SUBMISSION TO THE

SENATE INQUIRY INTO

THE WORKPLACE RELATIONS AMENDMENT

(TRANSITION TO FORWARD WITH FAIRNESS) BILL 2008

SUBMISSION BY

SHOP, DISTRIBUTIVE & ALLIED EMPLOYEES' ASSOCIATION

February 2008

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SDA SUBMISSION TO THE SENATE INQUIRY

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1. The SDA welcomes the opportunity to make this submission.

2. The SDA is Australia's largest trade union with approximately 220,000 members. The majority of those members are young people, a majority are also women.

3. The SDA supports the proposed legislation and urges its speedy passage through the Senate.

4. The legislation, in our view, will have a significant positive impact both economically and socially, especially upon the retail industry and the people working in it.

5. The legislation will encourage employment in the retail industry, which is currently experiencing some difficulty in recruiting labour.

6. The introduction of Australian Workplace Agreements from 1996 led to many employees being exploited and treated unfairly.

7. The AWA was given a privileged position. It could override any State Award or Agreement, or Federal Award that would otherwise apply. The only industrial instrument that could not be overridden by an AWA was a federally certified agreement which was still current.

8. The Legislation introducing AWAs was specifically designed to discourage the involvement of unions.

9. An AWA was certified by the Employment Advocate. Although the Employment Advocate was required to ensure that the AWA passed the No Disadvantage Test, this process was done in private by the

Office of the Employment Advocate without any public hearing or process whereby interested parties could become involved and make submissions.

10. Furthermore, the Legislation provided that the contents of Australian Workplace Agreements were to be kept secret between the employer and each individual employee. In other words, unions or other interested parties were not permitted to examine the terms of an AWA in order to satisfy themselves that it properly passed the No Disadvantage Test.

11. As a result of these secrecy provisions, some hundreds of thousands of Australian Workplace Agreements were certified by the Employment Advocate, and it was extremely difficult to ascertain the extent to which individual employees had been affected in the process.

12. What is without doubt is that many workers experienced reductions in wages and/or employment conditions when they were engaged under AWA's

13. The fundamental problem for many workers with AWA's was that they were simply "presented" with them by their employer. They had no realistic opportunity to negotiate the contents of their AWA.

14. There is no doubt that certain individual employees who have significant ability or skills, or are in short supply, have an ability to negotiate their wages and conditions with a prospective employer, and this has typically been done over the years by professionals such as engineers and others.

15. However, the notion that an ordinary wage employee is able to rise to the occasion and bargain with his/her employer on an equal basis when the employer determines whether the employee has a job and decides on the days on which the employee works, the starting times and finishing times of work on each day, the times when meal

breaks and tea breaks are taken, the way in which the work is to be performed or not performed, is absurd.

16. This is particularly the case when one examines the instance of vulnerable workers, including people who are still aged below 18 years, individual workers such as women who are completely dependent on their job for their livelihood, and also older workers or those with a disability who understand their employment security is precarious.

17. One of the clearest messages established by the operation of Australian Workplace Agreements under the Workplace Relations Act was that employees subjected to the requirement to enter into a Australian Workplace Agreement as a condition of gaining of employment, simply did not have any genuine bargaining capacity in relation to the terms and conditions of employment under which they worked.

18. 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.

19. Where the Union is the representative of employees, it is often the case that the Union in non-union agreement matters, has had 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.

20. 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.

21. AWAs in the retail industry were often confusing and misleading for employees. They sometimes, for example had a higher base rate of pay than the award for the retail industry.

22. However, the cost of obtaining this higher base rate was 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.

23. In such circumstances, advocates of AWA's often boasted that they had 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 provided 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 were 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.

24. A classic example of such an AWA is that operated by the Aldi Supermarket chain.

25. 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 a higher 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.

26. 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.

27. 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.

28. 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.

29. This AWA was established before Workchoices.

30. One issue which is clearly disclosed by this matter, is that the Office of the Employment Advocate appears to have had a policy whereby any condition of employment could be reduced to a dollar value.

31. In this sense, the Office of the Employment Advocate allowed fundamental terms and conditions of employment to be converted into a pure dollar value. The Association questions whether this mathematical approach results in fair value being given for terms and conditions of employment which bought out in an Australian Workplace Agreement.

32. With WorkChoices the former Government further promoted Australian Workplace Agreements.

33. It provided that Australian Workplace Agreements may be entered into at any time, even if a federal collective agreement is already in place. This meant that workers might negotiate a collective agreement at a workplace for their wages and conditions for a period of years, yet still be vulnerable to individual approaches from the employer for an individual contract, whose terms might be significantly worse than the collective agreement, but still be certifiable because it passed the Government's diminished No Disadvantage Test.

34. Opportunities to abuse these processes and thereby disadvantage workers were already clearly available to employers before the Workchoices legislation.

35. Prior to Workchoices the courts had already ruled that it was legal for an employer to offer employment to a prospective new employee on the basis that the employee signs an individual contract as a condition for obtaining the job. In other words, an employer could introduce unwanted Australian Workplace Agreements into a workplace simply using natural attrition of labour as the mechanism for signing all new employees on to the undesirable instrument.

36. Under WorkChoices, an employer with less than 100 employees could invite each employee to sign an AWA and, in the event of a refusal, dismiss the person for "operational" reasons, knowing that the employee no longer has access to the Unfair Dismissal provisions of the Workplace Relations Act.

37. A case in South Australia found that a 15 year employee had been subject to "manifest disadvantage" on her AWA made with her employer, Bakers Delight. A Judge of the South Australian

Industrial Relations Court, Justice Peter McCusker, found that the employee was paid 25% less than her minimum award entitlement. Because the employer could not produce the filing receipt from the Office of the Employment Advocate, the Judge found that the AWA was not legally effective, and accordingly he was able to find that the award still applied to the employee and he ordered Bakers Delight to pay over $1400 in back pay to the employee.

38. The Judge said it was "troubling" that more than 50 AWAs had been approved in the same terms as the one with which he was dealing and, as they had been certified by the Employment Advocate, they were now legally binding.

39. Not only was the entitlement under the AWA 25% less than the minimum award entitlement, it also purported to cash out annual leave, the annual leave loading and sick leave. As the ACTU Secretary, Greg Combet, said at the time, this was one of the most graphic examples of how the Government's AWAs were already used to exploit workers, particularly young people. If it was this bad then, just imagine how bad it became when the Government's WorkChoices Legislation came into operation.

40. The case also reflected badly on the secret approval process conducted by the Office of the Employment Advocate. If an AWA which is so demonstrably below the standards set by the under-pinning award could be passed by the Employment Advocate, then one could have no confidence in this secret approval process conducted at the behest of the Government.

41. Another example of an Australian Workplace Agreement that was below standard was explained by an employee of Krispy Crème in a submission to the Senate Employment, Workplace Relations and Education Committee on the 5th August 2005.

42. Again this was pre Workchoices.

43. The employee, Ms. Thea Birch Fitch, aged 21 years at the time, said that she did not wish to be employed on an Australian Workplace Agreement but had been compelled to sign the agreement.

44. She said that in July 2003, she told the company that she preferred to remain on the award rather than sign the proposed agreement. Management then told her that if she didn't sign the AWA, she had no chance of being promoted to be manager, a position in which she had expressed an interest, and that there would be no guarantee of hours of work in the future. She was also promised that if she signed the AWA, she would be offered full-time hours of work.

45. The employee sought the advice of the SDA, and following our examination of the document, we strongly recommended that employees refuse to sign. The Union said that the proposed AWA would cut weekend and evening penalty rates and remove rostering conditions, loadings, allowances and other award entitlements. We said that the employees would be better off staying under their existing award.

46. The Union then met with the company seeking improvements in the AWA in order to make it acceptable. The company refused to make any changes.

47. Most of the employees involved were 15 – 18 years of age and did not fully understand their rights or what was at stake. Most of them signed the agreement. Most employees were too apprehensive to authorise the Union to represent their interests, even though the employees were by now aware they would be paid less on weekends when most of them were available to work.

48. When the deadline for signing the agreement arrived, the employee in question said she did not want to sign the agreement. She sat in the manager's office in tears while she was told that she had to sign the agreement or she would not get any hours of work, and would

not be promoted. She told the Senate Committee that she felt she had been left with no choice and so she signed the agreement.

49. The Union's assessment was that the employee was, on a best case scenario, $58.62 worse off per week, or more than $2,800 worse off in a year, under the Australian Workplace Agreement compared with the award.

50. Once again this sub-standard AWA was certified by the Employment Advocate using his secret process as enacted by the Howard Government.

51. Prior to WorkChoices, any union agreement, non-union agreement or Australian Workplace Agreement could only be certified if it passed a "No Disadvantage" Test. This Test meant that the proposed agreement was compared with the State or Federal award which, in the absence of the agreement, would apply to the worker or the enterprise as the case may be if it was clear that the agreement was overall at least equal to the award, the agreement would be certified and become legally operative.

52. Even with this test being applied sub standard AWA's which "ripped" away workers entitlements were introduced on a broad scale.

53. The situation was exacerbated by Workchoices.

54. Instead of comparing a proposed agreement with the award which would otherwise apply, the comparison instead was made against a single rate of pay for the work that was to be performed by the person under the agreement and against four conditions of employment legislated by the Parliament.

55. The four conditions of employment legislated by the Parliament were:

    (i) Annual Leave (the standard 4 weeks).

(ii) Personal Leave, which is to include Sick Leave, Carer's Leave and Compassionate Leave.

(iii) Parental Leave, including Maternity Leave and Adoption Leave.

(iv) The maximum ordinary time hours of work, being an average of 38 per week.

56. The critical factor in this new No Disadvantage Test was the significant standard award entitlements which were missing which included:

(a) The entitlement to work the standard hours over a maximum of 5 days per week. It will be permissible for ordinary hours to be spread over 6 or 7 days per week, every week.

(b) Provisions for rostering a worker, including a maximum number of ordinary hours on a day, provision for consecutive days off in a week, a guaranteed minimum break between ceasing work on one day, or shift, and commencing again on the second day or shift, and so on.

(c) An entitlement to a day's pay when an employee takes a day off on a public holiday.

(d) Provision for meal breaks and tea breaks.

(e) The 17½% annual leave loading.

(f) Provision for penalty rates and shift loadings for working at unsociable times, including Saturdays, Sundays, Public Holidays, evenings and nights, or for working extended hours (say, in excess of 8 or 10 hours on a single day or shift), or

for working under extraordinary conditions (such as heat, cold, noise, etc).

(g) Provision for the type of employment, such as part-time, full-time and casual, and any loading in the hourly rate for casuals (in lieu of such employees receiving standard provisions for leave and public holidays).

(h) Redundancy provisions including notice and severance pay to cover a person for a period until a new job is found.

57. This meant that employees could be required to work under conditions where some or all of the above provisions were missing.

58. There was no requirement to compensate the employee for any benefits which were missing.

59. There was no obligation to trade improved benefits for the employee in return for the removal of other benefits.

60. Thus there was a powerful economic incentive on an employer to force his employees into a new agreement containing only the Government's five basic entitlements, in order to gain a competitive advantage in lower labour costs over that employer's competitors. This was designed to create in each industry a "race to the new bottom".

61. We need to understand that the basic conditions of employment which were removed are not outrageous entitlements extracted from vulnerable employers by an avaricious workforce, or imposed by an unreasonable Industrial Relations Commission.

62. They were in fact the result of 100 years of continuous painstaking work by trade unions, usually in negotiations with employers in seeking decent entitlements for work in a variety of industries. For a Government to legislate these entitlements away, across the

board, was an unprecedented and outrageous interference in the workplace and an unacceptable abuse of power.

63. In its WorkChoices Book the previous Government confirmed this pessimistic analysis by giving the example of "Billy" getting a job in a retail store.

64. This is what the Government said: -

"Billy is an unemployed job seeker who is offered a full-time job as a shop assistant by Costa's who owns a clothing retail store in Canberra. The clothing store is covered by a federal award. The job offered to Billy is contingent on him accepting an AWA.

"The AWA Billy is offered provides him with the relevant minimum award classification wage and explicitly removes other award conditions.

"As Billy is making an agreement under WorkChoices the AWA being offered to him must at least meet the Fair Pay and Conditions Standard.

"The AWA Billy is offered explicitly removes award conditions for public holidays, rest breaks, bonuses, annual leave loadings, allowances, penalty rates and shift/overtime loadings.

"Billy has a bargaining agent assisting him in considering the AWA. He understands the details of what is in the AWA and the protections that the Fair Pay and Conditions Standards will give him including annual leave, personal/carer's leave, parental leave and maximum ordinary hours of work. Because Billy wants to get a foothold in the job market, he agrees to the AWA and accepts the job offer."

65. In other words, Billy lost basic award entitlements upon commencing his new job, even if other employees in the store are still receiving these entitlements under the Award.

66. Billy took a job with sub-standard conditions, even though there's every prospect that his new employer is profitable company well able to afford the full award entitlements.

67. When it became clear that many workers were losing basic entitlements with little or no compensation, the Howard Government introduced the so-called "Fairness Test" for agreements lodged on or after 7th May, 2007.

68. The abolition of AWAs in the current Bill will remove a significant source of worker exploitation and mal-treatment.

69. The abolition of the "Fairness Test" will give employees a better chance of receiving a fairer deal in the workplace.

70. There are significant labor shortage problems in the service industries. Low wages and tough working conditions are a key factor in this.

71. In 2001 the Victorian Wholesale Retail and Personal Services Industry Training Board was funded by the Victorian government to undertake a Destination Survey of hairdressing graduates. In 2007 Service Skills Australia commissioned similar research. Both pieces of research produced similar findings in certain areas.

72. Analysis of the Victorian data identified that 18% of respondents left the industry for another career, 4% left because of the training issues, 7% decided they had made an incorrect career choice and 41% cited low wages and poor working conditions as being the reason for leaving their employer. This included employer exploitation, superannuation not being paid and general dissatisfaction with the industry.

73. A more recent survey by Service Skills Australia shows similar results.

74. Abolition of AWAs and the introduction of a No Disadvantage Test will make employment, especially in industries such as retail, more attractive to potential employees. As such, it will be a fillip to employment in the industry.

75. AWAs and the operation of the "Fairness Test" were anti-family.

76. One of the objects of the WorkChoices legislation set out in the Section 3 (l) was "assisting employees to balance their work and family responsibilities effectively through the redevelopment of mutually beneficial work practices with employers".

77. The mere provision of minimum entitlements did nothing to guarantee that an employee would be able to effectively balance his/her work and family commitments or that a worker will have any genuine ability to have a meaningful family life.

78. There was no guarantee that:

- Any worker would only work five (5) days out of every seven (7);
- A worker would have any day off in any week;
- Workers would have a right to have weekends off;
- Workers will be able to have public holidays off;
- Workers would have their hours of work set in single shifts each day;
- Preventing the employer from rostering workers to work several shifts on the same day;

- Preventing an employer from requiring a worker to work different shifts on different days so as to totally destroy a person's normal sleep patterns;

- An employee would have a regular roster;

- A worker would have a standard pattern of hours of work over a one (1) year cycle;

- Preventing an employer from requiring an employee to work 84 hours in some week (i.e. seven shifts of twelve (12) hours each) whilst then rostering an employee, in other weeks, to work seven (7) hours (i.e. one (1) hour per day each day) over an applicable averaging period;

- Where an employee has a dispute with their employer about how the 38 hours per week is to be worked over a one year cycle that such a dispute can be resolved by an independent third party, making a binding decision which has regard to the needs of the worker and his/her family, and the needs of the business.

79. The litany of what is not contained in the guarantee shows that what was guaranteed was quite limited.

80. The preservation of a genuine entitlement to balance work and family life commitments and to enable workers to be contributors to the broader social community through voluntary activities on weekends and outside work hours can only be achieved if there is a clear pronunciation of the key parameters of employment.

81. The former Government's approach attacked most of the fundamental rights of workers in accessing a 38 hour week in a manner which provides genuine and real benefits to the worker and enables the worker to have meaningful non work time with their families and with their broader community.

82. The changes proposed by the government are pro-family; they will encourage the development of family friendly workplaces, thus making employment more attractive.

83. The SDA does not believe that adverse economic impacts will flow from the introduction of this legislation.

84. During the operative years of AWAs many retail companies continued to apply state or federal awards or enterprise agreements negotiated with the union.

85. These awards and agreements generally provided wages and conditions in excess of those provided under many AWAs and certainly above those provided for by the "Fairness Test".

86. The companies operating under awards and agreements have demonstrably been satisfied to continue to apply such arrangements. Clearly they do not believe that this puts them at any significant disadvantage.

87. Requiring other employers to apply a higher common standard of wages and conditions should not economically disadvantage any effectively operating company.

88. The proposed legislation will help to restore fairness to the workplace without creating any significant economic downside.

89. The new legislation is socially progressive and economically responsible.

PART 11

Technical Matters

90. There are some technical matters which should be raised in relation to the proposed legislation. If adopted, the changes suggested

below would, in our view, further strengthen the operational effectiveness of the proposed legislative amendments.

The New No Disadvantage Test

91. A significant improvement is in the introduction of a No Disadvantage Test to replace the Howard Government Fairness Test.

92. However, proposed Section 346(D) (7) provides "a Collective Agreement is taken to pass a No Disadvantage Test if there is no reference instrument in relation to any of the employees whose employment is subject to the agreement." The affect of this provision is that where employees do not have any award, whether it is an actual award or a designated award or any pre-existing AWAs, State Agreements or Collective Agreements, then a new Collective Agreement made under the transitional Act is simply deemed to have passed the No Disadvantage Test.

93. This is sound in itself but there are some drafting problems which arise. To illustrate, if an employer has 1,000 employees to be covered by a new Collective Agreement and if all of the employees had a reference instrument, i.e. a pre-existing industrial instrument that had regulated their terms and conditions of employment then the No Disadvantage Test will be applied to the Collective Agreement.

94. If the employer with 1,000 employees has 999 employees for whom there is a reference instrument and one employee for whom there is no reference instrument then, under proposed Section 346(D)(7), the Collective Agreement will be deemed to have passed the No Disadvantage Test simply because there is one employee for whom there is no reference instrument.

95. This does create a potential problem. An unscrupulous employer through this provision could have the bulk of all his employees

covered by a pre-existing award, AWA's or Collective Agreements but have one employee for whom there is no existing reference instrument, add that person to the employee Collective Agreement, put into a collective agreement any terms and conditions even ones which clearly breach the No Disadvantage Test and still the Collective Agreement will be passed.

96. If this is not the intention of the Government, then Section 346(D)(7) must be amended.

97. The amendment needs to make clear that a Collective Agreement will be taken to pass a No Disadvantage Test in relation to an employee for whom there is no reference instrument but only in relation to that employee. Where the Collective Agreement applies to employees for whom there is a reference instrument then the No Disadvantage Test must be satisfied in relation to all of those employees.

98. Whilst the employer must make an application to the Director of the Workplace Authority for the designation of an award, the employees who are to be covered by the Workplace Agreement are not required to be told of the application by the employer.

99. It would appear fundamental that an employee can only make an informed choice in relation to entering into an ITEA or a Collective Agreement if they know how the Agreement is going to be tested and against which instrument it is to be tested.

100. If the Bill required the employer to give a copy of the designated award application to employees then clearly employees would understand the process used and understand which award was to be used for the purposes of the No Disadvantage Test.

101. Employees must be given an opportunity of questioning the choice of award for designation as made by the employer

Commencement of Operation of Agreements

102. The Bill proposes two separate mechanisms for the commencement of operation of agreements depending upon the type of agreement.

103. Some agreements will operate as from the date they are lodged with the Director of the Workplace Authority and these agreements are contained in Subdivision D of Division 5A

104. Some Agreements will only commence operation only from the date they are approved by the Director of the Workplace Authority. These are contained in Subdivision C of Division 5A.

105. There appears to be no rational justification for creating two separate regimes.

106. Either all Agreements should commence on date of lodge with the Director of the Workplace Authority or all Agreements should commence on the date they are approved by the Director of the Workplace Authority.

107. There is no logic to different provisions applying. In the submission of the SDA, Subdivision D, which relates to Agreements which commence on lodgement, should be deleted from the Bill. All agreements would then commence only on approval.

108. The approach adopted by the Bill provides that once approved an agreement comes into operation on the 7th day after the date of issue specified in the notice to the employer from the Director of the Workplace Authority. A particular problem with this approach is that not only do the parties to an Agreement need to wait until their Agreement, whether it be a new AWA or a form of Collective Agreement, is approved by the Director of the Workplace Authority but even then the Agreement then can't come into operation until 7 days after they receive notice of the approval from the Director of

the Workplace Authority. Nobody can be sure how long the approval will take.

109. The issue of the operative date of Agreements is a crucial matter for both the employee and the employer.

110. It should at least be possible for the parties to specify the operative date of operation of the Agreement.

111. This would protect both the employer and the employee from claims of technical non-compliance with the pre-existing industrial instrument.

112. This approach provides certainty and allows employers to plan payroll matters in a timely manner.

113. The single most important issue arising out of any form of Workplace Agreement making is the commencement date of any pay increase under. If an Agreement cannot commence operation until 7 days after the employer receives the notice from the Director of the Workplace Authority, this has the very real effect of significantly disadvantaging employees by preventing them getting, on time, the wage increases which they have agreed to with their employer.

114. Allowing Agreements to commence operation from a date specified in the Agreement where that date is after the date the Agreement is made allows the parties to have greater control over workplace relations issues, it does not detract from the role and function of the Director of the Workplace Authority in applying the No Disadvantage Test but it does recognise the industrial realities relating to the need to pass wage increases to employees sooner rather than later.

115. Should the Senate not remove Subdivision D from the Bill, then there is at least an important issue that arises in relation to

compensation for employees where the Agreement as lodged fails the No Disadvantage Test.

116. The current structure of the Bill at Section 346ZG identifies the entitlements of employees to compensation in respect to the No Disadvantage Test period. However it is clear from the structure of the Bill that the whole issue of compensation is left up to the employee to chase.

117. This would appear to negate the whole purpose of the compensation provision as even if employees receive notice that they are entitled to compensation most employees, especially in the cases of ITEAs or non-Union Collective Agreements, will not have the capacity to initiate a process to obtain compensation.

118. The Bill should be amended so as to provide for a specific provision that where the Director of the Workplace Authority determines that an Agreement does not pass the No Disadvantage Test and where the employer amends or varies the Agreement so that the Director of the Workplace Authority is satisfied that it will then pass the No Disadvantage Test then, in such cases, the Director of the Workplace Authority should be required to refer both a copy of the original Workplace Agreement and the variation and all associated documentation relating to the variation process to the Workplace Ombudsman. The Bill should then specifically provide that the Workplace Ombudsman should be required to ensure that any compensation required to be paid to employees is actually paid. This would at least be a pro-active compensation system rather than a reactive compensation system.

Agreements that don't pass the No Disadvantage Test

119. Proposed Section 346N deals with situations where an Agreement has been tested against the No Disadvantage Test and has failed the test. The employer is then able to lodge a variation of the Agreement with the Workplace Authority Director. Where that

variation satisfies the Workplace Authority Director then the Agreement will pass the No Disadvantage Test. However, Section 346N provides that in the case of a new AWA (ITEA) the employer is required to get the variation agreed to by the employee. The provision within Section 346N make clear that the same rule does not apply where a Collective Agreement, even a non union collective agreement is involved.

120. However, there is nothing in the Act or the Bill which would prevent an employer from significantly rewriting key sections of an Agreement which had failed the No Disadvantage Test in order to have it pass the No Disadvantage Test and this could include significant trade off between various provisions in the Workplace Agreement as lodged with the Director of the Workplace Authority.

121. There should be a requirement on an employer, in the case of any Collective Agreement that has failed the No Disadvantage Test, to process a variation through the employees to seek their approval.

122. The SDA however is very conscious that in some instances trying to initiate a full ballot of all employees would be so cumbersome and so expensive as to be effectively self-defeating in terms of trying to both improve and speed up the process of getting the Agreement made and approved.

123. The SDA, however, notes that the existing provisions of Section 373(2) allow flexibility in the approval of an Agreement or a variation to an Agreement. It is possible to meet both the requirement of having a variation process to an Agreement which has failed the No Disadvantage Test and to have a process where employees are given a genuine say in approving the proposed variation by the employer. This could be easily achieved by inserting a note at the bottom proposed Section 346N to give an example of an approval process under Section 373(2) (b) (ii) which avoids a ballot of all employees but which achieves a proper

indication that employees both know about the proposed variation and approve the proposed variation.

124. The example would need to be limited to variation of Agreements because of No Disadvantage Test issues and such an example could be that the employer gives notice to employees that a variation has been prepared and is proposed to be lodged and the terms of the variation, and then makes clear that there will be a presumption of approval by employees of the proposed variation if a majority of employees do not express their disapproval by a certain date and in a certain manner. This reverse process can work, it has been accepted by the Australian Industrial Relations Commission in relation to variations of Agreements under the earlier legislation and it does meet the policy objective of both speeding up the process of dealing with variations because of No Disadvantage Test issues, as well as making certain that such variations are genuinely approved.

Compliance with the Workplace Relations Act

125. Proposed Section 347A, 380A and 398 all open up a possibility that an employer can avoid complying with the requirements in the Workplace Relations Act relating to pre-lodgement procedures. These procedures provide that employees are given a copy, or have access to the proposed Agreement, that they are given explanations of the Agreement and a chance to approve the Agreement.

126. Whilst each of these issues, if non-compliance occurs, will trigger a civil penalty provision in relation to the employer the proposed provisions all operate so that the Agreement, and variation to the Agreement and termination of an Agreement, will still be valid where the employer has deliberately failed to comply.

Termination of Agreements by the Commission

127. The Bill proposes to introduce a system whereby the Commission may, on application and by order, terminate a Collective Agreement that has passed its nominal expiry date. Proposed Section 397A (2) identifies the persons who can apply for an order to terminate. The difficulty with this provision is that one of the parties who have been identified as a party able to make the application is "the majority of the employees who employment is subject to the Agreement".

128. The major weakness with this provision is that it is virtually impossible for a majority of employees to make such an application. The process involved in getting a majority of employees together in any business even small businesses is incredibly difficult.

129. The introduction of Collective Bargaining within the Industrial Relations Act, and then continued in the Workplace Relations Act, has never required approval by a majority of employees for the making of a Collective Agreement. The Act makes it clear that as long as a majority of those who vote in an approval process approve the making of an Agreement, then the Agreement is validly made. This approach has always recognised that even where employers and Unions have made a Union Collective Agreement, it can be difficult to get a majority of employees to participate by voting in a ballot to approve an Agreement.

130. The Act has therefore made it clear that whilst every employee must be given an opportunity to approve or disapprove the making of an Agreement, of those who take up that opportunity, only a majority need to approve the agreement.

131. What proposed Section 397A does, however, is to significantly reverse that process when it comes to termination of an Agreement by requiring a majority of the employees, whose employment is subject to the Agreement, to make the application for termination.

132. The Bill is setting a standard which is far greater than is the standard for approval and for making an Agreement.

133. The reality is that Section 397A(2)(b) may never be met in practical circumstances.

Transitional Arrangements for Existing AWA's

134. The Bill proposes that the appointment of a bargaining agent in relation to an old AWA ceases to have effect 14 days after the commencement of the schedule.

135. There is a question as to whether or not this has the effect of removing the ability of a bargaining agent to initiate actions under Division 11 of the Workplace Relations Act.

136. Currently a bargaining agent appointed in relation to an AWA is a person who's entitled to initiate action before the Court for some of the offences that can occur by employers in relation to the making of an AWA.

137. Often, a bargaining agent and an employee party to an AWA will not initiate action against an employer immediately or even within a short period of time after the AWA has been made but rather, will pick a time of their own choosing to initiate actions. It appears, however, that by unilaterally terminating the appointment of bargaining agents in relation to old AWA's, then employees who are relying on their bargaining agent to initiate actions at an appropriate time, will be disenfranchised and will be forced to act in their own name. The difficulty with this is that the bargaining agent process was specifically designed to allow employees the opportunity of having a person with skill, and with appropriate expertise, to act on their behalf. Terminating bargaining agents before all of their work has been concluded seems to be total overkill.

138. The Association would recommend that even if Item 3 of Schedule 7A is to be retained, that it be retained with a rider that the termination of the bargaining agent does not operate in relation to Section 405.

Transmission of Business

139. At Item 113 and following, the Bill introduces provisions relating to the transmission of ITEAs. Whilst these provisions are relatively unexceptional, it does give rise to a particular issue concerning transmission of business generally.

140. The transmission of an ITEA is still going to be limited to the transition period which is defined in Section 580(4) of the Workplace Relations Act as a period of 12 months.

141. The practical issue that now arises is, given that the Bill is a transition on the way with Forward with Fairness which will not commence operation until the 1st January 2010, then the Government and Parliament should amend Section 580(4) so as to extend the transmission period until the 31st December 2009.

142. This would at least allow employees and employers to not have to change in the middle of the transitional period from one instrument to another and then find at the end of the transitional period they may be facing an entirely new regime and require even further industrial instruments be created.

143. As a matter of sheer practicality, allowing workers who have the benefits of a transmission of business provision to stay on their existing instruments until the 31st December 2009, makes good industrial relations sense, it is both equitable and practical and avoids creating further confusion in an industrial relations environment which is to undergo significant change commencing the 1st January 2010.

PART 111

Award Modernisation

144. Award Modernisation is to proceed as soon as possible. A deadline of 31st December 2009 for the Award Modernisation process will be set.

145. A number of issues arise with regard to award modernisation.

146. The rules have completely changed in regard to award making.

147. The concept of parties to an industrial dispute becoming parties to an award will no longer apply. . Employer, employees and unions are bound to follow an award, but they have no ownership of the award as we understood that concept for the last 100 years. This is acceptable provided that unions, as interested parties, have the right to be heard on all matters related to awards relevant to them.

148. Industrial disputes will no longer be the base for making an award. Awards are to be made by the Commission regardless of the interest of any particular party, and regardless of the desire of any particular party to want an award or not. Unions should have the capacity to place issues relating to relevant awards before the Commission.

149. It is not intended that modern awards expand the area of existing award coverage into what are currently award free classes of work. Does this mean that some areas of work such as new or emerging areas will be award free indefinitely?

150. There is also a very clear expectation that high income employees will not be covered by modern awards. This gives rise to debates to what is an acceptable threshold.

151. A key document in relation to the Award Modernisation process is the ministerial request. Although the ministerial request has not formally been issued, it has been provided in draft form in the explanatory memorandum to the Transitional Bill.

152. The request must be complied with by the Commission. The discretion of the Commission is therefore restricted, irrespective of the nature of the request.

153. The request specifies that the process is not intended to disadvantage employees, or to increase costs for employers. The difficulty with these two directives to the Australian Industrial Relations Commission is that it becomes absolutely impossible in a practical sense for any rationalisation of award conditions in any industry. For example, if a State Award in Victoria has conditions better than a State Award in another State, it is not possible to bring everyone up to the Victorian standard because that would increase cost for employers and therefore would be an unacceptable consequence of Award Modernisation.

154. Equally it would not be possible to move employees down to a common standard as that would create disadvantage to employers.

155. The real issue for the Commission in dealing with this is that if any interested party can identify that an award will increase cost for employers or disadvantage employees, that would appear to effectively kill off a proper and pragmatic approach to making modern awards. How then to proceed?

156. Enterprise awards are not to be subject to award modernisation, and an employer who is currently bound to an enterprise award cannot be bound to a modern award. This causes enormous difficulties in the retail sector where Australia's major retailers do have enterprise awards. It may be of less concern in the fast food area where the awards are not genuine enterprise awards.

157. In the case of Coles Supermarkets, the Coles Supermarket Award would be an enterprise award because it relates to a single business specified in the award. It would be excluded from the process, irrespective of the wishes of either or both respondents.

158. In the retail industry, each retail award, such as the Victorian Shops Award, applies to a large number of employers. However, most of the employers covered by the Victorian Shops Award are small retailers. For each of these small retailers the Victorian Shops Award is effectively an enterprise award. This is so because the award regulates terms and conditions of employment of an employee or employees by an employer in a single business specified in the award. This award would be subject to award modernisation.

159. In reality, for the retail industry, some enterprise awards will be subject to award modernisation and some will not be.

160. Exclusion of enterprise awards should only occur where both employers and unions want the exclusion.

161. Exclusion of enterprise awards should not be possible where either the employer or the union party to the enterprise award want the enterprise award included in the modernisation process.

162. A real difficulty which arises is that if enterprise awards are excluded from the Award Modernisation process, does this mean that the government has the deliberate policy intention of freezing these awards in a time warp where they cannot be changed.

163. The government has made clear that it intends to expand the number of allowable matters that a modern award can contain. However, if enterprise awards are not modern awards, then does this mean that an enterprise award can never be varied to include the new expanded list of allowable award matters.

164. At the present time, there is nothing in the Bill, nor in the existing provisions of the Workplace Relations Act, that would allow an enterprise award to be varied to include matters which have been added by the new proposed Section 576J. What's the value of an enterprise award if it's frozen in a time warp and can't be changed.

165. The Association makes a very strong submission that if there is to be an exclusion of enterprise awards, then whilst this may be the default position, it should be subject to a very strict rider that if any person bound by an enterprise award, whether it be employer, employer organisation, employees or union, request the Commission to include the enterprise award in the Award Modernisation process, then the enterprise award must be included in the Award Modernisation process.

166. Importantly, such a request to include an enterprise award in the Award Modernisation process would have to be triggered at an early stage of the Award Modernisation process and certainly before any draft modern award is prepared for the industry section in which the enterprise award exists.

167. Whilst there may be valid reasons for some enterprise awards to be frozen in a time warp, that should only occur where all of the parties to the enterprise award specifically want that outcome.

168. The approach adopted by the government in drafting this Bill seems to treat all enterprise awards as being beyond review or amendment. Whiles some employers, or some unions, or even some employees, will want to retain a specific enterprise award in an unaltered state, such is simply not the case for all enterprise awards, and as we have made clear, only where all parties or all persons bound by the award want the enterprise award to remain untouched should it be excluded from the Award Modernisation process.

169. It seems ludicrous to expect that there could be any form of genuine Award Modernisation in retail if we can't include the company's specific awards for the major retailers.

170. The ministerial request on Award Modernisation requires the Commission to prepare a model flexibility clause which enables an employer and an individual employee to agree on arrangements that by-pass award entitlements. The model flexibility clauses must be in every award, and the only constraint on the Commission is that the Commission must ensure that the flexibility clause cannot be used to disadvantage the individual employee.

171. The emphasis here is on the individual employee who is party to a flexibility agreement. The real problem with this approach is that individual flexibility clauses which are used to avoid an award condition or obligation may be happily signed by one employee, but it may be other employees, including the bulk of the workforce who suffer a genuine disadvantage as a flow on consequence. This is clearly the case where an employee agrees to a flexible work arrangement, and as a result is then given all of the overtime or the additional hours that are available because the employee has signed an enterprise flexibility clause, whereas the other employees who are prepared to work overtime or additional hours, but only on the basis of their award entitlements then are excluded from overtime or extra hours.

172. At the present time there appears to be no avenue for unions or employers to have any role in the development by the Commission of a modern flexibility clause. There is nothing in the ministerial request that requires to Commission to consult with anyone over the development of an award flexibility clause. Traditional award parties must be properly consulted on this matter.

173. A key feature of the ministerial request is a very explicit statement to the Commission from the Minister, that it is the Commission who is to prepare the drafts of each modernised award. The Minister has

drafted the request in such a way as to exclude totally employers or unions from having a role in drafting the initial draft modern award. Whilst a consultation process has been set out in the ministerial request, that consultation process only occurs after the Commission has prepared an exposure draft of each modernised award. The difficulty with this approach is that no-one in the Commission may have the required level of industry knowledge that a union or employer organisation has in relation to their respective industries.

174. Once the consultation process has been completed, the Commission will then prepare and issue the modern award. While the Ministerial request and the provisions in the proposed Transitional Bill require a Full Bench to create the modern award, there is nothing in either the Ministerial request or in the provisions in the Bill that requires the Commission to hold hearings prior to issuing a new modern award. In fact, it appears to be implied that there is no need for the Commission to do anything other than to convene as a Full Bench for the purposes of issuing a decision which is the modern award. The whole process seems to be predicated upon a total absence of opportunity for any party, union or employer to properly argue the merits of any particular provision in a proposed modern award.

175. Equally in a consultative environment, the Commission is not obliged to weight up or give way to any particular view expressed in the consultation process. The Commission does not appear to even be obliged to adhere to the rules of procedural fairness to the final making of the award, as the award is simply to be made after the completion of the consultation process.

176. The Award Modernisation processes outlined in the Bill is designed around the creation of national awards without State based differentials. However, bearing in mind that this is not necessarily achievable immediately the Transitional Bill makes it clear that the Commission is entitled as part of the Award Modernisation process to retain state differentials for a period of up to 5 years. The

difficulty with this is that at the end of the 5 year period, any term in an award which is a specific State based terms and conditions of employment will simply cease to have an effect. What happens then?

177. In regard to Award Modernisation, the SDA suggests that without providing an exhaustive list, in addition to the five items identified at Section 576A(2), the following matters should also be included as objects for modern awards:

178. Modern awards must provide clear and detailed protection for workers. They must create easily enforceable terms and conditions of employment.

179. Modern awards should in particular recognise the vulnerability of low paid workers, and workers from various socio-economic groups who have limited ability to effectively represent themselves at the workplace in relation to bargaining and other matters.

180. The Bill identifies that the President is to allocate the carrying out of the Award Modernisation process to Full Benches. It appears that it is not necessary for there to be a single Full Bench, but rather that there can be several Full Benches operating simultaneously in carrying out the Award Modernisation requests.

181. In the context of this Bill, a Full Bench of the Australian Industrial Relations Commission is not acting as a Full Bench of the Commission resolving a dispute through conciliation and arbitration. Rather, a Full Bench of the Australian Industrial Relations Commission is acting as a body specifically empowered by law i.e this Bill, to rewrite awards that have previously existed. The duty on the Commission is to carry out the Award Modernisation request. The function of the Commission is to act as an Administrative Body, not a Tribunal involved in conciliation and arbitration.

182. There is a fundamental difference between a Full Bench carrying out an Award Modernisation request, and a Full Bench carrying out any of the traditional functions of the Australian Industrial Relations Commission under the Workplace Relations Act, or under the previous legislation. Whilst the name is the same, the status of the Commission is fundamentally and substantially changed from what most would know as being the Australian Industrial Relations Commission.

183. The Bill disregards the previous history of the Commission. The Bill disregards the fact that much work was done by employers and unions in running Test Cases to define particular issues that should be dealt with in awards, and defining the terms of award clauses to give effect to particular matters.

184. There is sound reason why Full Benches carrying out the Award Modernisation process should be required to have regard to award test case decisions. The most practical reason for requiring Full Benches to have regard to previous test case decisions is that it avoids a total fragmentation of what were originally hard fought cases on both sides to achieve standard conditions of employment in the award system.

185. A further issue which needs to be addressed by the Bill is that there must be some uniformity appearing in modern awards. At the present moment the Bill would allow various Full Benches of the Commission to devise modern awards with completely different language and different standards. Australian Industrial Relations would be well served by a modern award system which sought to have reasonable degrees of uniformity in the language and structure of award clauses relating to the same subject matter. There will always be a need for particular industry specific wording or language in an award but as far as is practicable, and possible modern awards should seek to strive to achieve a degree of uniformity on award language. At the present time there is no capacity under this Bill for the President or the Commission to

ensure that uniformity of outcome, even in language and structure, is achieved in modern awards.

186. The Bill treats each Full Bench of the Commission undertaking the Award Modernisation request as a separate entity. This may promote discordance in the award system and promote different outcomes on the same subject matter across different industries.

187. The Bill should be amended to require that Full Benches undertaking an Award Modernisation request from the Minister, should be required, as far as is possible and practicable, to achieve uniformity of language and structure in relation to each subject matter which is to be placed in a modern award.

188. The Bill should be supported with, or even without, the changes suggested above. While we strongly believe the changes we have suggested would strengthen the operational effectiveness of the proposed legislative changes, there can be no doubt that the Bill, as it stands, is a significant step forward towards improving fairness in the workplace.