Submission

to

Senate Employment, Workplace Relations and Education
References Committee

Inquiry into Workplace Agreements

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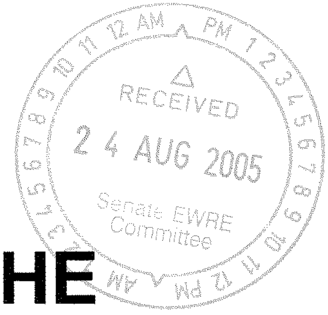

SUBMISSION OF THE SHOP DISTRIBUTIVE & ALLIED EMPLOYEES' ASSOCIATION TO THE SENATE EMPLOYMENT WORKPLACE RELATIONS & EDUCATION COMMITTEE INQUIRY INTO WORKPLACE AGREEMENTS

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Introduction

1. The Association welcomes the opportunity of making a submission to this Inquiry as the Inquiry is extremely timely given the announced intentions of the Federal Government to significantly amend the Workplace Relations Act in relation to agreement making.

2. The Association is Australia's largest trade union with over 225,000 members. Approximately 90% of the membership of the Association are covered by enterprise agreements with all but a very small number of such agreements being agreements made directly with the Association. Even where agreements have been made directly with employees as Section170LK Agreements, the Association has in all but a few of cases been able to successfully negotiate with the employer significant improvements over the original proposed agreement so that the agreement certified by the Commission contained improved terms and conditions of employment for the respective employees.

3. The Association has an extensive history of being able to negotiate substantial enterprise agreements with employers in the retail, warehouse and fastfood industries. The Association commenced making full enterprise agreements which effectively replaced existing minimum rates awards when the opportunity was offered under the former Industrial Relations Act to process enterprise agreements as consent awards through the Australian Industrial Relations Commission. In the early 1990's the Association entered into a number of consent awards with Australia's major retailers, including business arms of Coles Myer Limited and Woolworths Limited. These first enterprise agreements were negotiated often on the basis of creating single national standards for the employer and thus replaced the many State and Territory awards.

4. The various State and Territory Retail Awards essentially had the same rate of pay for the same type of work across each State and Territory. However, due to

historic reasons different terms and conditions would often apply in relation to other award clauses, for example sick leave, annual leave etc. The first enterprise agreements made between the Association and the major retailers sought to even out these differences by creating a single national standard for an employer across their business in all States and Territories. The Association and the employers were more than satisfied with the approach to enterprise bargaining at that time. Notwithstanding significant changes made with the introduction of the current Workplace Relations Act, the Association has steadfastly maintained good working relationships with all major retailers and fastfood companies, such that the Association has continued its original agreements by simply replacing them with more updated versions which have been processed under the relevant provisions of the Workplace Relations Act.

5. In addition, the Association has been able to enter into significantly more enterprise agreements with mid-sized and smaller operators in the retail and fastfood industries. More recently the Association has noted a significant increase in the use of Australian Workplace Agreements and non-union agreements in the retail and fastfood industries. In every case, the package on offer whether it be an AWA or a non-union agreement has been significantly less than what has been achieved by the Association through enterprise bargaining directly with employers.

6. In a number of examples involving non-union agreements the Association, representing individual members employed by the employer, has been able to intervene in the process of certifying the non-union agreement. As a result of our involvement the SDA has been able to identify significant weaknesses in the agreements in relation to their passing of the No Disadvantage Test, or in relation to compliance with the requirements to adequately explain the terms of the proposed AWA or non-union agreement. In such cases, the Association has invariably been able to obtain significant undertakings and understandings from the respective employer, so that the Association has either withdrawn its formal opposition to the certification of the agreement, or has become a party to the agreement on the basis of undertakings given by the employer to the Commission.

7. In some instances, the undertakings have not been given to the Commission but have been expressed in letters of exchange directly between the employer and the Association. In all cases where the Association has become involved, and a

non-union agreement has been made, the agreement has been significantly improved in relation to the package of terms and conditions offered to employees.

8. In some cases however, employers have specifically sought to exclude the Association at every step along the way when offering either AWAs or non-union agreements to their employees. In these cases, the Association has exercised what legal rights it has under the Workplace Relations Act to oppose certification of non-union agreements, or as bargaining agent, to intervene in the approval process for workplace agreements. Where employers have consistently refused to discuss or negotiate with the SDA over AWAs or non-union agreement, the Association has invariably opposed the certification of the agreement or the AWA under the respective provisions of the Workplace Relations Act.

9. The Association has in a number of these matters successfully prevented the certification of a non-union agreement or overturned the certification of a non-union agreement on an appeal initiated by the Association, invariably because of fundamental failure by the employer to comply with the mandatory provisions of the Workplace Relations Act, in explaining the proposed non-union agreement to employees in a manner, and in a form, such that the employee could make a genuine choice as to whether or not they wished to be covered by the agreement as proposed by the employer.

10. The Association has also work co-operatively with the Office of the Employment Advocate in matters where the Association was the bargaining agent for employees who had been offered an Australian Workplace Agreement. In some instances, the Association raised issues of cohesion with the Office of the Employment Advocate, and in other matters the Association raised issues going to the proper application of the No Disadvantage Test for the particular AWA.

11. It is from the position of this history that the Association feels confident in making this Submission on agreement making under the Workplace Relations Act.

<u>Terms of Reference 1</u>

"Whether the objectives of various forms of industrial agreement making, including Australian Workplace Agreements, are being met and whether the agreement making system, including proposed federal government changes, meet the social and economic needs of all Australians, with particular reference to the scope and coverage of

agreements, including the extent to which employees are covered by non-comprehensive agreements."

12. The key issue raised by this particular part of the Terms of Reference relates to the scope and coverage of agreements. The Association notes that most agreements that exist in the retail and fastfood sectors are not agreements which cover all employees. In fact, employers specifically negotiate agreements only for those classes of employees who would be described generally as shop assistants, or first line supervisors. Employers in nearly every case that the Association is aware, exclude managers and non-retail employees from the coverage of agreements, whether they be with the Association or non-union agreements.

13. In relation to agreements between the Association and employers, the segmentation of the workforce into two key groupings, namely general retail staff and managerial staff, is done specifically by employers for several reasons. Firstly, as the agreements with the Association normally contain clauses which promote union membership amongst persons covered by the agreements, the exclusion of managerial classes of employees from agreements with the Association means that the employer does not have to encourage any managerial staff to be members of a union.

14. Secondly, the removal of managerial staff from comprehensive certified agreements means that managerial staff are invariably employed on individual contracts, with the details of those contracts often only being known by the individual manager and the employer. There is in this sense no collective approach by managers to determining their terms and conditions of employment in major retail companies. The utilisation of individual contracts for managerial staff has no effect of reducing or eliminating the possibility of managers acting collectively. The segmentation of the workforce also is intended to create a clear divide between the general retail staff and the staff classed as managers.

15. A consequence of the separation of staff into two categories, the non-managerial and the managerial staff, is that whilst agreements provide comprehensive dispute resolution procedures in relation to issues arising amongst the non-managerial staff, the same cannot be said for the managerial staff. Workers employed under the certified agreements between the Association and the major retailers always have access to a comprehensive dispute resolution procedure

whether or not they are members of the Association. In addition, workers are able to join the Association and call upon their services when they have difficulties in their employment. By separating managerial staff out of the agreement process, such staff invariably are left to their own devices when they have a problem or dispute with their employer. This invariably puts managerial staff in a significantly weaker position in terms of bargaining with their employer.

16. The Retail Industry is replete with examples of people in trainee management positions or as junior managers who are actually performing more work and over longer hours than retail staff covered by certified agreement, but for essentially less pay. Junior managerial staff in the Retail Industry are generally in a more vulnerable position than the average retail employee who would be covered by comprehensive enterprise agreement with the Association.

17. In the retail and fastfood industries agreements are reasonably comprehensive in the way they deal with the terms and conditions of employment. As far as possible the Association certainly strives to have comprehensive agreements which replace the operation of an underpinning award in its entirely. There are however key areas where agreements are not comprehensive. The starkest example in relation to this is that invariably agreements in the retail and fastfood industries will only deal with long service leave by reference back to the relevant State Legislation.

18. The key driver of excluding long service leave from a comprehensive certified agreement is the differences appearing in the relevant State Legislation concerning Long Service Leave. States such as South Australia which offer three months long service leave after ten years of service as against other States offering three months long service leave after fifteen years of service, there is a disincentive for employees having a single national standard on Long Service Leave in a comprehensive enterprise agreement. Employers whilst they would argue for uniformity of terms and conditions of employment across their business where the business is a national one, always seem to be able to justify an exception to that rule when it comes to Long Service Leave. Quite clearly employers do not want to negotiate a common National Long Service Leave provision where they may be required to pay the more generous South Australian provisions in all other States.

19. A further matter relating to whether or not enterprise agreements are comprehensive relates to the specific jurisdiction given to the Australian Industrial Relations Commission in relation to enterprise agreements. In the Conciliation and Arbitration Act, the Industrial Relations Act, and currently in the Workplace Relations Act, the jurisdiction of the Commission in relation to the certification of agreements is limited to matters which pertain to the employer and employee relationship. This is significantly narrower a concept than is contained in the constitutional power relating to the prevention and settlement of interstate industrial disputes.

20. As the Government has chosen to limit the jurisdiction of agreements relating to matters pertaining to the employer and employee relationship then quite clearly not all issues that relate to workplace relations are able to be contained in a certified agreement. This creates fundamental problems for both the employer and workers and unions in creating single simple instruments which regulate terms and conditions of employment at the workplace. Currently, there are matters which simply cannot be contained within a certified agreement under the Workplace Relations Act. This means that where there is agreement between workers and the employer as to other matters relating to workplace relations, those other matters have to be dealt with by way of either Memorandum of Understanding, individual contracts, common law contracts or some other instrument, other than the certified agreement. There is a significant defect in the approach adopted by the Government limiting the content of a certified agreement or an Australian Workplace Agreement to matters pertaining to the employer/employee relationship.

21. The limitation of content of a certified agreement or an Australian Workplace Agreement adds a layer of complexity which is simply undesirable in terms of trying to regulate the terms and conditions of employment.

22. Finally, the Association has noted that there is a stark difference between Australian Workplace Agreements and non-union agreements used by employers in the retail industry as against the certified agreements negotiated directly with the Association. Agreements made between employers and the Association are as comprehensive as possible in terms of providing sufficient detail on substantive matters contained within the agreement, so that there are less disputes relating to the implementation of the agreement. The Association's agreements not only provide for a substantive subject matter, but attempt to

address the practical implementation and application of that substantive matter in the workplace.

23. A clear example of this is that Hours of Work clauses are not limited to merely specifying the broad parameters relating to the hours of work for ordinary hours and overtime hours, but include extensive provisions relating to the proper rostering of persons to be employed over those hours of work so as to ensure a proper work/family life balance. Thus, Association agreements generally contain clauses which specify the number of consecutive days off each week, the number of weekends off over each period, the number of hours to be worked each day, and the number of hours to be worked each week by particular groups whether they be casual, part-time or full-time employees.

24. Also the Association negotiated agreements contain very strict provisions which clearly delineate the nature of employment between full-time, part-time and casual, so that there is no attempt to have part-time casuals, in other words, people who are called part-timers and paid as part-timers but who are treated as casuals in relation to their hours of work.

25. Non-union agreements and AWAs in the retail and fastfood industries invariably deal with substantial matters only, and leave all procedural and practical application of the matters to the discretion of the employer. This creates significant disadvantage for employees who simply are at the mercy of their employer in relation to how and when they will access a substantiative right contained within their non-union agreement or their Australian Workplace Agreement.

26. Framework AWA's put out by the OEA clearly create a class of employee which is not recognised or tolerated under the award system. This new class of employee is a 'hybrid' – employees are called part-timers, paid as part-timers but have no more entitlement to hours of work than a casual.

27. The real effect of the OEA framework AWA is that an employer employs a retail worker as a <u>permanent employee</u> but without any obligation to provide set hours of work each week.

28. Under the OEA framework AWA for the retail industry these <u>permanent employees</u> work only when required by the employer.

29. In all real respects a permanent part-time employee employed under the OEA framework Agreement for the Retail Industry is a casual employee working casual hours at the discretion of the employer BUT WITHOUT the Award casual loading of 25%.

30. The OEA has contrived an AWA which at its simplest permits employers all of the benefits of casual employment without a casual loading.

31. Interestingly the OEA, in offering the Framework AWA for the Retail Industry, has deliberately crafted the AWA so that employers do not have to apply any of the safeguards which were specifically developed by the AIRC to take account of Parliament's expressed desire to promote regular part-time employment.

Terms of Reference No. 2

"Whether the objectives of various forms of industrial agreement making, including Australian Workplace Agreements, are being met, and whether the agreement making system, including proposed federal government changes, meet the social and economic needs of all Australians, with particular reference to the capacity for employers and employees to choose the form of agreement making which best suits their needs."

32. A critical defect of the current legislation to agreement making in the Australian Workplace is that employers and employees equally are not free to chose the form of agreement making which best suits their needs. The current legislative regime in particular in relation to Australian Workplace Agreements, ensures that there is no real choice for at least part of the workforce when it comes to choosing the form of agreement making.

33. Australian Workplace Agreements are able to be required as a condition of obtaining work at first instance. Because of this, there is no power given to a worker to choose the form of agreement making which would best suit their needs in relation to their employment. Rather, the Act allows the employer sole and absolute choice in relation to choosing the form of agreement.

34. There is no sense of equality between the power to choose as between an employer or an employee in relation to Australian Workplace Agreements which form part of gaining a job.

35. The Association is aware of the submissions made to the Inquiry by two persons that the Association has acted for in relation to their employment at Krispy Crème Donuts in Sydney. Submissions by Ms. Jasmin Leigh Smith and by Thea Corinne Birch Fitch clearly identify the problems associated with a legislative regime which allows AWA to be forced on workers.

36. Real choice at all stages of legislative regime relating to the initiation of agreement making resides with the employer.

37. Even where a certified agreement is sought to be made by employees with a union, the employer has the choice as to whether or not to enter into that agreement. A union representing a large portion of the workforce simply cannot require an employer to enter into an agreement with the Union as representative of the workers. Real choice in choosing the form of agreement making resides solely with the employer in all instances. An employer can choose to either have the union agreement, a non-union agreement or an AWA. Workers and their representatives through the unions have no choice in terms of initiating and ensuring that an agreement is reached in a particular form.

38. Workers and their unions can respond to the choices made by employers, they cannot effectively initiate an agreement. Notwithstanding the broad provisions relating to protected industrial action, ultimately real choice as to the form of agreement making resides solely with the employer. The role of employees and unions can, on occasions have an impact on the terms of an agreement but rarely have an impact on the choice or the form of agreement making.

39. As the current Government knows only too well, an employer, such as the Department of Employment and Workplace Relations has the ability to totally ignore the real wishes of employees as to the form of agreement making. Employers, such as the Department of Employment and Workplace Relations and other Government Departments can simply insist upon AWAs being a condition of gaining work within the senior levels of the Australian Public Service. Equally, Government Departments and Government Agencies have shown a remarkable preparedness to simply ignore the wishes of workers in insisting that collective agreements be made as non-union agreements under the provisions of Section 170LK of the Workplace Relations Act, rather than as an agreement with a registered organisation of employees.

40. The Government's own actions show the lie to the stated objective in the Workplace Relations Act, that workers and employers should be able to freely chose the form of agreement making which best suits their needs.

41. Choice is not genuinely given to employees as to the form of agreement making.

Terms of Reference No. 3

"Whether the objectives of forms of industrial agreement making, including Australian Workplace Agreements, are being met, and whether the agreement making system, including proposed federal Government changes, meet the social and economic needs of all Australians, with particular reference to the parties ability to genuinely bargain, focusing on groups such as women, youth and casual employees."

42. One of the clearest messages which has been established by the operation of Australian Workplace Agreements under the Workplace Relations Act is that employees subjected to the requirement to enter into a Australian Workplace Agreement as a condition of gaining of employment, simply do not have any genuine bargaining capacity in relation to the terms and conditions of employment under which they work. To this extent, the purpose of agreement making being to allow the parties to genuinely choose the form of agreement making which suits needs, and to be able to deal with the terms and conditions of employment through a Workplace Agreement, are simply not able to be met, in circumstances where the bargaining power is dis-proportionately in the hands of the employer.

43. Even in the case of agreements made collectively in the Retail and the Fastfood Industries, workers have limited bargaining power, vis a vis their employer. This is especially so when considered in the light of the position of employees in other industries where employees are in a skills group in short supply, and those employees invariably have an increased bargaining power. Retail and Fastfood employment however is an area where skills are often acquired on the job, and there is generally little shortage of labour being prepared to work in the retail and fastfood industries. This is especially so given that both the retail industry and the fastfood industries often constitute the first employment of school aged students. The number of young persons working a first job in fastfood or retail while still at school is extremely high. In this sense therefore, there is a

fundamental difference between the general bargaining power of employees in the retail and fastfood industries than in other industries. This has a significant impact on the employees ability to genuinely bargain over terms and conditions of employment.

44. Not only is age a factor, but more importantly, the class of work being performed that of customer service functions in retail and fastfood, put workers at a significant disadvantage. Workers who genuinely are customer service orientated, in other words, pleasant people with a demeanour suitable to a service culture, generally do not display the industrial militancy that is a feature of some of the more traditional blue collar industries such as building and construction. This means that employee's in the retail and fastfood industries start the negotiating process from a significantly weaker bargaining position than their employers.

45. Even where the Association has been involved in enterprise bargaining for and on behalf of employees in the retail and fastfood industries, this does not mean that there has been a real evening up of the bargaining position. Notwithstanding the professionalism of the Association and its ability to understand all of the nuances of enterprise bargaining, employers still, in most instances, maintain a significant edge in the bargaining profile as against the Union. This is simply so because the employers, as has already been identified in this paper, enjoy the real privilege of being able to choose the form of agreement making, and they choose the form which suits the employer's needs rather than suits the needs of both the employer and the employees.

46. Some employers (limited in numbers at this time) who have entered into enterprise bargaining with the Association have done so with the very blunt proviso, that unless an agreement was suitable to the employer, the employer would simply walk away from a union agreement and go down the path of either a non-union agreement or an AWA. In this sense bargaining was not between equals, but was predicated on the employer gaining their preferred option and outcome, and if that could not be achieved with the Union, then the employer would simply ignore the wishes of their workforce, ignore the Union and proceed down the path of either individual agreement making, using AWAs or, using non-union agreements.

47. This approach by some employers places tremendous strains on the ability of the Association to balance the genuine needs of employees with the open and overt threat of the employer to simply walk away from the bargaining table if things don't go the employer's way. Any further strengthening of an employer's powers will only lead to the limited number rapidly increasing.

48. There are a number of features of the current legislative regime, and certainly these will be exacerbated in the foreshadowed legislative regime, which work against the bargaining position of employees. The prime issue working to reduce the bargaining power and position of employees is the structure of the Workplace Relations Act, in relation to both Australian Workplace Agreements and non-union agreements. In both cases, the employer develops the agreement that they want and the employee has a choice as to whether or not to accept that agreement. Their choice is merely over accepting or rejecting the agreement offered. There is no opportunity given for the employee to bargain about its content.

49. The fact that the Workplace Relations Act provides no requirement on an employer to bargain fairly with their employees over the terms of either the Australian Workplace Agreement, or a non-union agreement means that there is effectively no bargaining undertaken in relation to these. In relation to an Australian Workplace Agreement, the most that can occur is the employer is obliged, if the employee appoints a bargaining agent, to deal with the bargaining agent over the proposed Australian Workplace Agreements. In relation to non-union agreements, if the employee authorises a union to meet and confer with the employer then the only obligation on the employer is to meet and confer with the Union.

50. The Commission has in many decision made it clear that "to meet and confer" does not require the employer to bargain with the Union. In fact, all of the decisions of the Commission relating to the processing of non-union agreements make it clear that at no stage is the employer required to make any concessions when meeting and conferring with a Union, or to engage in any form of genuine bargaining with the Union who is representing the worker or workers to be covered by the proposed non-union agreement.

51. In the complete absence of any requirement on employers to genuinely bargain and negotiate over the terms of either an Australian Workplace Agreement or a

non-union agreement, there is in reality no effective bargaining undertaken whatsoever in relation to these instruments. Even if bargaining was required in relation to AWAs or non-union agreements, genuine bargaining could only occur where the parties who are bargaining understood their rights and entitlements under existing awards and the proposed rights under the proposed agreement. Again, the reality is that workers in the retail and fastfood industries simply do not as a general rule have the knowledge and experience which would enable them to either individually or even collectively bargain effectively and equally with an employer over the terms and conditions of employment to be contained either in an AWA or a non-union collective agreement.

52. Workers in the retail and fastfood industries do not generally understand the nuances of language that are used in Australian Workplace Agreements and collective agreements. Where the Union is the representative of employees, it is often the case that the Union in non-union agreement matters, has to go to great length to explain to workers who are to be covered by the proposed non-union agreement what it actually means. Invariably the insight given to workers by the Union comes as a real shock or surprise to workers who suddenly find that the terms and conditions which they think they will be employed on, are significantly different from the terms and conditions which are actually contained in a proposed Australian Workplace Agreement or non-union agreement.

53. A real level of expertise is necessary in order to understand what an AWA or a non-union agreement is going to allow the employer to do in relation to the terms and conditions of employment of employees.

54. There are very real issues of concern relating to the current structure of the Workplace Relations Act, which do not require the employer in relation to either an AWA or a non-union agreement to explain the real impact that the proposed terms and conditions of employment under the AWA or non-union agreement will have on employees. The language of the Act requires that the employer must explain the terms of a non-union agreement to the employees prior to them voting on it. Explaining the terms is satisfied by merely showing the specific words used in a particular clause or provision in a non-union agreement. This is not the same as explaining the real effect that the term of the agreement will have on an employee's overall package of wages and conditions.

55. In a recent matter before SDP Cartwright, [Print PR957131] the SDA argued that:

S170LK(7) required the employer to explain the terms of the Agreement "in such a way that those terms are intelligible in comparison with the Award".

SDP Cartwright rejected this argument, saying:

"But the mandatory requirement of S170LK(7) does not extend beyond the plain meaning of the words of the section. The required reasonable steps were taken."

56. Clearly providing a proper analysis is not a requirement on employers. This meant ensuring the explanation of the conditions provided to employees was for comprehension and understanding was not a requirement. The Association has attached to this Submission some examples relating to a proper analysis of AWAs at Ocean Master Seafoods and Banjos Bakehouse, and also notice the Submissions made to the Inquiry by Ms. Smith and Ms. Fitch in relation to their employment at Krispy Crème.

57. The success of the Association in being able to genuinely bargain with employers in the retail and fastfood industries on behalf of employees owes nothing to the structure of the Workplace Relations Act. Rather, the success of the Association in being able to bargain with employers in the retail and fastfood industries owes most to the degree of trust established between the Association and the relevant employers, and the fact that employers accept that the Association bargains genuinely, fairly, although strenuously, and that the Association genuinely honours the agreements it has reached.

58. In the absence of a direct level of trust and understanding between employers and unions, and employers and their workforce, a legislative regime is required which would require employers and employees in the unions to bargain fairly and effectively with each other. It would not appear to be the norm in Australia that employers and employees, and employers and unions share the same level of comparative respect that exists between the Association and most employers in the retail and fastfood industries in Australia.

Terms of Reference 4

"Whether the objectives of various forms of industrial agreement making, including Australian Workplace Agreements are being met, and whether the agreement making

system, including proposed federal Government changes meet the social and economic needs of all Australians, with particular reference to the social objectives, including addressing the gender pay gap and enabling employees to better balance their work and family responsibilities."

59. In addressing this term of reference, the Association will not deal extensively with the first aspect of this matter, namely, the gender pay gap. However, the Association will make a number of very specific comments in relation to agreement making and the gender pay gap. In particular, the Association notes the submission made by Peter McIlwain the Employment Advocate to the Inquiry. At Page 35 of his Submission, the Employment Advocate deals with the subject matter of "earnings and the gender pay gap". At Page 37 the Employment Advocate has produced what is titled "3; Female to Male Earnings Ratio (AWTE) by industry". This table shows interestingly that in the retail sector, female employees are significantly more disadvantaged by AWA's than they are by either the award or certified agreements. In fact, whilst the figures are not specifically identified, the table would appear to show that female employees in the retail industry who are employed on AWAs will earn just over 50% of a male in the industry, who is also on an AWA. Female employees employed in the retail industry on an award will earn just under 80% of a male in the same industry and under the same award. Whereas a female, employed in the retail industry under the terms of a certified agreement will earn approximately 90% of male earnings where the male is also employed under a certified agreement. This figure which appears to be an extract out of ABS data clearly shows that AWAs in the retail industry act as a means of exacerbating the gender pay gap where a certified agreement in the retail industry acts as a significant feature in reducing the gender pay gap.

60. Given that the Association has very large numbers of employees in the retail industry under certified agreements with the Association, the Association takes significant credit for reducing the gender pay gap in the retail industry through our efforts in making agreements with retail employers.

61. Does the Office of the Employment Advocate equally take credit for expanding the gender pay gap in the retail industry through AWAs that the Employment Advocate has approved ?

62. One further comment that can be made in relation to the gender pay gap in terms of AWAs having a worse gender pay gap than awards or certified agreements in the retail industry, is that the Employment Advocate by approving such AWAs, is causing significant difficulties for female employees who will further struggle to balance work and family responsibilities in work environments where they are paid significantly less than male counterparts.

63. The second aspect of this Term of Reference relates to agreement making and the employee's ability to balance their work and family responsibilities. The Association in negotiating agreements with employers places great emphasis on the need to ensure that workers can fairly and effectively balance their work commitments and their family responsibilities. The Association achieves this through several means. Firstly, the Association in its agreements with employers insists upon quite detailed clauses relating to the number of hours to be worked each day, the number of hours to be worked both as minimum and maximum on a daily and weekly basis, and the number of days to be worked in a particular work period, whether it be 5 days, 7 days or over 28 days cycle. Provisions providing for regular rosters, rosters that are not frequently changed, are also included.

64. In this sense, the Association has particular regard to ensure that work time is effectively balanced by meaningful non-work time. Meaningful non-work time carries with it the very clear implication that it is not sufficient just to have time off work, but rather that there must be a sufficient number of consecutive days off work each week or each work cycle, so as to ensure that workers are able to carry out a full range of their family responsibilities. In particular, given that the retail industry is a 7 day a week industry, the Association strives through its enterprise agreements to ensure that workers are properly and fairly rostered to have a number of weekends off over a regular work cycle. This ensures that whilst employers are able to roster workers to work on weekends, workers are not going to be placed in a position where each and every weekend is treated as ordinary hours of work, and workers never see their families on weekends.

65. In addition, the Association has in its agreements, incorporated forms of leave which are not otherwise found in awards e.g. marrow donor leave, additional parental leave, multiple birth leave, defence force leave, emergency services leave to allow employees time off to work for the SES or CFA, cyclone alert

leave, blood donor leave, are amongst the forms of leave which enhance the work family responsibility balance.

66. Most commentators appear to focus on leave provisions in agreements as indicating whether or not there is a fair balance between work and family responsibilities for employees. This focus however is often misplaced. The presence or absence of a range of special leave provisions such as are contained in agreements made by the Association, may give a clear indication that an enterprise agreement does have a focus on trying to address the work family responsibility balance. However, the mere presence of such clauses in the absence of proper limitations on hours of work and fair and effective rates of pay may give an illusion that an agreement assists workers to better balance their work and family responsibilities, whilst actually creating extreme difficulties for workers to balance their work and family responsibilities.

67. To put this in perspective, there is little point in having a significant number of clauses providing particular types of leave if the core provisions relating to hours of work and rates of pay create such strong economic pressures on an employee, that they are effectively unable or unwilling to access leave provisions.

68. AWAs in the retail industry will often have a higher base rate of pay than the award for the retail industry. However, the cost of obtaining this higher base rate is often the total loss of penalties for night time work and weekend work, significantly reduced penalties for public holiday work, and the requirement to work public holidays, significant loss of annual leave entitlements, most normally through the total abolition of the annual leave loading and with often a significantly reduced entitlement to any specific number of hours of work per day or per week. In such circumstances, advocates of AWA's will often boast that they have higher hourly rates of pay than the award, and in some instances, higher hourly rates than agreements negotiated by the Association, but invariably, the AWA is far worse in allowing the employee to balance their work and family responsibilities. AWAs with higher rates of pay, but worse terms and conditions of employment in relation to hours of work, rostering, penalty rates, guaranteed days off, forces employees into a situation where they are often required to work any time with no notice at the direction of the employer on hours which clash with a significant number of family responsibilities.

69. A classic example of such an AWA is that operated by the Aldi Supermarket chain. The Association did attempt to negotiate an enterprise agreement with Aldi when they first commenced operations in Sydney. The Association offered a comprehensive enterprise agreement which was modelled on enterprise agreements the Association had with other grocery retailers. Aldi rejected the approach of the Association and in fact trumped the Association by offering an AWA with an hourly rate of pay of $19 per hour, when equivalent certified agreements with the Association had rates of pay around $14 to $16 per hour. However, the reality has been shown that employees at Aldi are virtual slaves to the company in terms of being required to be on-call and on-demand to work whenever the company rostered them to work. Rosters are not guaranteed to be set for lengthy periods in advance. Rosters may be changed at short notice. Employees are not guaranteed a specific number of hours each week, and specific days each week.

70. Employees at Aldi employed on a part-time basis find it next to impossible to take on any other form of employment to supplement their income from Aldi because of Aldi's requirements that the worker must be available to work any roster that Aldi sets. By contrast, workers employed under certified agreements with the Association who, as part of the certified agreement, are guaranteed regular rosters, and are able to be guaranteed regularity in terms of the days each week that they work, are able as part-time employees, to often have a second job to supplement their income, or more importantly are able to clearly plan to balance their work and family responsibilities.

71. One issue which is clearly disclosed by this matter, is that the Office of the Employment Advocate appears to have a policy whereby any condition of employment can be reduced to a dollar value. In this sense, the Office of the Employment Advocate will allow fundamental terms and conditions of employment which go to the quality of family and work life to be converted into a pure dollar value. The Association on its analysis of AWAs provided by the Office of the Employment Advocate questions whether even this mathematical approach results in fair value being given for terms and conditions of employment which bought out in an Australian Workplace Agreement.

72. Whilst the Office of the Employment Advocate has a statutory responsibility of assisting workers balance their work and family responsibilities, it is clear that the Office of the Employment Advocate is free to determine how the Employment

Advocate meets that responsibility. In other words, it is a purely subjective test applied by the Office of the Employment Advocate as to whether or not any particular AWA does, in the view of the Office of the Employment Advocate enable employees to better balance their work and family responsibilities.

73. It is important in relation to this term of reference to understand that there are significant differences in the way the Office of the Employment Advocate approaches such matters as the No Disadvantage Test as against the approach of the members of the Australian Industrial Relations Commission. Non union agreements which have been rejected by the Australian Industrial Relations Commission as failing the No Disadvantage Test have when converted to an AWA been accepted by the Office of the Employment Advocate as passing the No Disadvantage Test. Such was the case with Magnetmart, a hardware chain in the A.C.T. There is nothing inherently wrong in members of the Commission and the Office of the Employment Advocate each coming to the view that an agreement either passes or does not pass the No Disadvantage Test and coming to different conclusions in relation to the application of a test to a particular document. However, whereas decisions of members of the Commission on whether or not an agreement passes or fails a No Disadvantage Test are on the public record, what the Employment Advocate does is done in secret, and there is no explanation given by the Employment Advocate as to why any particular agreement will pass or will be considered to have passed the No Disadvantage Test.

74. If one refers to a Decision of Commissioner Whelan, 31 March 1999, regarding the certification of a Coles Myer clerical agreement [R3504], the Commissioner clearly defines one of the critical aspects of the No Disadvantage Test (s.170XA Workplace Relations Act) in relation to the certification of an agreement.

75. Paragraph 103 reads:

In my view the test is not what usually happens, what happens now, or what is likely to happen as a result of savings clauses but what the agreement allows to happen (underlining included in decision).

76. The Commissioner is saying that an agreement drafted in such a way that allows a reduction in conditions, even if an employer has no intention of effecting these reductions, counts negatively when applying the No Disadvantage Test.

77. This is an obvious protection, afforded by the Workplace Relations Act to employees who assume that their working conditions will not deteriorate upon the certification of a new agreement.

78. Whilst the comments of Whelan C were made in relation to the scrutiny of an agreement by the Commission they also have a direct relevance to the whole issue of whether employees really understand what they are voting on.

79. The experience of the Association with respect to employees having the terms and conditions of a proposed agreement explained to them before they are expected to endorse or not endorse the agreement is that the explanation focuses on what currently happens and what is expected to happen if the agreement is certified. Employees are particularly interested in any wage increase secured and, for example any changes to breaks and hours that may affect them.

80. The way in which AWAs and non union agreements are drafted can have a marked effect on the working conditions of an employee but may not be fully explained to employees who have to consider whether to endorse an agreement. By way of example, Federal Awards contain a Parental Leave provision whereby casual employees with 12 months service may access parental leave. Many parental leave clauses in agreements refer to schedule 1A in the Workplace Relations Act. The parental leave provision in the Workplace Relations Act does not provide casual employees with any parental leave. Because Parental Leave is one of the 'standard' employment conditions in most agreements, workers are often advised that the agreement contains a comprehensive Parental Leave clause and that Parental Leave will continue to be available to workers. A casual employee would undoubtedly assume that if they were not informed of any change to the parental leave provision in a proposed agreement that the current provision would remain. This would not be so. Casual employees would lose their parental leave entitlement but are unlikely to find this out until they request it.

81. In another Decision by Whelan C on 21 October 1997, the certification of the Bunnings Warehouse Agreement 1997 [P6024], the Commissioner refers to the No Disadvantage Test and how its application protects the conditions of workers. The Decision at p.4 reads:

The application of the No Disadvantage Test, as set out in Section 170XA was considered by Duncan DP in Re: Australian Workplace Agreements [Print P5472]. The provision was not contained in the original draft of the Workplace Relations Bill but was inserted as an amendment to the original Bill following agreement between the government and the Democrats in October 1996. The Agreed Statement of Position published at the time of the introduction of the relevant amendment states in clause 3.24 in relation to the test the following:

"No disadvantage test

3.24 Before certifying an agreement, the AIRC will be required to satisfy itself that the proposed agreement is no less favourable to the employees concerned, when considered as a whole, than the relevant award. This will be a global rather than a line-by-line `no disadvantage' test. A global test does not preclude line-by-line consideration of reductions and increases in entitlements or protections, in fact it requires such an assessment to form a judgement of whether all increases and reductions, when considered as a whole, result in no overall disadvantage. (As is the case for Australian workplace agreements, the minimum conditions provided for in schedule 13, Part VIE of the Bill are to be replaced by the 'no disadvantage' test)."

82. The current test is slightly different from the test contained in section 170NC(2) of the Industrial Relations Act 1988 but the intention of protecting employees' conditions remains thus illustrating that it is a long held intention of workplace legislation to protect employees' working conditions. Pages 45 and 46 of the Enterprise Flexibility Agreements Test Case [Print M0464] details how the test was to be followed:

"Where the implementation of an agreement would result in a reduction in employee entitlements or protections the Commission must determine whether, in the context of the terms and conditions of employees concerned when considered as a whole, the reduction would be contrary to the public interest. We agree with the submission put by ACCI in this regard, that is the Commission should adopt a ***global*** *approach rather than a line by line approach in making a public interest determination under section 170NC(2)(b). In practice this involves a consideration of the overall package of terms and conditions of employment to apply to the employees covered by the agreement. The reductions in employee*

entitlements and protections need to be balanced against the benefits provided in the agreement. Such benefits may include a wage increase or an improvement in conditions. The approach of balancing the reductions and benefits in an agreement is consistent with the following extract from the Minister's second reading speech on the Industrial Relations Reform Bill 1993:

"In the bargaining process employees want and deserve the security of knowing they cannot be worse off - worse off in totality. The security of knowing that the conditions they currently enjoy are not to be traded off without something being offered in return. It may not always be a pay rise, it may be extra training, more flexible rosters or just greater security; it will be something nevertheless." [House of Representatives Hansard , 28 October 1993 at p. 2778]

83. The Commissioner raises the question of whether the no disadvantage test is purely a mathematical exercise and suggests that some see the test as; "Entitlements can be 'bought out' provided the value of those entitlements is compensated for by the wage the employee takes home at the end of the week, fortnight, month or year" P.7.

84. Not all entitlements can be automatically 'bought out'. Some entitlements have more than just a monetary value, for example Parental Leave, Annual Leave and the maximum hours that may be worked. The value of these entitlements must also be considered in terms of the social value, the value to the family and the value to the community. Whelan C considers more than simply the monetary value of an entitlement in the Bunnings Warehouse Agreement 1997 Decision [P6024]. She refers to the proposed agreement allowing employees to work for 50 hours per week and six consecutive days per week.

85. Whelan C asks the question:

"The wages they receive may well compensate them for the loss of overtime they might otherwise be entitled to under the award. Does that, however, mean that on balance they are not disadvantaged?" p.8 [P6024]

86. Whelan argues that since 1904 hours of work have progressively fallen for reasons of "social desirability", until 1983 when standard hours of work became 38 per week.

87. Whelan C lists the following cases where the Courts considered working hours.

In 1913 (Timber Workers' Case 7 CAR 210 at 228) Higgins J concluded that 48 hours constituted the generally accepted standard of working time.

In 1921(Standard Hours Inquiry 15 CAR 1044 at 1051) Powers J expressed the view that it would be desirable to make standard hours 40 per week but concluded that industry could not afford to reduce hours from 48 to 44 under the prevailing economic conditions.

In 1926 (the Engineering Hours Case 24 CAR 755 at 764) Dethridge CJ expressed the view that there were few people in Australia who would not agree that 44 hours was desirable and likely to be beneficial not only to the workers themselves but indirectly to the whole community. Beeby J noted, in the same case (at page 871) that the first 48 hour week had been introduced in Australia in 1857.

In 1947 (the Standard Hours Inquiry 59 CAR 581) the Full Bench (at page 587) in introducing the 40 hour week noted that:

"One hundred years ago in England a 10 hour day or a 60 hour week was enacted. In Australia 90 years ago an 8 hour day or 48 hour week was achieved in limited cases. Twenty years ago this Court awarded a 44 hour week. There is no reason to assume that the capacity of industry has ended at 44 hours."

They referred to the 40 hour week as a desirable social reform.

In 1997 should this Commission consider employees not to be disadvantaged by an agreement which provides for a 50 hour week, a 10.5 hour week day or six consecutive days of work in any one week? In my view it should not. P.8 [P6024]

88. Whelan C, after considering the judgments of the four Decisions above, clearly recognizes that an increase in the number of hours per week creates a disadvantage to those workers expected to work those added hours even though they will be financially compensated for them. Financial compensation for regularly working longer hours does not adequately compensate a worker for the social disadvantage suffered by that worker, and therefore also suffered by his or her spouse and his or her children.

89. Commissioner Whelan in her Decision on the certification of the Coles Myer Limited Clerical and Administrative Employees Agreement 1998 [R3504] at paragraph 103 and 104 clarifies the role of the no disadvantage test.

90. She states:

The fact that an agreement disadvantages only some employees does not however mean that, on balance, it passes the test.

I am satisfied that the agreement disadvantages some employees in relation to their terms and conditions of employment in that it would result on balance in a reduction on their overall remuneration.

91. The application of this global test is regularly misunderstood. It is misunderstood by some parties who read the global test as applying to the majority of employees i.e. that when the conditions of all employees are considered, if the majority of employees are better off or at least no worse off, then the no disadvantage test has been met. This is an incorrect reading of the intention of the global approach to the no disadvantage test. The global approach ensures that every employee affected by a new agreement is better off or at least no worse off.

92. Both the current and the previous no disadvantage tests allow for the trade off of some conditions with compensation by the offer of others. However the compensation for the trade off must be fair and in the public interest.

93. The complete secrecy surrounding the Office of the Employment Advocate and the complete lack of any guidelines, or any requirement to have regard to clear social policy, means that the Office of the Employment Advocate acts in a relative vacuum in terms of carrying out its duties. Having the ability to approve agreements which the Commission has refused to approve may be within the broad statutory power of the Office of the Employment Advocate. However, when that power is able to be exercised without any control over the Employment Advocate in terms of having regard to key and core social values, the result will be AWAs which in the end, significantly reduce the overall social value of work and which significantly impact in an adverse manner on the ability of employees to balance their work and family responsibilities.

Terms of Reference 5

"Whether the Objectives of various forms of industrial agreement making, including Australian Workplace Agreements" are being met, and whether the agreement making system, including proposed federal government changes meet the social, economic

needs of all Australians, with particular reference to the capacity of the agreement to contribute to productivity, improvements, efficiency, competitiveness, flexibility, fairness and growing living standards."

94. In relation to the retail and fastfood industries, it is the experience of the Association that agreements assist but do not contribute greatly to either productivity improvements, efficiency or competitiveness in relation to the business of employers. In relation to productivity quite clearly productivity can be significantly increased if workers are paid zero wages for their output. In this sense therefore using agreement making to reduce wages will always lead to a measurable increase in productivity. Whether agreements contribute to real productivity improvements in relation to method of work or other forms of measuring output is very doubtful.

95. Agreements in the retail and fastfood industries have very little effect on efficiency of work. This is so because the underlying awards for the retail and fastfood sectors of themselves provide for reasonably efficient means of utilisation of labour. On this basis, agreements seldom improve upon the inherent efficiency of labour.

96. In relation to competitiveness, agreements seldom if ever contribute to the competitiveness of a business over another employer in the same sector. The only exception to this rule is where agreements are used to deliberately reduce the cost of labour by reducing overall wages earned by employees in order to gain an unfair competitive advantage vis a vis another employer. In other words, if in relation to product or market share two employers are generally equal, one employer can gain a competitive advantage over another by reducing wages, or the total wage bill through the reduction of total wages in an agreement. This clearly is the case in the Association's submission in relation to a number of AWAs which seek quite deliberately to reduce the real income of employees so as to give the employer a competitive edge in a particular market sector where they cannot compete either on quality or style or other more traditional measures of competitiveness.

97. It is important in the context of this discussion to understand the role of the Office of the Employment Advocate in deliberately creating unfair advantages for employers who choose AWA's rather than Collective Agreements.

98. The Office of the Employment Advocate has created a set of Framework AWA's for various industries and promotes these Framework AWA's on the basis that an employer who uses the Framework AWA will have their AWA approved without real scrutiny.

99. The Association has had the opportunity to fully examine the Framework AWA for the Retail Industry and found it to be seriously deficient in many areas.

100. The Framework AWA for the Retail Industry is structured on the premise that a single hourly rate of pay can be set which effectively recompenses an employee for any work performed over a specific period of time and over a specific work pattern.

101. As a simple proposition this is true only in those cases where the pattern of work is fixed both under the award and under the AWA. Once any degree of variation is introduced into the actual hours worked then this proposition fails.

102. To put this in perspective it can be asserted that the average hourly rate for work in ordinary hours in the Retail Industry in Victoria is $16.59 per hour. This figure is arrived at by calculating both the total number of available ordinary hours (78hours) of work and the total amount to be paid for those hours (including penalty rates($1294.22)) under the Victorian Shops Award and then divide the total amount to be paid by the total number of hours.

103. The Actual rates of pay under the Victorian Shops Award for the various ordinary hours of work are:

7am – 6pm Monday to Friday - $14.30 per hour
6pm – 9pm One Night between Monday and Friday - $17.88 per hour
7am - 6pm Saturday – $17.88 per hour
9am - 6pm Sunday - $28.60 per hour

104. Using this approach an AWA can be structured which has a single rate of pay in it.

105. An employer who only employs workers to work between the hours of 9.00am to 6.00pm Monday to Friday would never want to put their employees on the average rate as it is higher than the award rate.

106. However an employer who only employed a worker to work every Sunday would be mad not to put the employee on an AWA with an averaged rate in it as the AWA rate would be enormously lower than the award rate.

107. The only occasion when the wage position as between the average rate in the AWA and the actual rate in the Award is neutral is when the actual hours of work of an employee are in exactly the same proportion of base rate and loaded rate hours (penalty rates apply) as was used to calculate the average. Where the AWA actually encourages the employer to use flexible rostering without giving an employee a guaranteed pattern of hours it will generally only be a coincidence or random chance that an employee earns the same under the AWA as they would under the award.

108. The reality is that employers will never use an averaged rate of pay when it leads to paying a worker more than they would earn under an Award.

109. Employers will only use an averaged rate of pay when it is cost neutral or where it provides a clear saving to the employer by being lower than the amount that would otherwise be paid under an Award.

110. This is not rocket science! This is simple stuff! The Office of the Employment Advocate knows this and they know that the Framework AWA for the Retail Industry permits employers to pay a wage to an employee which is less than the employee would otherwise have earned under the Award.

111. The Association has set out in Annexure A to this Submission a more detailed comparison of the Employment Advocate's Framework AWA for the Retail Industry with the Victorian Shops Award.

112. The Association notes that many non union agreements in the retail and fast food industry follow the example of the Office of the Employment Advocate in doing away with all penalties or loadings for ordinary hours and replace them with a flat rate. These non union agreements create the same disadvantage for employees as do the AWA's.

113. In contrast the Association has encouraged employers to retain penalties and loadings for Sunday work and Public Holiday work in Agreements negotiated by

the Association as the retention of these penalties and loadings provides a fairer outcome for workers who are predominantly employed only to work these penalty or loaded hours whilst also providing the very real cost saving of not having to pay an averaged rate which incorporates penalty and loaded hours to workers who only work the non penalty and non loaded hours.

114. Agreements in the retail and fastfood sectors do contribute to increasing the flexibility of the use of labour within those sectors. By inference this terms of reference seems to attempt to look at agreements at increased flexibility from a position of inflexible use of labour to a position of flexible use of labour. The reality in the retail and fastfood industries is that the awards that the Association is party to do already provide for flexible use of labour. This flexibility has increased given the award simplification processes where such matters such as minimum and maximum hours of work on a daily and weekly basis were removed for part-time employees from most awards. Even with the changes in the award system, employers still want increased flexibility through their agreements. The push by employers to use agreement making to increase flexibility generally reflects poor management practices by employers who simply will not devote the time and effort to ensuring that labour is able to be flexibly used within the operational constraints of an award.

115. In a practical sense, this means that rather than rostering staff to ensure that there are clearly defined rosters over a 2 or 4 week period with set hours of work for employees. The employer does not put the effort into proper workforce planning and simply has all workers agreeing to be able to work at any time with one hours notice. In this sense the increased flexibility given by agreements encourages poor management practices.

116. Rostering clauses in agreements negotiated by the Association require employers to forward plan their use of labour within a store. This is especially so in relation to the use of part-time and full-time employees who are the permanent workforce. However, employers consistently want more flexible rostering provisions in agreements so that they simply do not have to worry about proper forward planning in the utilisation of staff. Casual employment is by its nature able to be used to fill in the peaks in trading, and to deal with the troughs in trading. Permanent workers should be entitled to well planned and significant forward planning in relating to rostering. Employers however simply do not bother putting sufficient effort into rostering of staff. This is so both in relation to

the formal training of supervisors and managers to understand how to effectively forward plan the utilisation of permanent staff, and also in relation to ensuring that sufficient time is allocated to the proper forward planning of the utilisation of staff. Employers see that increased flexibility through agreement making gives them the opportunity of having workers pay for the lack of proper management skills in terms of rostering, and the lack of adequate resources for managers to properly roster staff.

117. Therefore agreement making certainly does contribute to improving and increasing the flexible utilisation of staff, but this is a spurious argument in relation to the overall competitive position of employers, and operates generally to the extreme disadvantage of staff. Flexibility in this sense is not an argument of flexible utilisation of staff against inflexible utilisation of staff, rather it is flexibility for the purpose of avoiding fair, proper and reasonable management of staff.

118. The Association through its certified agreements with employers strives to ensure that agreements made are fair to both the employer and the employees and that living standards of employees are progressively increased. The Association achieves this by getting a proper balance between wages outcomes and terms and conditions of employment which go to the whole of life experiences and planning for employees. The Association notes that there are significant differences between the quality of agreements made in the retail industry between those involved in the Association and those not involved in the Association. The Association notes that most non-union agreements do not strive for fairness and do not strive to ensure living standards are increased where living standards include the entirety of the whole of life experience.

119. Further the Association is aware that AWAs operate mostly in an unfair environment with unfairness being a built-in feature of the operation of an AWA. AWAs further do not guarantee growth in living standards of employees. As the Office of the Employment Advocates in their Submission to this Inquiry, wage increases were only a feature of 38% of AWAs looked at by the Employment Advocate for making their Submission. The Employment Advocate noted that their employer attitude survey in 2001 found that 66% of AWA employees had received a pay rise in the 12 months preceding the survey date. What this means is that whilst large percentages of AWAs do not include provisions relating to wage increases, wage increases may be given by an employer. The

real difficulty with this analysis is that if wage increases are to be given to employees at the discretion or at the whim of an employer, such agreements cannot be considered to contribute to growing living standards where the agreement is silent on such a fundamental matter as wage increases during the life of the agreement.

120. Even where wage increases are given at the discretion or whim of management, the frequency of such wage increases significantly impacts upon the growth in living standards of employees.

121. The mere giving of a wage increase at the discretion of management, or even as a term of an agreement does not necessarily mean that living standards are growing. This is so because the wage increases may simply fall below the cost of living increases, or the CPI movement and may fall significantly behind the wage increases that have been given to persons performing the same class of work under an award covering the same area.

122. This raises an important issue in relation to the structure of the Workplace Relations Act. Agreements only have to pass the No Disadvantage Test as at the date of certification. This means that as long as the wage rates in the agreement will pass the No Disadvantage Test as at that specific date, then the agreement will be certified whether this is done by the Commission or by the Employment Advocate. There is no need, in fact there is not capacity for either the Employment Advocate or the Commission to review the certification of an agreement during its life to see whether or not it has at least maintained the living standards of employees. Thus an AWA or an certified agreement can be certified for a period on a particular date, and within six months, the award rates might move and the agreement rates stay the same.

123. Further increases may be given in awards on a yearly basis with no improvements in AWAs or certified agreements. There is no capacity to review the operation of the AWA or the certified agreement during its life time. The most that can occur is once the AWA or agreement passes its normal expiry date, it can be set aside and the Commission or the Employment Advocate only re-visits the particular circumstances of the employee when the next AWA or certified agreement is put forward for consideration. There appears to be a fundamental weakness in the structure of the Act, which allows sub-standard AWAs or agreements to operate for their full term, when those agreements may be

marginally acceptable on the date of certification, but rapidly and consistently become worse than the under-pinning award.

Australia's international obligations.

124. The Association does not wish to make a submission in relation to this particular term of reference.

Proposed Government Changes

125. Whist each of the terms of reference seek to have the term of reference considered in the light of proposed federal Government changes, this is somewhat problematic given that the proposed federal Government changes appear not to have been articulated with any real clarity. In many respects the real impact on agreement making flowing from the Federal Government's proposed changes will not be known and understood until such time as the proposed legislation is revealed to the public. However, given that the Government has made certain statements about its intentions to alter or to replace the Workplace Relations Act, the Association takes the opportunity of making comments based upon what little we know to date of the Government's intended changes.

126. One of the key proposals of the Federal Government is to change the No Disadvantage Test for the purposes of agreement making. The current No Disadvantage Test assesses whether or not an agreement will disadvantage employees against the overall terms and conditions of employment of an award of the Commission. The proposed No Disadvantaged Test will test whether an agreement disadvantages an employee against four minimum standards of wages and conditions. The immediate effect of a change in the No Disadvantage Test will be to reduce the size and the value of the package of terms and conditions which need to be compared with a proposed agreement.

127. At the present time the No Disadvantage Test is applied in a global manner. In other words the sum total of the terms and conditions of employment contained within an agreement must be at least equal to the sum total of the terms and conditions of employment contained in the relevant or designated award. This approach at least ensures that agreements have to have the semblance of being comprehensive in relation to the provision they make for terms and conditions of

employment of an employee. Under the proposed No Disadvantage Test, an agreement will be tested against the global value of four statutory conditions. Thus, an agreement can and will be approved even if it significantly reduces terms and conditions of employment which are contained within a current award.

128. In fact, an agreement will need to contain nothing other than the four minimums specified by the Government in order to be approved. There is also no suggestion that the Government intends to change the provisions of the Workplace Relations Act which ensures that an agreement displaces an award, and displaces any State Law or award. The real effect therefore will be an agreement containing nothing other than the four statutory minimum conditions specified by the Government could become the total and actual package of terms and conditions of employment for employees.

129. It is clear in the Associations view that this approach will lead to immediate and significant reductions in the real wages of employees. What is missing from the Government's statutory minimum are all of those provisions which go to ensuring that unsociable hours and unsociable work patterns are recompensed at a rate of pay higher than the ordinary rate of pay. In other words, Saturday, Sunday, public holiday, weekend and late night penalties will all be removed. An agreement will not need to provide for any additional payment to a worker in the retail industry who is employed on a Sunday or a public holiday. Further in the absence of a provision requiring the payment of overtime at time and half or double time rates, then any excess hours of work could be paid at the ordinary hourly rate of pay or could in fact be nothing for additional hours/overtime.

130. The impact of this change alone will be dramatic and will be dramatic in terms of driving down the real income of workers. If there is any doubt about the effect of a small number of statutory minimums leading to a significant reduction in wages, one only has to look at the examples in Victoria. The Kennett State Government was the first to introduce a set of minimum conditions of employment for Victorian employees who were not otherwise covered by awards. The Kennett Government approach of abolishing the award system in Victoria and introducing statutory minimums was met by unions moving as many employers as possible on to federal awards which retained the comprehensive set of terms and conditions of employment for the employees of those employers. However, this exercise still left large number of employees employed on nothing other than statutory minimum.

131. In an exercise commencing in 1998 and concluding in early 2003, the Association commenced a process of serving a letter of demand and log of claims on some 35,000 employees in the retail industry in Victoria, who were not covered by the federal award for the retail industry in Victoria. Eventually, some 17,000 employers were specifically roped into the SDAEA Victorian Shops Interim Award 2000. During the proceedings in the determination of the existence of an industrial dispute, the parties to the dispute and subsequently the application to have the employers roped into the award, the Australian Retailers Association supported by Victorian Employers Chamber of Commerce and Industry and other employer organisations argued that the move from the statutory minimums provided in Schedule 1A of the Workplace Relations Act (which replaced the statutory minimum introduced by the Kennett Government) to the provisions of the SDAEA Victorian Shops Interim Award 2000 would lead to a 25% increase in the wages cost for those employers. If it was true that a move from 6 statutory minimums to award coverage would lead to a 25% increase in the wages cost for employers in the retail industry, then it must also be true that a removal of the awards as a benchmark for the No Disadvantage Test, and replacing that with four statutory minimums will enable employers to **reduce real wages by at least 25%.**

132. Whilst the Association has comprehensive agreements with most major retailers, there will be enormous pressure placed upon those employers who have entered into enterprise bargaining with the Association to reduce the wages and conditions of employment they pay to their employees if other employers in the retail and fastfood industries are able to structure non-union agreements, or AWAs which, by being compared with four statutory minimum conditions, enables the employer to reduce real wages by 25% or more. The disparity between employers able to utilise the Government's proposed No Disadvantage Test to create significant reductions in real wages outcomes, as against employers negotiating with the Union to retain comprehensive agreements will be such that employers even those wanting and willing to have comprehensive agreements with the Association will, through market forces, inevitably be forced to seek reductions in wages outcomes and enterprise bargaining.

133. The entire approach of the Government to introduce a new sub-standard No Disadvantage Test can lead and will only lead to a real reduction in the income and wages of most, if not all Australian employees.

134. Bearing in mind at all times that it is the current Federal Government who has supported, through the award simplification process, the creation and maintenance of a fair and effective safety net of terms and conditions of employment through the award system, then for this Government to introduce a No Disadvantage Test for agreement making, which does not compare an agreement with the fair and effective safety net of terms and conditions of employment found in awards, but a lower set of conditions must by implication mean that this Government does not intend agreements to operate as instruments to provide a fair and effective safety net of terms and conditions of employment. Quite clearly the Government's intention is to allow agreements to operate to reduce terms and conditions of employment below the current fair and effective safety net.

135. A second proposal of the federal Government which will have a fundamental and significant impact on agreement making is the intention to remove certification of all agreements from the Australian Industrial Relations Commission and give that function to the Employment Advocate. A substantial issue of public policy arises in relation to the conduct of proceedings before the Employment Advocate. All proceedings before the Employment Advocate are held in secret. There are no public hearings. There is no record of those proceedings. There are no formal decisions issued by the Employment Advocate as to why he forms the view that an agreement will pass a No Disadvantage Test, or why he forms the views that an agreement meets the statutory requirements of the Act. There is currently no effective means of review of any of the actions or conduct of the Employment Advocate. In a technical sense the Employment Advocate is subject to application for review to the High Court using the prerogative writs. This however is simply not a practical means of reviewing the decisions of the Employment Advocate in circumstances where those seeking review are employees who may be disadvantaged by a decision of the Employment Advocate.

136. The Commission, however. has the history of developing precedent decisions which guide individual members of the Commission in interpreting and applying their statutory functions under the Act. No such process operates in relation to the Employment Advocate. The Employment Advocate is clearly and definitely a lone operator, and in every real sense is answerable to no one. This is a totally unsatisfactory state of affairs. Given the intention of the Government to remove the subject matter of terms and conditions of employment from being effectively

regulated by awards to being effectively regulated by enterprise agreements, whether they be AWAs or a form of collective agreement means that a fundamental fabric of society, i.e. wages and conditions of employment of all employees is to be placed ultimately in the hands of a statutory appointed official who is not answerable to the community in any public way. The total secrecy surrounding the operations of the Employment Advocate in its approval of AWAs and, the intended secrecy surrounding the approval of collective agreements is undesirable in the extreme.

137. Even if the Employment Advocate is seen to be honest and professional in the conduct of its statutory functions, the same cannot necessary be said of those who will promote a particular outcome in terms of a collective agreement or an AWA. In other words, without public review of the decisions of the Employment Advocate, it is extremely easy for employers and their agents to mislead the Employment Advocate on key issues relating to compliance with statutory obligations for agreement making. This is not a fanciful scenario. The Association has time and time again come across cases of non-union agreements in the retail and fastfood sectors, where employers and their advocates have misled the Commission on key and fundamental issues. If employers and their advocates are prepared to mislead the Commission when Commission proceedings are public and Commission decisions are potentially reviewable, such employers and their advocates will be even more willing to act in a less than honest manner in relation to proceedings done in secret before the Employment Advocate.

138. The entire integrity of the agreement making system will fall into disrepute if everything relating to certification of agreements is done in secret.

139. The public will have no confidence in the Office of the Employment Advocate if secrecy is the cornerstone of its operations.

ANNEXURE A

Comparison between the Office of the Employment Advocate Framework AWA for the Retail Industry in Victoria versus The Victorian Shops Award

The Office of the Employment Advocate has devised a framework AWA for the Retail Industry in Victoria which is offered to employers. The AWA has a single set of terms and conditions of work but contains 4 possible wage rates with each of the 4 possible wage rates being higher than the Victorian Shops Interim Award ordinary hourly rate of pay. The employer chooses the wage rate to be used in the AWA on the basis of a particular pattern of work hours. The AWA is structured so that the employee subject to the AWA will be called and paid as a permanent employee.

Prima facie, the AWA appears to provide a better result for workers than the Award as the AWA both cements permanent employment and a higher base hourly rate of pay.

However not only is the AWA a monumental con job but it is absolutely clear that in promoting the Framework AWA and in giving automatic approval of AWA's which are copies of the framework AWA that the Employment Advocate is ignoring his statutory duties and in fact is operating in breach of his statutory duties.

The "Con Job" undertaken by the Office of the Employment Advocate is operating at least at 2 levels.

Firstly, while the AWA calls employees permanent and pays them as permanent the AWA in fact provides the employer with the same level of flexibility in giving work to the AWA employee that they would get in employing a casual employee under the Award. The only difference is that under the AWA the employer does not pay the casual loading whereas under the Award the employer must pay the casual loading.

Effective casual labour can be employed under the AWA as permanents for a wage which is at least 25% lower than the Award rate.

Secondly, even in the case of genuine part time employees employed under the AWA with its higher base hourly rate of pay, some common work patterns in the retail industry will earn significantly less under the AWA than under the Award.

A simple comparison of several key employment provisions is set out in the table below.

SUBJECT	AWA	AWARD
Dispute Resolution	AWA does not refer to AIRC but instead refers to legal action that the OEA will assist with.	Victorian Shops Award has access to AIRC
Casuals	The AWA does not have a casual classification	The Victorian Shops Award contains a casual classification
Part time Employee:	The AWA contains less than 38 hours per week (pro rata Annual Leave and Personal Leave)	The Victorian Shops Award contains the following provisions for Part-time employees -less than 38 hours per week **-reasonably predictable hours of work**, agreement also as to; - hours worked each day, -- - which days to be worked, - start and finish times, - variation in writing, - 3 hour min per day, - all hours in excess of agreed hours is o/time.
Rosters	The AWA requires that – - rosters are to be established in accordance with business demands. - The employer to make effort to ensure that rostering is fair and equitable. - The allocation of penalty hours are equally divided. - The employer will attempt to accommodate family and study commitments	The Victorian Shops Award requires that: -Part timer's roster (but not no. of hours) may be altered by giving notice of 14 days. -Rosters not to be changed from week to week nor changed to avoid penalty payments. -Max. of 5 days per week unless employees requests more.

Additional Hours/Overtime:	The AWA contains - that additional hours are work outside ordinary hours. - If employee volunteers then paid at ordinary time rate. If employee is directed then paid at 1.5. TOIL	The Victorian Shops Award contains -within ordinary hours but outside rostered hours obtain 150% their ordinary rate for 1st 3 hours then 200% thereafter - Greater than 10.5 hours once per week or 9 hours thereafter-150% the 200% - Outside ordinary hours 200% of ordinary rate. -On RDO-200%
Meal/Rest Breaks	The AWA contains - Meal Breaks of 30 minutes after 5 hours work - Rest breaks of 10 mins for each 4 hours	Victorian Shops Award - Meal break after 5 hours work 2, 10min rest breaks for Full Time employees 4-7hours work gets a10 min break, Greater than 7hours work gets a 2nd 10 min break-part-time employee
Supported Wage:	The AWA does not contain a supported wage provision	Contains a supported Wage Provision
Junior Rates:	AWA and Victorian Shops Award have same percentages	AWA and Victorian Shops Award have same percentages
Wage Increases	The AWA contains annual 2.5% increases	The Victorian Shops Award are subject to Safety Net Adjustments through Annual Safety Net Case with the lowest increase over the last 4 years being 3.2%
Meal Allowance:	The AWA contains no meal allowance	Victorian Shops Award – contains a meal allowance of $12.60/11.30
Transport Allowance:	The AWA contains no Transport allowance	Victorian Shops Award -yes (58c per km)
Cold Work Allowance:	The AWA contains no Cold Work Allowance	Victorian Shops Award does contain a Cold work Allowance
Annual Leave Loading	The AWA contains no Annual Leave Loading - this has been incorporated into hourly wage rate	The Victorian Shops Award –contains Annual Leave Loading of 17.5% on top of Annual Leave

Public Holidays	The AWA contains pay for public holidays which is incorporated into hourly rate	The Victorian Shops Award - pay for public holiday is paid at 250%
Personal Leave	The AWA contains 9 days per year (includes Sick Leave, Family Leave, Compassionate Leave)	The Victorian Shops Award contains Sick Leave of 5 days in the first year and 8 days every year thereafter Compassionate Leave of 1 to 3 days Family Leave- The ability to use Sick Leave for Family Leave purposes

A worker employed under the OEA Victorian Retail Framework Agreement AWA may be paid under one of four rates schedules (identified in the OEA Retail Framework as attachments 1 (or below as AWA-option 1 to 4). The rates in each of these schedules are different. A particular schedule applies depending on the hours worked by an individual employee. (By way of contrast there is only one rates schedule in the Victorian Shops Award).

AWA – Option 1	**AWA – Option 2**	**AWA – Option 3**	**AWA – Option 4**	**Victorian Shops Award**
$17.07ph Any work during the following hours Mon-Sun 9am-6pm, 1 evening 6pm-9pm	$15.57ph Any work during Mon-Sat 9am-6pm, 1 evening 6pm-9pm Sunday-overtime $23.35	$14.63ph Any work during Mon-Fri 9am-6pm Evenings Hourly rate+25% Sat and Sun- $22.83 per hour	$22.83 ph Weekend only Any work during Saturday and Sunday 9am-6pm Attracts a hourly rate of $22.83	**Grade 1** $14.30 per hour **Casual** $19.06 Sat +$5.06 (+35%) (Casual $20.55) Evenings 6pm-9pm (+25%) Sundays (+100%) (casual $29.79)

For example AWA- Option 1 lists rates for any work that may be rostered within the hours of Monday to Friday 9am – 6pm, one weekday evening opening 6pm - 9pm and Saturday and Sunday 9am – 6pm. For a Retail Worker 1 there is one pay rate for all work conducted during the above hours. That rate is currently $17.07.

The following example provides typical scenario's for a part time employee working across a number of different rosters over a 4 week cycle under AWA – Option 1 versus the same employee working under the Victorian Shops Award. The example provides for an employee working during weekly normal hours, weekly normal hours and a late

night, weekly normal hours and a weekend and on Saturday and Sunday over a 4 week period.

The example uses the following hours:

Thur 9am-3pm and Fri 3pm-9pm	total 12 hours
Fri 3pm-9pm and Sat 9am-3pm	total 12 hours
Sat 9am-3pm and Sun 9am-3pm	total 12 hours
Sun 9am-3pm and Mon 9am-3pm	total 12 hours

Because the span covers Monday to Sunday, AWA-Option 1 applies. Each hour worked is paid at $17.07. The total pay for the four weeks is **$819.36.**

Under the Vic Shops Award, a part time employee working the same roster would be paid **$922.35**.

The following 4 week roster provides an example of the wages accrued by a part-time employee under both the AWA-option1 and the current Victorian Shops Award. The Award applies the relevant penalty rates for late nights and Saturday and Sundays. The ordinary hourly rate under the Award is $14.30per hour, the hourly rate of the AWA is a flat $17.00 (no penalty rates apply under the AWA)

WEEK 1 AWARD

	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday	Monday	
7am-8am								
8am-9am								
9am-10am			$14.30					
10am-11am			$14.30					
11am-12pm			$14.30					
12pm-1pm			$14.30					
1pm-2pm			$14.30					
2pm-3pm			$14.30					
3pm-4pm				$14.30				
4pm-5pm				$14.30				
5pm-6pm				$14.30				
6pm-7pm				$17.88				
7pm-8pm				$17.88				
8pm-9pm				$17.88				**TOTAL**
Total			$85.80	$96.53				$182.33

WEEK 1 AWA

	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday	Monday	
7am-8am								
8am-9am								
9am-10am			$17.07					
10am-11am			$17.07					
11am-12pm			$17.07					
12pm-1pm			$17.07					
1pm-2pm			$17.07					
2pm-3pm			$17.07					
3pm-4pm				$17.07				
4pm-5pm				$17.07				
5pm-6pm				$17.07				
6pm-7pm				$17.07				
7pm-8pm				$17.07				
8pm-9pm				$17.07				**TOTAL**
Total			$102.42	$102.42				$204.84

WEEK 2 **AWARD**

	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday	Monday	
7am-8am								
8am-9am								
9am-10am					$17.88			
10am-11am					$17.88			
11am-12pm					$17.88			
12pm-1pm					$17.88			
1pm-2pm					$17.88			
2pm-3pm					$17.88			
3pm-4pm				$14.30				
4pm-5pm				$14.30				
5pm-6pm				$14.30				
6pm-7pm				$17.88				
7pm-8pm				$17.88				
8pm-9pm				$17.88				TOTAL
Total				$96.53	$107.25			$203.78

WEEK 2 **AWA**

	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday	Monday	
7am-8am								
8am-9am								
9am-10am					$17.07			
10am-11am					$17.07			
11am-12pm					$17.07			
12pm-1pm					$17.07			
1pm-2pm					$17.07			
2pm-3pm					$17.07			
3pm-4pm				$17.07				
4pm-5pm				$17.07				
5pm-6pm				$17.07				
6pm-7pm				$17.07				
7pm-8pm				$17.07				
8pm-9pm				$17.07				TOTAL
Total				$102.42	$102.42			$204.84

WEEK 3 **AWARD**

	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday	Monday	
7am-8am								
8am-9am								
9am-10am					$17.88	$28.60		
10am-11am					$17.88	$28.60		
11am-12pm					$17.88	$28.60		
12pm-1pm					$17.88	$28.60		
1pm-2pm					$17.88	$28.60		
2pm-3pm					$17.88	$28.60		
3pm-4pm								
4pm-5pm								
5pm-6pm								
6pm-7pm								
7pm-8pm								
8pm-9pm								TOTAL
Total					$107.25	$171.60		$278.85

WEEK 3 **AWA**

	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday	Monday	
7am-8am								
8am-9am								
9am-10am					$17.07	$17.07		
10am-11am					$17.07	$17.07		
11am-12pm					$17.07	$17.07		
12pm-1pm					$17.07	$17.07		
1pm-2pm					$17.07	$17.07		
2pm-3pm					$17.07	$17.07		
3pm-4pm								
4pm-5pm								
5pm-6pm								
6pm-7pm								
7pm-8pm								
8pm-9pm								TOTAL
Total					$102.42	$102.42		$204.84

WEEK 4 **AWARD**

	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday	Monday	
7am-8am								
8am-9am								
9am-10am						$28.60	$14.30	
10am-11am						$28.60	$14.30	
11am-12pm						$28.60	$14.30	
12pm-1pm						$28.60	$14.30	
1pm-2pm						$28.60	$14.30	
2pm-3pm						$28.60	$14.30	
3pm-4pm								
4pm-5pm								
5pm-6pm								
6pm-7pm								
7pm-8pm								
8pm-9pm								TOTAL
Total						$171.60	$85.80	$257.40

WEEK 4 **AWA**

	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday	Monday	
7am-8am								
8am-9am								
9am-10am						$17.07	$17.07	
10am-11am						$17.07	$17.07	
11am-12pm						$17.07	$17.07	
12pm-1pm						$17.07	$17.07	
1pm-2pm						$17.07	$17.07	
2pm-3pm						$17.07	$17.07	
3pm-4pm								
4pm-5pm								
5pm-6pm								
6pm-7pm								
7pm-8pm								
8pm-9pm								TOTAL
Total						$102.42	$102.42	$204.84

A comparison of the overall total weekly earnings under the AWA vs. the Victorian Shops Award shows the different rates earned under each instrument on a weekly basis as well as a 4 weekly basis. As you can see the shaded numbers provide the higher amounts per week for this part-time employee under either instrument governing their wages. Although, an overall total over the 4 week period that this employee works shows that the Employee under the Victorian Shops Award will earn $102.99 more than the employee under the AWA.

	WEEK 1	WEEK 2	WEEK 3	WEEK 4		TOTAL OVER 4 WEEKS
AWARD	$182.33	$203.78	$278.85	$257.40		$922.35
WA	$204.84	$204.84	$204.84	$204.84		$819.36

The Following Example provides the different wages an employee predominantly working weekends (either Saturday or Sunday) would receive under both the AWA-option 4 and Victorian Shops Award:

SITUATION	AWA –Option 4 (Attachment 1)	Victorian Shops Award
A part time employee works 6 hours on a Saturday:	AWA-Option 4(attachment 4-Weekend only) **$136.98** ($22.83ph)	Vic Shops Award **-$107.28** (17.28ph)
A part time employee works 6 hours on a Saturday and 6 hours on a Sunday:	AWA – Option 4 (136.98 + 136.98) - **$273.96**	Vic Shops Award (107.28 + 171.60) - **$278.88**
A part time employee who works 6 hours on a Sunday:	AWA - **$136.98**	Vic Shops Award - **$171.60**

A part time employee under the Vic Shops Award can be guaranteed fairly regular hours. A part time employee under an AWA may have their roster varied regularly. In effect a part time employee under an AWA may be treated as a casual employee is treated under the Vic Shops Award. Under the Vic Shops Award a casual employee is paid between 25% and 33% more than a part time employee. There is no equivalent compensation under this AWA

There is also no provision within the AWA retail framework to stop an employer hiring an employee and starting them on a Monday to Sunday roster at $17.07 and then change their roster to have them working only on Saturdays and Sundays at the same rate. This rate of $17.07ph is $5.76ph less than the rate for an employee who works solely on the weekend ($22.83ph).