the employer, including sensitive and confidential information, but then require that the recipients of such information are absolutely prohibited from publishing, disclosing or disseminating such information outside the bargaining process.	133

RECOMMENDATION	PARA NO.
The BOOT should not be applied as a one off static test at the time of the agreement being made, but should be an ongoing test which has to at least be met at regular intervals, such as at 1 July, which is the commencement date for any Fair Work Australia minimum wage increases.	141
There should be a provision within the BOOT to ensure that the test is applied to an employee on the basis of a reasonable period of employment, rather than at the fixed point of time being the test time.	145
For the purposes of the application of the BOOT, the test should be against the modern award as it will be at the end of the transition, rather than the BOOT being applied to the modern award as at the date of transition.	147
An applicant seeking approval of an agreement which clearly fails the BOOT, should be required to positively establish that approval is in the public interest.	150
Where an agreement is approved under the provisions of Clause 189 on the basis that it needs to be approved on public interest grounds to deal with either a short term crisis in the business, or to assist in a revival of the business, then if the nominal expiry date is going to be limited to two years, the Bill should have a corresponding provision in the termination provisions of the Bill which determines that, on reaching the nominal expiry date, the agreement is actually terminated.	153
it would be a preferable if the Bill permitted public interest approved agreements to be varied, but under certain specific circumstances. The two critical issues for a variation of a public interest approved agreement would be where the variation resulted in the agreement passing the BOOT, or alternatively, where the variation to the public interest approved agreement led to a result where the varied agreement did not pass the BOOT, then the variation itself would also have to be subject to the same Public Interest Test as set out in Section 189.	155,156
The Bill itself should have a clear unambiguous requirement on employers that, at all times they must have available in their workplaces, a copy of the agreement as approved, including any undertakings given to Fair Work Australia.	162

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The Bill itself should contain a specific provision mandating the display of the award in each workplace.	164
An application under Clause 225 by any party to an agreement, should trigger an automatic involvement of Fair Work Australia in a process of encouraging and assisting the parties to explore a new enterprise agreement.	167
The SDA would urge the Senate to specifically amend both clause 139 and clause 157 of the Bill so as to permit a modern award to include a term which is required in the public interest to deal with special provisions or special circumstances associated with the industry and which are for the benefit and protection of employees.	180
The SDA would urge that at the very least the definition of Enterprise Award in S.576U of the Act be amended so that an award can only be considered to be an Enterprise Award, where the package of terms and conditions of the award equals or exceeds the package of terms set by the Modern Award for the relevant industry.	194
The Fair Work Bill needs to be amended to specifically permit a modern award to supplement each matter in the NES. This amendment needs to operate prior to the commencement of the modern award system so as to permit the AIRC to revisit the modern awards made under the award modernisation process which commenced March 2008.	202
The list of specific factors for determining whether additional hours are unreasonable is too few. The SDA recommends that some additional specific factors to be included in Clause 62(3).	206
Piece workers should have the same protection in relation to hours of work as apply to non-piece workers.	207
This Family Provisions Test Case provided fair parameters as a basis for refusal. These should be used as a guide to employers and as a basis for review of any decision to refuse a request. The SDA strongly supports the addition of this provision into the NES.	220
The NES expresses the entitlement as 4 weeks leave. This should be stated as 152 hours and 190 hours in the case of shift workers.	224

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Clause 88 needs to provide specific authorisation for Fair Work Australia to arbitrate any dispute over taking annual leave.	227
A simple amendment to Clause 90 would provide for the payment of Annual Leave Loading on the same basis as originally set by the AIRC.	230
The SDA believes that the entitlement for personal/carers leave should be expressed as 76 hours and not 10 days	231
Clause 101 should contain an additional provision permitting modern awards or enterprise agreements to set an accrual entitlement more beneficial than that provided in Clause 96.	233
An employee on personal leave should receive their full rate of pay as defined in Clause 18.	234
Add a Note to Clause 107(3) which identifies that a certificate from a registered health practitioner or a Statutory Declaration are forms of evidence which would satisfy a reasonable person.	239
A new Clause needs to be added to Division 8 to permit modern awards or enterprise agreements to deal with providing reasonable rest periods (non work periods) after periods of community service leave.	242
The SDA would urge the Senate to consider adding Blood Donor Leave to the Community Service Leave NES.	245
The SDA would urge that the Fair Work Bill be amended to permit Modern Awards to contain more advantageous Community Service Leave provisions that are set out in the NES	249
The Fair Work Bill should provide a specific provision within Division 8 permitting a modern award or enterprise agreement to provide for payment for periods of community service leave.	251
Unpaid Parental Leave should be available to women after 6 months of service or more. The SDA suggests that such leave could be set as 6 months.	254

RECOMMENDATION	PARA NO.
The language of Clause 79(1) does not allow an employer to refuse leave, so the example is misleading.	256
Genuine rights of review need to be provided to employees in circumstances where an employer refuses an employees request for additional unpaid parental leave.	259
Amend Clause 78 to provide that where the employee advises the employer of her changed circumstances, and also advises the date when she wishes to return to work. The employer then must advise the employee of when she can resume work. This date must be within 4 weeks of the day the employee gave notice.	261
In all NES provisions dealing with requests from employees for flexible working arrangements, "reasonable business grounds" should be defined within the Bill as those listed in the AIRC Family Provisions Test Case.	265
Fair Work Australia must have the capacity to arbitrate any intractable dispute about requests for flexible working arrangements and additional Parental Leave.	267
Modern awards should be specifically permitted to deal with issues such as return to work part-time or replacement employees.	268
The SDA urges that the Fair Work Bill be amended to specifically provide that Modern Awards may provide Public Holiday entitlements which are additional to the NES.	270
The SDA expresses the very strong view that as a matter of fundamental work rights, there should be no limits or restrictions placed upon the ability of any worker to have an independent third party tribunal such as FWA determine whether termination of the employee's employment was harsh, unjust or unreasonable.	274
The SDA is of the very strong view that the small business employer definition should be based upon a simple number of employees employed by an employer, with no distinction being drawn between casual, part-time, full-time or piece workers. All employees, no matter what status, should be included in the count of 15.	281
In Clause 387 there should be a requirement that in any case where the dismissal is related to unsatisfactory performance by an employee, that Fair Work Australia must	285

RECOMMENDATION	PARA NO.
consider the treatment of other workers by the same employer in relation to performance issues.	
The SDA would urge that Clause 391 be amended so as to deal with situations where there has been a change in employing entities. If the new employing entity is an associated entity with the employer at the time of the dismissal, then Fair Work Australia must have the capacity to order the new employing entity to be the employer who reinstates the person unfairly dismissed.	292
The SDA strongly opposes the provision of Clause 392(4) and would strenuously urge that it be removed from the Fair Work Bill.	293
The Fair Work Bill should permit Fair Work Australia to award such compensation but only in circumstances where the distress, humiliation, shock or other analogous hurt suffered by the employee who has been dismissed, is to a significant degree beyond that associated or experienced by a reasonable person in the same situation.	295
The SDA would urge that a far more realistic time frame be given for the making of an application under Clause 394. A period of 21 days would genuinely allow employees to consider the issues surrounding the termination of employment with their employer, prior to deciding whether or not an unfair dismissal application would be made.	303
There is no logical reason why the Bill should outlaw an employer paying any form of payment during any period of industrial action. In particular, the provisions of Clause 474 which mandate a minimum four hour withholding of pay for any form of unprotected industrial action is simply not warranted and is totally counter-productive to maintaining industrial harmony and peace in a workplace.	319
Employers should have a discretion as to whether or not they make payments in relation to any period of industrial action, whether it be a full strike or a work ban.	320
The Fair Work Bill should provide that every agreement made before Fair Work can continue to operate beyond the 31/12/09 and for its nominal period if and only if the agreement passes the NDT established by Fair Work Bill which applies as from 1/1/10.	356

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Minimum Wage Panel Members should not be permitted to sit on Full Benches constituted under Clause 618 of the Fair Work Bill.	395
The coverage of the Fair Work Bill should be extended by use of a full range of Constitutional powers, including external affairs and referral from States.	403
Each of the types of conduct that employees can take and which constitute industrial action have corresponding conduct by an employer which should be treated as industrial action.	414

REMOVING EMPLOYEES' RIGHTS TO ACCESS ARBITRATION

10. In many respects the Fair Work Bill is a positive move forward in improving the industrial relations climate in Australia. However, there is a serious and major defect in the Bill.

11. For the very first time in Australia's history, workers are being denied the right to access arbitration by a third party in matters where there is a dispute between the employee and the employer.

12. The Fair Work Bill requires that both modern awards and enterprise agreements must contain clauses that provide dispute settlement processes. This appears to reflect the existing approach that a dispute resolution process is both a necessary part of the management of industrial relations issues at the workplace and that such clause will actually achieve a resolution of the dispute. The requirement to have such clauses also appears to reflect the existing approach that a proper dispute resolution process allows one party to the dispute to initiate the processes of mediation, conciliation and/or arbitration of the dispute. However, such is not the case in reality.

13. The Fair Work Bill makes very clear that Fair Work Australia does not have the power to exercise arbitration in relation to a dispute before it unless arbitration is either specifically provided for in a provision of the Act, or unless both parties to a dispute permit Fair Work Australia to arbitrate a dispute.

14. The long standing feature of the Australian industrial relations landscape whereby an employee with an intractable dispute with their employer was able to initiate the process of having the dispute referred to the Australian Industrial Relations Commission for arbitration has been removed. Making the exercise of arbitral powers conditional upon agreement by both parties to a dispute, is a sure guarantee that employers will never agree to arbitration.

15. An employer always has the capacity to change workplace terms and conditions of employment and can do so knowing that where a dispute arises in relation to the actions of the employer, that the employee has no capacity whatsoever to force the dispute before Fair Work Australia for arbitration. Even where a dispute can be referred to Fair Work Australia for mediation

and conciliation, there is no incentive on an employer to participate in a meaningful way in any mediation or conciliation where the employer knows full well that Fair Work Australia can never arbitrate the dispute unless the employer agrees.

16. Employers simply have to withhold permission from Fair Work Australia arbitrating a dispute to ensure that all matters are resolved in favour of the employer.

17. The removal of the right for workers to initiate access to arbitration is a seriously retrograde step and will cause significant and long term disadvantage to employees.

18. The removal of the right of an employee to initiate access to arbitration is a significant shift in the power balance in favour of employers.

19. Most of the benefits otherwise provided for in the Fair Work Bill are rendered valueless if employees cannot initiate arbitration proceedings when they have a dispute with their employer.

20. The inability of workers to access arbitration as of right, has a serious impact on a number of workplace relations issued covered by the Fair Work Bill.

21. The approach adopted by the Fair Work Bill to provide for 10 NES as the absolute minimum statutory standards, but to do so by only expressing the core principle around each entitlement. The lack of procedural detail about how the NES will work in the case of any particular workplace is left up to the parties at the workplace. The Fair Work Bill also places constraints on the ability of Modern Awards to deal with some of the practical difficulties that arise in the implementation of the NES.

22. The inevitable outcome of this approach is that there will be disputes about the practical implementation of the employee rights guaranteed by the NES.

23. Employees need the right to access arbitration over any dispute about their entitlement to a right provided by the NES.

24. Employees don't need to access a Court to enforce a right under an NES.

25. Employees need to be able to access arbitration over the practical implementation of an NES right.

26. The issue arising in the workplace will not be a question about the entitlement to a right under the NES.

27. The issue that will face most employers and their employees is how the NES rights will be practically implemented in the workplace.

28. These are disputes about process with the employer arguing for their preferred method of implementation and the employee arguing for their preferred method. Access as of right to arbitration of these workplace disputes is essential.

29. The clearest example of the need for such arbitration rights is in relation to work on Public Holidays.

30. An employer who requests an employee to work on a public holiday will always insist that their request is reasonable and the employee's refusal of the request is unreasonable. Equally the employee will always insist that the employer's request was unreasonable and that their refusal was reasonable.

31. Either the employer of the employee need to be able to access arbitration as of right to have these disputes settled.

32. Arbitration does nothing to alter the NES or affect the NES in any way.

33. Arbitration simply deals with the practical application of the NES.

34. Arbitration as of right is a necessary tool to make the NES work effectively.

35. In the absence of a right to access arbitration, neither the employer nor the employee need make any concession on their position. In the absence of arbitration of the dispute, the matter may end up in Court on the basis of the employer withholding payment for the public holiday on the basis of the

employee's unreasonable refusal to work on the public holiday and the employee then using the Court to recover the lost wages. Recourse to a Court to resolve such a dispute is a costly process for both the employer and the employee and wastes the time of the Court and of the Workplace Ombudsman in circumstances where the dispute could have been resolved easily and quickly if either side had a right to access arbitration before the FWA.

36. Where Modern Awards and Enterprise Agreements provide basic provisions on the terms and conditions of employment, the practical application of the Modern Award or Enterprise Agreement is a matter which relies upon the actions of both an employer and employees. Modern Awards and Enterprise Agreements are not intended to micro manage a workplace. Rather, the Modern Award or Enterprise Agreement sets the parameters for the legal minimum safety net of terms and conditions of employment.

37. A Modern Award or Enterprise Agreement in the Retail Industry will contain basic provisions about the rostering of work. Employers have a degree of flexibility about how they implement the rostering arrangements in Retail.

38. A standard rostering clause in a Modern Award or Enterprise Agreement sets the minimum required notice that an employer must give to initiate a roster change and some clauses will contain specific constraints on patterns of work to provide essential protections for employees. Outside these constraints the actual roster worked is determined by the employer.

39. The most common dispute in retail is over rosters.

40. Roster changes can be made:

- in circumstances where the employee insists that a verbal agreement exists with the employer that a particular roster will not be imposed on the employee.

- requiring an employee to work hours which the employer knows are difficult or impossible for the employee to work because of personal commitments or because of extraneous matters such as transport issues.

- to reduce hours of work in what is an apparent attempt to discipline a worker.

- so that the more work can be given to a favoured employee (relative or friend) at the expense of other workers.

41. In all of these examples the affected employee will dispute the roster change and will want to have access to an Independent Umpire to determine the issues in dispute.

42. In each case the employer will insist on their rights under the Modern Award or Enterprise Agreement to do whatever they want and will resist any attempt to require them to either explain their decision or review the roster change.

43. In every case employers will only agree to effective conciliation on the dispute if they know they can be subject to arbitration.

44. In every case it is only where the employee has an absolute right to access arbitration that the dispute will be resolved.

45. The resolution of these roster disputes never involves an amendment to the Modern Award or Enterprise Agreement.

46. Arbitration of these disputes is all about ensuring that the discretionary powers of the employer to set rosters is exercised with a degree of fairness towards employees, whilst still permitting the employer to manage their business effectively.

47. Last resort arbitration in an enterprise bargaining context is one of the most effective means of resolving deadlocks between negotiating parties.

48. Last resort arbitration that can be initiated by either side in the bargaining for an enterprise agreement is a form of arbitration that is seldom used. The real effectiveness of last resort arbitration is that it focuses the minds of the negotiating parties on the key issues of difference between them and provides the strongest encouragement to them to resolve the issues through negotiation rather than risk losing out in an imposed arbitrated settlement. However last resort arbitration is an effective tool when it is used.

49. In industrial relations “bottom line” positions are often adopted by parties which are unrealistic and which have been set in place for ideological or emotive reasons.

50. This can include CEO’s or Boards of Directors setting limits on wage increases because of the “need to be tough with the unions”, or elected Union officials making demands because “a mass meeting of members demand it”.

51. Often the negotiators for both sides, the HR Director and the Union Industrial Officer, know that only through imposed arbitration will their principals accept a moderation of their respective hard line positions, and that last resort arbitration permits their principals to save face.

52. The SDA strongly condemns the approach adopted in the Fair Work Bill in making access to arbitration conditional upon agreement by both parties.

53. The SDA urges the Senate to amend the Fair Work Bill and to provide an unequivocal right for employees to be able to access arbitration where they have a dispute with their employer about a matter concerning the operation of the NES, and award or an enterprise agreement. The right to arbitration is so fundamental that it must be guaranteed in the Fair Work Bill.

AGREEMENT MAKING

54. The SDA welcomes the return to fair enterprise bargaining now restored by the Labor Government under the Fair Work Bill.

55. The reintroduction of a Good Faith Bargaining process redresses the serious imbalances which existed under the Howard Governments industrial relations legislation which loaded the rules in favour of employers at the considerable expense and detriment of workers.

56. The SDA also welcomes the introduction of a specific process which will enable the low paid workers in the retail and fast food sectors to gain access to the benefits of enterprise bargaining. The low paid are always those with the least bargaining power and with the least capacity to engage in enterprise bargaining.

57. The SDA strongly supports the introduction of the Single Interest Employer authorisations as this will overcome many of the practical difficulties faced by the SDA and the groups of employers who want an enterprise agreement with the SDA.

58. Each of the 3 above core concepts in the Fair Work Bill will assist in genuine enterprise agreement making and will lead to better outcomes for both workers and employers.

LOW PAID BARGAINING – A MAJOR STEP FORWARD

59. One of the new and improved aspects of Fair Work Bill is the concept of low paid bargaining provided for Division 9 of Part 2 – 4 in Chapter 2 of the Bill. The low paid bargaining stream will significantly improve the capacity of low paid employees to access collective bargaining in circumstances where the legislation to date has not assisted them. However, notwithstanding the extreme benefits which will flow from accessing the low paid bargaining stream, there are difficulties with the structure of the Bill. In particular, Clause 242(2) requires that any low paid authorisation must specify the employers that will be covered by the agreement. In a strict legal sense, this would require that an employer be specified with sufficient particularity that the employer, in other words, the actual entity engaged in employing labour is specified in the low paid authorisation.

60. Given that the areas in which low paid authorisations are most likely to be sought are those areas where it may be difficult to identify with certainty the exact entity which is the legal employer, then compliance with Clause 242(2) may be very difficult. For example, in the retail area low paid authorisations could be sought in relation to, a group of employers collectively engaged in the provision of fast food services in a food court of a major shopping centre. Such food courts commonly have 20 or 30 separate establishments. Whilst each establishment may able to be identified by its trading name, identifying the exact identity of each employer could be extremely difficult. There needs to be a provision within the low paid bargaining provisions which would allow applications to be made which identify an employer by trading name, rather than identifying them strictly by their legal name, and then allowing Fair Work Australia to assist in the process of determining the current legal identification of the employer to be named in the low paid authorisation.

61. Given the purpose of low paid authorisations is to assist low paid employees access the bargaining stream, it would be ironic if access to the stream can be thwarted by employers or employer organisations raising arguments about the mis-naming of an employer. Given past conduct by employers and law firms to prevent and frustrate industrial action requests by challenging the identification of an employer, it should be expected that employers seeking to

frustrate access to low paid bargaining stream would use challenges based upon the incorrect identification of an employer.

62. The approach to low paid bargaining must take into account that the initial identification of employers in the industries most likely to use low paid bargaining stream will be on the basis of a trading name, or a generic descriptor of the employer rather than exact identification of the legal entity which is the employer.

63. The role of Fair Work Australia should be to assist in the clarification of these issues rather than to frustrate access to the low paid stream.

64. A further weakness with the approach of the Bill to low paid bargaining is in Clause 262(4), which requires that the Commission has to be satisfied of two particular issues before it can make a low paid workplace determination.

65. The two issues are:

Firstly, that making the determination will promote bargaining in the future between the parties; and

Secondly, that the making of a determination will promote productivity and efficiency in the enterprises.

66. The very rationale for a low paid workplace determination and the low paid bargaining stream is to enable employees, who are on minimum conditions of employment set by the NES or an award, to gain benefits through bargaining. In other words, the low paid bargaining stream is not intended to merely have the employees sit still, but rather to enable them to use the bargaining process to advance their terms and conditions of employment. Therefore requiring the FWA to be satisfied only about future agreement making or, promoting productivity and efficiency in the enterprise leads to the obvious conclusion that low paid bargaining has nothing to do with workers advancing or improving their terms and conditions of employment.

67. In making a low paid workplace determination, Fair Work Australia should be required to consider whether or not the making of the determination will promote an improvement in the terms and conditions of employment of

employees. As any agreement has to meet the BOOT test then there must be something about the agreement which makes employees better off, rather than either standing still or going backwards. The fact that this is not a consideration, that Fair Work Australia must take into account, appears to miss the point of having the low paid bargaining stream.

68. The conclusion to be drawn from the approach adopted in Clause 262(4) is that low paid workplace determinations will only issue if the effect of them is to assist the employer through increasing productivity and efficiency.

69. Whilst productivity and efficiency are important factors to be considered in enterprise bargaining they should not be the predominant factors of whether or not a low paid workplace determination will be made.

70. A key factor that should be taken into account in the making of a low paid workplace determination is that the low paid employees will be Better Off Overall under an enterprise agreement than they would be continuing on under the modern award and NES.

SINGLE INTEREST EMPLOYER ENTERPRISE BARGAINING

71. The SDA welcomes the introduction into the Fair Work Bill of the concept of Single Interest Employer authorisations.

72. The SDA has for many years negotiated enterprise agreements on the basis of single interest employer groups. However, to do so under the provisions of the Workplace Relations Act was quite difficult and also uncertain. The enterprise bargaining approach introduced into the Workplace Relations Act by the Howard Government, was predicated upon workplace agreements being made for an individual business or enterprise. The Workplace Relations Act defined a single business as including two or more employers who are carrying on a business as a common enterprise. The difficulty with this approach was establishing what was meant by 'common enterprise'.

73. Where two or more employers were carrying on separate businesses, then the Workplace Relations Act required those employers to seek approval to make a multiple employer agreement. During the period of operation of the Workplace Relations Act, differing opinions were given by the Australian Industrial Relations Commission and the Office of the Employment Advocate, as to what constituted a common enterprise carried on by two or more employers, and what constituted the requirement for a multiple employer agreement.

74. This led to the SDA having some agreements which were made with large numbers of fast food franchisees and franchisors, being treated as single business agreements and other, in the same industry, being required to be dealt with as multiple employer agreements.

75. Furthermore, the making of a multiple employer agreement was subject to satisfying the Australian Industrial Relations Commission or the Workplace Authority that it was in the public interest to have a multiple employer agreement. The tests imposed by the Commission or the Workplace Authority appeared to be different and while some multiple employer agreements were allowed to proceed, others were refused.

76. The welcome aspect of the Single Interest Employer authorisation process introduced by the Fair Work Bill, is that it makes it very clear that groups of employers who trade as a franchise group will satisfy the requirement of gaining a Single Interest Employer authorisation from Fair Work Australia. With this authorisation in hand, a fast food franchise system will be entitled to negotiate and make a single enterprise agreement covering the whole of the franchise system.

77. This is a significant improvement over the existing legislative regime. It adds greater certainty to agreement making and the fast food industry, and in such areas of the retail industry as hardware, amongst small hardware employers and in the independent supermarket sector of retail.

78. These are all of the areas where employers act as groups and where they need to have capacity to very quickly and simply embark upon enterprise agreement making as a collective group of employers.

79. A critical change, and a welcome one, introduced by the Single Interest Employer authorisation process, is that the multiple employer agreements made in relation to franchise systems, are treated as being equally appropriate and valid as individual single employer agreements. No longer is there a requirement for a franchise group to establish that it is positively in the public interest for them to be entitled to bargain as a group for a single enterprise agreement covering the franchise system.

80. Providing this as of right to employers will significantly improve bargaining processes and encourage far more franchise groups to utilise the process of single interest employer authorisations

APPOINTMENT OF BARGAINING AGENTS

81. Clause 178 of the Bill requires that when an employee appoints their bargaining representative, the appointment only comes into effect if a copy of the instrument of appointment is given to the employer. The difficulty with this provision is that it leads to the identification of an individual employee as the person who has appointed a bargaining representative.

82. Whilst the Bill is predicated upon the principle that there should be no victimisation, coercion or injury to an employee who appoints a bargaining representative, the reality is that in workplaces which are very lightly unionised, a single employee who is a union member and who appoints the union as the bargaining representative, may find themselves on the receiving end of unwarranted attention from the employer. It is relatively easy for an employer to engage in conduct which is significantly less than coercion or duress so as to achieve a result of having an employee withdraw the appointment of the bargaining representative. The vulnerability of workers in this particular circumstance, has been long recognised.

83. In the 1996 Workplace Relations Act, a specific amendment was made in 2002 to insert Section 170LKA which permitted the bargaining representative to go to the Commission and obtain a certificate which established that the bargaining representative had been validly appointed. The certificate was then given to the employer. The certificate never identified the individual employee who had appointed the bargaining representative. Work Choices moved the process of giving certificates to the Workplace Authority under S.335 of the current Act.

84. This process gave significant confidence to employees that they could engage in a bargaining process through a bargaining representative without being identified or ultimately without being picked on by their employer.

85. In the current scheme of the Bill, it would be appropriate for a provision similar to current Section 335(6), (7) and (8) which is set out here to be inserted immediately after Clause 178 of the Bill.

"335(6) The Workplace Authority Director may issue a certificate that he or she is satisfied of one of the following matters if he or she is so satisfied:

(a) on application by a bargaining agent--that the employee has made a request in accordance with subsection (1) or (2) for the bargaining agent to represent the employee in meeting and conferring with the employer;

(b) on application by the employer--that, after the making of the request, the requirement in subsection (3) for the employer to give a reasonable opportunity to the bargaining agent to meet and confer, has, because of subsection (5), ceased to apply to the employer.

(7) The certificate must not identify any of the employees concerned. However, it must identify the bargaining agent, the employer and the agreement.

(8) The certificate is, for all purposes of this Act, prima facie evidence that the employee or employees made the request or that the requirement has ceased to apply."

THE PARTIES TO AN ENTERPRISE AGREEMENT

86. A significant change made by the Bill is that unions will have an extremely limited role in any aspect of the making of collective agreements.

87. Under the Bill the only agreement that can be made with a union is when a union has no members. Under the Bill, an employer can make a union agreement only where it is a greenfields agreement and thus the union has no members in a workplace. Whenever a union does have members in a workplace, it cannot make an agreement with the employer and equally the employer cannot make an agreement with the union.

88. The structure of the Bill is such that even where all workers in the workplace are members of the union, the employer and the union are not entitled to make an agreement between themselves. Under the Bill, a union is entitled to be a representative of workers for the purposes of bargaining but any agreement can only be made between the employer and the employees.

89. The Bill should, at the very least, provide that the process of agreement making should be able to be completed between an employer and a union in relation to a particular workplace. A practice that has been permitted to date under the Workplace Relations Act. There can be no justification for preventing unions from being the entity which directly makes a collective agreement with an employer.

90. This is not to confuse the issue of approval of collective agreements by employees.

91. The SDA strongly supports the provisions of the Bill and previous legislation which required any agreement made between an employer and a union to be approved by the employees to whom it would apply. Having said this, it is important at all times to distinguish between the agreement making process, i.e. the bargaining parties determining the terms and conditions to be placed in a collective agreement and the approval of that agreement by employees.

92. Permitting employers to make enterprise agreements with unions does not require introducing twp separate agreement making streams as occurred

under the Workplace Relations Act. It is desirable to have a single agreement making process and the SDA supports the Government's attempt to achieve this. However the simple addition of permitting the employer to make an agreement with a union does not detract from the single agreement making process.

93. The Bill specifically recognises in Clause 183 that unions can be covered by an enterprise agreement. It is a simple step to also provide that employers can make agreements with a union.

UNLAWFUL CONTENT IN ENTERPRISE AGREEMENTS

94. The SDA is strongly opposed to the provisions of Clause 194(c), (e) and (f) and urges their removal from the Bill.

95. The Labor Government appears to be continuing a modified approach of the Howard Government, which is to micro-manage the agreement making between employers and employees.

96. In particular, Clauses 194(c), (e), (f) are an example of micro-management of the relationship between an employer and their employees. There is no compelling reason why an employer and employees cannot make an agreement that deals with the issues of termination of employment remedies, the taking of industrial action by employees, or right of entry into the employer's workplace by any person.

97. The provisions of Clause 194, which have an apparent justification, are paragraph (a), relating to discriminatory terms of agreements, paragraph (b) relating to objectionable terms, paragraph (d) in relation to reducing employee entitlements to unfair dismissal provisions of the Act, and paragraph (g) relating to the application of State and Territory Occupational Health and Safety laws.

98. There appears to be no policy reason why an employer should be prevented from having an enterprise agreement which deals with right of entry, industrial action or entitlements on termination.

99. The unfair termination provisions of the Bill are to provide an absolute minimum safety net for employees to prevent an employee from being unfairly dismissed. The compensation available for an unfair dismissal under the provisions of the Bill is capped at six months, and in addition, there is an absolute bar in the Bill on any compensation for distress or humiliating conduct by the employer.

100. An employer who wishes to provide better compensation entitlements to employees or, to provide a process for review of terminations decisions which an employee may consider to be unfair, where the employee does not have a

right under the Bill to access Fair Work Australia, should not be prohibited from dealing with those matters in an enterprise agreement.

101. Good industrial relations would suggest that these are the very types of issues surrounding unfair termination matters that an employer would want to have contained in an enterprise agreement. Allowing casual employees who may not have the statutory right of review of the termination decision access to a dispute resolution process in an agreement, was certainly a feature of certified agreements made by the SDA in the retail industry prior to those provisions being removed by the Howard Government.

102. They operated effectively to ensure that in areas where there are high numbers of casual employees, a casual employee who had a specific grievance about termination of employment, could at least use the dispute resolution procedures of the agreement as an effective remedy for review of a termination decision. Whilst these provisions existed in Agreements they were rarely used. The mere presence of such provisions was sufficient. Employees knew that their employer could have any termination of employment decision disputed and reviewed and thus when employees were terminated there was generally an acceptance that the termination would most likely be fair because the employer would act fairly in order to ensure that the termination decision was capable of being overturned on review.

103. Clause 194 paragraph (c) would stop casual employees or probationary employees from accessing any review mechanism which would be able to be provided by an enterprise agreement. The rigidity imposed upon agreement making in relation to this particular issue is both undesirable and unfair.

104. Clause 194(e) prevents an enterprise agreement having any term which is inconsistent with the industrial action provisions of the Bill. This means that an employer could never have an agreement with an employee that permits the employer to pay an employee who is engaged in any form of industrial action. Part 3-3 of the Bill makes it an absolute bar for an employer to pay an employee who is engaged in any form of protected industrial action, and also requires an employer to withhold a minimum of four hours' pay from an employee who engages in any form of unprotected industrial action.

105. There are good and cogent industrial relations reasons why an employer may want to have the capacity in some circumstances, to offer payment to an employee or groups of employees, who have engaged in either protected industrial action or in unprotected industrial action. The fact that Clause 194 absolutely prohibits such terms and conditions from being placed in an enterprise agreement denies an employer a practical tool for both managing the taking of and reducing the incidence of both protected or unprotected industrial action in a way which causes least disruption to the workplace.

106. Where an enterprise agreement contains provisions which allows for some payments, retrospectively even, for employees who have engaged in limited forms of protected or unprotected industrial action, this can have the benefit of encouraging employees not to step beyond the limits of the enterprise agreement when planning any form of industrial action. This can mean that employees who may see that enterprise agreements can provide them with some or all of the payment for a period of taking protected industrial action, but only where they comply strictly with the provisions of an enterprise agreement, will then not seek to take industrial action which will be unpaid.

107. The reality is that the provisions of Part 3.3 so micro-manage the taking of industrial action, both protected and unprotected, that they have the effect of often driving employees to take as much industrial action as is permitted, given that there is no incentive on the employees to limit the taking of industrial action. If all protected industrial action is to be done without pay, then employees will simply construct the industrial action to suit their own ends.

108. Equally, if the taking of any form of unprotected industrial action is to lead to a minimum of four hours deduction of pay, then employees have no incentive to ever limit the amount of unprotected industrial action. Enterprise agreements, which are able to contain provisions relating to the management, including the payment of protected and unprotected industrial action, can provide a significant benefit to employers as well as limiting the industrial action taken by employees.

109. Clause 194(f) continues the approach of the Howard Government in preventing any enterprise agreement from dealing with right of entry

provisions. Under the previous Howard Government legislation, clauses were taken out of agreement on the basis that they breached the right of entry provisions of the Act, even where the purpose of the clause was simply to allow a union official to enter the premises for the purposes of attending consultation meetings, provided for under an enterprise agreement.

110. The difficulty with s.194(f) is that it treats the employer as being incapable of protecting their own best interests when it comes to their relationship with union officials that they deal with. There are strong and cogent reasons why enterprise agreements should be permitted to deal with the issue of entry of union officials onto an employer's premises, either for the purposes of investigating suspected contraventions of the agreement, the award, the NES or other laws, or for the purposes of holding discussions with employees.

111. Not all employers have anti-union attitudes. Many employers want good and positive relationships with the union that represents employees in their workplace. Positive relationships with a union can pay significant dividends to an employer. Enterprise agreements which deal with the entry of union officials onto an employer's premises often provide significantly better relations between the union and the employer than any reliance upon the provisions of the Act.

112. An employer can use an enterprise agreement to establish protocols for a union visit which go beyond the controls set by the legislation and at the same time giving union officials access to a workplace without the need to exercise a statutory right of entry.

113. The SDA has, for many years prior to the Howard Government removing such provisions from enterprise agreements, had agreements which contained right of entry clauses. In many respects, the clause was not a right of entry but rather a mechanism establishing protocols for union visits to workplaces in a way where the protocols clearly suited the business requirements of the employer whilst at the same time allowing SDA officials to enter workplaces.

114. Access to the workplace by an SDA union official, was guaranteed under enterprise agreements entered into between the SDA and major employers

but subject to very clear protocols concerning the behaviour of the union official.

115. These clauses worked to the benefit of the employer in that workers were able to gain easy access to a union official, but only in circumstances which did not disrupt the business of the employer. The protocols ensured good and solid communication between the union and the employer over any conduct by any individual union official which was considered by the employer to be unacceptable or in breach of the agreed protocols. This allowed for the monitoring of union visits by both the employer and the union, and ensured that at all times the relationship between the union and the employer was maintained at the highest levels and in the most positive form.

116. The prevention of enterprise agreements dealing with this issue takes an important tool away from both the union and the employer in the development and maintenance of a good industrial relations environment in any particular workplace.

117. Clause 194 (f) would even have the effect, in the retail industry, of preventing an enterprise agreement containing a provision that permitted the SDA to attend induction meetings for new staff. At the present time, most major employers have arrangements with the SDA which allows the SDA to attend the induction meetings of new staff. This permits a process which is controlled and managed whereby the Union is able to acquaint employees with their rights to join or not to join a union, and to give them information about the SDA.

118. The Howard Government prevented such clauses from being contained in enterprise agreements, and it appears that the Labor Government is maintaining this unfair micro-management of agreement making.

119. The fact that such arrangements will exist and continue to exists shows that employers want arrangements in place which regulate their relationship with unions.

120. Clause 194 simply prevents such arrangements being reflected in enterprise agreements. Such terms may be unlawful terms for the purposes of an

agreement, but there are not unlawful per se and employers are quite clearly capable at law of making arrangements, or agreements, or contracts with the union that deal with the issues prohibited by Clause 194(c), (e) and (f), but requires them to do so outside of the framework of an enterprise agreement. This is not sensible industrial relations management. It has the effect simply of hiding from the public view the full range of matters dealt with in enterprise bargaining negotiations. It is a short-sighted approach which was adopted by the Howard Government and it appears to be continued by the Labor Government.

GOOD FAITH BARGAINING

121. The Bill provides a reasonably comprehensive process to ensure fair bargaining, however, there is one critical defect in this process. The Bill, at Clause 228, requires an employer to disclose information which is relevant to the bargaining process. However, the Bill at Clause 228(1)(b) specifically exempts the employer from providing to the union, or other work representatives, any information which is confidential or commercially sensitive.

122. The difficulty with this exemption is that it is easy for an employer to assert that any relevant information is confidential or commercially sensitive.

123. How much effort will employers, who are faced with the requirement to fairly bargain with workers and unions, give to hiding information from the unions and workers? the exemption permitted by the Fair Work Bill will be exploited by employers. The exemption will operate to effectively negate the fair bargaining process.

124. Whilst the SDA acknowledges that employers have genuine and real concerns about the security of information which may affect their commercial operations, the answer to such concerns is not to permit the employer to simply hide the information, but rather, to address the issue of the disclosure.

125. The existing legislation and the Act in its previous incarnations, has always contained provisions which allowed the Commission to declare information produced in proceedings before courts or the Commission to be sensitive or protected information which could not be disclosed to any other person. Where disclosure occurred in breach of the orders of a court or Commission, then an offence occurred and was able to be dealt with.

126. Currently the Act provides in Section 839 that trade secrets or other like information can be declared to be subject of an order preventing its disclosure by a person who has received the information in the course of a court or Commission proceeding. A breach of an order under Section 839 is a specific offence with a penalty of twenty penalty units able to be applied against a person who breaches that Section.

127. The Bill already contains some provisions which directly address the issue of improper disclosure of certain information received by the union official. Clause 594 is similar to the existing S.839 and Clause 504 of the Bill creates an offence if a union official discloses employee records gained through a right of entry visit.

128. A similar approach should be incorporated into the fair bargaining provisions. Such an approach would ensure that an employer could not hide relevant information from unions or workers merely by attaching the label commercial in confidence to such information. However, where an employer did disclose information which was genuinely confidential or commercially sensitive to the unions or workers in the process of fair bargaining, the union or workers would be prohibited from further disclosing that information.

129. The prohibition on the disclosure or dissemination of such information by a union official or any person engaged in the bargaining process, is the most effective way of ensuring confidentiality of such information whilst at the same time guaranteeing that workers are not disadvantaged in the bargaining process with their employer.

130. The Senate should also be specifically mindful of the approach adopted by the International Labour Organisation in relation to collective bargaining. The ILO, in Recommendation 163, the Collective Bargaining Recommendation, specifically deals with the issue of the disclosure of information by an employer to worker organisations in the process of the bargaining process.

131. In Section 2 of ILO Recommendation 163 titled "Means of Promoting Collective Bargaining", Article 7 states:

> *"(1) Measures adapted to national conditions should be taken, if necessary, so that the parties have access to the information required for meaningful negotiations.*
>
> *(2) For this purpose;*
>
> *(a) Public and private employees should, at the request of workers' organisations, make available such information on the economic and social situation of the negotiating unit and the*

undertaking as a whole, as is necessary for meaningful negotiations; where the disclosure of some of this information could be prejudicial to the undertaking, its communication may be made conditional upon a commitment that it would be regarded as confidential to the extent required; the information to be made available may be agreed upon between the parties to collective bargaining;"

132. It is clear from the approach adopted by Article 7 of Recommendation 163 that the issue of the disclosure of information is critical to effective bargaining. As the ILO Recommendation makes clear, the difficulty of dealing with sensitive and confidential information is not to exclude it from the bargaining process but rather to require it to be revealed and then to place conditions upon the recipient of the information preventing their further disclosure of the information.

133. The Bill should reflect the provisions of Article 7 of Recommendation 163 and provide for the mandatory disclosure of information by the employer, including sensitive and confidential information, but then require that the recipients of such information are absolutely prohibited from publishing, disclosing or disseminating such information outside the bargaining process.

134. Another feature of the structure of Clauses 228 and 229 of the Bill, is that where an employer refuses to disclose relevant information on the basis that the information is confidential or commercially sensitive information, such refusal does not permit a bargaining representative for the employees to seek a bargaining order under Clause 229.

135. In other words, merely classifying information as being confidential or commercially sensitive information seems to be an absolute bar to employees gaining access to that information, including through Fair Work Australia. Quite clearly, the approach proposed by the SDA in this submission, is preferable as it would ensure that a proper examination is undertaken by Fair Work Australia of information which is not being handed over to employee representatives.

136. Mere classification by the employer of information as confidential or commercially sensitive for the purposes of avoiding disclosure, would not be permitted but protection of genuinely confidential or commercially sensitive information would be guaranteed and protected. Unions receiving information which was confidential or commercially sensitive as part of the bargaining process should be required, under pain of a significant penalty, not to disclose that information.

BETTER OFF OVERALL TEST

137. The Bill provides at Clause 193 for a Better Off Overall Test, (BOOT), in relation to any enterprise agreement made under the Fair Work Bill. Much of the BOOT reflects the traditional approach to a no disadvantage test. Any differences between the BOOT and the previous NDT is quite marginal. However, there are a number of issues which arise in the application of past NDT's and which should be addressed in the creation of the new Fair Work Bill.

138. Clause 193(4) requires that the BOOT be applied at the test time which is defined in s.193(6) as being the time the application for approval of the agreement by Fair Work Australia was made. This ensures that the BOOT is a static test in that it is applied once, and only once, and only at the time the original agreement is made.

139. There are real issues surrounding the notion of a BOOT which is applied once, and once only. From experience, the SDA has noted that many agreements, especially non-union agreements, can be made which pass an NDT or will pass the BOOT, as at the date the agreement is made, but which, during the life of the agreement, fall below the relevant NDT or BOOT. This occurs simply because at the test time the agreement may contain a wage rate which reflects both the minimum wage rate required to be paid by an award, plus a component which buys out the current value of terms and conditions of employment.

140. Every agreement must at all times during its operation, meet the minimum wages set by Fair Work Australia. However there is no guarantee within the legislation that the component of the wage which reflects the buyout of loadings and penalties, is maintained at its proper relative value If the agreement does not contain specific provisions ensuring that the bought out component for loadings and penalties is regularly reviewed, then over the life of an agreement, the value of the wage would fall below the value set by the BOOT.

141. An effective BOOT should not be applied as a one off static test at the time of the agreement being made, but should be an ongoing test which has to be

met either constantly or at least be met at regular intervals. Given that the Bill is structuring annual wage movements around 1 July, then it would be appropriate for the BOOT to be applied at least yearly as at 1 July, which is the commencement date for any Fair Work Australia minimum wage increases.

142. This guarantees that an enterprise agreement has an effective value which always meets the BOOT, rather than meeting the BOOT once and then progressively falling below the BOOT over the life of the agreement.

143. Another specific difficulty with the current approach to NDT or BOOT, is that by applying a static test which is applied at one day only, this can lead to employees being disadvantaged, even where the enterprise agreement notionally passes the BOOT, because the BOOT is applied to that employee as at the date of the test. There is no provision within the Fair Work Bill to ensure that the full circumstances of the employee are taken into account for the BOOT.

144. An employee who works a pattern of work which may have periods of work on high penalties, and periods of work on low or no penalties, and who has the BOOT test applied at a time when no penalties are being occurred, may have an agreement which clearly passes the BOOT at that time but which would have failed the BOOT if the test had been applied when the employee worked penalty or loaded hours.

145. There should be a provision within the BOOT to ensure that the test is applied to an employee on the basis of a reasonable period of employment, rather than at the fixed point of time being the test time. Requiring a reasonable period of employment of an employee to be considered for the BOOT purposes, would mean measuring a casual over a period which includes, say Christmas trading, where large numbers of hours of work, or alternatively measuring a casual, where they are engaged in stocktake work. Christmas trading, stocktake and other peak periods of retail trading, create patterns of work which are important in a longer term work cycle for an employee, but which do not necessarily coincide with test time. Given that in the retail environment no agreements are effectively processed during the Christmas trading period, it inevitably means that employees are tested on the BOOT at

a time of low hours and low penalties. This means that the BOOT significantly favours the employer, as they are able to construct agreements which have a real capacity to reduce wages and income, simply by the judicious timing of the making of an agreement.

146. A further issue which needs to be considered in applying the BOOT as at the test time, is that when modern awards are introduced, it is clear that for a period of time there will be transitioning from existing instruments to the full effect of the modern award.

147. In the modern retail award, the Full Bench of the Commission has inserted transition arrangements which will phase in some aspects of the modern award, e.g. classification increases. For the purposes of the application of the BOOT, the test should be against the modern award as it will be at the end of the transition, rather than the BOOT being applied to the modern award as at the date of transition.

148. This is important in those areas where there is a phasing in of conditions of employment for employees, so that as at the date of the test time, the full benefit of the modern award may not yet be available to an employee but the full benefit of the modern award may become available during the period of operation of the agreement.

149. A more flexible approach to the BOOT test would at least accommodate the phasing in, or transitional arrangements, being incorporated into modern awards, especially in the retail industry.

APPROVING ENTERPRISE AGREEMENTS THAT FAIL THE BOOT

150. Clause 189 of the Bill continues a provision currently in the Workplace Relations Act which permits an enterprise agreement to be approved, even where it fails the BOOT, if Fair Work Australia determines that approval of the agreement would not contrary to the public interest. The provision should, in any event, be changed so that rather than having a test of approval where it is not contrary to the public interest, an applicant seeking approval of an agreement which clearly fails the BOOT, should be required to positively establish that approval is in the public interest. This is a slightly more onerous test than approval on the basis that it is not contrary to the public interest.

151. However, increasing the hurdle that an employer has to jump in relation to a Public Interest Test, should be consistent with maintaining the notion that approval of such agreements is not to be the norm.

152. Notwithstanding, that the language of Clause 189 reflects the existing language which suggests that approval in the public interest should only be to deal with matters such as a short term crisis in a business, or to assist in the revival of a business.

153. The SDA does note and approves the approach adopted in the Bill, that agreements made under Clause 189 can have a nominal expiry date no later than two years after the date upon which the agreement is approved. A difficulty with these Public Interest Test agreements is that the nominal expiry date is simply that, its nominal not actual. Where an agreement is approved under the provisions of Clause 189 on the basis that it needs to be approved on public interest grounds to deal with either a short term crisis in the business, or to assist in a revival of the business, then if the nominal expiry date is going to be limited to two years, the Bill should have a corresponding provision in the termination provisions of the Bill which determines that, on reaching the nominal expiry date, the agreement is actually terminated. There should be nothing nominal about an expiry date of an agreement approved under Clause 189.

154. A provision which provides that there is an actual expiration of the agreement made under Clause 189 would go a long way to encouraging employers to fix

the problem which led to them seeking approval of an agreement under the Public Interest Test.

155. Another issue relating to Public Interest Test agreements is that there appears to be no mechanism for such agreements to be varied. Proposed Clause 207(5) operates as a bar on any variation to an agreement that was approved in the public interest under Clause 189. The difficulty with this bar is that it has the effect of condemning employees to be employed under the terms of an agreement which has failed the BOOT without the possibility of the employees or the employer varying the agreement during its life, so that it may meet the BOOT or improve employees' conditions. Rather than a bar on the variation of public interest approved agreements, it would be a preferable if the Bill permitted public interest approved agreements to be varied, but under certain specific circumstances.

156. The two critical issues for a variation of a public interest approved agreement would be where, the variation resulted in the agreement passing the BOOT, or alternatively, where the variation to the public interest approved agreement led to a result where the varied agreement did not pass the BOOT, then the variation itself would also have to be subject to the same Public Interest Test as set out in Section 189.

157. The need for the ability to vary a Public Interest Test approved agreement is that as such agreements are initially made to overcome a short term crisis, or to assist in the revival of a business, both employers and employees may be cautious in terms of the terms and conditions of employment in the enterprise agreement. However, once approved, it may become apparent that terms and conditions of employment which are lower than the BOOT are not necessary for the full duration of the agreement.

158. In such circumstances, rather than the employer and employees negotiating a complete new agreement, and attempting to set aside the old agreement, it would be preferable if they had the ability of negotiating variations in a way that allowed them to increase the terms and conditions of employment, either on the basis that such terms and conditions surpassed the BOOT, or whether they were still below the BOOT, were nevertheless an improvement over the original terms and conditions approved under Section 189.

EMPLOYEE ACCESS TO AGREEMENTS AND AWARDS

159. One important aspect relating to agreement making which is simply not dealt with by the Bill is the access by employees to a copy of the agreement after approval by Fair Work Australia.

160. Clause 800 of the Bill provides that regulation may deal with the exhibiting on the premises of an employer of a Fair Work instrument which would include an enterprise agreement or an award. The difficulty with this is that the display of a copy of the enterprise agreement is so important in the lives of employees that it should not be left as regulations. The Bill itself should contain provisions specifically mandate that an employer must maintain available copies of the enterprise agreement in all workplaces, and to have them in a form and in a position which is readily accessible to all employees. This is not a matter which should be left to the regulations, it should be dealt with specifically in this Bill.

161. Not only is it necessary for the agreement as approved, to be available to employees, but where the Fair Work Australia approves an agreement subject to undertakings given by the employer, or approves the variation to an agreement subject to undertakings given by an employer, then those undertakings must be attached to the agreement, and the agreement, including the undertakings, must be displayed.

162. The Bill provides in Clauses 201 and 215, that decisions of Fair Work Australia which approve an agreement or a variation to an agreement that is subject to undertakings then the undertakings must be noted in the decision. This is unsatisfactory as a mechanism to ensure that employees are aware of the undertakings. The Bill itself should have a clear unambiguous requirement on employers that, at all times they must have available in their workplaces, a copy of the agreement as approved, including any undertakings given to Fair Work Australia. Nothing less should be expected, and nothing less should be provided to employees.

163. Ultimately, employees must know their entitlements and rights. The penalties for breach of an agreement are severe, and as such, employees should be able to ascertain at all times whether or not the enterprise agreement is being complied with.

164. Similar issues also arise in relation to awards as Clause 800 of the Bill also leaves the publication and display of awards to be dealt with by the regulations. Our comments in relations to agreements apply equally to awards. The Bill itself should contain a specific provision mandating the display of the award in each workplace.

A POSITIVE ROLE FOR FAIR WORK AUSTRALIA AFTER TERMINATING ENTERPRISE AGREEMENTS

165. Clause 225 of the Bill permits the termination of enterprise agreement by Fair Work Australia on application by either an employer, union or employees covered by the agreement. An application would only be made under Section 225 where either there was no agreement amongst the parties that the enterprise agreement be terminated, or, in circumstances where no new enterprise agreement had been negotiated by the parties. If a new agreement had been negotiated then Clause 58 of the Bill applies and the there is no need for an application for termination.

166. The effect of Clause 225 is that an application under this clause would only be made in circumstances where there appears to be a failure of the relationship between the unions or employees and the employer, so that the employer is no longer willing to make an enterprise agreement. It would be important in the SDA's view for the Bill to require that Fair Work Australia engage with the parties to the enterprise agreement, and to assist them in the process of moving towards a new enterprise agreement.

167. Clause 226 of the Bill requires that Fair Work Australia must take into account the views of the parties to the agreement, and also public interest issues relating to the termination of the agreement. Where Clause 226 is satisfied and Fair Work Australia then determines that termination of the agreement will occur, there should be an additional requirement placed upon Fair Work Australia to act on its own initiative to assist the parties explore the making of a new enterprise agreement. This does not need to be a heavy handed approach but rather it would permit Fair Work Australia having considered all the circumstances surrounding the application to terminate an old enterprise agreement, to be in a position of offering its services through conciliation and mediation to the parties. Rather than leave the issue up to the parties to access Fair Work Australia's general assistance role in bargaining, an application under Clause 225 by any party to an agreement should trigger an automatic involvement of Fair Work Australia in a process of encouraging and assisting the parties to explore a new enterprise agreement. Such a new provision would be consistent with the objects of the Fair Work Bill in encouraging enterprise bargaining.

MODERN AWARDS

168. The Fair Work Bill at Part 2-3 of Chapter 2 deals with the topic of Modern Awards. Much of the debate concerning modern awards was addressed during the discussion over the Forward with Fairness Transition Bill when it was introduced into Parliament in March 2008. since the passage of that Bill, the Australian Industrial Relations Commission has embarked on a comprehensive programme of modernising awards in Australia.

169. The SDA has been a very active participant in the award modernisation process and has taken to heart the policy of the Government, that there is a need to rationalise awards, primarily on an industry basis, so as to significantly reduce the number of awards and to create single national employment standards across each industry, including the retail industry.

170. The provisions of the Fair Work Bill in essence simply replicate most of the work already done by the March 2008 amendments to the Workplace Relations Act. In this context, therefore, the SDA makes only a few comments in relation to the modern award provisions of the Fair Work Bill.

171. The contents of many modern awards are constrained by the terms of Clause 139 of the Bill. Clause 139 reflects the policy position of the Government that there would be a limited number of subject matters that could be dealt with by a modern award. In the SDA's very strong view, there is one key deficiency in relation to the list of matters identified at Clause 139.

172. There is no provision which would enable any special provisions that are peculiar to a particular industry to be included in the modern award if they cannot fall within one of the enumerated matters in Clause 139. This leads to the problem that there are often highly specific award provisions that have applied in particular industries but which are no longer able to maintained in a modern award.

173. An example of this in the retail industry is that for several decades the Victorian Shops Award, the prime award for the retail industry in Victoria, contained a specific clause protecting workers from having to wear indecent or revealing dress while at work.

174. This clause was specifically inserted into the Victorian Shops Award as a result of a move by employers in the 1980's to introduce the concept of either topless retail workers, including in sandwich bars, hairdressing and hardware shops, or requiring workers to wear see-through tops. This was not a device used by employers to require men to be topless or wear see-through tops, but was specifically directed at female employees.

175. Legislation on sexual discrimination or equal opportunity does not, and has never, dealt with this particular problem. Earlier this year the Commonwealth's Sex Discrimination Commissioner, Elizabeth Broderick, in the context of her Listening Tour around Australia, has commented on this particular issue and noted that not only does the practice of requiring retail employees to wear indecent or revealing dress still continue but also that the legislation does not deal with this issue.

176. The answer to the problem in the 1980's lay solely with the Industrial Relations Commission and on application by the SDA, the Commission inserted a specific provision into the Victorian Shops Award, protecting workers from any requirement from their employer that they wear revealing or indecent clothing. This clause was removed from the Victorian Shops Award as part of the Howard Government's Award Simplification process in 2000.

177. The SDA argued that the Australian Industrial Relations Commission should re-insert this clause into a modern retail award. However, the structure of the current Award Modernisation Request from the Minister and the requirements of the Act placed upon the Australian Industrial Relations Commission, prevent an indecent or revealing dress clause from being inserted into a retail award. This clause would have no effective relevance outside the retail industry. It is a special provision that meets exceptional and particular circumstances faced by workers in the retail industry.

178. Under the structure of both the Award Modernisation provisions introduced in March 2008 and Clause 139 of the Bill, there is still no possibility of an indecent or revealing dress clause being inserted into a modern award.

179. Similarly, the structure of Clause 157 of the Bill in relation to the variation of modern awards, also precludes any consideration being given to introducing into an award special provisions which are highly industry specific.

180. The SDA would urge the Senate to specifically amend both Clause 139 and Clause 157 of the Bill so as to permit a modern award to include a term which is required in the public interest to deal with special provisions or special circumstances associated with the industry and which are for the benefit and protection of employees.

181. Adding such a provision to Clause 139 would enable the initial modern awards to deal with this issue at the present time, adding the same provision to Clause 157 would permit the Fair Work Australia to add such provisions in future reviews or variations of awards if such provisions were needed.

182. The SDA is not seeking an ability to vary awards at large, in order to add a range of other matters to any modern award, rather, as outlined above, the purpose of the proposed amendments to Clauses 139 and 157 of the Bill would be highly specific and very limited. The circumstances identified in relation to the retail industry in relation to indecent and revealing dress, give a clear indication that this is not an attempt to have a broad power to increase the contents of awards, but rather should be seen as providing only essential necessary protections for workers.

ENTERPRISE AWARDS

183. The Forward with Fairness Transition Act in March 2008 introduced the process of Award Modernisation for all awards except “Enterprise Awards”.

184. The Fair Work Bill does not mention Enterprise Awards at all.

185. The current position appears that whilst Enterprise Awards as defined in S.576U of the current Act, the concept of “enterprise Awards” has not been included in the Fair Work Bill.

186. The consequence of this is that “Enterprise Awards” are not to be subject to award modernisation, but are also not mentioned as being continued under the operation of the Fair Work Bill.

187. The SDA is concerned that the status of Enterprise Awards is clarified as soon as possible.

188. There has been significant debate in the Retail and Fast Food sectors as to whether a number of brand specific awards are Enterprise Awards and thus not subject to award modernisation, or whether they are general awards that are caught up in the award modernisation process.

189. The status of a number of awards needs to be clarified.

190. The Full Bench of the AIRC dealing with award modernisation in a Statement issued on 12 September 2008, [2008] AIRCFB 717, at paragraph 7 stated:

> *(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.*

191. The Fair Work Bill does nothing to assist in resolving the question as to whether an award is an enterprise awards.

192. The Fair Work Bill does nothing about clarifying the justification, if any, for having a separate class of awards known as Enterprise Awards and for having Enterprise Awards continue to be free from award modernisation.

193. In the Retail and Fast Food sectors, there is simply no rationale for having any award continue to operate as an Enterprise Award in circumstances where an Enterprise Award has lesser value than the wages and terms and conditions of employment set by the Modern Award for the Retail Industry.

194. The SDA would urge that at the very least the definition of Enterprise Award in S.576U of the Act be amended so that an award can only be considered to be an Enterprise Award where the package of terms and conditions of the award equals or exceeds the package of terms set by the Modern Award for the relevant industry.

195. Alternatively, the Fair Work Bill should be amended to ensure that Enterprise Awards can be varied by the AIRC on application by any party to the award to include wages, classifications and terms and conditions of employment at least equal to those set by a Modern award for the relevant industry. There needs to be specific direction given to the AIRC that an Enterprise Award cannot have a package of terms and conditions of employment which is lower than the modern award for the relevant industry.

THE NES – AN INTRODUCTION

196. A key election policy of the current Labor Government was to increase the five statutory minimum conditions of employment introduced by the Howard Government to ten National Employment Standards. During the election campaign, the Labor Party announced the broad thrust of the contents of the proposed ten National Employment Standards. A detailed proposal on the National Employment Standards was first issued for public consultation in March 2008, accompanied by a Discussion Paper together with the proposed NES. The Discussion Paper identified the government's key thinking on each of the NES matters and then sought detailed public submissions on the proposed NES. The consultation process generated a very large response from employer organisations, unions, businesses, governments, community organisations and individuals. The NES, which is now contained in the Fair Work Bill, is different from the original. The conclusion to be drawn is that as a result of the public consultation process, changes were made to the NES prior to their finalisation in the terms appearing in the Fair Work Bill.

197. The single greatest difficulty with the consultation process initiated by the government through the Department of Employment and Workplace Relations, was that the consideration by departmental officials of public submissions has not been articulated. Changes made to the current draft NES and resulting in the version appearing in the Bill, have never been explained by the Department. No analysis was ever given on the public submissions made as to why some were accepted and others rejected. This leads to the position that the Senate Inquiry will be the first fully open process for examination of the NES and many submissions made to the public consultation process initiated by the Department will need to be repeated to the Senate so that the Senate can consider the value of the proposed NES and whether or not amendments need to be made to the NES. The mere fact that the government initiated public consultation process over the proposed NES should not constrain the Senate in examining the proposed NES, nor should it constrain the Senate in proposing amendments to the NES where such amendments are clearly justified to provide fairness in Australian workplaces.

198. The SDA has limited its comments on the NES to a number of specific issues where we are of the very strong view that amendments need to be made to the draft NES in order to improve their efficacy and their relevance to providing guaranteed rights to Australian workers.

199. The NES, together with Modern Awards, are intended to provide the safety net wages and conditions of employment for Australian workers. The interaction between the NES and the modern awards is critical to establishing this safety net. The March 2008 Forward to Fairness Transition Act introduced the award modernisation process which was to be initiated and carried out in compliance with a Ministerial Request.

200. The decision of the Award Modernisation Full Bench in 2008AIRCFB 1000 issued on 19th December 2008 (copy attached) has made clear that the AIRC takes the view that the NES cannot be added to or improved in a modern award, even where the existing awards have conditions which are superior to the NES. The result is that the interaction between modern awards and the NES leads to the result that modern awards will be stripped of conditions which provided better entitlements than the NES, even where such additional entitlements have been long standing award provisions. The Senate is urged to rectify this problem.

201. At the present time, the relationship between the NES and modern awards is too rigid. The SDA understands that Modern Awards are not to be as wide ranging in their regulation of industrial matters as the old awards were. However, where awards currently deal with matters that are contained in the NES, the modern awards being made by the AIRC should be permitted to reflect existing award treatment of NES subject matters, where the existing awards provide a better safety net for workers than the bare bones minimal approach of the NES.

202. Two very simple examples illustrate this. Awards in the retail industry, and many other industries, have provided that an employee's sick leave entitlements are credited to the employee in full at the commencement of each accrual year. The NES provides that sick leave can only be accumulated progressively over a year. The modern awards will remove the existing entitlement to accrue in full on the commencement of each year. Existing awards spell out in detail the entitlements to at least 11 Public Holidays and include special entitlements for part time and full time workers

who normally are not rostered to work on a day which is a public holiday. The NES provides a simple entitlement to only the core 8 public holidays and other days as specified in state legislation. Modern Awards will remove any reference to any specific public holidays not mentioned in the NES and will remove any provisions providing for the application of public holiday entitlements to workers who are not normally employed as Monday to Friday workers. The Fair Work Bill needs to be amended to specifically permit a modern award to supplement each matter in the NES. This amendment needs to operate prior to the commencement of the modern award system so as to permit the AIRC to revisit the modern awards made under the award modernisation process which commenced March 2008.

THE NES – SPECIFIC COMMENTS

MAXIMUM WEEKLY HOURS.

203. Clause 62 of the Bill sets the maximum weekly hours of work as an average of 38 for a full time employee. The SDA welcomes this as a significant improvement over the approach adopted by the Howard Government which contained a notional 38 hour week but in reality permitted employers to require workers to work significantly longer hours.

204. The key improvement introduced by the Bill is the ability of employees to refuse to work additional hours if the additional hours are unreasonable.

205. Clause 62(3) sets out a list of factors which need to be taken into account to determine whether or not the additional hours are reasonable or unreasonable.

206. In the SDA's view the list of specific factors is too short. Whilst the catchall provision at Clause 62(3)(j) picks up every other factor it would be preferable in our view for some additional specific factors to be included in Clause 62(3).

207. The following additional factors need to be considered:

- The quantum of any additional payment that may apply to the additional hours eg: 10% vs 50%. This is necessary as the mere existence of a penalty or loading for working additional hours as provided for in Clause 62(3)(d) is only part of the picture. Additional hours can be unreasonable if they fall at a time which is considered to be unsociable working hours but where the penalty or loading is so low as to fail to provide adequate compensation for the unsociable hours.

- Any obligations or commitments that the employee has in relation to community activities, including sporting activities (participant in a sport as a player, coach, umpire, administrator, or general helper) social work (helping volunteer groups), education commitments (attendance at classes, study commitments, school working bees, parents and friends groups), etc,

- The staffing profile of the business concerned including the adequacy of the staffing levels and staffing profile to meet the normal operation of the business without the requirement of workers to work additional hours. This is an important additional factor given that often the request to work additional hours is made on workers simply because the employer has tried to cut costs by understaffing the workplace.

- Safe Transport home.

  An important consideration in determining whether hours are reasonable or not, is whether an employee can get safe transport home. This is an important consideration for many young workers and also women who may feel pressured to work the additional hours.

- Piece Workers

  Piece workers should have the same protection in relation to hours of work as apply to non-piece workers.

  Piece work relates to the form of remuneration and not to the hours of work.

208. If the social norm is full-time employment of 38 hours per week then this standard should apply to an employee regardless of whether they are paid an amount for each hour worked or an amount for what is produced in any hour worked.

REQUESTS FOR FLEXIBLE WORKING ARRANGEMENTS

Parent and Responsibility Definition

209. The proposed flexible working arrangements NES applies if the employee is either:

   - *a parent of a child under school age ; or*
   - *has responsibility for the care of a child under school age.*

210. Flexible working arrangements should be available for all carers. This would be of great assistance to those with eldercare and disabled care responsibilities, as well as for care of older children up to 16 years of age.

This is particularly an issue in industries such as ours where hours of work can be at any time of the day or night.

211. The current UK standard that applies includes caring for disabled children and any adult needing care. This gives a broader recognition of carers.

Fairness in Requesting and Refusing Flexible Arrangements

212. The Bill at Clauses 739(2) and 740(2) prohibits Fair Work Australia or any other Alternative Dispute Resolution provider from dealing with a dispute about a refusal to grant a request for flexible working arrangements.

213. Although the NES does require at Clause 65(6) that the employer must give written reasons the adequacy of those reasons is moot as there is no third party review of either the reasons or the employer's conduct in considering the request.

214. When the Government first proposed the NES it issued a Discussion Paper which at paragraph 61 stated – "The United Kingdom experience has demonstrated that simply encouraging employers and employees to discuss options for flexible working arrangements has been very successful in promoting arrangements that work for both employers and employees."

215. Whilst the discussion paper confirms the success of the UK system to 'encourage bargaining' it omitted to point out that the UK system has extensive supporting guidelines, legislative requirements that compel employers to genuinely examine requests and an appeal mechanism with penalty. The encouragement given to employers to address the issue is compelling to say the very least.

216. Although the Government engaged in a public consultation process over the NES the Government has steadfastly refused to consider a review process in relation to a refusal to grant a request for flexible working arrangements.

217. As the proposed NES stands, a right to request without any 3rd party review of the employer's decision is an illusory right for working families. In the absence of any possibility of 3rd party review an employer has no need to decide fairly,

and simply needs to create the appearance of having properly decided on the request.

218. The NES needs to properly address the issues employees will have whilst balancing the needs of business. The UK model has done this in the UK context (i.e. no awards). In the Australian context a full bench of AIRC gave consideration to 'rights to request' in a Work and Family test case. This test case examined the arguments of all parties and was able to examine the UK standard. Throughout the case the Howard government opposed any change.

219. The AIRC decided to give employees a 'Right to Request'. The following was inserted into Awards:

> *"P. Right to request*
>
> *P.1 An employee entitled to parental leave pursuant to the provisions of clause [ ] may request the employer to allow the employee:*
>
> > *P.1.1 to extend the period of simultaneous unpaid parental leave provided for in clause[ ] up to a maximum of eight weeks;*
> >
> > *P.1.2 to extend the period of unpaid parental leave provided for in clause [ ] by a further continuous period of leave not exceeding 12 months;*
> >
> > *P.1.3 to return from a period of parental leave on a part-time basis until the child reaches school age, to assist the employee in reconciling work and parental responsibilities.*
>
> *P.2 The employer shall consider the request having regard to the employee's circumstances and, provided the request is genuinely based on the employee's parental responsibilities, may only refuse the request on reasonable grounds related to the effect on the workplace or the employer's business. Such grounds might include cost, lack of adequate replacement staff, loss of efficiency and the impact on customer service."*

220. This Family Provisions Test Case provided fair parameters as a basis for refusal. These should be used as a guide to employers and as a basis for review of any decision to refuse a request. The SDA strongly supports the addition of this provision into the NES.

221. As the Government has clearly modeled the NES relating to Requests for Flexible Working Arrangements on the UK model then by adopting the AIRC provisions, the NES would contain similar procedures and processes of the UK model but in a contemporary Australian way.

222. It should be noted that the explanatory material prepared by the UK Department of Business Enterprise and Regulatory Reform is titled: "Flexible working: the right to request and the duty to consider" and the explanatory material runs to many pages. A copy of this is attached at Appendix B.

223. The specific provisions of the UK Act and Regulations are attached as an Appendix, as is the AIRC statement from the Family Provisions Test Case.

ANNUAL LEAVE

224. The NES expresses the entitlement as 4 weeks leave. This should be stated as 152 hours and 190 hours in the case of shift workers.

Leave Requests

225. It would seem appropriate that if an employer has refused a leave request, an employee should be able to appeal that decision if it appears to be unreasonable.

226. Reasonable or unreasonable refusal must be sufficiently flexible to ensure that specific individual circumstances are afforded proper consideration eg an employee of 10 years requests time off during the busiest period ie 4 weeks annual leave starting in the last week of the 6 week blackout period to attend her daughter's wedding. Such a request should be deemed reasonable and approved given the employee's service and significance of the event.

227. Access to arbitration by Fair Work Australia is essential if the right to take annual leave is to have any real value for employees. Clause 595(3) specifically prohibits Fair Work Australia from arbitrating a dispute unless specifically authorised by the Act. Clause 88 needs to provide specific authorisation for Fair Work Australia to arbitrate any dispute over taking annual leave. Without arbitration employers can effectively dictate the timing of taking annual leave by employees.

Annual leave loading

228. A long standing provision of 17½% Annual Leave Loading was ripped away from many workers under the Work Choices legislation.

229. It would be appropriate for the Government to restore this entitlement to working families and to do so as part of the Annual Leave NES.

230. A simple amendment to Clause 90 would provide for the payment of Annual Leave Loading on the same basis as originally set by the AIRC.

PERSONAL/CARER'S LEAVE AND COMPASSIONATE LEAVE

Days vs Hours

231. The SDA believes that the entitlement for personal/carers leave should be expressed as 76 hours and not 10 days. A day means different things to different employees. Also, employees may at times only take a couple of hours for a medical appointment, or go home ill half way through a shift and should only have the hours absent deducted from their entitlement.

Accruing leave upfront

232. Currently many of the SDA awards in the Federal and State jurisdictions give sick leave/personal leave as an upfront entitlement at the start of each year from the 2nd year. Modern Awards need to continue to do this and not have that benefit reduced by the application of the NES. The SDA would urge that the NES to be amended to accommodate this or at least a guidance note to this effect to be issued.

233. Clause 101 should contain an additional provision permitting modern awards or enterprise agreements to set an accrual entitlement more beneficial than that provided in Clause 96. This is an effective means of dealing with the accrual issue on an industry by industry basis, in light of the previous practices adopted in each industry.

Rate of pay

234. An employee on personal leave should receive their full rate of pay as defined in Clause 18. An employee who has an expected wage level should have this protected and guaranteed when they fall ill, so that undue financial pressure is not placed on them.

Reasonable Person Test

235. If a reasonable person test is contained in the NES relating to personal leave this will lead to the Courts having to determine what a "reasonable person" would consider to be appropriate.

236. Whilst a "reasonable person" test offers a degree of flexibility in relation to the proof requirements to access personal/carers leave this very flexibility can cause serious disputes.

237. The approach adopted by the current Act is both known and does not appear to produce unreasonable results.

238. Certificates from a registered health practitioner, or a statutory declaration or nothing in cases where neither is possible, is a broadly acceptable regime which at least works and appears to have worked without producing unreasonable results.

239. It is possible to make the reasonable person criteria work better in practice through simply adding a Note to Clause 107(3) which identifies that a certificate from a registered health practitioner or a Statutory Declaration are forms of evidence which would satisfy a reasonable person.

COMMUNITY SERVICES LEAVE

Combining Work and Community Service

240. The NES should include a provision that ensures that shift workers/weekend workers do not have a combination of work/community leave that exceeds the rostering/working hours limits.

Example 1: Normal roster of 38 hours is Sat – Wednesday. 5 days jury service then work Sat and Sunday and the rest of the roster. This would mean the employee has a total of 10 days straight of work and jury service.

Example 2: Jury Service finishes on Thursday, the employee should not be required to work a shift starting at 11pm on Thursday evening.

241. As this issue will depend upon a number of variables it would be proper to allow this issue to be dealt with in detail by modern awards or enterprise agreements.

242. A new clause needs to be added to Division 8 to permit modern awards or enterprise agreements to deal with providing reasonable rest periods (non work periods) after periods of community service leave.

Blood Donor Leave

243. Another community service that should be included as paid leave is Blood Donor leave. The removal of this provision as an allowable award matter dramatically impacted on blood donation.

244. It is a vital community service that needs to be recognised within the NES.

245. Notwithstanding the period of public consultation over the NES the Government has not acknowledged the need to provide for Blood Donor Leave in the NES. The SDA would urge the Senate to consider adding Blood Donor Leave to the Community Service Leave NES.

PAID OR UNPAID COMMUNITY SERVICE LEAVE

246. Clause 111 of the Fair Work Bill provides for payment of only one form of Community Service leave, namely Jury Service, and then only at the base rate of pay.

247. All other Community Service Leave is prima facie unpaid leave.

248. In most awards many forms of community service leave have been treated as paid leave. With awards setting rules about how much leave will be paid leave and the criteria for payment.

249. The decision of the Award Modernisation Full Bench on 19 December 2008, attached to this submission, in 2008 AIRCFB 1000, determined at paragraphs 103 and 104 that no Modern Award would contain any provision in relation to any additional entitlement for paid jury service, as to do so would be an effective alteration of the NES. This decision now means that the existing award entitlements will be lost and workers will be given only the base protection of the NES. The SDA would urge that the Fair Work Bill be amended to permit Modern Awards to contain more advantageous Community Service Leave provisions that are set out in the NES.

250. The current structure of the Fair Work Bill would suggest that modern awards would now treat all forms of community service leave other than jury service leave as unpaid leave.

251. The Fair Work Bill should provide a specific provision within Division 8 permitting a modern award or enterprise agreement to provide for payment for periods of community service leave. The AIRC would, as part of the finalisation of the modern awards, be able to consider the issue of whether any community service leave should be paid leave and the appropriate criteria for gaining payment.

PARENTAL LEAVE AND RELATED ENTITLEMENTS

Employees with less than 12 months service

252. The proposed NES has set a standard of 12 months Parental Leave available for employees with 12 months service. This however leaves a large part of the workforce without any access to guaranteed leave at a critical point in their lives.

253. In 2006, 24% of all working men and 44% of casual women workers had less than 12 months continuous service with the same employer. *(ABS, Forms of Employment Australia, November 2006, Cat No. 6359.0)*

254. Unpaid Parental Leave should be available to women after 6 months of service or more. The SDA suggests that such leave could be set as 6 months.

Use of Accrued Paid Leave

255. The example after Clause 79 says that a pregnant employee wanting to use accrued Annual Leave while she is absent on Parental Leave, may do so subject to agreement with her employer ! The employer should not be able to refuse the use of accrued leave during Parental Leave.

256. The language of Clause 79(1) does not allow an employer to refuse leave, so the example is misleading.

Additional Leave Request

257. A business refusing a request for additional unpaid Parental Leave under Clause 76(4) will not be the subject of third party as Clauses 739(2) and 740(2) specifically prohibit either Fair Work Australia or any other ADR provider from dealing with a dispute about the refusal of a request for additional leave.

258. This in practice will mean that employers can come up with any reason under "reasonable business grounds" for refusing a request. The Family Provisions Test Case (as discussed earlier) provided fair parameters as a basis for refusal. These should be used as a guide to employers and as a basis for review of any decision to refuse a request.

259. As Clauses 739 and 740 prohibit anyone from dealing with disputes about either requests to work flexible arrangements or requests to have additional Parental Leave, then a similar response needs to be developed to ensure that genuine rights of review are available to employees in both circumstances.

Ceasing Responsibility

260. Clause 78, as a stand alone provision, is somewhat strange. The employer would not normally become aware of these circumstances except from the employee, and often at the time of the employee requesting a return to work. So, therefore, the employer would not normally be in a position to give such notice.

261. This NES provision is half of the longstanding current provision, where, in these circumstances, the employee advises the employer of her changed circumstances and also advises the date when she wishes to return to work. The employer than must advise the employee of when she can resume work. This date must be within 4 weeks of the day the employee gave notice.

262. This provision is missing from the NES and must be reinserted so as to provide some certainty of a timely return to work for employees who find themselves in these tragic circumstances.

Define Refusal on Reasonable Business Grounds

263. The Fair Work Bill fails to give any guidance on what constitutes "reasonable business grounds" when refusing a request to work flexible arrangements or when refusing a request for additional Parental Leave.

264. Expecting employers to give serious consideration to an employee's request for workplace flexibility is naïve. Requests from employees for flexible working arrangements or for additional Parental Leave are often seen by employers as an inconvenience, resulting in a knee jerk reaction of refusal without any good reason.

265. To provide fairness and balance for both employees and employers, in all NES provisions dealing with requests from employees for flexible working arrangements, "reasonable business grounds" should be defined within the Bill as those listed in the AIRC Family Provisions Test Case (as previously discussed).

266. Clearly identifying the criteria for "reasonable business ground" will at least ensure that the detailed written reasons required by both Clause 65(4) and 76(5) address the criteria.

267. The SDA again stresses that there needs to be a grievance procedure in relation to the NES so working families can go to the umpire for assistance which will resolve any dispute. Fair Work Australia must have the capacity to arbitrate any intractable dispute about requests for flexible working arrangements and additional Parental Leave.

Award Provisions

268. The draft Annual Leave NES, at Clause 93 details those items that a modern award may include. A similar approach should also be used in the Parental Leave NES so that items such as return to work part-time or replacement employee can be addressed in a modern award.

Public Holidays

269. The Award Modernisation Full Bench in its decision on 19 December 2008, in 2008 AIRCFB 1000, at paragraph 104, determined that Modern Awards will not provide entitlements to any additional days as this would be in conflict with the NES.

270. The SDA urges that the Fair Work Bill be amended to specifically provide that Modern Awards may provide Public Holiday entitlements which are additional to the NES.

UNFAIR DISMISSAL

271. The SDA welcomes the return to fairness in relation to termination of employment. The Fair Work Bill redresses some of the most serious imbalances that existed under the Howard Government's industrial relations legislation.

272. Fair Work Bill has generally restored a high degree of fairness in termination of employment procedures through removal of the operational reasons exemption for employers and in removing the exemption relating to employers employing less than 100 employees.

273. Whilst the Howard Government had provisions in the Workplace Relations Act dealing with unfair dismissal, the two exemptions relating to operational reasons and 100 employees, effectively excluded most employees from being able to gain access to a review of an unfair termination of employment.

274. The SDA expresses the very strong view that as a matter of fundamental work rights, there should be no limits or restrictions placed upon the ability of any worker to have an independent third party tribunal, such as FWA, determine whether termination of the employee's employment was harsh, unjust or unreasonable. Any requirement that an employee have a minimum period of service, or be of a particular class of employee before they are permitted to access the unfair dismissal jurisdiction of FWA, is objectionable as a removal of a fundamental worker right. The SDA would prefer that the limitations on the access to FWA by workers who have been unfairly dismissed be removed.

SMALL BUSINESS FAIR DISMISSAL CODE

275. The SDA recognises that one of the critical issues for the government was balancing the need to provide effective remedies and protections for employees to prevent them from being unfairly dismissed from their employment, whilst at the same time recognising the difficulties that small businesses face in dealing with complex legal codes relating to termination of employment.

276. The SDA notes that the Fair Work Bill introduces a new concept the 'Small Business Fair Dismissal Code', which is designed to ensure that where a small business follows the code, then prime facie, any termination of employment will be considered to be fair.

277. The Small Business Fair Dismissal Code represents a practical mechanism for articulating a set of clearly defined procedural rules for small businesses to comply with in order to have a termination of employment considered to be fair. The impact on employees is unclear and it will not be until some time after the introduction of the Fair Work Bill that a proper analysis will be able to be made about the efficacy or fairness of the Small Business Fair Dismissal Code. However, in the context of the Fair Work Bill, the SDA accepts that devising specific rules for small businesses to apply in relation to termination of employment gives a higher degree of certainty to both employers and employees than has existed in the past, and will at least ensure that employees of small businesses are subject to the broad provisions of the Bill protecting them from unfair termination of employment.

278. There is a residual difficulty with the structure of the Bill in relation to the Small Business Fair Dismissal Code and that concerns the definition of 'small business employer' in Clause 23 of the Bill. For the purposes of ascertaining whether or not an employer or employee has than 15 employees, Clause 23 provides that casual employees are not to be counted unless the casuals are employed on a regular and systematic basis.

279. The SDA notes that every time legislation provides an exemption in favour of business, businesses will attempt to use that exemption as far as is possible. Small business employers keep casual employees employed on an irregular but systematic basis, or keep casuals employed on a regular but non systematic basis, will be able to avoid having such casuals counted for the purposes of 15 employees. Practical difficulties will always arise in defining whether or not a casual is employed on a regular and systematic basis.

280. Given that many employers in the retail and fast food industries run their businesses entirely on the basis of employing casual labour, then there is a very real incentive for such employers to structure the casual employment in

such a way that they never meet the count of 15 employees for the purposes of Clause 23 of the Bill.

281. The SDA is of the very strong view that the small business employer definition should be based upon a simple number of employees employed by an employer, with no distinction being drawn between casual, part-time, full-time or piece workers. All employees, no matter what status, should be included in the count of 15.

CRITERIA FOR DETERMINING IF TERMINATION IS UNFAIR

282. A practical and welcome provision of the Fair Work Bill is Clause 387 which identifies criteria for considering whether or not termination of employment was harsh, unjust or unreasonable. The list of criteria in Clause 387 is extremely broad given that in paragraph (h), any other matters that the Fair Work Australia considers relevant, have to be taken into account under this clause. The structure, therefore, of Clause 387 is that paragraphs (a) to (g) are examples of specific criteria which must be taken into account with paragraph (h) providing the broad catch all provision.

283. The SDA notes that the value of having both specific criteria and general catch all provision, is that each of the specific criteria has an educative effect on employers by giving them a clear indication of the types of matters which will be considered by Fair Work Australia in considering whether or not a termination is harsh, unjust or unreasonable. The SDA welcomes and supports the approach adopted by Clause 387.

284. The SDA does, however, suggest that there is an additional, specific factor which should be inserted into Clause 387 to give further guidance to employers. Paragraph (e) of Clause 387 deals with dismissals related to unsatisfactory performance and requires that Fair Work Australia must take into account whether the person had been warned about their unsatisfactory performance before they were dismissed.

285. There is an additional factor in relation to dismissals related to unsatisfactory performance. Unsatisfactory performance is often one of the most common reasons for termination of employment of individuals. There should be a requirement that in any case where the dismissal is related to unsatisfactory

performance by an employee, that Fair Work Australia must consider the treatment of other workers by the same employer in relation to performance issues.

286. A requirement to take into account comparative treatment different employees of the same employer at least ensures that employers get the very strong message that they cannot single out an employee for termination on the grounds of unsatisfactory performance where the unsatisfactory performance criteria for the dismissed employee is significantly different from the unsatisfactory performance criteria for other employees.

REINSTATEMENT

287. The scheme of the unfair dismissal provisions places a very high emphasis on reinstatement of employment, rather than payment of compensation for termination of employment. This is clearly consistent with the underlying rational of providing for a process to determine whether or not termination is fair or unfair. Reinstatement in employment should always be the preferred remedy and the SDA welcomes the approach adopted in the Fair Work Bill.

288. Clause 391 of the Bill deals specifically with the issues relating to reinstatement of employment and requires, at 391(1), that "A*n order for a person's reinstatement must be an order that the* person's *employer at the time of the dismissal reinstate the person.*.".

289. The language used in Clause 391(1) does create a potential real difficulty. The wording requires that reinstatement must be with the exact employer who was the employer at the time of the dismissal. This means that where there has been any form of rearrangement of an employer's business so that a different entity is the employer of labour at the time of the reinstatement order, as against the time of the termination, then the reinstatement cannot be effected under Clause 391.

290. Whilst the sentiment and purpose of Clause 391 is clearly supported by the SDA, we have real concerns that the highly specific language of this section permits employers to simply avoid the reinstatement process by using a different entity as the employer. Company restructuring or moving labour from one associated entity to another within a business group, is quite

common and takes place for various reasons. Employers are always quick to seize on opportunities to defeat the operation of legislation which favours employees through the device of moving employees from one employer to another.

291. The SDA is concerned that the very language of Clause 391 will encourage some employers to simply change the employing entity for a particular workplace, between the period of a termination of employment and the period in which an order is likely to be issued by Fair Work Australia.

292. Without undermining in any way the underlying rationale for Clause 391, the SDA would urge that the clause be amended so as to deal with situations where there has been a change in employing entities. If the new employing entity is an associated entity with the employer at the time of the dismissal, then Fair Work Australia must have the capacity to order the new employing entity to be the employer who reinstates the person unfairly dismissed.

COMPENSATION FOR SHOCK, DISTRESS OR HUMILIATION

293. The SDA notes that the Fair Work Bill continues an approach adopted by previous governments which is to prevent any compensation being given to an employee who has been unfairly terminated, where the compensation is for shock, distress, humiliation or other analogous hurt. The prohibition on awarding such compensation is found in Clause 392(4). The SDA strongly opposes this provision and would strenuously urge that it be removed from the Fair Work Bill.

294. When Courts and Tribunals have had the capacity to order additional compensation for shock, distress or humiliation, they have generally done so on the basis of a proper examination of the facts concerning the particular dismissal and compensation only flows where the hurt, shock or distress is greater than that expected to be suffered by a reasonable person in the same position.

295. Rather than have the blanket prohibition on awarding compensation for shock, distress or humiliation, the Fair Work Bill should permit Fair Work Australia to award such compensation but only in circumstances where the distress, humiliation, shock or other analogous hurt suffered by the employee

who has been dismissed, is to a significant degree beyond that associated or experienced by a reasonable person in the same situation. A reasonable person test would at least ensure that only the more extreme cases of abuse in relation to termination of employment would generate compensation under this provision.

296. The very real difficulty that the SDA has with a blanket exclusion of compensation on the grounds of shock, distress, humiliation or other analogous hurt, is that it effectively rewards employers for treating their employees in a unconscionable manner when terminating them.

297. The compensation limits established by Clause 392 of the Bill only provide minimal compensation to employees who have suffered an unfair dismissal. The very low limits placed upon compensation under the Fair Work Bill ensures that employers are never punished where they act in an abusive or degrading manner towards the employees being terminated.

298. There must be a provision within Fair Work Bill which ensures that employers cannot get away with treating employees in an inhumane and socially unacceptable manner when terminating them. Terminations of employment in the retail industry which are carried out in front of customers or members of the public by vitriolic employers heaping abuse upon employees, causes very serious amounts of shock, distress or humiliation for such employees. As presently structured, the Fair Work Bill permits employers to effectively get away with such behaviour.

299. The wording of Clause 392(4) simply means that the conduct of the employer, no matter how outrageous, cannot be taken into account in considering the value of the compensation. As any consequences of such outrageous behaviour leading to shock, distress, humiliation or other analogous hurt caused to the dismissed employee, simply cannot be the subject of compensation. This is grossly unfair and should be remedied.

300. Additionally, any compensation for shock, distress or humiliation should be additional to and separate from the compensation cap set in Clause 392.

TIME LIMITS FOR MAKING AN UNFAIR DISMISSAL APPLICATION

301. The procedure for initiating an application for unfair dismissal, as set out in Clause 394 of the Bill, requires that an application must be made within 7 days after the dismissal took effect, or within any longer period if Fair Work Australia allows it. The 7 day rule is so short a time frame, that it will require employees to file an application under Clause 394 as a matter of protection.

302. The SDA will have to adopt the approach in relation to representing its members of always filing an unfair dismissal application within the 7 days, even in circumstances where the SDA has not yet commenced proper discussions with the employer over the circumstances of the dismissal. The 7 day time frame is so short that the SDA will have to give priority to filing the application rather than giving priority to settling the issue of an alleged unfair termination of employment.

303. The SDA would urge that a far more realistic time frame be given for the making of an application under Clause 394. A period of 21 days would genuinely allow employees to consider the issues surrounding the termination of employment with their employer, prior to deciding whether or not an unfair dismissal application would be made.

304. The SDA notes that progressively over the years, governments of different political persuasion have moved to reduce the amount of time available to make an application for unfair dismissal. The SDA notes that there is always a balancing act required to be undertaken in determining a time frame for an unfair dismissal application and the balance is between giving an employee sufficient time to make the application whilst also recognising that employers will often want to replace the dismissed employee with a permanent employee and can only do so after knowing whether or not the original dismissal will be challenged.

305. If the Government is insisting upon a 7 day time frame for the making of an application, then the SDA proposes that there be an additional process inserted into Clause 394. Where the time frame for the making of an application is as tight as 7 days, then there should be an additional process where by an applicant can notify Fair Work Australia that they challenge a termination decision with the filing of that challenge to be done within the 7

day rule, but then be allowed 30 days more to file an application under Clause 394. The notification of a challenge would permit an employee to discuss with the employer, circumstances surrounding the termination without requiring the employee to formally invoke the Fair Work Australia jurisdiction, and without incurring costs in relation to invoking that jurisdiction.

306. The concept behind having a challenge to a termination which is significantly different to an application for unfair dismissal, means that the jurisdiction of Fair Work Australia will not be invoked until the formal application under Clause 394 is made. Filing a notice of challenge within 7 days will not require Fair Work Australia to engage in any activity whatsoever. It would, however, clearly identify to the employer that there is potentially a real issue in dispute over the termination of employment and would at least permit the employer and the employee to consider the matter in the challenge period.

307. The fee payable for making an unfair dismissal application could simply be brought forward and made to apply to a challenge but such fee should be refundable if no formal application was made within the 30 days. A challenge process would also have a significant impact on any applications for an extension of time being made under Clause 394(2)(b).

308. Time frames for the making of applications for unfair dismissal must be realistic. At the present time, a 7 day limit is unrealistic. If it is to be kept, then there needs to be an additional process such as the challenge concept, identified above. Alternatively, the simplest and easiest way to fix the problem is to simply extend the time provided in Clause 394(2)(a) from 7 days to 21 days.

COMPLIANCE AND ENFORCEMENT

309. The SDA makes the general observation that the structure of the Fair Work Bill is placing a greater reliance upon Courts for enforcement of employee rights and entitlements. The SDA has no difficulty with this, as it is quite clearly a proper function of the Courts to enforce existing rights and entitlements. However, the SDA notes that the Fair Work Bill, whilst giving greater emphasis to access to the Federal Magistrate's Court, State Magistrates' Courts and Federal Court for the enforcement of worker rights and entitlements, does nothing about the structure of those Courts.

310. It is important that Courts which are specifically charged with dealing with worker rights and entitlements issues, should be comprised of persons with relevant industrial relations experience. As part of its policy announcements prior to its election, the Government commented that Forward with Fairness would create a one stop shop approach to industrial relations with user friendly Courts being the effective enforcement arm for industrial relations matters.

311. Translation of this policy into the Fair Work Bill does not appear to have guaranteed that there will be user friendly Courts that can be accessed by employees. Merely using the existing Federal Court, Federal Magistrates' Courts and State Magistrates' Courts, for compliance and enforcement processes, does not guarantee that they be user friendly. There is nothing within the Fair Work Bill which amends the procedures of the respective Courts to guarantee that those procedures are user friendly, nor does the Fair Work Bill do anything about the constitution of those Courts in terms of dealing with matters arising under the Fair Work Bill. There is no guarantee, therefore, that the members of the respective Courts, who are dealing with matters arising under the Fair Work Bill, have any broad understanding of the industrial relations environment.

312. The consequence of not dealing with the structure, staffing and processes of the respective Courts means that the effective compliance and enforcement processes are to be determined by Courts which have not been established for the purposes of giving effect to Forward With Fairness. This means that traditional, legal norms will simply operate in the Court system and the practice to date is that Courts are slow to act and often take a legalistic approach to compliance and enforcement measures, rather than an approach predominately based upon equity and fairness.

PAYMENTS RELATING TO PERIODS OF INDUSTRIAL ACTION

313. The provisions of Division 9 of Part 3-3 of the Fair Work Bill appear to be a case of gross overkill.

314. One of the starkest realities of industrial relations life is that employers don't need to be encouraged to withhold money or take money off workers who engage in any form of industrial action, protected or not protected.

315. The very first response of employers when faced with any form of industrial action, or any form of action which they consider might be industrial action, is to work out how much money they can take off the workers. Employers simply do not need to be encouraged to withhold pay from employees.

316. The approach adopted in Division 9 of Part 3-3 of the Fair Work Bill mandates that employers must not pay employees for periods of protected or unprotected industrial action. In the SDA's view, this approach is unnecessary and is ultimately counter-productive.

317. The most effective provisions of Division 9 of Part 3-3 are Clauses 471, 472 and 473 which regulate the payments for partial work bans and also which seek to prevent employees making demands for what may be referred to as strike pay.

318. The core provisions of Division 9 are simply unwarranted.

319. There is no logical reason why the Bill should outlaw an employer paying any form of payment during any period of industrial action. In particular, the provisions of Clause 474 which mandate a minimum four hour withholding of pay for any form of unprotected industrial action is simply not warranted and is totally counter-productive to maintaining industrial harmony and peace in a workplace.

320. Employers should have a discretion as to whether or not they make payments in relation to any period of industrial action, whether it be a full strike or a work ban.

321. The general reaction of most employers will be to withhold whatever pay they are permitted to withhold in relation to any period of industrial action undertaken by employees. However, there are occasions where an employer will recognise that it is simply good business and good industrial relations to pay either all, or part of, the money that the employer is entitled to withhold from employees.

322. The Bill should clearly provide as it does in Clause 473, that an employee cannot make a demand for any payment for any period where the employee is engaged in industrial action. Once that protection is guaranteed so that an employer cannot be the subject of duress or pressure from a union or employees, then the matter, as to whether or not pay is made for a period of industrial action, should be at the discretion of the employer.

323. The provisions of Clause 474 of the Bill may very well promote industrial action rather than minimise it. The requirement that an employer must withhold a minimum of four hours' pay for any form of unprotected industrial action, is likely to have the effect of encouraging instances of unprotected industrial action to be at least four hours.

324. Clause 474 would have the effect that if a group of workers took unprotected industrial action in the form of a 5 minute stop work meeting at the commencement of a shift the employer is nevertheless required by law to withhold four hours' pay from each employee. This is counter-productive.

325. In such circumstances, if employees knew that they would lose four hours' pay, it is highly likely that the employees will simply not return to work until the four hours has expired.

326. Alternatively, if the employees held a 5 minute stop work meeting at the commencement of a shift, concluded that stop work meeting and were then prepared to return to work, the employer is prohibited from paying them for the remaining 3 hours and 55 minutes. A real question arises as to whether or not the employees are then required to work for that remaining 3 hours and 55 minutes.

327. An employee who engaged in 5 minute stop work meeting but then was prevented from being paid for the ensuing 3 hours and 55 minutes, would appear not to be in breach of the contract of employment by not working for that remaining time, because the employer cannot comply with the contract of employment in terms of paying for work performed by the employees.

328. If the employer is precluded by law from complying with the contract of employment for 3 hours and 55 minutes by not providing payment for any work performed, then employees will clearly not be required to fulfil their part of the contract of employment for the same 3 hours and 55 minutes.

329. This raises the difficult question that if an employee only stops work for 5 minutes, but is not permitted to be engaged in paid employment for an additional 3 hours and 55 minutes, does the employer have any rights whatsoever to sue the employees for economic loss, occasioned by their not working for the 3 hours and 55 minutes, where the employee cannot be paid for any work performed during that period of time.

330. No breach of a contract of employment would occur after the 5 minute stop work meeting, because the employee was available to work but the employer was not able, by force of law, from complying with the contract of employment by paying the worker for work performed.

331. This is likely to give rise to a new pattern of industrial action which can impose serious economic burdens on employers but in circumstances where employees cannot be sued for causing that economic loss.

332. A new type of industrial warfare could emerge in industries which are vulnerable to four hour stoppages. Employees need only have a 5 minute period of unprotected industrial action to generate a four hour non-work period. A 5 minute stop work meeting at commencement of a shift may impose no real economic loss on an employer but where critical work functions are to be formed in the remaining 3 hours and 55 minutes, then serious economic loss could be imposed on the employer when those work functions are not carried out.

333. The employer, in such circumstances, would not be able to blame the employees because it would be the frustration of the contract of employment caused by the Fair Work Bill which would have prevented the employees from working and the employer from paying the workers for any work. The frustration of the contract of employment, or at the very least its suspension, for that period of 3 hours and 55 minutes, leaves the employer open to bear the costs of any economic loss suffered through the period of non-performance of work by the employees.

334. In some industries, a tactic of 5 minute stop work meetings at the commencement of a shift, with a consequent non work period of 3 hours and 55 minutes would seriously disrupt industries and cause great economic loss to the country.

335. It is this very scenario which appears to be the inevitable conclusion of the introduction of Clause 474.

336. These issues clearly show the absurdity of this over regulation of payments for periods of industrial action.

337. There may very well be an unintended consequence flowing from the introduction of Clause 474 of the Fair Work Bill.

UNFAIR AND DISADVANTAGEOUS WORKPLACE AGREEMENTS

338. The SDA is aware that the Government intends to deal with the continued operation of workplace agreements made before the commencement of the Fair Work Bill through a Transition Bill which will be developed during 2009.

339. The SDA is if the very strong view that the segmented approach adopted by the Government in having 3 separate pieces of legislation deal with the transition from Work Choices to Fair Work Australia means that a holistic approach to the transition from Work Choices to the new system cannot be appreciated.

340. The SDA notes that many of the evils attached to workplace agreements made under the Howard Government legislation will be dealt with in the next stage of legislation in 2009. However the SDA is concerned that debate on the Fair Work Bill does not take place in isolation. It is important that consideration be given now to dealing with the legacy of the Howard Governments failed IR experiment.

341. There appears to be an accepted convention in Australian industrial relations that if an agreement is validly made under one piece of legislation, then the agreement's operation is continued, even when the legislation substantially changes.

342. This convention has led to large amounts of transitional provisions being inserted into the Workplace Relations Act to protect the continued operation of agreements made under earlier laws or earlier versions of the Workplace Relations Act.

343. This convention is not an absolute rule but is merely a practical means of dealing with the potential impact on business of constant changes to industrial laws.

344. 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.

345. 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 Government's Fairness Test and the current Government's No Disadvantage Test.

346. The following chart provides a snapshot of workplace agreements over the last 15 years.

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

347. The odd group out are those workplace agreements made between March 2006 and August 2007.

348. 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 May 2007.

349. 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.

350. 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.

351. Information released by the former Office of the Employment Advocate showed that very 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.

352. 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.

353. The fact that these workplace agreements were made in the first place, and made with employees who would be clearly worse off under the workplace agreement, is reasonably conclusive of 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.

354. Every workplace agreement should be required to pass some form of no disadvantage test. Currently agreements made under Chart A, row (c), are the only agreements that had no test applied.

355. In the case of the Work Choices workplace agreements, the following should apply:

356. Every agreement made before Fair Work can continue to operate beyond 31/12/09 and for its nominal period if, and only if, the agreement passes the NDT established by Fair Work Bill which applies as from 1/1/10.

357. To make this option work in a practical manner, there must be a process which allows the parties to a pre-Fair Work agreement to have it tested as against the Fair Work BOOT, or varied so as to pass the Fair Work BOOT at some time before the 1/1/10.

358. This would be possible in the period between the handing down of the last decision of the AFPC and 31/12/09. The AFPC decision sets the wage rates which will apply at the commencement of the Fair Work Act.

359. The AIRC could be given the role of applying the BOOT, as determined by the Fair Work Act, so as to approve the operation of a pre-Fair Work agreement after 31/12/09, or to vary a pre-Fair Work agreement so that it can operate after 31/12/09.

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

361. 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.

362. 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.

363. Recently a supermarket in Queensland was sold by its owner to a new owner/operator.

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

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

366. Enterprise Initiatives have 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.

367. The workers at this supermarket were working at the supermarket on 31st March 2008 and still working there on the 1st April 2008.

368. Nothing in their job changed.

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

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

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

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

373. 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.

374. Until the HRO Initiatives P/L Employee Collective Agreement is set aside by legislation, then Enterprise Initiatives have a very strong marketing tool where they can promise new businesses a way to avoid the No Disadvantage Test and to avoid the protections promised to Australian workers, by both the Forward to Fairness Transition Act and the Fair Work Bill.

375. 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.

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

377. 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 NAPSA derived from the Queensland Retail Award.

378. A further example of the continued oppression of Australia's workers by the Howard government Work Choices agreements is illustrated in the case of Louis Vuitton.

379. This iconic brand name caters to the rich.

380. As with other brands which target the rich and famous, Louis Vuitton is not likely to be effected by the downturn in the broader economy. An article in the Melbourne Herald Sun, 19 November 2008, titled, "*Top Shops Stay Jolly*" makes clear that companies such as Louis Vuitton make money in any economic climate. See Attachment to this submission.

381. As the Herald Sun article notes, the current Hot Item to buy from Louis Vuitton is $3,530.00 handbag. Certainly not what the average low paid Australian could afford.

382. Louis Vuitton opened a refurbished store in Melbourne in November 2008, which necessitated them closing off Collins St for the opening. Such large scale events don't come cheap.

383. With what appears to be a very profitable recession proof business operating on a global scale, it is scandalous to discover that Louis Vuitton employees its

Australian retail staff on sub standard wages and terms and conditions of employment set by a Work Choices agreement.

384. For the privilege of being able to sell a $3,530.00 handbag at the new Collins Street store, a shop assistant is guaranteed to be paid significantly lower than the minimums currently set by the Victorian Shops Award.

385. A simple comparison between the Louis Vuitton Work Choices Agreement (which is attached to this submission) and the Victorian Shops Award of the AIRC, shows where workers lose out.

386. An adult casual employed over the Christmas/New year sales period receives the following:

Hours worked	Louis Vuitton Work Choices Agreement Wage rates up to 31 Dec 2008	Louis Vuitton Work Choices Agreement Wage rates from 1 Jan 2009	Safety Net Victorian Shops Award
Monday to Friday 9.00 am to 9.00pm	16.48	16.80	19.82
Saturday 9.00am to 5.00pm	16.48	16.80	19.82
Sunday 10.00am to 5.00pm	16.48	16.80	31.72
Overtime on any day	Zero – any overtime is unpaid	Zero – any overtime is unpaid	19.82 if total hours less than 38 23.79 for overtime worked after 38 hours work
Public Holidays	16.48	16.80	39.65

387. There is an urgent need to stop the rorts imposed on workers by Work Choices Agreements.

388. It has been over a year since the Labor Government was elected, and still there is no end in sight for these horrendous Work Choices Agreements.

389. Louis Vuitton is one of the many retail employers who are smiling all the way to the bank, knowing that they can legally continue to grossly underpay their employees, thanks to the legacy of Work Choices.

FAIR WORK AUSTRALIA

390. The policy decision behind creating a new body called Fair Work Australia appears to have been that it would be a completely new institution and membership of the institution would be chosen on the basis of genuine merit.

391. Prior to the election of the current government, the only guaranteed position in Fair Work Australia was that of the President as this had been offered to the current President of the Australian Industrial Relations Commission. In all other cases, appointments of Fair Work Australia were to be based upon a non partisan merit based system.

392. Since that time, the Government has now guaranteed that all existing appointments to the Australian Industrial Relations Commission will be appointed to Fair Work Australia. Given that Fair Work Australia is now nothing other than renamed Australian Industrial Relations Commission, the SDA expresses the view that much of the rationale for having a completely new structure associated with Fair Work Australia is no longer relevant. Many, if not most, of the provisions relating to the existing structure and powers of the Australian Industrial Relations Commission should simply be retained.

MINIMUM WAGE PANEL MEMBERS

393. The SDA notes that the Fair Work Bill does introduce a new concept of Minimum Wage Panel Members and supports this concept as providing the necessary additional skill sets required in wage fixing matters.

394. The SDA notes that under the provisions of Clause 612, a Minimum Wage Panel Member cannot normally perform the functions of a single member of Fair Work Australia. This clearly means that Minimum Wage Panel Members are appointed to Fair Work Australia on the basis of only performing Minimum Wage Panel work.

395. However, Clause 518 of the Fair Work Bill appears to permit a Full Bench of the Fair Work Australia from being constituted predominantly by Minimum Wage Panel Members. A Full Bench can be constituted under Clause 618 with one Deputy President and the remaining members being Minimum Wage

Panel Members. Given that most matters coming before a Full Bench of Fair Work Australia will not involve issues directly relevant to minimum wage setting matters, it would appear that there is no reason why Minimum Wage Panel Members should be permitted to sit on a Full Bench. Most Full Bench matters will either be appeals or will be those matters specifically required to be dealt with by a Full Bench and will involve the broader industrial relations issues normally faced by the Australian Industrial Relations Commission.

396. Minimum Wage Panel Members do not have to be appointed to Fair Work Australia on the basis of having any industrial relations experience. Minimum Wage Panel Members can be appointed solely on the basis of their economic credentials. In the SDA's very strong view, Minimum Wage Panel Members should not be permitted to sit on Full Benches constituted under Clause 618 of the Fair Work Bill. Minimum Wage Panel Members should be restricted to work relating to the Minimum Wage Panel.

397. Clause 620 provides for the constitution of the Minimum Wage Panel. The Minimum Wage Panel must comprise at least the President and at least three Minimum Wage Panel Members but a Minimum Wage Panel will consist of seven Fair Work Australia members.

398. The Department, in its oral presentation to the Senate Committee on 11 December 2008, advised the Senate Committee that under Clause 620, a Minimum Wage Panel could comprise three Minimum Wage Panel Members and three other members of Fair Work Australia. However, Clause 620 does not provide for this with any certainty.

399. In fact, the structure of Clause 620 would permit a seven member Minimum Wage Panel being comprised of the President, and six Minimum Wage Panel Members. If there is a specific intention that a Minimum Wage Panel have a balance between Minimum Wage Panel members and normal members of Fair Work Australia, then it would appear prudent to make an amendment to Clause 620 to provide this.

400. If, however, the intention is to permit a Minimum Wage Panel comprising the President and six Minimum Wage Panel Members, then that would appear to be already be contemplated by Clause 620.

EXTENDING THE REACH OF THE FAIR WORK BILL

401. The Fair Work Bill has been based upon use of the Corporations power in the Constitution. This continues the change introduced by the Howard Government to move away from using the conciliation and arbitration power in the Constitution and relying more on the corporations power.

402. The weakness with a reliance on the corporations power is that there are many employers who are simply not constitutional corporations and thus who cannot be regulated by a law which is only based on the corporations power.

403. There are three ways in which the Government could extend the reach of the Fair Work Bill so that it became a truly national law regulating employment across the entire private sector.

404. Firstly, the Government could base the Fair Work Bill on other constitutional powers which would clearly enable the Fair Work Bill to apply to most, if not all, of the private sector in Australia. These other constitutional powers include such subjects as banking, trade and commerce, telecommunications and foreign affairs. For example industrial relation regulation could be linked to the suppliers and users of telecommunications or to providers or users of banking services.

405. Secondly, the Government could encourage the States to refer their industrial relations powers to the Commonwealth. Any referral of power by the States would be successful only if the Government engaged in genuine negotiations about the content of the Fair Work Bill. The SDA notes that such negotiations have been occurring over the recent past and have taken place in the specific context of the Fair Work Bill.

406. The current structure of the Fair Work Bill and other industrial relations legislation proposed by the Government, provides a less comprehensive coverage of industrial relations than does the laws of some of the States.

407. Referral of powers from the States to the Commonwealth would guarantee that the new industrial relations system being developed by the Government would genuinely be national in nature, coverage and operation.

408. Thirdly, the government can significantly expand the coverage of the Fair Work Bill through greater reliance on the foreign affairs power and the ILO Conventions that Australia has ratified.

409. Already the Fair Work Bill uses the foreign affairs power to ensure that all employees in Australia are covered by the protections provided in Parts 6-3 and 6-4 of the Bill. Each of these two Parts extends the protections in relation to Parental Leave and Unlawful Termination to all employees in Australia. Each of these two Parts relies upon the foreign affairs power to give effect to two of the ILO Conventions that Australia has ratified.

410. If the Fair Work Bill also relied on the ILO Conventions for Collective Bargaining and Minimum Wages, then the provisions of the Fair Work Bill which deal with enterprise bargaining and with minimum wages, classifications loadings and penalties could be extended to all employees in Australia. Using the foreign affairs power in this way would permit the low paid workers employed anywhere in Australia by any employer to access the Low Paid Bargaining provisions of the Bill. Similarly, employers could, regardless of their status (corporations, unincorporated associations, etc) band together to use the Single Interest Employer Bargaining provisions.

411. Effective use of the foreign affairs power to give effect to several ILO Conventions ratified by Australia would create a Fair Work Bill with such extensive coverage of the Australian workforce that very little would be left to be covered by State IR laws. State governments would likely refer the residual areas to the Commonwealth.

412. It is unfortunate that the referral of IR powers from the States could not have been agreed before the Fair Work Bill was introduced. If referral does occur in the future, it will require some significant amendments the Commonwealth's own legislation.

INDUSTRIAL ACTION BY EMPLOYERS

413. The definition of industrial action only treats lockouts by employers as the only industrial action that employers can take.
(See the Full Bench AIRC decision in [2008] AIRCFB 311 PR981439)

414. Each of the types of conduct that employees can take and which constitute industrial action have corresponding conduct by an employer which should be treated as industrial action.

415. For example an employer can direct the performance of work in a manner which is not customary and which is designed to adversely impact on employees. This should be industrial action.

416. An employer could withhold the offering of work, especially where large numbers of employees are casuals and this should constitute industrial action.

417. Employers could significantly alter roster patterns in a retail environment to the significant detriment of workers and as part of a bargaining strategy and under the Bill this would not constitute industrial action.

418. Fairness should require that employers are subject to the same rules in relation to defining industrial action that apply to employees.

ATTACHMENTS

	PARAGRAPH NO.
♦ ABC Online	175
♦ PR092008	190
♦ AIRC Decision Family Provisions Test Case	218
♦ UK Employment Act Provisions	223
♦ Decision 2008 AIRCFB 1000 - Award Modernisation	249
♦ Herald Sun Article 19 Nov 2008	380
♦ Herald Sun Advertisement of Street Closure of Louis Vuitton Store	382
♦ Louis Vuitton Work Choices Agreement	385
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♦ Pay Scale Summary for Vic Shops Award	385