Submission to House of Representatives Standing Committee on Education and Employment on Inquiry into Inhibitors to Employment for Small Business and Disincentives to Working for Individuals

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Inquiry into inhibitors to employment for small business and disincentives to working for individuals

The SDA

The Shop, Distributive and Allied Employee's Association (SDA) is Australia's largest trade union with approximately 216,000 members. The majority of these members are young people and women. Registered in 1908, the SDA has coverage of areas including retail, fast food, warehouse, drug and cosmetic manufacturing and distribution, hairdressing, pharmacies and modelling.

Summary

Small business is an important part of the Australian economy.

It provides employment for large numbers of people.

Government should provide fair and reasonable levels of support for small business.

Government must also ensure that small businesses provide fair and equitable wages and employment conditions for their employees.

Currently the Fair Work Act provides a safety net of wages and working conditions. This safety net must be maintained.

Just as any individual should have the right to set up their own business so should anyone employed in such a business expect to receive fair and just wages and working conditions.

All workers and their families are entitled to income sufficient for them to live decently with dignity

There are no fair grounds to argue that an employee in a small business should receive sub standard wages or working conditions.

The Award system provides a fair safety net for workers and a level playing field for employers. There is no evidence the current workplace relations system inhibits productivity.

A Fair and Equitable Set of Wages and Employment Conditions for Employees

Since the establishment of the *Conciliation and Arbitration Act* in 1904 the legislated Australian workplace relations system has been structured primarily to deliver workplace fairness and justice to both employers and employees. It is our view that whilst from time to time individual parties may not have been happy with particular decisions the system has nevertheless, when looked at holistically over the time period, delivered on its fundamental aims.

The Fair Work Act (FWA) states in its objectives:

"The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians…

> (a) providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and
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> (b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; and
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> (c) ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system; and

(d) assisting employees to balance their work and family responsibilities by providing for flexible working arrangements; and

(e) enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms; and

(f) achieving productivity and fairness through an emphasis on enterprise level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action; and

(g) acknowledging the special circumstances of small and medium sized businesses. [1]

As evidenced from the objects of the FWA, the emphasis is primarily on a fair system which aims to balance the needs of employees and employers and acknowledges that workplace relations is as much about the social, as it is about the economic.

Unions are a fundamental part of the Australian workplace relations system.

The main purpose for a union is to represent the voices of the often voiceless – employees who, by virtue of their status within the workplace, are not afforded the ability to ensure that their working conditions are fair and just.

The SDA does not intend to use this submission as an opportunity to revisit the history of unionism in Australia. Rather, we would point to recent

[1] S3. The Fair Work Act 2009

international data to illustrate the importance of unions in ensuring that the rights of employees are improved, protected and enforced. As recently as February this year, a longitudinal survey of poverty in the United Kingdom was published, *Breadline Britain*[2]. The data is compelling, but quite disturbing. The situation in the UK is one of entrenched poverty and a proliferation of the working poor. It is one Australia would do well to avoid.

What is most interesting to note is the conclusion of the two authors of this study. They note that the solution to addressing this growing and deepening poverty is to two-fold. One is to increase the presence and power of unions and the second is to increase wages.

Despite the claims of some, unions do not aspire to destroy business. In the industries the SDA covers, such as retail and fast food, the SDA has bargained fairly and pragmatically with companies which have demonstrated difficulties within a slowing economy, in order to ensure the viability of such companies and therefore the continued employment of its members and other employees. No one 'wins' when good businesses disintegrate and employees are left without an income; the union movement is only too aware of the repercussions of this. This is precisely why unions understand the importance of a level playing field within workplace relations, and act to ensure that no company has an unfair advantage over another, especially when that advantage is gained through the exploitation and unfair treatment of employees.

[2] S Lansley, J Mack. Breadline Britain: The Rise of Mass Poverty, 2015

The Award System and the National Employment Standards

The Award system and the legislated National Employment Standards (NES) provide a basic safety net of wages and conditions for workers.

The award system is structured on an industry by industry basis to take account of the particular needs of individual industries. While Australia has over 100 Awards most businesses have only one or a small number which apply to them. This is particularly the case for small businesses. Most small businesses, particularly in retail, fast food, hair and beauty and hospitality are covered by the relevant award. The award serves to create a level playing field for employers.

The award system ensures fairness for all industrial parties. This long-standing feature of Australian workplace relations distinguishes Australia from many other industrialised nations.

Awards not only provide this fundamental safety net for employees through containing their basic entitlements, they are also tailored to ensure that they 'fit' the industries to which they apply and assist employers in managing their workforce. The *General Retail Industry Award 2010* is an example of an award which acknowledges the expansion of retail trading hours and days, by allowing for a 24 hour, 7-day a week spread of hours (albeit with penalty and shift rates to compensate those working at unsociable hours). Conversely, the *Hair and Beauty Industry Award 2010*, whilst its spread of hours is generous, is not as broad as the retail award's, simply because it is not required in the hair and beauty industry.

Fair wages are a fundamental hallmark of a fair and equitable workplace relations system. They ensure that all working people have at least a minimum income based upon the number of hours they work.

It also, by extension ensures all people have a minimum standard of living. The Harvester judgement of 1907 enshrined this core principle and it remains as relevant today as when Justice Higgins first delivered that judgement.

Any fundamental change in the award system would seriously disadvantage employees and act as a major disincentive to many who would otherwise seek employment.

The SDA rejects the textbook supply and demand argument that award minimum wages reduces employment. There is very limited evidence to justify this position. In reality the economy does not operate on a pure textbook model. The Fair Work Commission has rules, as the Commission points out that small movements in the award wage have basically a zero sum impact on employment. The SDA endorses that position. In the retail industry, a low wage, labour intensive industry certain minimum staffing levels are required. A business which does not staff appropriately will lose customers to those who do. Wages is a cost of doing business. Workers are entitled to a fair outcome.

If one analyses the operation of the Australian workplace relations system and the decisions of the Fair Work Commission (and for that matter its predecessors) it could not be fairly argued that periodic increases in award wage have significantly outstripped broader wage movements or community standards.

Indeed it could be argued that recent award wages movements have actually been less than average wage movements and as such have led to increasing

levels of financial hardship for those on award wages. Certainly there has not been any wages breakout across the Australian economy in recent times and certainly not at the award wage level.

The fact that some minimum wage workers do not live in low income households is not an argument against a minimum wage. In our view all workers are entitled to a fair minimum wage, regardless of location, gender, age or other factor.

The SDA has strongly argued that the minimum wage should be applied according to the work undertaken, in other words those performing the same job to the same standard should receive the same wage. This is a matter of fundamental equity.

There is no evidence that minimum wages have any impact on employers engaging in the training of young workers. Indeed enrolments in traineeships are highest in the retail, clerical and hospitality industries.

The SDA does recognise that by itself a minimum wages system does not guarantee that people will not live below the poverty line. That is where the tax transfer system comes into play.

The SDA has always argued for a strong system of transfer payments to low income families in order to ensure that all people in all families have a basic standard of living.

In a paper presented to the 7th Australian Institute of Family Studies Conference on 26 July, 2000, NATSEM (The National Centre for Social and Economic Modelling) showed clearly that introducing and then increasing

payments to low-income working families with children has been a resounding social policy success.[3]

NATSEM shows that government initiatives in regard to increasing family support payments and in improving access to education and health services for all members of the community during the 1980's significantly ameliorated the financial position of many low income families, especially for those with dependent children.

A tax transfer system should operate to ensure that no individual or family lives in poverty. It complements the wages system. It does not transfer the burden of sustaining employment onto the taxpayer (including business taxpayers) as would occur if minimum wages were reduced and then supplemented by a government funded work incentive payment. It supplements earnings to ensure a minimum standard of living.

Productivity

There is no evidence award entitlements inhibit productivity.

Australian economy is growing. It has now been increasing for 23 consecutive quarters. The SDA accepts that continued productivity growth is critical.

Various factors influence productivity and productivity growth and there are various means of measuring productivity. In our view labour productivity is probably the most relevant measure, although it must be acknowledged that any form of productivity measure has its complications.

[3] Social Policy Matters, The Changing Face of Child Poverty in Australia: 1982 to 1997-98, Anne Harding and Aggie Szukalska, NATSEM, University of Canberra.2000

Despite continued growth we acknowledge that overall productivity in Australia has slowed in recent years. It should also be acknowledged that throughout history productivity growth has not been a straight line growth. Productivity growth occurs in cycles.

There are a range of factors which have led to the slow down in national productivity. It is unreasonable to suggest that a decline in labour productivity is the reason for Australia's overall productivity slowdown. The fall off in the mining boom, under investment by corporation in infrastructure, training and management in "good" times are key factors in the decline.

It is important to note a recent report by the Fair Work Commission which shows that labour productivity has remained steady or increased in the past year for 85% of enterprises. To the extent there have been wage increases in this period they clearly have not impacted adversely on labour productivity.

In short, labour productivity has largely sustained itself over the recent period. There is no evidence that any movement in wages has led to reduced labour productivity. If businesses are failing they should look beyond the issue of labour and labour productivity.

Productivity of enterprises is a key feature of enterprise negotiations of which the SDA is a part.

The SDA negotiates enterprise agreements with many companies. These employers range from some of the largest in Australia to small businesses. Rarely do negotiations take place without productivity being a central feature of those negotiations. In many cases negotiations commence with the relevant company briefing the union on the "state of the business". The SDA encourages employers to do this as it sets a framework for the negotiations.

Negotiations inevitably focus around issues raised by the union on behalf of the employees of the enterprise and the willingness and capacity of the employer to meet those concerns. Employers also raise issues of concern. Sometimes agreements mention the word productivity but to suggest that if the word is not encapsulated in the final document then productivity has not been a central feature of the negotiations is an overly simplistic and erroneous interpretation of the whole negotiating process.

Penalty Rates

Penalty rates are an integral part of the wages system. The SDA is totally opposed to any reduction in penalty rates.

The Victorian government has calculated that a retail worker could lose up to $300 a week, an effective pay cut of 24.5% if their penalty rates were removed.

Penalty rates for working unsociable hours and weekends have formed part of Australian workplace regulation for almost 100 years. In a contemporary context, the central rationale for payment of penalty rates for work performed in unsociable hours such as on evenings, nights and weekends is to compensate employees for the disabilities to which workers who work such hours are subject. [4]

At the most general level, those disabilities concern the way in which the performance of work at such times interferes with the personal, social and family life of workers. As such penalty rates in Modern Awards are not the product of out-dated principles.

[4] See SDA v $2 and Under (2003) 135 IR 1 at [91] per Watson SDP and Raffaelli C.

Any change or removal of penalty rates would be a severe disincentive to many people to seek employment.

Most employees do not even have the luxury of choosing whether or not to work at nights and weekends. They are rostered to do so by their employer and must fulfil the requirements of their employer.

On the other hand penalty rates apply equally to all employers covered by an award. No single employer gets an advantage over another. A level playing field applies.

Current rates were set in the award modernisation process in which the Full Bench of the AIRC stated, as set out above, that their rationale was to compensate for "the inconvenience and disability associated with work at nights and on weekends". [5]

The SDA adduced evidence in those proceeding which established that the retention of existing modern award provisions in relation to penalty rates remains not only fair in compensating employees for the disadvantages of work during evenings, nights and weekends, but highly relevant and essential today. That evidence is summarised below.

Evidence of Associate Professor Lyn Craig

Associate Professor Lyn Craig is the Australian Research Council Queen Elizabeth II Fellow at the Social Policy Research Centre at the University of New South Wales. She is an internationally recognised leading scholar in the area of work-family and gender issues. Her research is widely published and highly cited. Over a period of 10 years her research has concerned the intra-household effects of social and workplace policy, the gendered division of

[5] [2009] AIRCFB 865 at [232].

labour, work-family balance, parenthood and gender equity and intersections between the family and the economy.

In her report dated 12 September 2012 (the first report), Associate Professor Craig considers whether existing research supports a conclusion that the performance of work by employees on weekday evenings and nights, or on Saturdays and on Sundays has adverse effects on employees, their families and the community. In considering this question, Associate Professor Craig reviewed an extensive range of international and Australian research. She concluded that the research identified the following adverse effects of working on weekday evenings or nights, Saturdays and Sundays:

(a) For employees, the adverse effects include physical and mental health problems, psychological distress, job dissatisfaction, poor work-life balance and work-family strain.

(b) For families, the adverse effects include higher marital discord and marital dissolution, more parenting stress, poorer education and social outcomes for children, higher adolescent depression and anxiety and more time without the worker's participation in family activities.

(c) For the community, the adverse effects include less well-functioning families, less effective parenting, lower participation in volunteering and civil activities, lower social productivity and loss of social consistency and cohesion.

The major cause of these adverse outcomes and effects identified by Associate Professor Craig is that employees who work on weekday evenings and nights, on Saturdays or on Sundays have schedules which limit their ability to participate fully in family, social and community activities and to foster their relationships and cement their bonds with others.

Associate Professor Craig also considered the extent to which the adverse effects described above depended upon whether the work was performed on weekday evenings or nights, on Saturdays or on Sundays. She concluded that the adverse effects did vary in the following ways:

(a) That night work was particularly associated with poor physical health, sleep problems and fatigue.

(b) That evening work was particularly associated with less couple time and supervision of children and with high time commitment and stress.

(c) That weekend work caused emotional exhaustion, job dissatisfaction, work-family strain, stress, burn out and the most interference between work and non-work activities, with the effects particularly pronounced for Sundays.

(d) That Sunday was the least usual and the least popular day on which to work and that it retained a special status and is regarded as particularly important for family. She concluded that Sunday work is associated with the most significant losses and disruption to specific participation in family leisure time and that workers are unable to make up for foregone activities or social contact during the week.

The conclusions reached by Associate Professor Craig from her examination of the Australian and international research were confirmed in a further report prepared by her dated 28 September 2012 (the second report). In that report, Associate Professor Craig considered the conclusion she reached in her first report by reference to available Australian data.[6]

[6] The analysis was undertaken by reference to the Australian Bureau of Statistics Time Use Survey 2006, being the most recently available data set. As explained in paragraph 10 of the second report, the survey gathers information on the time allocation of all members of sampled households over the age of 15 via the recording in a time diary of all activities undertaken over two 24 hour time periods to a detail level of 5 minutes. The Time Use

As explained in the second report, non-work activities may be grouped into the following categories which in turn can be disaggregated:

(a) personal care;

(b) education;

(c) domestic activities;

(d) child care;

(e) voluntary work and care;

(f) social and community interaction; and

(g) recreation and leisure.

Associate Professor Craig's analysis of the ABS Time Use Data revealed that more time is spent in non-work activities on a weekend than on a weekday and that average time in domestic activities, personal care and sleep, recreation and leisure and social and community interaction are all higher on the weekend than on a weekday. Further, personal care and recreation and leisure are higher on Sundays than on Saturdays.

The data also indicated that more people participate in domestic activities, unpaid housework, shopping and home maintenance on the weekend than on weekdays. More people also participate in personal care, leisure and social and community interaction over the course of a weekend day than over a weekday, particularly between weekdays and Sundays.

The data also revealed that participation in childcare activities is higher on a weekend day than on a weekday. The data indicated that more mothers and

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Surveys record the days of the week on which activities occur and all activities that respondents undertake each day including employment-related and non-work activities.

fathers performed childcare on weekend days and in the evenings than during week days between 9am and 5pm and that in the case of fathers, childcare most often occurs on weekends and more so on a Sunday than on a Saturday. On a Sunday, participation in play with children and physical care of children is especially higher for fathers.

In the second report, Associate Professor Craig was asked to identify, by reference to her examination of the Time Use Data and the research referred to in her first report, the consequences for employees, families and the community when work is performed at times when non-work activities are generally undertaken. She identified the following consequences:

(a) The performance of work at times when non-work activities are generally undertaken means that workers spend less time than others do in non-work activities and miss out on opportunities that others have for rest, recuperation, exercise, household management, family and social activities and civic participation.

(b) All non-work activities are significantly lower for weekend and evening workers than for those who work standard hours, save only in relation to time spent in education activities in the case of Sunday workers.

(c) Workers who work non-standard hours lose substantial time in domestic activities and also have less time than others in personal care, with these losses of time being highest for Sunday workers.

(d) The performance of work at times when non-work activities are generally undertaken puts employees out of sync with their family, friends and community, limiting opportunities for coordinating activities

and spending time with others. This occurs because many of the activities which are foregone by those who work non-standard hours are activities which involve and require social contact.

(e) Weekend workers and those who work in the evening spend substantially more and statistically significantly more time alone and less time in social interaction and leisure with friends and family than workers who work standard hours. Differences in spouse time, time with children, time with older family and with friends are most for Sunday workers, confirming that Sunday work was associated with the most disruption to family time.

(f) Weekend workers are unable to make up for non-work activity time lost and that, in some instances (most notably in relation to childcare for Sunday workers) there is further time lost during the week. The same conclusion was identified in relation to lost social and community interaction and leisure/recreation time with others.

(g) Time spent by Sunday workers with others is even more negatively affected by those hours than Saturday workers. Compared to weekday workers, Sunday workers spend significantly more time alone and have less social interaction and leisure/recreation time with their spouse. She concluded that this underlined that:

> "Sunday is important not only because of what is done on the day, but who it is done with. Opportunities for sharing time with others, including leisure, recreation and social interaction with friends and

> family are diminished by all types of non-standard work, but most especially by Sunday work." [7]

In summary, Associate Professor Craig concluded[8] that an examination of the most recent nationally representative Australian Time Use data identified the same patterns of time use as indicated in the research referred to in the first report. Namely that the performance of work on weekday evenings or nights or on Saturdays and Sundays has detrimental effects on the employees concerned, their families and the community. The major cause of those adverse outcomes is that employees who work outside standard hours have schedules which limit their ability to participate fully in family, social and community activities and to foster their relationships and cement their bonds with others. She confirmed that her examination of the Time Use Data indicated that work performed at times when non-work activities are generally undertaken had the adverse consequences identified in the first report.

Associate Professor Lyndall Strazdins

Associate Professor Lyndall Strazdins is the Future Fellow at the National Centre for Epidemiology and Population Health at the Australian National University. She is a highly regarded and widely cited academic whose research interests include contemporary predicaments and health consequences of work and care, linkages between the quality and conditions of work to adult and child health and time scarcity as a risk factor for inequalities in health and family wellbeing.

Associate Professor Strazdins prepared a report dated 4 September 2012. That report was prepared by reference to Australian and international research

[7] Second report, para 28.
[8] Second report, para 29.

dealing with the health consequences of the circumstances and conditions in which parents perform work. Associate Professor Strazdins' conclusions were as follows:

(a) That there is evidence that the performance of work by workers on evenings and nights or on weekends has mental and physical health impacts on those workers, particularly in relation to night and evening work. In relation to weekend work, the major impacts will be social and will flow from disruptions to family, social and community engagements.

(b) That there was a reasonable body of evidence which showed associations to poorer cognitive outcomes and poorer mental health in children when their parents performed work on weekends, evenings or nights.

(c) The research identifies that low socioeconomic resources are a factor that may amplify negative associations between children's health and work on weekends, evenings and or nights. She identified that those resources include income and that one way to support families when parents work non-standard times and to avert possible health impacts, is to increase family resources, including income.

<u>Associate Professor Sara Charlesworth</u>

Associate Professor Sara Charlesworth is the Principal Research Fellow at the Centre for Work + Life at the University of South Australia. She has significant experience as a researcher in the areas of employment regulation and gender equality.

Associate Professor Charlesworth prepared a report concerning the results of two large scale surveys of employees which have sought to measure different

dimensions of work-life interaction experienced by employees. That interaction is measured and compared though the "Australian Work and Life Index" (AWALI) which measures perceptions by employees of work-life interaction by reference to the following five dimensions:

(a) "general interference", being the frequency with which work interferes with responsibilities or activities outside work;

(b) "time strain", being the frequency with which work restricts time with family or friends;

(c) "work-to-community interaction", being the frequency with which work affects workers' ability to develop or maintain connections and friendships in their local community;

(d) satisfaction with overall work-life "balance"; and

(e) frequency of feeling "rushed or pressed for time".

The AWALI measure brings together the above five dimensions of work-life interaction to produce an overall work-life index scaled from 0 (best work-life interaction) to 100 (worst work-life interaction).

The AWALI measure has been utilised in two surveys considered by Associate Professor Charlesworth in her report.

(a) The AWALI 2008 (the AWALI survey) survey being a nationally representative survey of 2831 employed persons conducted in 2008.

(b) The Victorian Work and Life Survey (the VicWAL) being a survey conducted in 2009 and by reference to 3007 employees in Victoria.

Associate Professor Charlesworth states that both the AWALI and VicWAL surveys are generally representative of the relevant Australian and Victorian populations at the time those surveys were conducted.[9] As outlined below, the data collected from those surveys does enable retail industry employees to be identified. Associate Professor Charlesworth notes however, that the surveys were not designed to be specifically representative of retail industry employees, but because the VicWAL survey included a larger sample of retail industry employees,[10] the results of that survey are likely to be more representative in relation to retail employees. [11]

In her report, Associate Professor Sara Charlesworth outlines the analysis of both the AWALI and VicWAL surveys in relation to employees generally and in relation to retail industry employees specifically. Her examination of the survey results is summarised below.

An examination of both the AWALI and VicWAL surveys indicated that there was a statistically highly significant difference in the AWALI scores between employees who often or almost always worked weekends and those who do not.[12]

Both surveys also produced a statistically highly significant difference in AWALI scores for employees who often or almost always worked evenings after 9pm and those who did not.[13]

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[9] Para 19.
[10] 322 employees as against 118 employees in the AWALI survey.
[11] Para 19.
[12] In the AWALI survey, employees who often or almost always worked weekends had an average AWALI score of 49.09 compared to a score of 36.01 for those who do not. The equivalent AWALI scores for the same classes of employees in the VicWAL survey was 46.58 and 38.37 respectively.
[13] In the AWALI survey, employees who often or almost always worked evenings after 9pm had an average AWALI score of 53.21 compared to a score of 37.49 for those who do not. The equivalent AWALI scores in the VicWAL survey (but in relation to employees who work between 7pm and 7am) was 47.85 and 37.83 respectively.

In the case of those who work on weekends, these results [14] mean that those who often or almost always work weekends are significantly more likely than those who never, rarely or sometimes work weekends to say:

(a) that their work almost always, or often, interferes with their responsibilities or activities outside work;

(b) that their work almost always, or often, keeps them from spending the amount of time they would like with family or friends;

(c) that their work almost always, or often, interferes with their ability to develop or maintain connections and friendships in their community;

(d) that, thinking about their life in general, 60% said they almost always, or often, feel rushed and pressured for time compared to 22% of those who never, rarely or sometimes work weekends; and

(e) that, thinking about their work, 22% said they are not very, or not at all satisfied with the balance between their work and the rest of their life compared to 15% who never, rarely or sometimes work weekends.

Similar outcomes are described in relation to the VicWAL survey.[15]

[14] In the case of the AWALI 2008 survey.
[15] See para 33.

Retail industry employees

As noted above, the analysis of retail employees from the VicWAL survey is likely to be more representative than the analysis of that group of employees from the AWALI survey.

Associate Professor Charlesworth's analysis of the VicWAL data for retail employees indicated the following:[16]

(a) Retail employees who usually work weekends have an average AWALI score of 40.42, compared to 34.82 for those who do not. That difference is statistically significant.

(b) Retail employees who usually work between 7pm and 7am have an average AWALI score of 44.18 compared to 35.18 for those who do not. The difference is statistically highly significant.

Associate Professor Charlesworth also compared the impact of working weekends and work between 7pm and 7am on work-life interference as between retail employees and employees in other industries. She concluded as follows: [17]

(a) When hours worked are controlled for, work on weekends was significantly associated with higher AWALI scores. Work in the retail industry had no significant effect on average AWALI scores when compared to those working in other industries, such that the influence of working weekends on work-life interference was not affected by whether or not employees worked in the retail sector.

[16] Para 35.
[17] Para 37 and 38.

(b) When controlling for hours worked, work performed between 7pm and 7am was significantly associated with higher AWALI scores and that work in the retail industry had no significant effect on average AWALI scores compared to working in other industries. As such, the influence of work between 7pm to 7am on work-life interference was not affected by whether or not employees worked in the retail sector.

In summary, the evidence of Associate Professor Charlesworth is of significance because it confirms, through the AWALI measure, the conclusions reached by Associate Professor Craig, Associate Professor Strazdins and Dr Woodman that work performed on weekday evenings and weekends has adverse consequences and disadvantages on employees, their families and the wider community. It also confirms that the level of interference with work-life balance caused by evening and weekend work does not vary as between workers in the retail industry and workers in other industries. This undercuts the suggestion that the nature of work in the retail industry and in particular the deregulation of trading hours justifies the elimination or reduction of penalty rates for work performed in those hours.

Dr Dan Woodman

Dr Woodman is the TR Ashworth lecturer in Sociology in the School of Social and Political Sciences at the University of Melbourne. His principal area of expertise is as a youth researcher. His research is widely recognised and cited both in Australia and internationally. He has prepared a report dated 21 September 2012 which the SDA relies on in this proceeding.

Dr Woodman's evidence is based upon research he has conducted over the past 7 years in which he and other researchers have tracked the lives of young

Australians after the end of secondary school. As part of that research, in 2008 Dr Woodman conducted 50 interviews with young people aged 18-20. Those interviewees were sampled from 1294 participants who had been recruited through secondary schools in Victoria, New South Wales, Tasmania and the ACT and included a balance of young people according to gender, whether they were studying or not and their place of residence (urban versus regional areas).

In his report, Dr Woodman has referred to six case studies of young people interviewed as part of the above research. Those case studies were selected from those interviewees who had worked in the retail or hospitality industries and who had raised in their interviews issues about the impact of work patterns on their relationships.

Dr Woodman states in his report [18] that the interview excerpts he refers to are not intended to be representative in the framework of probalistic sampling. As he notes, the focus of his report is primarily qualitative. The interviews referred to in his report are used "to highlight the different mechanisms by which weekend and evening work appeared to impact on the participants' lives outside work". [19]

On the basis of the excerpts from the six interviews referred to in his report, Dr Woodman reached the following conclusions:

(a) The extension of the working week for young people over seven days and into the evening adds a new challenge to scheduling regular periods of time with a collective of others – organising leisure time

[18] Para 18.
[19] Para 17.

activities so that others could attend and to themselves attend, becomes more difficult for young people.

(b) Although weekend and evening work likely held some benefits for some young workers in helping then coordinate earning money with engaging in education, those benefits did not flow in relation to those young people working those hours who were not students.

(c) Although working on the weekend and evenings is a common experience for the participants in the study, this did not mean that Sunday was just like any other day or that evening employment is the same as daytime employment. None of the participants spoke about weekend and evening work in of itself in positive terms. [20]

(d) Although some workers may prefer to work weekend or evening work because of study commitments and because they can earn relatively higher wages, the interview suggested that if pay rates were equal and if study timetables could be controlled and weekday work available, participants would prefer to have evenings and weekends free to spend with others.

(e) He concurred with previous research that the growing pattern of spreading the work week across seven days and into the evening does not mean that Sunday or the evenings are now just like any other time. The experiences identified in the interviews he conducted suggest that weekend and evening work continue to have an effect on peoples' time with significant others and hence can still be said to be unsociable.

[20] Para 39.

(f) He concluded that the "stretch" of potential working hours and associated variability in working hours means "that it is more difficult to organise collective time together among friends and other significant others". This suggested limits to which the impact of work times on evenings or weekends on relationships and collective activity can be compensated by non-work time at other periods such as weekdays.

Dr Woodman's report contradicts the simplistic claims advanced by employers in this proceeding that because some young people seek to work at non-standard times, such as on weekends, there is no justification for the existing penalty payments. His evidence highlights that, even in the case of young people who seek to work on weekends because, for example, of their study commitments, it does not follow that such work does not bring with it adverse consequences or effects of the type identified by Associate Professor Craig. Dr Woodman's evidence is of significance because it highlights how the lack of synchronisation between the time available for non-work activities for young people who work on weekends and evenings and the time for such activities with family, friends and community is equally applicable in the context of young people. The nature of these impacts may be different but they are of the same character, namely: the difficulty generated by such work in enabling workers to synchronise their social and family time with significant others.

Retail in Australia has never been based on a 9 am to 5 pm, Monday to Friday working week. The retail industry always had industrial awards that permitted (or required) work to be performed on Saturdays. Seventy years ago, a working week for a full time retail worker was from Monday to Saturday lunchtime. Thus, the working week was five and a half days for full timers during a period when all other workers enjoyed a five day working week. The standard week

for other industries, including manufacturing, metals etc., over that period was five days, Monday to Friday. This anomaly continued until the 1970's. It was a "requirement" that employers wanted and needed to ensure that stores opened on Saturday mornings, Saturday was an important trading day.

In 1972, in Victoria and New South Wales, and in later years in other states, a late night of trading was legislated, accompanied by a five day working week in the relevant retail State awards. Employers were still able to roster workers across Monday to Saturday but only as a five day week. This was the first time retail workers were entitled to two full days off a week. With the longer extended trading hours, awards were adjusted to have ordinary and penalty rates in lieu of overtime provisions. Exactly the same things happened when Saturday afternoon trading was legislated in the 1980's and Sunday trading started in the 1990's. The idea that retail awards reflect 9 am to 5 pm, Monday to Friday is simply nonsense, and is not supported by history.

The modern General Retail Award provides for ordinary hours on all days of the week. The Retail Award has a span of Monday to Friday, 7am to 9pm (11pm for those employers who open beyond 9pm Monday to Friday, or 6pm on Saturday or Sunday), Saturday 7am to 6pm and Sunday 9am to 6pm. Further the modern Retail award has a night shift work provision.

The Modern Retail Award arose from the process of modernising the award system, as part of the Federal Government's move to a fairer and simpler system. The modernisation process in retail was long and complicated, given the fact there was no National Retail Award. Awards applied on a State or Territory basis. Various occupations in each State or Territory other than the shop assistant such as bakers or butchers also had awards applying in State or Territories.

Each of the awards was different in terms of language, style etc. but also in conditions that applied and what was allowed eg rest breaks, start times, penalties etc.

In developing the Modern Retail Award, a full consultation process was undertaken by the Australian Industrial Relations Commission (AIRC). The Award was not developed in a void, isolated from the industry employers. A simple look at the number of submissions made in the retail industry modernisation process shows the sheer volume of submissions and the range of interested parties. Small retailers, large retailers, big and small employer organisations and unions all made repeated submissions arguing various points.

Many employer submissions were made seeking lower penalties and lower casual loadings than those that were eventually placed in the award. The AIRC was required to examine submissions, examine the then current awards that operated and determine, based on this, what conditions would apply. In most cases of penalty rates and loadings, the AIRC simply adopted the middle position or the most common position contained in the various pre-existing State retail awards. Employers were not satisfied with the considerations and findings of the AIRC and have attempted to rehash their former prima-facie claims in a different forums including other Productivity Commission Reviews, Senate Inquiries and FWC proceedings.

The retail industry during the modernisation process received the most submissions. The retail industry also had the longest hearings. In fact the retail industry always required extra time and extra submissions over the modernisation process. Even when the Award was made in December 2008, a

further round of applications was made by parties seeking changes. Multiple applications were made by various employer organisations to reduce penalties.

A Full Bench of Fair Work Australia determined these applications. An extract of the decision is as follows:

> *Sunday penalties*
>
> *The NRA, CCIWA, RTAWA and the Australian Retailers Association (ARA) seek to reduce the Sunday penalty rates for full time employees from 100% to 50% and for casual employees from 125% to 50%. The rates sought are reflected in NAPSAs applying in New South Wales and to Queensland exempt shops but are not generally reflected in other pre-reform awards and NAPSAs. The modern award rate of 100% for full time employees is in line with the existing rate in Victoria, the Australian Capital Territory, Queensland non-exempt shops, Western Australia and Tasmania. In our view the critical mass supports the retention of this provision.*[21]

The modern retail award that is now in place radically overhauled the structures that previously applied through the multitude of awards. The retail industry, unlike many other industries, never had a national award. Having one single award apply nationally is a productivity gain that needs to be recognised.

The modern retail award provides for 24 hours, 7 days a week operation without overtime. This is the first time such a provision has applied. Under the numerous previous awards there were limitations on when and how

[21] [2010]FWAFB 305, 29th January 2010

ordinary hours could be worked, i.e. night fill could only occur when the store was closed, “fill” ended at midnight, only one late night (evening) of work in a week could be rostered. A 24-hour trading store would have needed to use overtime rates to staff the store for substantial periods of the night and early morning.

The modern retail award now allows and caters for 24 hour operations. This is a major productivity gain for employers that the modern award has provided.

Much has been made of employers complaining about increased penalties. Any penalty increase took five years to fully implement. However, many retail employees lost in an instant a substantial component of their regular wage due to the fact overtime was not a “penalty” and therefore was not phased in or out. It was simply removed. To illustrate this, in many states work between 6pm to 9pm, Monday to Thursday, was overtime. Retail workers regularly worked this time, e.g. supermarkets open to 8 pm. Employees working between 6 pm and 8 pm were paid a 50% overtime penalty. With the new award span of hours allowing work after 6 pm with a penalty of 25%, a “transition” was to occur. This transition however, was from 0% to 25% over five years as the overtime penalty was not saved. FWA and FWO both agreed this was correct, so employers could freely trade to 8pm, no longer paid the overtime penalty, did not have to pay the full 25% penalty, but enjoyed a five year phase-in of the transition from 0 to 25%.

The modern award does not contain “restrictions” that prevent labour being employed. It does provide a balance between the employer’s and employee’s needs. For example, there are maximum shift lengths of 11 hours, but someone could work 12 hours. Paying appropriate penalties or observing minimum standards are not a “restriction” prohibiting employment at certain

times. If the employers' argument was correct that the award was "restrictive" then awards should not exist, as any provision or condition is a restriction. Industrial relations is about the balance to protect employees from employers' absolute power. Any look at the minimalist Work Choices contracts demonstrates clearly the power employers can exercise, when there are no or very few minimums in place.

The examination of penalty rates had a live experiment during Work Choices. Many employers in the retail industry, especially in small operations, took up the option under Work Choices of removing employee entitlements. Any look at individual contracts made clearly show that retail employers made bare minimum agreements. They did not include trade offs.

Given that the option of individual contracts was available, employers simply reduced entitlements – removed penalty rates, took away tea breaks, reduced overtime rates to ordinary rates and increased the working week, to name a few. Furthermore, the payment made to workers was the award rate or a little more – but clearly insufficient to compensate for lost entitlements and insufficient to pass a 'no disadvantage' or boot test.

There have been studies conducted regarding the effects of Work Choices.

One such study which specifically examined the Retail and Hospitality Industry was conducted by the Workplace Research Centre of the University of Sydney. The study's findings were reported in "'Lowering the standards': From Awards to Work Choices in Retail and Hospitality Collective Agreements." This report is attached at Appendix 7. The report contained the following overview:

> "The findings of this study can be simply stated:

- In the first round of bargaining, under the best macro-economic conditions in a generation, agreements rarely raised employee's work standards and usually lowered them. As such, it reveals that the shift from award to statutory based enforceable rights has profound implications in sectors where workers have limited choices.
- The changes achieved through agreements were often derived from template contracts. They usually had nothing to do with customising employment arrangements to the unique needs of the enterprise.
- A quarter (24 percent) of the agreements studied had been based around a template devised by one consultant working both the retail and hospitality industries.
- Where agreements differed, it was due to union influence and the fact that employers were larger and had bargaining experience.
- 90 percent of union agreements preserved nearly all protected Award matters, whereas 50 percent of non-union ones abolished five or more
- The scope of issues covered in agreements was extremely narrow. They generally dealt with working time rights and rarely anything else
- Less than a third dealt with skills issues and less than one in six addressed childcare and work and family balance issues.
- Most left out the majority of 'non-protected' award matters like redundancy and severance pay (which where lost or reduced in 77 percent of agreements)

- The interaction of the new entitlements with common rostering arrangements will generally lead to falls in earnings. In retail these falls are in the range of 12 percent to 1 percent and in hospitality in the range 6 to 10 percent (although for union agreements increases of 3 percent are possible).

- In particular sectors, workers on particular rosters will be up to 30 percent worse off. Cafés and Restaurants offer consistently poor prospects for casual and part-time workers.

- The best that the 'Fairness Test' can deliver is partial compensation for a limited range of award losses.

- Employees have lost up to 10 – 30 percent in earnings, more when allowances, paid breaks and annual leave loading and overtime are factored in.

- No modelling has been done for losses concerning redundancy and severance pay.

- No amount of money can compensate for losses like the right to notice, rights to recovery time and basic protection for part-timers which are now purely optional for employers." [22]

Clearly, most retailers using individual contracts and others using agreements under the Work Choices legislation took away basic entitlements to pay and penalties. Employees were not in a position to "bargain" and obtain a better result in a "free market." The power imbalance between employer and employee continues.

[22] Lowering the standards': From Awards to Work Choices in Retail and Hospitality Collective Agreements Evesson et al Pg vii

In 2006 the Federal Government made arbitrary and sweeping restrictions to the ability of Australian workers to access to unfair dismissal rights.

Unfair Dismissal Protection

An estimated 4 million workers were excluded from the scope of those laws making the capacity to access unfair dismissal applications a privilege rather than a right, the exception rather than the rule.

Under either State or Federal industrial law workers, who had been unfairly dismissed, had previously held the right to go to a tribunal and have their matter determined by an independent umpire. This fundamental right was severely circumscribed by the commencement of WorkChoices and removed for many, many workers.

One of the more odious aspects of the legislation was the entitlement any employer with less than 100 employees to dismiss with impunity – using any concocted reason – any employee. Employees in businesses with 100 employees or less (including full-time, part-time and regular casual employees with more than 12 months service) were jurisdictionally barred from making unfair dismissal applications.[23]

Two tiers of justice were established under the WorkChoices legislation for unfairly dismissed workers; that is, those who worked for employers with more than 100 employees retained curtailed rights and those who worked for employers with 100 employees or less had none.

> *"It is expected that this exclusion will reduce unfair dismissal claims by between 75% to 90%."*[24]

[23] Section 643(10), (11) and (12) of the *Workplace Relations Act* 1996
[24] Macken J, ""Macken on Work Choices" January 2006, p 8.

The SDA remains profoundly opposed to this artificial distinction; any unfair sacking remains morally unfair irrespective of whether the employer has 1 or 10,000 employees. The law should operate equitably to protect all employees from such conduct.

Another inexcusable aspect of the legislation was the entitlement of any employer to dismiss an employee for "genuine operational reasons" (or for reasons that include genuine operational reasons)[25].

The gross unfairness of this provision played itself out in 2009 when Commissioner Larkin made the following observations:

> *"[35] I have read and considered each statement filed in this matter by the employees who were terminated from their employment at the Myer Charlestown store. I accept their evidence of the distress, frustration and anger they felt in relation to their termination of employment, especially given their length of tenure with Myer. I can also appreciate their feelings and the difficulties some alluded to in their respective statements.*
>
> *[36] As unfortunate as the redundancies were, the legislation in these types of cases is clear, as is authority on the point …"*[26]

The decision made plain that the Commissioner's hands were tied and the Commission was unable to test or thoroughly consider the process adopted by the employer in that matter, whereby seven long-term, full-time employees were made redundant when the workplace retained a large pool of casual and part-time labour.

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[25] Section 643(8) and (9) of the *Workplace Relations Act* 1996
[26] Leonie Slee and ors v Myer Pty Ltd re Termination of employment - operational reasons [2009] FWA 419, 12 October 2009 - Larkin C

These provisions were offensive when introduced in 2006, unfair when applied in 2009 and remain so now.

Given the lack of any empirical evidence to support arguments that unfair dismissal laws in the Australian context will create jobs, lift productivity or improve living standards the SDA strongly opposes any attempt by the Government to co-opt the Productivity Commission to act as its Trojan horse through this Inquiry and recommend the reintroduction any of these odious WorkChoices unfair dismissal provisions.

Fair Playing Field for International Commerce

The retail industry in Australia is facing a significant disadvantage against overseas on-line retailers.

Australian retailers are required to pay G.S.T. on all merchandise they handle, plus pay any import duty on this merchandise.

Overseas-based on-line retailers do not pay the G.S.T. on merchandise priced under $1,000. They do not pay import duty. This gives them a price advantage of up to 20% over Australian-based retailers who must pay both the G.S.T. and any import duty.

Therefore, we have an uneven playing field. This is unfair competition.

The magnitude of the disadvantage suffered by Australian retailers is substantial for an industry where profit margins are generally quite small. It is not a sustainable situation.

International on line retail should not be given preferential treatment at the expense of Australian workers and businesses.

Overseas operators are taking advantage of the unfair competitive environment to grow their business. It is not uncommon for overseas operators to ensure GST and import duties are avoided. For example, if an order is over $1000, it is automatically split into two orders to fall below the $1000 threshold. A system that actively and willingly condones such approaches is wrong.

Having inefficiencies that give overseas competitors an advantage in that they can avoid GST and import duties is something that the Australian retail industry should not have to contend with.

Many countries deliberately protect domestic companies from overseas competition. Here, we are doing the opposite. Government policy actually penalises Australian retailers against their overseas on-line competitors.

The Australian Retail Industry is already a modern and competitive industry with an extremely flexible workforce and an efficient mode of operation. It is as advanced as any retail industry in North American or Western Europe.

The Government legislates to impose various taxes and duties. In doing so, it has an obligation to the retail industry and its employees to ensure that this taxation regime does not disadvantage any companies, whether domestic or foreign. It has a duty to ensure there is a level playing field.

Overseas on-line retailers should pay the same taxes and duties as their Australian-based competitors.

The continued existence of the current system acts as a limitation on employment and should be removed.