



**PRODUCTIVITY COMMISSION REVIEW OF THE AUSTRALIAN
WORKPLACE RELATIONS SYSTEM**

SUBMISSIONS ON ISSUES PAPERS

MARCH 2015

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Introduction to the Australian Retailers Association

1. For over 110 years, the Australian Retailers Association (ARA) has been the peak industry body for Australia's retail sector, and is an incorporated employer body under the *Fair Work (Registered Organisations) Act 2009*. The ARA represents the interests of over 5000 independent and national retailers throughout Australia.
2. The ARA's members place a high value on the employment relations services we offer. The ARA engages closely with its membership on a full range of employment relations services, and has directly sought feedback from its members on the issues to be dealt with by the Productivity Commission (PC) in its Review of the Workplace Relations Framework (**Review**).

Our approach to this submission

3. The ARA understands the PC is undertaking a significant review of the current system and will make evidence based findings. The ARA acknowledges its submissions deal with the circumstances of the retail industry, and are predominantly confined to that industry. The ARA does, however, regularly engage with other industry associations and it is clear from those discussions that, in general terms, the matters of concern to retail industry employers are common to a number of other industries.
4. Through these submissions the ARA addresses the Issues Papers released by the PC in order of their importance to the retail industry. The ARA has drawn on previous research conducted by the PC and other bodies, its own expertise and anecdotal information from members, and data sourced from a variety of bodies in forming its position on the matters raised by the PC in its Issues Papers. We have sought to assist the PC by identifying gaps and flaws in the current system and proposing measures that would most effectively address those gaps and flaws.
5. At the end of these submissions we have provided links to research papers and other documents referred to in the submissions.

The retail workforce

6. The retail industry employs more than 1.2 million Australians, and is the largest private sector employer. The demographics of the retail industry demonstrate the important contribution it makes to Australian society. A third of the retail workforce is aged 24 years or under and almost three-quarters of the workforce is aged under 45, making retail the second youngest employing industry. Further, 56% of the retail workforce is female, compared with 46% across the entire Australian workforce.¹
7. The contribution the retail industry makes to young people entering the workforce is significant. With youth unemployment increasing at an alarming rate, from a low of approximately 8% in 2008 to 13.9% in February 2015, the need to provide meaningful employment opportunities for young people is crucial. Any changes that will promote workforce participation in the retail industry will naturally have a positive impact on youth employment levels.

¹ Australian Workforce and Productivity Agency and Service Skills Australia – *Retail Workforce Study* March 2014

Challenges faced by the retail industry

8. The PC is well versed in some of the challenges faced by the retail industry. The PC conducted a broad reaching review of the retail industry in 2011² (the 2011 Review) and in 2014 the PC reviewed the costs of doing business in retail trade (the 2014 Research).³ Both these projects involved some analysis of the challenges faced by the industry and the impact of the workplace relations framework on the industry's capacity to respond to those challenges.
9. From a workplace relations framework perspective the most pressing issues for retailers centre on its ability, under the current framework, to engage its workforce in ways that drive productivity and align with consumer demand.
10. As identified in the 2011 Review, a clear challenge for the retail industry is to achieve productivity gains under a workplace relations framework that does not always support those gains.

Issues Paper 2 - Safety Nets

11. As identified earlier in this submission, the issue of minimum safety nets is a pressing one for the retail industry. Online retailing, both domestic and international, has increased its market share to the detriment of traditional bricks and mortar retailing. The challenge for multi-channel and bricks and mortar retailers has increasingly become how to differentiate their offering, particularly where they cannot differentiate on price. The point of difference increasingly has become about shopping experience, including service.
12. Multi-channel and bricks and mortar retailers have a high level of control over the shopping experience. The aspect they have least control over is their people. Retailers are able to select and train their sales employees. They are significantly restricted, however, in their capacity to put the right number and quality of people on the shop floor when their customers want to shop, and in their capacity to provide incentives for their store based employees.

Sub-Issue - Penalty Rates

13. As a starting point, the ARA considers it essential that there be a mature and reasoned discussion of the current system for the setting and variation of penalty rates. The ARA therefore welcomes the PC opening up that discussion and offering all interested parties the opportunity to provide submissions and evidence in that debate.
14. In Issues Paper 2 the PC has asked that submissions on penalty rates express a preference for a model for the setting of penalty rates. The first option outlined by the PC is that regulated penalty rates are an inherent element of any regulatory structure necessary to protect employee interests, in which case the area of interest for the PC is the methodologies and benchmarks for determining regulated rates. The second option is to have the market determine what appropriate rates of pay are for evening and weekend work.

² Productivity Commission 2011, *Economic Structure and Performance of the Australian Retail Industry*, Report no. 56, Canberra

³ Productivity Commission 2014 Research Report, *Relative Costs of Doing Business in Australia: Retail Trade*

15. The ARA prefers the first option. While there is merit in allowing market forces to determine appropriate rates of pay for weekend and evening work, and, as set out below, the retail industry would welcome the ability to reduce “fixed” costs in order to provide increased sales based incentives to its store employees, it is accepted that there is potential under such an arrangement for employees to be under compensated for some work under such a system. We have not, however, been able to identify the real impact of predominantly market set rates of pay (the United States and New Zealand both provide for minimum rates with no evening or weekend penalties) due to the absence of sufficiently detailed data in either jurisdiction on actual rather than minimum wage rates.
16. The ARA considers it appropriate that weekend and evening rates of pay are regulated. The key question is whether the current regulatory regime is appropriate. In the ARA’s submission, this can be answered quite simply through a cursory review of recent award regulation history. We use the Sunday penalty rate under the *General Retail Industry Award 2010 (GRIA)* as an example.
17. Under the retail awards with common application across the various states and territories prior to the Award Modernisation process conducted by the predecessor to the Fair Work Commission (FWC), the Australian Industrial Relations Commission (AIRC), there were a variety of penalty rates applicable to Sunday work. We have set these out in the table below:

State/Territory	Pre-Modern Award/NAPSA	Sunday penalty
NSW	NAPSA Shop Employees (State) Award	50%
VIC	Victorian Shops Interim Award 2000	100%
QLD	NAPSA Retail Industry Award - State 2004 (QLD)	100% (Non-exempt stores) 50% (Exempt stores and Independent Retailers)
WA	Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977	100%
NT	Retail, Wholesale and Distributive Employees (NT) Award	100%
TAS	NAPSA Retail Trades Award	100%
SA	NAPSA Retail Industry (South Australia) Award	60%
ACT	Retail and Wholesale Industry - Shop Employees - ACT Award 2000	50%

18. It can be seen from this that there was a mix of Sunday penalty rates applicable across Australia prior to the Award Modernisation process in 2008, with three jurisdictions, including the largest in New South Wales, providing for a Sunday penalty rate of 50% or 60% for all employees. Additionally, Queensland provided for a 50% Sunday penalty for employees of Exempt stores (retail businesses selling particular types of goods, including newsagents, fruit and vegetable shops, sporting goods retailers etc) and of Independent Retailers (businesses where the number of people engaged at any one time in the shop is not more than 20 and the number of people engaged in all shops in Queensland owned by the person, partnership or corporation is not more than 60).

19. The decision of the AIRC, taking into account a Modern Awards Objective (MAO) in substantially the same terms as that currently contained within section 134 of the FW Act, was to increase the Sunday penalty rate to 100% for all States and Territories.
20. This increased penalty rate, under a “modern” award system was implemented despite shifts in retail trading hours, changes to consumer preferences, the prevalence of weekend work in the industry and, as we set out below, the views and experiences of retail employees and employers. It is difficult to reconcile the movement, led by consumers, away from non-standard shopping hours and a decision to significantly increase the penalty rate applicable to employees who need to be engaged to meet the shifting consumer preferences. In the ARA’s submission this is indicative of a fundamental issue with either the architecture of the MAO or the manner in which it is being applied.
21. A further example of this fundamental issue can be demonstrated when the Sunday penalty rate under the GRIA is compared with like industries (those where employees are likely to work on Sundays) when compared with non-like industries (those where Sunday work is relatively uncommon). This is set out in the table below:

Awards in like industries	Sunday penalty
<i>Fast Food Industry Award</i>	50%
<i>Restaurant Industry Award</i>	50%
<i>Registered and Licensed Clubs Award</i>	75%
<i>Hospitality Industry (General) Award</i>	75%

Awards in non-like industries	Sunday penalty
<i>Clerks Private Sector Award</i>	100%
<i>Manufacturing And Associated Industries And Occupations Award</i>	100%
<i>Building and Construction General On-site Award</i>	100%
<i>Higher Education Industry - General Staff - Award</i>	100%

22. It is also clear that the FWC (and its predecessor the AIRC), having considered the Sunday penalty rate against the MAO, has reached a conclusion that on its face is contrary to any reasonable analysis. It is clear to the ARA, based on this, that the FWC is not being appropriately directed in its consideration of what constitutes a fair and relevant minimum safety net under the MAO as presently constructed, and that changes to the MAO are essential to ensure the award system promotes economic growth and productivity, and which promotes a alignment between the operations of the industry and the relevant modern award.
23. Relevant to the issue of appropriate regulation of weekend and evening penalty rates, the PC during the 2011 Review considered retail trading hours and consumer preferences for access to retail businesses. The PC made the following observation in relation to this:

The most notable omission in the objectives underpinning trading hours regulation are the interests of consumers. Consumer preferences or needs can no longer be ignored or downplayed. In the past consumers had few or no places to shop if retailers were closed. In the internet age they do – to the potential detriment of many ‘bricks and mortar’ retailers (and their employees), and to the vitality of shopping precincts and community life that is often the objective of trading hours regulation.

24. In the ARA’s submission this is equally relevant to the issue of applicable penalty rates for weekend and evening work. The GRIA sets the minimum safety net payments for employees working at historically non-standard hours. As set out above, on Sundays under the GRIA retail employers are required to pay their employees at double the base rate of pay. This is as significant a barrier to the ability of retailers to meet consumer preferences as restrictions on trading hours. It also impacts on the shopping experience so crucial to a retailer’s capacity to compete, as retailers are prevented from engaging the number and mix of employees on Sundays that will provide the best customer experience.
25. To assist the PC in understanding the impacts of this, we refer to research commissioned by the ARA during the 2012 Award Review⁴, which is attached to these submissions. The Australian Centre for Retail Studies (ACRS) conducted research into consumer, retail employee and retail employer attitudes and experiences in relation to Sunday trading. Key themes which emerged through the research were:
- a. There was consistency between retail employers and retail employees in what they reported regarding the detrimental impact on them attributed to the Sunday penalty rate. For retail employers it was that they operated with a lower number of employees than optimal, or with a mix of employees that was less than optimal. For retail employees it was that older, more expensive employees were disadvantaged when compared to younger, lower cost employees when it came to the allocation of Sunday hours.
 - b. Sunday is an important trading day, where despite more constrained trading hours retailers reported strong sales figures, with average spend per transaction the third highest behind Saturday and Thursday.
 - c. Profitability of Sundays is marginal due to higher labour costs.
 - d. Employees are willing to work on Sundays for lower penalty rates than that imposed by the GRIA.
 - e. While the impact of working on Sundays on their weekend social life was the most common difficulty experienced by Sunday workers in retail, this was closely followed by difficulties that relate directly to Sunday staffing levels (“limited number of staff”, “inexperienced staff” and “pace of weekend trade”).
26. It is clear from this that retailers are restricted in their ability to meet consumer preferences, in particular as it relates to access not just to retail stores but also to retail service, on Sundays.

⁴ Australian Centre for Retail Studies, *Sunday Trading Research 2012*

Response to Penalty Rates questions

27. The PC has asked a number of questions in relation to the setting of penalty rates. We address each of these below

How should penalty rates be determined?

28. The ARA's view is that penalty rates should be determined by an appropriate regulatory body within an appropriate regulatory framework. It is essential, in our submission, that this regulatory framework take into account the specific circumstances of the industry and give precedence to economic considerations such as employment levels in the industry, productivity and the viability of business operations. We provide a recommendation on this below.

What changes, if any, should be made to the MAO in relation to remuneration for non-standard hours of working?

29. The ARA considers there are four fundamental changes that are required to be made to the MAO. These are:

- a. The removal of section 134(da) of the FW Act. This provision is an attempt to enshrine penalty rates within the Modern Award system and limit the ability of the FWC to make amendments to Modern Awards, such as the GRIA, in relation to penalty rates. It is an unfair and unnecessary impediment to reasonable, evidence supported changes to penalty rates.
- b. A reframing of the MAO so that factors which go to fundamental issues of business viability, employment levels and productivity are to be given precedence over other objectives. This would be achieved in the following way:
 - i. An amendment to current section 134(h) so that industry specific impacts are closely considered.
 - ii. An amendment to current section 134(d) to recognise the need for alignment between industry work patterns and award regulation.

30. The ARA's recommended amendment to the MAO which will reflect this is set out below.

What are the economic effects of current and alternative penalty rate arrangements on business profitability, prices, sales, opening hours, choice of employment type, rostering, hours worked, hiring, unemployment and incomes?

31. The ARA refers the PC to the Attachment A in relation to this matter. It is also relevant for the PC to maintain a watching brief on developments in the 2014 Award Review process as they relate to AM1024/305 - Penalty Rates. The ARA, and a number of other industry associations, will be providing materials to the FWC as part of this matter which will be of relevance to the PC's consideration of the basis for, and mechanisms for the setting of, penalty rates.

Were penalty rates deregulated, would wages fall to those applying at other times, or would employers still have to pay a premium to attract labour on weekends and holidays?

32. There is insufficient information available to identify specifically what the impact of complete penalty rate deregulation would be. We note that there was a significant period between March 2006 and July 2010 where, for new businesses operating in the federal industrial system, no penalty rates applied. There is no data available to our knowledge that would indicate whether those employers paid the minimum applicable rate of pay, or paid a premium to attract labour. The PC may be able to obtain more detailed data on the way in which employees of these businesses were paid during that period, which may assist in resolving this question.
33. We can say, based on the research commissioned by ARA and attached at Attachment A that in the retail industry penalty rates are a key factor in an employee's decision making process in relation to Sunday work, and that it is likely retail employers would pay a premium to ensure they have sufficient labour to meet consumer needs on weekends and holidays.

What are the long run effects of penalty rates on consumers and on the prices of goods and services?

34. As it relates to the retail industry the PC will be assisted in its analysis of this issue by the content of Attachment A, and the information obtained through, and outcomes of, the 2011 Review and the 2014 Research.

To what extent does working on weekends or holidays affect families, employees and the community? Are penalty rates effective at addressing any concerns in this area?

35. The answer to a number of these questions, as they relate to the retail industry, can be found in Attachment A. The ACRS sought the views of retail employees about Sunday work in particular, and it is clear that there are some difficulties experienced by those working on Sundays in terms of the balance between work and their family and social lives.
36. These difficulties are not causing employees in retail to seek to withdraw from Sunday work, and it is clear from Attachment A that employees in the main would be happy with a 50% penalty for Sunday work. In that sense, as it relates to the retail industry, penalty rates for Sunday work are not effectively addressing these concerns as they are overcompensating for them.
37. We expect further research on this issue will be conducted through the 2014 Award Review, and the PC is encouraged to review materials filed by parties on the issue of penalty rates and the impact of weekend and holiday work in AM2014/305.

What do the experiences of countries like New Zealand, the United Kingdom and the United States – which generally do not require penalty rates for weekends – suggest about the impacts of penalty rates?

38. While we have not conducted any extensive research in this area, it is clear that labour costs in Australia are significantly higher than in other developed countries. The International Labour Organisation has conducted a comprehensive review of labour conditions across the world⁵. It is clear from this that Australia is among the most expensive countries in the world to employ labour.

⁵ Working conditions laws report 2012: A global review/Naj Ghosheh; International Labour Office - Geneva: ILO, 2013

39. It is apparent from New Zealand, United Kingdom and United States that the absence of penalty rates has not caused a labour shortage at times where, in Australia, penalty rates would apply. We are not aware of any research in any of these countries that would indicate they are experiencing labour shortages, or difficulty attracting sufficient labour, on weekends and evenings due to the absence of penalty rates.

What are the variations in profit margins and sales over the week, and to what extent does this affect the appropriate design of penalty rate arrangements?

40. We again refer the PC to Attachment A in that regard, and encourage the PC to consider any further materials that come before the FWC during AM2014/305 to assist in its consideration of this issue.

Recommendation

41. Considering the changes proposed above, the ARA recommends section 134 be structured as follows:

134 The modern awards objective

What is the modern awards objective?

(1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

- a. the likely impact of any exercise of modern award powers on employment growth and inflation in Australia or in a particular industry, and the sustainability, performance and competitiveness of the national economy and/or of a particular industry; and
- b. the need to promote flexible modern work practices and the efficient and productive performance of work, including ensuring work patterns applicable to a particular industry are able to be implemented in an efficient and productive manner; and
- c. the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and

(1A) Having considered the matters in (1) above, the FWC must, as a secondary consideration, take into account:

- a. relative living standards and the needs of the low paid; and
- b. the need to encourage collective bargaining; and
- c. the need to promote social inclusion through increased workforce participation; and
- d. the principle of equal remuneration for work of equal or comparable value; and
- e. the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards.

This is the *modern awards objective*.

Sub-Issue - Minimum Wages, the NES and Awards

42. As referred to above, the 2011 Review looked at the issue of opportunities for productivity increases in the retail industry. The PC reported on the low usage in Australia of incentive based arrangements in the retail industry when compared to the United States. There is a clear

linkage between the comparatively high minimum safety net applicable to the retail industry in Australia the low take up of incentive payments for store based employees. During the 2011 Review retail businesses and industry bodies reported to the PC that a significant barrier to implementing incentive payments is the high, fixed minimum safety net applicable under the *General Retail Industry Award 2010* (GRIA).

43. The ARA is not advocating wholesale reductions in minimum wages, or award wages. What we are proposing is twofold. The first is that there that there is a level of flexibility in the way that minimum conditions interact with above minimum incentive payments. Clearly, at least as it relates to the retail industry, the current system does not provide a viable opportunity for retail businesses to offset incentive payments against minimum conditions. This is a significant barrier to driving productivity in the industry, and if that barrier is not removed there is little genuine scope for real productivity gains that do not come with reductions in labour hours offered across the industry.
44. The second is that the framework under which the Minimum Wage Panel of the FWC operates should be reviewed. Clearly, from the ILO research referred to earlier in these submissions, Australia operates under higher wage structures than most other countries. The Minimum Wage Panel, in setting minimum wages, should be required to take into account the circumstances of other countries, and in particular Australia’s key competitors.
45. The ARA also brings to the attention of the PC an undesirable impact the minimum safety net under the GRIA is having on one of the key planks of the FW Act - enterprise level bargaining. Data released by the Commonwealth Department of Employment clearly demonstrates that enterprise level bargaining in the retail industry has gone backwards at an alarming rate since the commencement of the GRIA. We have set out in the table below a summary of that data, setting out enterprise agreement lodgement numbers in the year prior to the commencement of the GRIA and lodgements in each of the years after.

Year	Agreements lodged
2009	685
2010	401
2011	120
2012	108
2013	117
2014 (to end September Quarter)	75

46. The full data can be found at <http://employment.gov.au/trends-federal-enterprise-bargaining#foidoc-KMXIVKCGEP>
47. The implication of this is that retail businesses are increasingly reluctant to enter into enterprise agreements. Anecdotal information from ARA members indicates that the fundamental reason for this is the high minimum safety net set by the GRIA, and the difficulty of implementing a viable set of terms and conditions that will leave employees better off overall than they would be under the GRIA while still promoting productivity increases.

48. There is a clear question for the PC about what type of industrial system will best promote ongoing prosperity for Australia. If, as the ARA believes, this is best achieved through enterprise level bargaining where real productivity gains are achieved and employees are able to be fairly rewarded for their contribution to those gains, then the modern award system, in conjunction with the NES, need to be a true minimum safety net. Currently for the retail industry it is our submission that this is not the case. The Modern Award imposes rates of pay, penalty rates and other restrictive employment conditions that are unsustainably high, and which act as a disincentive to bargaining.
49. It is instructive in this regard to consider average weekly earnings in the retail industry against other industries, and then to compare this to the safety net applicable in those industries. We have compared below the circumstances of the retail industry against the Rental, Hiring and Real Estate Services industry.
50. As at May 2014, average weekly earnings in the retail industry were \$649.60. In the Rental, Hiring and Real Estate Services this figure was \$1064.70.⁶ The GRIA provides for rates of pay that are equivalent to, or greater than, those applicable under the *Real Estate Industry Award 2010*, an award applicable to the Rental, Hiring and Real Estate Services Industry. And in the period where enterprise agreement lodgements have been dramatically falling in the retail industry, the real estate industry has seen an increase in enterprise agreement lodgements (as can be seen from the link provided above). It is not being suggested by the ARA that the difference between safety net levels and actual pay rates in these two industries is the sole reason for the opposing trajectory for enterprise bargaining in those industries. It is, however, reasonable to conclude that this has some bearing on the outcomes.
51. In relation to the National Employment Standards (NES) the ARA considers the current structure to be broadly reasonable. The ARA cautions against expansion of the NES. As set out earlier in this submission, the current safety net of conditions of employment is extensive, provides for substantial benefits for employees and creates challenges for retail businesses. Any additional safety net conditions can only increase those challenges.
52. An issue with the NES which ARA sees as requiring immediate attention is the controversy surrounding the interaction between section 90(2) of the FW Act and award and agreement provisions for the payment of annual leave loading on termination. While it is accepted this is proposed to be dealt with by the *Fair Work Amendment Bill 2014*, the change has been held up and needs to be addressed as a matter of urgency.

Issues Paper 3 - The Bargaining Framework

53. The ARA has significant concerns about the way bargaining is regulated under the current system. The fundamental problems we see with the current system are:
- a. the expansion of permitted matters is causing bargaining to become protracted where unions pursue matters that are in their own interests rather than in the interests of employees and employers, and create unworkable outcomes for employers;

⁶ Australian Bureau of Statistics 6302.0 – Average Weekly Earnings, Australia, May 2014

- b. while there have been improvements in the way in which the Better Off Overall Test (BOOT) is administered, there are fundamental flaws with the current system;
- c. the Individual Flexibility Agreement system is fundamentally flawed; and
- d. the discretion afforded to the FWC in determining Majority Support Determinations is inconsistent with the general approach taken to bargaining under the FW Act and allows employees to be subjected to undue influence.

Permitted content

54. Under the current system, section 186 of the FW Act defines permitted matters in a way that is significantly more broad than under previously settled law, as set out in the *Electrolux*⁷ decision of the High Court of Australia. The ARA's experience is that the problems created by the current section 186 are twofold.
55. Firstly, and this has been our direct experience in negotiating enterprise agreements for members with unions, the majority of bargaining discussions are taken up debating union rights, with employee benefits a secondary issue. As an example, the ARA negotiated an enterprise agreement for a relatively small retail business' distribution function. The negotiation involved a series of meetings involving the relevant union, management of the employer, the ARA and an employee delegate. Approximately 75% of the time in those negotiation meetings was spent debating union rights clauses which were of no identifiable benefit to anyone other than the union or the one union delegate. No meaningful discussion of wage benefits or productivity incentives was able to occur until those union rights issues were settled. The employer incurred significant costs and impact on management time dealing with issues that had no ability to deliver a benefit to them or the significant majority of their employees. This is not an isolated incident.
56. Secondly, the ability of unions to push issues through bargaining processes outside the *Electrolux* permitted matters framework can lead to employers being forced into arrangements that are either unsustainable or leave the employer open to non-compliance. An example of this is in relation to labour hire. Unions consistently seek provisions in agreements which either limit the use of labour hire or require the employer to ensure labour hire workers receive the same entitlements as directly engaged employees.
57. Any restriction on an employer's ability to increase or decrease its workforce through the use of labour hire to meet peaks and troughs is inconsistent with the promotion of productive workplaces. Further, requiring labour hire employees to be paid agreement entitlements creates significant compliance issues for the business and the labour hire firm.
58. For the retail business, the challenge is that it imposes a compliance requirement on them which they have limited capacity to control. The business entering into the agreement is undertaking that a third party will pay its employees, and not the employees of the business, in a certain way. The agreement-bound employer can negotiate terms with a labour hire firm to the effect that they will pay their employees in a certain way, but if the labour hire firm elects not to do so the agreement-bound employer has no way of knowing this, and while they might be able to terminate their relationship with the labour hire firm, can do nothing to ensure employees receive the required payments.

⁷ *Electrolux Home Products Pty Ltd v The Australian Workers Union and Ors* [2004] HCA 40

59. For the labour hire firm the challenge is that they are exposed to inadvertent breaches by complying with an enterprise agreement that does not apply to them or their employees. Most enterprise agreements involve trade offs, whereby the business accesses things like relaxed ordinary hours of work provisions in exchange for higher base rates of pay. The risk for labour hire firms is that they pay these higher base rates, but their employees may be working at times where the applicable Modern Award requires them to pay overtime or other penalty rates.

Recommendation

60. ARA recommends the FW Act is amended to provide that enterprise agreements only be able to contain permitted matters, and that the definition of permitted matters is amended to reflect the *Electrolux* decision.

BOOT

61. The fundamental flaws in the application of the BOOT by the FWC are:

- a. there is a reluctance on the part of the FWC to apportion any value to contingent or non-monetary benefits provided to employees, while at the same time the FWC does consider removal on contingent employee benefits to represent a detriment; and
- b. while the legislation, and explanatory memorandum, do not require the FWC to enquire as to individual employee circumstances, the reality is that FWC members have demonstrated a tendency to speculate about potential, rather than real, impacts on employees.

Contingent & non-monetary benefits

62. We have set out earlier in these submissions the ARA's views regarding the ability for retail businesses to achieve productivity gains through the use of incentive based arrangements. Retailers' ability to roll out valuable incentive arrangements is not just limited by the high safety net imposed by the GRIA. It is also limited by the approach the FWC takes to contingent incentive arrangements.

63. The ARA is aware of retail businesses where store based employees earn, through a mix of base pay and commissions, up to 40% above the base rate applicable under the GRIA. When such businesses have attempted to reflect these arrangements in enterprise agreements they have been required to implement administratively unworkable reconciliation arrangements to cover the rare circumstance where an employee might, in a particular period, receive less than they would have under the GRIA. This has caused these businesses to step away from implementing these arrangements through an enterprise agreement, resulting in a detriment to the business and its employees.

64. The ARA is also aware of retail businesses offering a range of non-monetary benefits which are highly valued by their employees but which the FWC effectively ignores. Most retailers have staff discount arrangements that deliver significant outcomes to their employees, but which the FWC consistently refuses to recognise when conducting the BOOT. The ARA is not suggesting these discount arrangements are intended to be used by retail businesses to offset base entitlements, but a refusal to even recognise them represents a flaw in the FWC application of the BOOT.

Recommendation

65. ARA recommends that the FW Act require the FWC to take a practical approach to the application of the BOOT, and to take into account contingent and non-monetary benefits where it can be established those benefits have .

Potential impacts

66. It has been the ARA's experience that in applying the BOOT the FWC has a tendency to speculate about potential working patterns or other situations rather than focusing on actual patterns within the business. It is our view that this stems from a lack of clarity within the FW Act in relation to how the BOOT is to be applied.

Recommendation

67. The ARA recommends that the FW Act is amended to clarify that the BOOT is to be conducted on the basis that classes of employees are assessed as opposed to individual employees, and that those classes are limited to particular classifications and employment statuses.

IFAs

68. IFAs are used sparingly within the retail industry. The fundamental flaw with IFAs is that there is no mechanism for an independent assessment of an IFA that would provide a business with confidence that they are using them in the correct manner.

69. IFAs must meet the individual needs of the employer and the employee and ensure the employee is better off overall when compared to the relevant award. There are also numerous procedural requirements that are required to be met for an IFA to be compliant, and therefore applicable to the employer and employee. The issue of not having an independent body assess these matters is that employers and employees may enter into an IFA, and happily work under its structure, but if they have failed to meet any of the requirements the IFA never existed, and the employer is exposed to inadvertent award breaches and potential underpayment.

Recommendation

70. It is recommended that the IFA system be revamped to ensure that employers are not exposed to inadvertent breaches. One method of achieving this could be that if an IFA is found to have been invalid at any time, it is only invalid from the time the invalidity is identified, and any inconsistency between the IFA and the relevant award before that time does not give rise to any breach of the FW Act or underpayment.

Majority Support Determinations (MSD)

71. The issue the ARA has with the FW Act provisions in relation to MSDs is that the requirements placed on employees (and unions) to establish majority support are inconsistent with, and significantly lower than, the requirements placed on employers generally through the agreement making process. For an employer to enter into an enterprise agreement with its employees it is required to, among other things:

- a. notify employees of their right to be represented in bargaining;
- b. give all employees an opportunity to participate in bargaining;
- c. explain to all employees the terms of the proposed agreement and its impact; and

d. conduct a fair ballot process to establish the employees approve the agreement.

72. In a Majority Support Determination little or no scrutiny is placed on the party seeking the Determination (generally a union) and the bar the FWC sets for establishing majority support is unfairly low. The FWC will accept a union produced petition as a means of establishing majority support without any analysis of the information provided by the union that has encouraged employees to sign the petition. In our view, that is inappropriate and inconsistent with the intent of the FW Act.

Recommendation

73. It is recommended that the FWC be precluded from making a Majority Support Determination unless it has established that employees wish to bargain through the conduct of a secret ballot.

Issues Paper 4 - Employee Protections

74. The key employee protections the ARA intends to comment on are:

- a. unfair dismissals;
- b. General Protections; and
- c. workplace bullying.

75. The ARA agrees that it is necessary for the workplace relations system to provide protections for employees. The ARA does, however, have issues with components of the current system in relation to each of the above protections.

Unfair Dismissals

76. The common feedback ARA receives from its membership in relation to the unfair dismissal system is that it is used by employees as a means of obtaining additional payments from their employer. ARA represents its members in a number of these matters and in the significant majority of circumstances the member has carried out the termination in a fair manner which complies with the requirements of the FW Act. This is because our members have access to a cloud based employment lifecycle management solution which guides them through a fair termination process. They come to a point, however, where the financial cost and distraction of resources means settling the claim via a payment to the employee represents a more palatable option.

77. This is an unsatisfactory system. The fundamental problem is that there is no mechanism within the system that establishes whether the employee's claim has been validly made, even where this should be readily identifiable and can be established easily. Where an employee has made a claim that is outside the 21 day time limit prescribed by the FW Act, or where the employee has not completed the Minimum Employment Period, the employer is still required to expend money and resources responding to the claim. This is an unfair and unnecessary burden which impacts on productivity.

Recommendation

78. The ARA recommends the FW Act be amended to require the FWC to establish, as a first step, whether each unfair dismissal claim is within jurisdiction, and where the FWC identifies a claim is outside its jurisdiction the employee is required to provide evidence to satisfy the FWC, on a prima facie basis, that the claim should proceed. In the event the FWC is satisfied the claim is outside its jurisdiction, the claim should be dismissed. If the FWC is satisfied the claim is within its jurisdiction, on a prima facie basis, the employer should then be given the opportunity to provide a response to that prima facie finding. This would eliminate a significant number of what are clearly baseless claims.
79. The ARA also considers the system would be improved if employee applicants were liable for consequences of clearly baseless claims. Currently an employee can make an unfair dismissal claim for a very small fee which in most circumstances is refunded to them. They also can do so knowing there is very little risk of them being required to meet the costs expended by their employer in defending the claim. This encourages employees to pursue unfair dismissal claims regardless of their merits.

Recommendation

80. The ARA recommends the FW Act be amended to allow costs to be awarded against employees and their representatives in a wider variety of circumstances. The ARA also recommends that the fee payable by an employee to make an unfair dismissal claim be substantially increased, and that this fee is only refundable where the employee discontinues their claim before the employer is required to take any steps to defend the claim.
81. The ARA also has concerns about the unfair dismissal provisions of the FW Act as they relate to genuine redundancy. The two areas where these concerns arise are in relation to consultation obligations and redeployment.
82. In relation to consultation obligations the ARA agrees it is important employees are provided with information throughout a redundancy process, and are afforded an opportunity to discuss the redundancy and its impact on them with their employer. But there is confusion for employers, and apparently for FWC members, about what that consultation is required to cover. It appears clear that the employee is not entitled to question, or have the employer justify, the basis for the employer's decision. Unfortunately some decisions of the FWC seem to suggest this is the case.

Recommendation

83. The ARA recommends the FW Act be amended to provide that an employer's obligation to consult in relation to redundancy does not include an obligation to consult on the basis for its decision to implement changes to its operations.
84. In relation to redeployment the ARA has two concerns. The first is that there is a lack of unclear direction as to the extent of the obligation to redeploy in terms of the type of role that needs to be offered to the employee. From a retail perspective, if a retail store closes, and a permanent full time store manager is no longer required, it would appear that to satisfy the redeployment obligations the employer would be required to offer the employee any casual shop assistant position it has available anywhere in Australia. This is an absurdity, and in most cases would be seen by the employee as insulting.

85. The second issue is that employers who are part of a larger group are required to redeploy into associated entities, even where they have little or no influence over those associated entities.

Recommendation

86. The ARA recommends the FW Act be amended to provide that the requirement to redeploy is limited to reasonably equivalent roles, and that this be limited to the employer's business and not the business of associated entities.

General Protections

87. The two issues the ARA considers require attention in relation to the GP provisions of the FW Act are the reverse onus of proof and the absence of a cap on compensation. Currently all an employee needs to establish in a GP claim is that they had, had exercised, or had proposed to exercise a workplace right, and that they have suffered a detriment. The employee is not required to demonstrate any connection between the right and the detriment. Instead it is the obligation of the employer to demonstrate they did not act based on that right. This reverse onus encourages speculative baseless claims, and it has been the experience of ARA members that these types of claims are being made by terminated employees where they cannot access unfair dismissal protection, or because the absence of a compensation cap and the risk of civil penalties is a bigger stick that the employee and their representative can use against the employer.

Recommendation

88. The ARA recommends the FW Act be amended to remove the reverse onus of proof in GP matters and to impose a compensation cap that is aligned with the unfair dismissal cap. This would keep open the option for the FWC or the Courts to impose a civil penalty in appropriate circumstances.

Bullying

89. The capacity for employees to seek Orders from the FWC to cease bullying is a relatively new area, and as such the system for dealing with these matters is still evolving. The ARA does, however, question whether the FWC is the appropriate body to be dealing with bullying. Prior to the commencement of the FWC's bullying jurisdiction an employee who felt they had been subjected to bullying could pursue a workers compensation claim, could complain to the relevant State or Territory workplace health and safety authority or, if the bullying was based on a recognised attribute, make an equal opportunity/discrimination complaint. The FWC jurisdiction adds another avenue in what the ARA considers is an area that already afforded sufficient protection to employees.

90. The ARA does not make any recommendations in relation to the bullying jurisdiction of the FWC, but we do consider it appropriate that the PC assess whether this represents the most effective use of the FWC's resources.

OTHER MATTERS

91. A final issue the ARA considers requires the attention of the PC in the Review is the insertion into the FW Act by the previous government of a new section 145A, the effect of which is to require Modern Awards to contain a clause requiring employers to consult with employees

about changes to their regular roster. This was also extended to enterprise agreements by the insertion of a new section 205(1A).

92. The concern the ARA has about this new requirement is that the terms of section 145A and 205(1A) do not appear to be consistent with the intent of the provisions, and create significant uncertainty regarding the circumstances in which the obligation is enlivened.
93. The Explanatory Memorandum for the *Fair Work Amendment Bill 2013* provides, at paragraph 44:

'Regular roster' in new paragraph 145A(1)(a) is not defined. It is intended that the requirement to consult under new section 145A will not be triggered by a proposed change where an employee has irregular, sporadic or unpredictable working hours. Rather, regardless of whether an employee is permanent or casual, where that employee has an understanding of, and reliance on the fact that, their working arrangements are regular and systematic, any change that would have an impact upon those arrangements will trigger the consultation requirement in accordance with the terms of the modern award.

94. It is clear from this that it was intended the requirement to consult should be enlivened where an employee has an understanding that their working arrangements are regular and systematic, and a reliance on the regular and systematic nature of their hours of work. The example provided in the Explanatory Memorandum is of an employee who makes arrangements for outside work activities based around her working hours, and those hours are changed such that they impact on those arrangements. There is a significant gap between the intent of the provisions as set out in the Explanatory Memorandum and the wording of the provisions. This creates a high level of uncertainty for businesses about the circumstances in which they are required to consult, and therefore uncertainty for a business about their compliance with the legislation.

Recommendation

95. The ARA recommends the FW Act to provide that the obligation to consult regarding roster changes is limited to circumstances where the employee has a reasonable understanding of, and has reasonably relied on, the regular and systematic nature of their working hours.

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