sda NATIONAL
Shop Distributive and Allied Employees' Association

THE UNION FOR WORKERS IN
RETAIL. FAST FOOD. WAREHOUSING.

SUBMISSION

Senate Inquiry Into Penalty Rates In The Retail, Hospitality And Fast Food Sectors

18 July 2017

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The following motion was passed by the Senate on Monday 19 June 2017.

"19 **Education and Employment References Committee—Reference**

Senator Xenophon, also on behalf of Senator Griff, pursuant to notice of motion not objected to as a formal motion, moved business of the Senate notice of motion no. 1— That the following matters be referred to the Education and Employment References Committee for inquiry and report by 16 October 2017:

(a) claims that many employees working for large employers receive lower penalty rates under their enterprise agreements on weekends and public holidays than those set by the relevant modern award, giving those employers a competitive advantage over smaller businesses that pay award rates;

(b) the operation, application and effectiveness of the Better Off Overall Test (BOOT) for enterprise agreements made under the Fair Work Act 2009;

(c) the desirability of amending the Fair Work Act 2009 to ensure that enterprise agreements do not contain terms that specify penalty rates which are lower than the respective modern award;

(d) the provisions of the Fair Work Amendment (Pay Protection) Bill 2017; and

(e) any other related matter related to penalty rates in the retail, hospitality and fast-food sectors. Question put and passed."

1. Introduction

Competitive Advantage Claims Rejected

The SDA rejects claims that large employers have a competitive wage advantage over smaller businesses in the industries covered by the union. Wages are a significant and critical component of a business's costs and like any other cost (e.g. product, electricity, tax etc.) it must be measured over a trading cycle, financial quarter or season to be properly understood. Retail and fast food operate across 7 days of the week and are also subject to seasonal variations so any logical examination of wage costs must be made across appropriate time frames.

A disingenuous argument has been advanced by some business groups which calls out rates on specific days but completely disregards the higher wage rates paid at other times across the roster cycle. Businesses assess their wage costs across longer time periods and likewise employees assess their take-home-pay over longer time frames.

Loaded rates have been a part of the Australian industrial relations landscape for decades and the underlying reference point has always been 'take-home-pay'. Recent history has shown that smaller retail and fast food businesses have been quick to take advantage of aggressive workplace laws introduced by Liberal/National Party Governments but they have been less keen to actually engage in enterprise bargaining that might increase take-home-pay and other benefits for employees. The zero take up of the South Australian Small Business EBA Template 2015 (SDA and Business SA) demonstrated clearly demonstrated what the real agenda was for this sector and that was to reduce wage costs. When it became clear that cutting wages wasn't on the table there was no interest in applying the bargaining template, despite the fact that it required no engagement at all with the industry union.

Wages for employees in retail and fast food are regulated by two major industry Awards and multiple Enterprise Agreements. Through bargaining and diligent award work by the SDA, Australian retail and fast food workers are amongst the best paid in the world (see Appendix "A").

This submission will outline a brief history of industrial legislation in Australia and set out the radical Liberal/National Party agenda in recent decades to cut the take home pay of some of Australia's lowest paid workers.

The submission will also examine the relentless attack on penalty rates over the past three decades and the defences, including enterprise bargaining, that the SDA has employed to resist this onslaught.

SDA bargaining will be shown to have delivered good industrial outcomes for retail and fast food workers. Some of the complexities of the penalty rate debate will also be explained and recommendations made for improving the current system.

To properly understand the debate about enterprise bargaining, penalty rates and take-home-pay, it is important to firstly understand the tumultuous nature of workplace law reform and trading hours regulation over the past 25 years.

2. Industrial Legislation to the 1990's

Today's Federal System of Industrial Relations, centred on the Fair Work Act and the Fair Work Commission, has built upon previous legislative frameworks and is also a response to the actions of various Governments throughout Australia in recent decades.

The relative stability of the State and Federal industrial relations systems which had existed since 1904 underwent radical and dramatic change in the 1990's. Until that time, the State and the Federal systems had operated long term, on a basis of setting wages and conditions that were applied generally through award systems. Legislation in all jurisdictions provided processes and rules for parties to participate in hearings, run cases to address claims or issues and arbitrate matters when needed. Both unions and employers participated.

The Awards were a central platform for wage equity. National and State Wage cases, work value cases which addressed the changing nature of jobs and wage rate relativities based on skills were features of the Award system. For example, the SDA was able to secure a 92.14% relativity to the tradespersons rate in the retail industry in the late 1980's/early 1990's. This was an enormous advance for retail workers at the time.

Legislation history

In 1904 the Commonwealth enacted the Conciliation and Arbitration Act 1904. It relied on the powers conferred by s.51(xxxv) of the Constitution.

By 1912 all States in Australia had a State system in place to deal with relationships between employers and unions.

- NSW, Qld and WA adopted conciliation and arbitration systems.
- Vic and Tas adopted wage board systems (equal representations of employers and unions with an independent Chair)
- SA adopted a combination of the two.

The Conciliation and Arbitration Act was amended by 60 Acts until 1988. That Act was then repealed and replaced with the Industrial Relations Act 1988 but the system created by the 1904 Act did not have its essential elements change dramatically over this time.

Conservative Attack on Wages and Conditions

Victoria 1992 – the First Wave

The Victorian Liberal Government under Premier Kennett made changes in legislation to reduce employee working entitlements. These included removing an employer's obligation under State Awards to pay the 17.5% annual leave loading (Annual Leave Payments Act 1992) and reduced the number of Public Holidays in Victoria by removing Easter Saturday, Show Day and substituted Christmas public holidays.

The Kennett Government then introduced the *Employee Relations Act 1992*, which repealed the Industrial Relations Act 1979. This left employees in state regulated industries with no awards from 1 March 1993. The practical objective was to move these employees onto individual agreements.

Employees who stayed with their employer maintained most of their conditions from the Awards. However, all other employees had only five minimal protections:

- Minimum hourly rate of pay (no stipulation of penalties)
- Annual leave
- Sick leave
- Parental leave
- Long Service Leave

This was catastrophic for employees in high staff turnover industries like retail and was a challenging period for the SDA. Small business escaped the Award system and was now able to reduce the take home pay of employees. It was also at this time that the SDA began bargaining National Enterprise Agreements with larger employers and this development is dealt with in detail later in this submission.

In 1996 certain legislative powers of the State were transferred to the Commonwealth via the Commonwealth Powers (Industrial Relations) Act 1996. This legislation did not provide powers to make 'common rule' awards in the Federal system. The Victorian Government deliberately kept this power to try and prevent the Federal Industrial system being able to apply in a simple manner in Victoria by removing Easter Saturday, Show Day and substituted Christmas Public Holidays.

The Kennett Government then introduced the Employee Relations Act 1992, which repealed the Industrial Relations Act 1979. This left employees in State regulated industries with no Awards from 1 March 1993. The practical objective was to move these employees onto individual agreements.

Western Australia 1993 - the Second Wave

In 1993, the Court government introduced the Workplace Agreements Act 1993 ("the WA Act") and the Minimum Conditions of Employment Act ("the MCE Act"). The WA Act was arguably the most radical Act of the individual agreement enabling Acts, drafted by Liberal governments at that time. Rather than having a form of no-disadvantage test versus the relevant Award, a Western Australian Workplace Agreement ("WAWA") made under the Act only had to meet the conditions of employment set out in the MCE Act. Those provisions were simply:

1. Four weeks annual leave (with no loading)
2. Two weeks sick leave
3. Two days compassionate leave
4. The right to paid time off on a public holiday that fell on a working day (but no penalties for working or right to refuse to work)
5. A minimum weekly wage, set at the Minister's discretion via a Minimum Wage Order. The first Minimum Wage Order in 1993 set the minimum wage at $275.50 per week. By comparison, the Award rate at the same time was $385.00 per week.

The WA Act provided that once a WAWA was in place, it totally displaced any Award that would apply. Unsurprisingly, WAWAs were embraced with gusto by Western Australian employers, particularly smaller retailers. Rather than be saddled with the Award rate of pay and conditions, they could have employees working 24/7 and 365 days a year with no penalties whatsoever.

During the period 1993 to 2001, the retail sector in WA was divided into two groups - the larger employers covered by SDA Agreements, who were paying base rates above the Award plus penalties, and the remainder of the industry, which was overwhelmingly using WAWAs with the lowest possible level of wages and conditions.

Studies of WAWAs and their conditions have concluded that a significant proportion of workers were worse off than they would have been had they been on the relevant award or a collective agreement[1].

It was generally concluded that WAWAs 'were not used to facilitate mutually rewarding workplaces. They were used instead to strip awards and drive down wages and employment conditions' [2].

Federal 1996 - The Third Wave

In 1996 major change was introduced and the Act was renamed the Workplace Relations Act 1996. The significant changes including contracting out of the award system by the use of individual 'Australian Workplace Agreements' (**AWAs**). At this time limitations on Award provisions were introduced including awards no longer being able to set minimum or maximum hours for a part time employee.

To be approved, these 'secret' AWAs must be no less than the award. It has been shown that while most collective agreements were well above the safety net, AWAs often just passed, and were sometimes approved despite failing a no disadvantage test.

Academic studies showed that AWAs provided wages and conditions less than those achieved through collective agreements[3]

But worse was still to come for workers.

Federal 2005 – The Fourth Wave (WorkChoices)

The Howard Government introduced the *Workplace Relations Amendment (Work Choices) Act* 2005 (**"Work Choices").** This Act further reduced entitlements by removing the no

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[1] Fells R and Mulvey C (1994) 'Changes in Western Australian Industrial Relations', *NZJIR*. 19 (3): 289-30; ACIRRT (1996) 'Understanding Individual Contracts of Employment: An Exploratory Study of how 25 WA Workplace Agreements Compare with Relevant Award Entitlements'; ACIRRT (1999) *An Exploratory Study of Western Australia s.30 Workplace Agreements: Emerging Trends*; Bailey J and Horstman B (2000) 'Life is full of Choices: Industrial Relations 'Reform' in WA since 1993', *Research on Work, Employment and Industrial Relations 2000*, 14th AIRAANZ Conference, Newcastle, Feb, 1: 39-51; Berger K (2000) 'Workplace and Enterprise Agreements in the Western Australian Public Sector: Some Preliminary Findings', *Research on Work, Employment and Industrial Relations 2000*, 14th AIRAANZ Conference, Newcastle, Feb, 3: 131-142; Plowman D and Preston A (2005) *Submission to Senate Employment, Workplace Relations and Education Legislation Committee Inquiry into the WRA (Work Choices) Bill 2005*, University of Western Australia, Perth, Nov

[2] Senate *Report into the Provisions of the Workplace Relations Amendment (Work Choices) Bill 2005*, Senate Employment, Workplace Relations and Education Legislation Committee, Senate Printing Unit, Canberra, Nov.

[3] Bramble T (2001) 'Family-friendly Working Arrangements and the Howard Government Industrial Relations Agenda', *Crossing Borders: Employment, Work, Markets and Social Justice across time, discipline and place*: Proceedings from the 15th AIRAANZ Conference, 1: 26-33, 31 Jan – 3 February, Wollongong; Cole M, Callus R and van Barneveld K (2001) 'What's in an Agreement: An Approach to Understanding AWAs', *The AWA Experience; Evaluating the Evidence*, Conference presented by ACIRRT and the Office of the Employment Advocate, 7 Sept, University of Sydney, Whitehouse G (2001) 'Industrial Agreements and Work/Family Provisions: Trends and Prospects Under Enterprise Bargaining', *Labour and Industry*. 12 (1): 109–130; Mitchell R and Fetter J (2003) 'Human resource management and individualisation in Australian labour law', *Journal of Industrial* Relations, 45 (3): 292-325; van Barneveld K (2006) Australian Workplace agreements under Workchoices, The Economics and Labour Relations Review 165

disadvantage test and introducing 5 minimum conditions known as the Australian Fair Pay and Conditions Standard (AFPCS)

These conditions were:

- minimum hourly rate of pay and casual loading;
- maximum ordinary hours of work;
- annual leave;
- personal leave; and,
- parental leave and related entitlements.

AWAs were used to increase the number of hours an employee could work whilst minimising the cost of labour[4] . Further highlighting the labour-cost focus of AWAs, numerous studies have found that the wages of AWA workers were less than those on collective agreements.

A Radically Changed Environment

In a very short period of time the Australian Industrial legislative framework had radically changed. It was no longer based on Awards which provided protections and a platform for improvements in wages and conditions. Minimum conditions including penalty rates were removed and employees were vulnerable and exposed to the whims of employers.

Dramatic Expansion of Enterprise Bargaining

Running parallel to these legislative attacks on Australian workers Award protections was the expansion of Enterprise Bargaining.

The Keating Government 1993 Amendments to the Industrial Relations Act (Industrial Relations Reform Bill 1993) moved the emphasis in the Federal system from safety net Awards to Enterprise Bargaining. Such bargaining could be undertaken by both large and small employers but in Victoria and Western Australia smaller businesses generally took advantage of the radical State Legislation that existed.

This shift to enterprise bargaining in the early 1990's saw bargaining commence in industries like retail where the norm had been wage setting through the Award system. The SDA's first comprehensive EBA was with Coles Supermarkets and was finalised in 1994. This is examined in more detail later in this submission.

At this time, there were some attractions for both unions and employers to engage in enterprise bargaining.

A key attraction for unions was access to wage increases. The Industrial Relations Minister Peter Cook proposed in August 1992 that there would be no 'national wage increase'.

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[4] R Roan A, Bramble T, Healy J, Lafferty G and Tomkins, M (2000) 'AWAs: The Story So Far', in Burgess, J and Strachan, G (eds) *14th AIRAANZ Conference, February, Newcastle, NSW, 3*: 34–42; Mitchell R and Fetter J (2003) 'Human resource management and individualisation in Australian labour law', *JIR*, 45 (3): 292-325; Briggs C (2005) *Federal IR Reform: the shape of things to come*, ACIRRT report commissioned by Unions NSW, University of Sydney, November; HREOC (2005) *Submission to the Senate Employment, Workplace Relations, and Education References Committee Inquiry into the Workplace Relations Amendment (Work Choices) Bill 2005,* Submission 164, Human Rights and Equal Opportunity Commission, Sydney, Nov.

Furthermore, there would only be access to $10 per week increases for the lowest 30% of wage earners in 1993 and 1994. Any other increases would only be available through enterprise bargaining. This was all part of Accord Mark VII and if unions were to effectively lift wages for their members they had to engage in enterprise bargaining.

Another advantage that enterprise bargaining at the national level provided the SDA was the capacity to protect its members in States like Victoria and Western Australia who from 1993 onwards had Liberal Governments strip away their Award protections. These Governments trampled on the Award safety net (see below) and unfortunately Retail and Fast Food workers were among the most exposed. A national Agreement restored comprehensive workplace rights for these employees and ensured that the value of penalty rates could be protected either directly or in the form of loaded base rates.

For national employers, enterprise bargaining meant they could move off six (6) different State Award systems and have one industrial instrument covering their entire workforce. It also meant that many national retailers created single national benchmark instruments known as Enterprise Awards.

3. Establishing and Defending Penalty Rates

The following table is not exhaustive but sets out the attack on penalty rates in several jurisdictions since the late 1980's to the present day:

Year	Retail or Fast Food	Sunday	Saturday	State/ Territory	Governing Party
1980's		-	IRC replaced Overtime Sat afternoon with 125%. ALP Govt by Regulation sets 150%	NSW	ALP
1988		-	New Govt cut 150% Sat afternoon to 125%	NSW	LNP
1991		-	VIC IRC cut 150% to 125% (phased in)	VIC	ALP
1992		12 Trading Sundays introduced. SDA had to defend 200% in VIC IRC	-	VIC	ALP
1992	Retail and Fast Food	Awards (& therefore penalty rates) abolished	Awards (& therefore penalty rates) abolished	VIC	LNP
1993	Retail and Fast Food	West Australian Workplace Agreements used to remove penalty rates	West Australian Workplace Agreements used to remove penalty rates	WA	LNP
1994	Retail	200% Sunday rate		VIC/FED	LNP
1996	Retail and Fast Food	Ability to contract out of Award system. Part time award protections removed	Ability to contract out of Award system. Part time award protections removed	Fed	LNP
2003	Retail	200% Sunday Rate for 17,000 Roped-In Employers won by SDA		VIC/FED	ALP/LNP
2005, Dec	Retail and Fast Food	Work Choices – AWA's used to remove penalty rates. Awards to be replaced with 5 minimum standards	Work Choices – AWA's used to remove penalty rates Awards to be replaced with 5 minimum standards	Fed	LNP

2008	Retail	SDA begins case to set Sunday at 200% in Mod Awards		Fed	ALP
2008	Fast Food	SDA begins case to set Sunday at 200% in Mod Awards Employers seek 0% or 150%		Fed	ALP
2008 Dec	Retail	Modern Award Sets 200% for Sunday		Fed	ALP
2008 Dec	Fast Food	Modern Award Sets 175% for Sunday		Fed	ALP
2009	Fast Food	Employers apply to cut the 175% rate which is to be phased into the Modern Award from Jan 2010		Fed	ALP
2010, Jan	Fast Food	Employers win cut from 175% to 150%. This to transition into effect by July 2014		Fed	ALP
2012 - 2013	Retail	SDA successfully defends 200% Sunday against employers seeking to reduce the rate to 0% or 150%.		Fed	ALP
2012-2013	Fast Food	SDA successfully defends 150% Sunday against employers seeking 0%.		Fed	ALP
2014	Retail	Sunday rate reaches everywhere 200% 1/7/14	-	Fed	LNP
2014	Fast Food	Sunday rate reaches everywhere 150% 1/7/14	-	Fed	LNP
2014	Retail	Employer case to cut 200% begins		Fed	LNP
2014	Fast Food	Employer case to cut 150% begins		Fed	LNP
2017, Feb	Retail	200% cut to 150% (phased in)	-	Fed	LNP
2017, Feb	Fast Food	150% cut to 125% (phased in)	-	Fed	LNP

The above table clearly demonstrates the relentless attack on retail and fast food penalty rates waged by employers and Governments in recent decades. It should be noted that several jurisdictions did not have penalty rates in the relevant Award regulating work in Fast Food. The setting of penalties in the Modern Fast Food Award was a significant win by the SDA for fast food employees.

In the retail sector across all State jurisdictions the penalty rate debate was inexorably linked to the push for extended trading hours. Employers would push for an extension of trading hours in relevant State legislation and often submit that this would enable employees to work at times attracting higher rates of pay.

The reality was that once extended trading hours were secured Employer groups would then seek a cut in the applicable rate of pay. This has played out consistently for over 35 years with the introduction of late night trading, Saturday afternoon trading and finally Sunday trading. For example, in 2003 with the introduction of Sunday trading in South Australia the Retailers Association headed by Stirling Griff ran a case to move Sunday work from overtime (200%) into Ordinary Time. The South Australian Industrial Relations Commission agreed and set a 60% penalty for Sunday work. The SDA appealed this to the Supreme court but lost.

Once a rate was established the next argument faced by the SDA would be centred on defending the penalty rate that had been established immediately after the extension of trading hours. If successfully defended there would invariably be another application to again cut the established penalty rate. If the February 2017 FWC Penalty rates decision stands (currently subject to Judicial Review) the applicable rate for Sunday work in South Australia will have fall below the 60% set in 2003/4.

The extension of trading hours has fed the attack on penalty rates in both the State and then Federal jurisdictions.

Implementing Our Defence

An Award Defence:

In 1992 the SDA faced the reality that its members in Victoria would suffer a massive reduction in conditions of employment caused by a State Liberal Government implementing anti worker legislation.

The SDA undertook a massive job to ensure its members were protected from the effect of the legislation.

The first stage was to have awards made in the Australian Industrial Relations Commission (AIRC).

The timeline and steps of this stage were:

Early 1993	SDA logged approximately 200 employers (covered major retailers and small retailers) where the SDA had members.
March 1993	AIRC found a dispute between the SDA and the employers logged.
March 1993 – - Early 1994	AIRC arbitration between the SDA, Vic Government + employers over a Victorian Award.
December 1993	AIRC made an interim award to provide substituted Public Holidays over the Christmas 1993 period.
March 1994	AIRC made an interim award to provide Easter Saturday 1994 as a Public Holiday. Awarded an $8 per week wage increase.
April 1994	Interim Federal Awards made in retail for Victoria. Casual conditions not included. The new federal awards reflected previous State Retail Awards.

The Kennett Victorian Government did intervene in the proceedings to try and prevent the SDA making awards.

Then the second stage was an even larger exercise with the objective of having the award apply to the many thousand small retailers who were now award free in Victoria. This was done via a process of serving logs of claims on employers and disputes being found in the AIRC. The Victorian Government had not allowed the AIRC to make any Award applying in Victoria 'Common Rule' and so the individual logging of employers was the only option.

This exercise by the SDA faced considerable opposition from the State Government and also employers which resulted in numerous proceedings before the AIRC. The SDA persevered because re-establishing award coverage would restore take home pay for employees in small retail businesses by reintroducing penalties and other Award entitlements.

The time-line for ultimately "roping in" over 17,000 award-free retail employers in Victoria into Federal Award coverage is as follows: -

1 March 1993	State Awards abolished in Victoria. No penalties on any hours.
26 June 1998	SDA Letter of Demand and Log of Claims to **35,877** retail employers.
29 December 2000	Dispute found between SDA and 24,422 retail employees. (C. No. 1998/75644)
5 August-25 October 2002	Hearing on the making of a roping-in award for 17,628 retail employers.
17 January 2003	Decision in favour of roping-in award, SDA Victorian Shops Interim (Roping-in No. 1) Award 2003, including interim penalty for Sunday of 150%.
17 February 2003	Operative date of roping-in award except for Saturday penalty and interim Sunday penalty.
17 May 2003	Operative date under the roping-in award of Saturday penalty of 125% and interim Sunday penalty of 150%.

3 December 2003	Final decision: 200% Sunday penalty. [Print PR941526]
1 January 2004	Operative date of Sunday penalty of 200%.

This work was conducted in 2 stages and took over a decade of continuous work from the SDA. Many challenges were faced and the legislation was challenged in complex hearings as aspects of this case were often without precedent.

The SDA was ultimately successful in ensuring that members and thousands of non-union employees in the Retail Industry in Victoria were able to have an appropriate safety net award restored despite hostile Government legislation.

The result was a more equitable platform of conditions of work applying to both small and large retailers. Large retailers had been award covered since 1994 and now a decade later most small retailers were also back under an Award.

Bargaining Defence – Case Study 1 (VIC Small Business)

The SDA is always ready to engage employers of any size to negotiate good Agreements that provide benefits to employees and allow effective operation of the business.

Following the abolition of State Awards by the Kennett Government in 1992 the SDA had logged thousands of employers (see table above). A large number of these had been independent supermarkets where the SDA had some members. Following this logging of employers, The Masters Grocers Association of Victoria (MGAV) opened up discussions with the SDA and by 1994 the SDA and MGAV had negotiated an Agreement which covered around 100 small supermarket employers.

This first Agreement contained a spread of hours up to 10pm Monday to Friday and provided a Sunday penalty rate of 150%.

In 2005 the Commission said that the agreement could only include employers with single sites. After this date, any employer with more than one store had to have their own separate agreement and this was facilitated by the SDA and MGAV. The agreements have continued up until today and still cover approximately 55 employers.

Bargaining Defence – Case Study 2 (WA Small Business)

(2001 – repeal of the Workplace Agreements Act and transition to Awards and Agreements)

In early 2002, the SDA engaged with FAL, who were at the time the master franchisors of the Dewsons, Supa Valu and Foodland brands (all later re-branded as IGA), with a view to securing a multiple business Agreement with approximately 130 franchisees.

At the time, the Award rate was $491.00 per week and all of the penalties and allowances above still applied. By contrast, the final Minimum Wages Order set the minimum weekly wage at $413.40.

As such, the FAL franchisees were looking at an increase of $77.60 per week (18.8%) just on base rate alone, let alone the impact of a comprehensive suite of penalties and allowances. SDA Officials involved at the time did not find one example of a franchisee who was previously paying anything other than the absolute minimum allowed by the operation of the WA Act and the MCE Act.

Despite the obvious obstacles, the SDA was able to successfully engage this group of small business owners and negotiate an outcome that included:

1. A Shop Assistant rate that was applicable to most stores of $500 per week, with six monthly increases of $10 per week (roughly 4% per annum)
2. Sunday penalty of 50%
3. Public Holiday penalty of 200% in year one, rising to 250% in the third year of the Agreement.
4. Eleven public holidays (versus the ten applicable under the MCE Act)
5. Non-working day benefits for public holidays for full time employees
6. Allowances such as meal money, in charge and cold work
7. 17.5% annual leave loading
8. Overtime rates at time and a half for the first two hours and double time thereafter. (No overtime rates were payable under the MCE Act or WAWAs)
9. Standard SDA rostering protections

Some of the franchisees had purchased stores in the 1993-2001 period and had never known anything other than WAWA rates of pay. For them, the increase was massive. During this time, the SDA operated in good faith with franchisees and negotiated an Agreement satisfying the No Disadvantage Test applicable at the time. The reality of the situation was that no Agreement meant that employees would continue, for the time being at least, to languish under the vastly inferior WAWA conditions. The Full Bench certified the Agreement.

Regrettably, not all 130 franchisees were ultimately covered by the Agreement. In the final week before rollout, the Chamber of Commerce and Industry (CCI) of WA became aware of the proposal and told the franchisees that there was a much cheaper way. CCI insisted that they could get AWAs (which were by then in operation Federally in a restricted form) certified with no penalty rates and just the Award base rate of pay. The SDA genuinely believed this was not possible. However, the Office of the Employment Advocate was advising that, as per then IR Minister Tony Abbott's comments in parliament, where an employee expressed a preference for a particular hour of work, there was no need to pay that employee a penalty, no matter what the Award provided. This led to a raft of AWAs, all in identical terms (as is usually the case with "individual" Agreements), which required the employee to sign a pre-filled back page that set out the employee's "preferred hours".

These CCI AWAs were indeed certified with no penalty rates and lead to two tiers of industrial standards in independent supermarkets in WA. This was not a good outcome for genuine competition and not a good outcome for these employees forced onto AWA's.

The SDA had succeeded in raising the standards for many thousands of employees in the independent supermarket sector, albeit that in many cases this was short lived, as competitive pressure saw many franchisees seek out CCI AWAs as soon as they were able. Yet another example of Liberal Party laws cutting the take home pay of lower paid Australians.

Building The Modern Awards (2008-2009)

Creating the General Retail Industry Award (GRIA) and the Fast Food Industry Award (FFIA) – modern Awards which both took effect 1/1/2010- was an enormous task as the variations between State Awards were large and achieving common conditions and rates was complex and difficult.

The GRIA was a major advance for retail employees with the SDA securing a rate of 200% for Sunday work despite some major jurisdictions having a Sunday rate of 150%. It should be noted that the 200% was subject to transitioning and did not take full effect until July 2014.

The FFIA was also a significant case for the SDA as the union secured its long-term objective of a base hourly rate equal to that in retail. At the time the SDA was declared the 'Principle Union' in the fast food industry (the 1990's), the various relevant State Awards had provided weekly rates between $40 and $88 a week lower than the corresponding retail Award. There was also a complete absence of penalty rates in some of those Awards.

4. SDA Bargaining – How it has delivered for Retail and Fast Food Employees

In the complex environment of various State Liberal Governments dismantling Award protections and Federal Liberal Governments doing likewise from 1996 onwards, the SDA was able to provide significant protections for its members through enterprise bargaining.

SDA agreements have provided critical protections against the relentless attack on the earnings and conditions of low paid Australians by Liberal Governments throughout the 1990's and 2000's. (See previous table, Relentless Attack on Penalty Rates).

The SDA has successfully used enterprise bargaining as a mechanism to increase wages and conditions for retail and fast food employees. In companies where the SDA has a long history of bargaining, wages outcomes exceed both CPI and Award increases.

Table 1 Rates of pay in Retail enterprise agreements

	Award	Coles	Woolworths	Myer	David Jones	Target	Big W	Kmart
Rate as at July 1993	$383.80	$383.80	$383.80	$383.80	$383.80	$383.80	$383.80	$383.80
Rate as at July 2014	$703.90	$773.80	$793.48	$709.00	$726.00	$743.70	$743.36	$747.70
Increase	83.4%	101.6%	106.7%	84.7%	89.2%	93.8%	93.7%	94.8%
Real increase (i.e. above CPI)	9.2%	27.4%	32.6%	10.6%*	15.0%	19.6%	19.5%	20.6%

Rates are based on a full-time shop assistant with greater than six months service working in NSW

As well as increasing base rates of pay, the SDA has been successful in improving other entitlements for employees. Below is a list of examples of entitlements that are typical in SDA Agreements.

	NES/Award entitlement	Typical SDA Agreement entitlement
Minimum part-time hours	3 hour shift per week	10 hours per week and minimum daily shift 3 hours
Work on public holidays	May be required to work if "reasonably requested"	Voluntary
Public holidays falling on non-working days	No entitlement to Public Holidays	Full-time employees and eligible part-time employees entitled to additional paid day
Christmas Eve and New Year's Eve Work	No entitlement unless legislated as a public holiday	Voluntary work after 6pm or 7pm
Easter Sunday	No entitlement unless legislated as a public holiday	Voluntary work
Redundancy	Employee with more than 10 years' service- 12 weeks' pay	Higher standard up to 20 weeks No reduction in amount after 10 years' service

	NES/Award Entitlement	Typical SDA Agreement entitlement.
Compassionate Leave	2 paid days for the relatives/household	5 paid days for parents, partner, children 3 paid days for other NES relatives 1 paid day for close friend/other relative not in NES
Junior Rates	90% or 100% for 20 yr old's	100% for all 20 yr old's
Annual leave consideration	Nil	Timing with Partners Leave considered
Domestic Violence Leave	Nil *(* Union test case in FWC awarded access to personal leave, July 2017).*	Recognition of issue, use of personal leave, unpaid leave or extra paid leave
Permanency of employment	Nil	Full time and Part time work promoted over casual work
Accident Pay	No entitlement in Victoria	39 weeks available in Victoria
Long Service Leave	Double leave at half pay only in a few States/Territories	Double Leave at half pay across Australia
Safe Transport home	Nil	If overtime worked Safe transport home to be provided/ensured
Escorts to car for after dark finish	Nil	Employees can be escorted to cars or move cars closer after dark.
Rostering consideration	Nil	Rostering needs to consider family responsibilities, study responsibilities, safe transport home
Limited Tenure	Allows employee to fall outside rights under Act Promotes insecure work	Ensure employee remains under the Act. Protections given with maximum length 1 yr, no back to back contracts, 1 month minimum
Additional leave entitlements	Unpaid community leave	Paid Natural Disaster leave Paid Blood Donor leave Paid Emergency Services Leave Paid Defence Forces Leave

The SDA has also engaged with companies to design conditions of employment that encourage permanent work over casual employment. Despite being a highly casualised industry, companies with SDA agreements have often had a majority of employees on permanent contracts. Many agreements also contain clauses on casual conversion that allow regular casuals to convert to permanent part-time employment and clauses that enable employees to increase their permanent hours where they regularly work additional hours.

Providing greater security of employment for employees in retail and fast food is an ongoing challenge.

Small Business and Enterprise Bargaining

Since the 1990's the SDA has engaged in Enterprise Bargaining with companies regardless of size. The SDA has negotiated numerous agreements with small and medium sized businesses. However as noted previously, wherever legislation has permitted the stripping of penalties and take home pay it has often proven difficult to engage smaller businesses. Below is a list of small and medium independent supermarket agreements that the SDA has negotiated.

Table 2 SDA independent supermarket agreements

Employer	Agreement	Final base rate of pay relative to award rate	Sunday penalty rate
Doonside Boys Pty Ltd T/A Rainbow IGA Doonside	Rainbow IGA Enterprise Agreement 2012	111.0%	50%
Dunpec Pty Ltd T/A Khan's IGA	Khan's IGA Supermarkets Certified Agreement 2003	111.0%	50%
Various employers trading as IGA in the ACT	Independent Supermarkets ACT Certified Agreement 2010	106.7%	50%
Romeo's Retail Group T/A Romeo's IGA and Romeo's Foodland	Romeo's Retail Group Enterprise Agreement 2012	106.9%	50%
PNO Retail Pty Ltd T/A Jury's Supa IGA Plus Liquor Nambucca Heads	PNO Retail Certified Agreement 2005 to 2007	105.1%	50%
Grayson Pty Ltd T/A IGA Woolgoolga	Grayson Pty Ltd Collective Agreement 2007	106.1%	50%
Strathony Pty Ltd T/A Supabarn Supermarkets	Supabarn Supermarkets (NSW & ACT) Collective Agreement 2011	110.6%	50%
The Fourth Force Pty Ltd and Dramet Pty Ltd T/A Drake Supermarkets (Foodland)	Drakes Supermarkets Retail Agreement 2012	111.24%	50%
Palcove Pty Ltd T/A Cheap as Chips	Cheap As Chips (Retail Sa / Broken Hill Staff) Enterprise Agreement 2013	107.05%	80%
Mandurah Iga	Mandurah Iga And SDA Agreement 2010	105.4%	50%
4 Igas	Queens Supermarket (WA) Pty Ltd And SDA Agreement 2010	105.4%	50%
Albany And Spencer Park Igas	Albany Iga And Spencer Park Iga And SDA Agreement 2010	105.4%	50%
Cellarbrations	Cellarbrations Geraldton, Chapman Road And SDA Agreement 2011	107%	50%

Template EBA for Small Retailers

In 2015 the SDA's South Australian Branch negotiated a template enterprise agreement with Business SA. The purpose of this was to provide an off-the -shelf template which smaller retailers could access through Business SA, in the knowledge it would pass the BOOT. No engagement with the SDA was necessary for a business to adopt this template.

The template did include a 50% penalty rate on Sundays, a higher base rate of pay (a loaded rate) and enhanced rostering provisions. The template agreement received wide publicity and was hailed by some media outlets as an "historic workplace deal"[5]. However, several months later it was revealed in the media that the template agreement had not been taken up by ***any*** small business in South Australia. Master Grocers CEO Jos de Bruin was reported as saying of the Template EBA "It should [at least] represent the same cost but it doesn't, it's actually more expensive [than the Award]".

This template and the many EBAs with smaller retailers demonstrate that the SDA is prepared to make any agreement that is good for employees and passes the relevant minimum standards set by legislation. Small business have had the opportunity to make enterprise agreements similar to those made with large retailers but often have not taken the opportunity and invariably cite the higher costs associated with the framework of SDA retail agreement.

Arguments that:

(a) A 50% Sunday loading provides a competitive advantage for large business but;

(b) SDA Agreements with a 50% Sunday loading are too expensive and set wage costs above the Award

cannot be run concurrently!

[5] *The Australian* - 24 May 2015 - Historic workplace deal cuts penalty rates

5. Operation and Application of the BOOT (Better Off Overall Test)

In May 2016, there was a dramatic change in the approach of the FWC to agreement making and the application of the BOOT. The Coles 2014 EBA was terminated by a Full Bench in May 2016 on the ground it failed the BOOT Test.

By way of background the Coles 2014 EBA at the time it was set aside provided:

- a weekly base rate of $821 ($99.50, or 13.8%, above the Award rate of $721.50)
- a Sunday rate of 150%
- a midnight to 5am rate of 130%
- a public holidays rate of 250%
- a casual loading of +25% on top of any penalty loading
- 17.5% annual leave loading

Whilst some specific provisions would alter with each new Agreement, the framework of the Coles 2014 Agreement had been endorsed by the Commission for decades, under the Industrial Relations Reform Act 1993, the Industrial Relations Act 1996 and the Australian Fair Work Act 2009. Under all legislative frameworks, the SDA bargained and registered Enterprise Agreements that complied with the industrial law of the day.

The SDA has had numerous Agreements registered under the BOOT as applied by the FWC since 2009. Many of those Agreements had a framework of loaded hourly rates which reflected the buyout of penalty rates in part or full. The May 2016 Full Bench Coles Decision effectively requires each individual employee to be better off on any given shift so the value of any bought out penalty rate must now be transferred back to the actual penalty rate hour as prescribed by the Award.

As a law-abiding union, the SDA will now bargain for outcomes consistent with the BOOT as applied in the Coles Full Bench decision but the SDA does submit that this decision was a significant revolution in how the BOOT has been applied.

Whilst the Full Bench in the May 2016 Coles Decision provides guidance for industrial parties for the future, it is submitted that the BOOT until then had been regularly applied looking at the impact on the workforce more broadly and not on each and every individual employed at the time or potentially employed.

The McDonalds Full Bench Decision of 21 July 2010 in Matters C2010/3643 and C2010/3668 (The McDonalds Decision) clearly demonstrates that BOOT was not being applied as an individual test. The Bench's comments at several paragraphs in the decision are noteworthy:

> [53] *"We have considered the material regarding the advantages and disadvantages to employees under the Agreement in conjunction with the undertakings given by McDonalds in the proceedings before the Commissioner*

and updated in the proceedings before us. We consider that the Agreement does contain some disadvantages to employees compared to the content in the reference statements. The disadvantage is minimised in many cases by undertakings given by McDonalds. In other cases, the disadvantage is confined to a small proportion of employees and is the consequence of adopting uniform national provisions or contingent on future events. Some disadvantage exists in relation to the wage rate for some age groups in Western Australia, some allowances, weekend overtime in Western Australia.....

[54] The agreement contains advantages to certain group of employees or generally in relation to the classification structure, the rates of pay, early morning work penalties, hours of work provisions, minimum engagements, overtime rates, redundancy entitlements, casual loadings, junior rates, allowances, salary sacrifice, breaks, annual leave, public holidays.....

[55] We have considered the comparative material which explains the relevant advantages and disadvantages to employees and have concluded that the Agreement does not result on balance, in a reduction in the overall terms and conditions of employment of the employees who are covered by the Agreement under reference instruments applying to the employees."

This approval framework was clearly based upon the workforce as a whole and not as an individual test.

The SDA does disagree with the 2016 FWC Full Bench decision in Coles in that some of its remarks and calculations concerning rosters were not completely accurate for comparison purposes.

Coles Employee: Roster U

Employee U is the worst case example cited in the 2016 FWC Coles Full Bench decision. The decision lists Employee U as suffering an annual loss in earnings of $3,506 per year.

A reconciliation using employee U's roster that was printed in the decision was undertaken by the SDA. The SDA used the employee's total remuneration package including superannuation, annual leave and Public Holiday non-working day benefits (these must be paid out to the employee)

The time period looked at is the three months immediately before the FWC decision, 13 weeks of work and one week of annual leave that fully accrued in that period.

The SDA reconciliation for the quarter at the time of the Decision shows Employee U better off overall under the 2014 EBA compared to the Award by $459.76. So, over the full year Employee on roster U would be at least $1600 better off and not the $3,506 worse off.

At Appendix "B" is the detail of this reconciliation.

Inconsistent BOOT Application

There have been some assertions by commentators in the media that union agreements were somehow waved through by the FWC with little scrutiny and the real attention was on non-union Agreements.

This does not stand up to examination.

Research shows many current non-union Enterprise Agreements were approved by the FWC under the 2009 BOOT and in those circumstances the FWC was clearly not applying an individual test. A number of examples are now listed:

Non-union enterprise agreements approved by the FWC:

1) *Oporto (Franchising) Pty Ltd - Enterprise Agreement 2013-2017*

   - Approved 9 July 2013 – Expiry 1 April 2017
   - **Base hourly rate + $0.28 (+1.5%) above FFIA**
   - No weekend penalties
   - No late night penalties
   - No public holiday penalty
   - No Annual Leave loading

2) *Oporto Carillon Enterprise Agreement 2014*

   - Approved 30 October 2014 – Expiry 1 June 2015
   - **Base hourly rate + $0.29 (+1.5%) above FFIA**
   - No weekend penalties
   - No late night penalties
   - No public holiday penalty
   - No Annual Leave loading

3) *El Restaurant Services Enterprise Agreement 2014*

   - Approved 30 June 2014 – Expiry 6 July 2018
   - Base hourly rate + $2.26 (+12.5%) above FFIA
   - No weekend penalties for Monday to Sunday employees
   - No late night penalties
   - Public holidays +71% for permanent Monday to Sunday employees
   - No Annual Leave loading

4) *Wok in a Box Holdings Pty Ltd Enterprise Agreement 2014*

   - Approved 22 August 2014 – Expiry 28 August 2018
   - Base hourly rate + $1.53 (+8.2%) above FFIA
   - No weekend penalties
   - No late night penalties
   - 150% public holiday penalty
   - No Annual Leave loading

5) *Balmain Gelataria Pty Ltd 2015-2018 (AG2014/706)*
   - Approved 7 May 2014
   - Base hourly rate $18.41 p.hr (+0.43 p.hr or +2.4%) above the Fast Food Industry Award upon registration.
   - No weekend penalties
   - No public holiday penalties

6) *Inn Fast Food Enterprise Agreement 2015 (AG 2015/7569)*

   - Approved 21 December, 2015 – Expiry 21 December 2019
   - At approval base rate 8.5% above the Fast Food Award
   - Base hourly rate + 3% higher than the FFIA as per Clause 8, from 2nd year of agreement.
   - No weekend penalties
   - No late night penalties
   - No Annual Leave Loading
   - No Laundry Allowance
   - Full time and part-time employees can be required to work Public Holidays without penalty rates applying.
   - some undertakings with respect to Sunday rostering but not strong

7) *PA Enterprise Pty Ltd t/as Gloria Jeans Glencore Park 2014-18 (AG2014/8829)*

   - Approved 8 December 2014 – Expiry 1 July 2018
   - Base hourly rate $1.25 above (+6.7% above FFIA)
   - Includes Introductory rate $0.20 above award (for 3 or 6 months)
   - No weekend penalties
   - No late night penalties
   - 150% rate for Public Holidays via undertakings.

8) *Schnitz HR Enterprise Agreement 2015 (AG 2015/5032)*

   - Approved 9 November 2015 – Expiry 1 June 2019
   - Base hourly rate + $1.71 (+9%) above FFIA
   - No weekend penalties
   - No late night penalties
   - Public holidays +150% via undertakings
   - No Annual Leave loading

9) *The Swan View IGA Agreement 2015*

   - Approved 22 April 2015 – Expiry 26 February 2019
   - Base hourly rate + $1.50 (+8.1%) above GRIA

- 50% penalty for Sundays and 10% loading for Saturdays
- 20% penalty for late nights
- 100% public holiday penalty
- No Annual Leave loading

10) Boost Shreeji Juice Pty Ltd Enterprise Agreement 2015

- approved 2 March 2016 to 2 March 2020
- There are no Saturday, Sunday or late night penalties
- EBA's base rates being 12.43% to 15.81%
- Public Holiday rates in excess of FFIA
- Annual leave loading 11.2%

11) Deli Devine Enterprise Agreement 2015

- approved 22 September 2015 to 30 May 2019
- Base rate $19.95, GRIA rate $18.98
- 20% casual loading
- 4 hour shift – no break (GRIA – 10 minute break)
- Saturdays – 10% loading, (casuals 20%)
- Public holidays 200% (Permanents and casuals)
- an employee required to perform regular work on a Saturday, Public Holiday and evenings. The company will ensure that the employee is better off when compared to the award. Further issue no definition of regular i.e. one off work doesn't need to be better

It is submitted that the above non-union Agreements appear to set standards well below what the Coles and other Union Agreements contain.

6. Complexity of The Penalty Rate Debate

The SDA has sought to protect its members through decades of attacks on penalty rates and numerous changes to the legislation it is not surprising that people get confused

This year in the Senate, Senator Seselja demonstrated such confusion when he incorrectly stated in Parliament that:

> "They sold me out on penalty rates. I think we got time and a half in the Nineties on a Sunday. I was young. I was 19 and I joined the SDA in good faith, hoping they would do me a good deal. It turned out like so many others in the union movement and like Mr Shorten: they sold me and thousands of other workers out as well"

The following tables set out what Senator Seselja would have received if he was a casual or a part-time employee. In both circumstances, he would have been receiving more under his SDA Agreement than under the relevant Award.

1996 rates of pay Comparison of ACT Retail & Wholesale - Shop Employees Award with the Retail Supermarket Industry - Woolworths - NSW/ACT Agreement 1995

Part-time Rates

For a 19 year old (80% of adult rate)	Award penalty rate	Award Rate	EBA penalty rate	Woolworths EBA Rate	WW Better off per hour by $	WW Better off by %
Base rate of pay	-	$8.58	-	$9.04	$0.46	5.4%
Sunday rate of pay	50%	$12.87	50%	$13.56	$0.69	5.4%

Casual Rates

For a 19 year old (80% of adult rate)	Award penalty rate	Award Rate	EBA penalty rate	Woolworths EBA Rate	WW Better off per hour by $	WW Better off by %
Base rate of pay	15%	$9.86	22%	$11.03	$1.17	11.8%
Sunday rate of pay	time and a half of the casual rate	$14.80	time and a half of the permanent rate plus casual loading	$15.55	$0.75	5%

Enterprise Awards

The 'Review of the Wage Fixing Principles 1993' set the 'Principles' for the making of Enterprise Awards. Where Enterprise Awards were created, they became the relevant benchmark for measuring no disadvantage and would later be used as the relevant instrument when assessing BOOT from 2009 until December 2013.

Whilst the SDA had argued that all such enterprise awards should cease to exist upon commencement of the Modern Awards (1/1/2010), the Commonwealth Government determined that they could continue to operate until 31/12/2013. There were over 37 Enterprise Awards operating in retail and fast food.

Despite what the SDA regarded as clear legislative intent there were challenges to the 31/12/2013 expiry (or modernisation) date for Enterprise Awards.

KFC applied to the FWC in 2010 and in proceedings before the Full Bench of the Commission ([2011] FWAFB 1078) sought to retain its Enterprise Award. The Company's objective was to create a benchmark modern award that would supplant the Fast Food Industry Award for BOOT and other purposes. The SDA opposed the application and reciprocally applied to terminate the existing Enterprise Award pursuant to item 5 of Schedule 6 of the Transitional Act.

After losing the case before the FWC Full Bench KFC sought a judicial review before a single judge in the Federal Court (NSD428/2011). Following this decision KFC appealed in the Full Federal Court (NSD2251/2011) but again lost and was ordered to pay costs to the SDA.

It's Not a Retrospective Test

It is a factor that is lost or misrepresented deliberately by parties that current agreements in place today were not necessarily tested against the Fully implemented Modern Award.

The appropriate underpinning awards for BOOT purposes could have been an Enterprise Award (up until December 2014) or a State Award/Federal Award under transition to the Modern Award rates and penalties (transition completed July 2014).

One example is the McDonald's *Australia Enterprise Agreement 2013*. The Agreement was approved by Commissioner Bull on 24 July 2013.
The agreement was tested against various Awards which were not the Fast Food Industry Award. The following are the awards it was tested against:

Enterprise Awards:

- *McDonald's – Shop, Distributive and Allied Employees' Association – Victoria – Award 2004*
- *Restaurant Industry – McDonald's – South Australia / Northern Territory – Award 2000*
- *Restaurant Industry – McDonald's – Australian Capital Territory – Award 2000*
- *McDonald's – Shop, Distributive and Allied Employees' Association – NSW – Award 2006*

State Awards Transitioning to Fast Food Industry Award

- *Fast Food Outlets Award 1990 (WA)*
- *Quick Service Food Outlets (QSFO's) Award – State 2004*

7. Detrimental Provisions Requiring Amendment

The current industrial relations system has a major flaw that disadvantages employees and their entitlement to the full and proper effect of the Modern Awards that apply to employees throughout Australia. The SDA has concerns with 2 areas that causes disadvantage to employees:

a. Terminating Expired agreements (EAs past there nominal expiry date) and

b. Current agreements that no longer pass the BOOT test

There are two further sub-categories of agreements the SDA addresses in this section:

Agreements made pre-Fair Work Act and

Agreements made since the Fair Work Act came into operation.

Expired Agreements

Expired Agreements Continue

Under the Fair Work Act 2009 an expired agreement (Collective or Individual) continues to apply after its nominal expiry date. Wage increases will not apply to an expired agreement unless the base rate of pay falls below the relevant Award rate (see FWA s 206).

Terminating Expired Agreements

Employees working under expired non-union agreements have two options for remedying this situation. The first is to convince their employer to negotiate a new enterprise agreement. This is difficult for employees, particularly in a non-unionised workplace. Employers have little incentive to bargain a new agreement when their current agreement allows them to legally pay substantially below the award penalties.

The second option is to apply to terminate the agreement. Under the *Fair Work Act 2009* an employer, employee or employee association covered by the agreement may apply to the Fair Work Commission to terminate the agreement. The SDA can apply to terminate an agreement but only where it is bound or a party to the agreement. This means the SDA does not have standing to terminate a non-union agreement. It is therefore up to individual employees to apply to terminate an expired agreement. In the SDA's experience, employees are rarely willing to apply in their own name to terminate an enterprise agreement for fear of being targeted by their employer. Even where the SDA has members covered by an agreement, if the SDA is not covered by the agreement, an individual employee must still volunteer as the applicant to terminate the agreement.

A further problem in the current system is the identification of expired agreements that apply in an industry. Agreement names do not need to disclose the trading or operating name.

Many agreements use the registered business name or holding company name or family company name which bears no resemblance to the actual operation. For example, an agreement called 'Khans Group Employee Collective Agreement 2006' does not indicate the precise nature of the operation or work-site(s) that it covers. This agreement actually covers some IGA supermarkets.

This methodology makes it hard to identify an agreement that covers a Retail or Fast Food operation and the precise store(s) it covers. This is also further complicated as the scope of the agreement probably also fails to identify the actual or commonly named operation.

This all means that there are many agreements that are expired but cannot be readily identified by the SDA for termination. The SDA also cannot in its own right make application to terminate non-union agreements that apply in Retail and Fast Food.

Case study: Employment Innovations Pty Ltd Enterprise Agreement 2010

Employment Innovations Pty Ltd operates as a labour hire company across a number of industries including retail and fast food. In July 2010, the Fair Work Commission approved the *Employment Innovations Pty Ltd Enterprise Agreement 2010* to cover employees working for the company in the retail, fast food, hospitality and clerical industries.

The agreement offered a base rate of pay of $17.68 for a retail shop assistant, $1.32 (8.0%) above the relevant award rate. The agreement provided for some modest wage increases, depending on the classification. The agreement provided very few entitlements to employees above those required by the national employment standards (NES). There were no penalties for weekends, nights or public holidays.

The agreement nominally expired on 29 July 2014. By the time the agreement expired, the shop assistant rate in the agreement had already fallen below the award rate. The company was required to pay the award base rate of pay but not the award penalties. After July 2014, employees covered by this agreement continued to receive wage increases only in line with the award increase, but the employer has continued to avoid paying penalty rates.

The SDA has recently applied to terminate this agreement and the matter is currently before the Fair Work Commission.

Agreements Made Prior To The Fair Work Act

When the Federal Government abolished Work Choices and passed the Fair Work Act some employees were left trapped in the Work Choices system. These include employees on Australian Workplace Agreements (AWAs), employees on Individual Transitional Employment Agreements (ITEAs) and employees under collective agreements made prior to the Fair Work Act. These instruments may continue indefinitely and employees may be suffering substandard wages and conditions when compared to the new modern awards. They have never been tested against the new modern awards. In some cases there was no real test done.

The Act does not provide any easy avenue to rescue the last of the employees on the Work Choices system. They need to be dealt with now. The SDA proposes to deal with these agreements using an automatic FWC review process so that the last remaining employees on Work Choices are moved fully into the Fair Work environment.

As discussed earlier there are difficulties in terminating expired agreements.

The Fair Work Act commenced on 1 July 2009. However various provisions commenced at a later date such that the full transition to the new system was not complete until 1 January 2015. The outline below shows the phasing in:

1 July 2009	Fair Work Act commenced
1 January 2010	National Employment Standards and modern awards commenced (except for the new classification systems, rates of pay and penalty rates)
1 July 2010	New classification systems in modern awards commenced and 20% of the change in classification rates of pay and penalty rates apply
1 July 2011	40% of the change in classification rates of pay and penalty rates apply
1 July 2012	60% of the change in classification rates of pay and penalty rates apply
1 July 2013	80% of the change in classification rates of pay and penalty rates apply
31 December 2013	Enterprise awards cease to exist if not modernised
1 July 2014	Full Classification rates of pay and penalty rates apply
31 December 2014	Awards based on the conciliation and arbitration head of power in the Constitution rather than the corporations power cease to exist.

This demonstrated that the process of phasing in the full effects of the Fair Work Act was not complete until 1 January 2015.

The process of transitioning the last employees out of Work Choices agreements and onto the full Fair Work system should also now occur as it is wrong to allow a system to permit sub-standard arrangements remaining in place.

AWAs AND ITEAS

All AWAs and ITEAs made under Work choices have passed their nominal expiry date (April 2013 was the latest expiry date). The Government should legislate that every AWA and every ITEA shall cease to have effect as of 1 January 2018.

Recommendation
The Government should legislate that every AWA and every ITEA shall cease to have effect as of 1 January 2018.

Collective Agreements

There continue to exist a range of union and non-union collective agreements in existence made under the Howard Government legislation. Some were made under Work Choices. It is possible some were made under even earlier legislation. All employees should now enjoy the full benefits of the Fair work system.

The last agreements made before the Fair Work Act took effect were on 31 December 2009. (The NES and modern awards commenced 1 January 2010.) The maximum length of an agreement at that time was 5 years. So, all pre-Fair Work Act enterprise agreements have expired (the latest date was 31 December 2014). Some employers have chosen to stay under old expired agreements to protect themselves from increases under the Fair Work system.

Case study: Khans Group Employee Collective Agreement 2006

The Khan's group of companies operates approximately 10 IGA supermarkets across NSW. In 2006 the *Khans Group Employee Collective Agreement 2006* was approved under *Work Choices*.

The agreement when approved provided a base rate of pay of $15.35 for a shop assistant, $1.08 (7.5%) above the award rate. There were no wage increases in the agreement. There were higher rates for Sundays and public holidays, but these were expressed as a flat dollar amount, not a percentage of the base rate of pay, so they did not increase if the base rate increased.

The award rate of pay caught up to the agreement rate of pay in 2008. Khans Group were required to pay employees the award base rate of pay, but the low flat dollar amounts for Sunday and Public Holidays remained unchanged.

The agreement nominally expired in 2011. The SDA was not covered by the agreement, so the SDA had no standing to terminate the agreement. It needed an individual employee to do so. The SDA wrote to its members in the Khan's group to encourage them to talk to the SDA about terminating the agreement, but no employee came forward.

In 2015 an employee finally approached the SDA about terminating the agreement and with the SDA's assistance the employee applied to FWC to terminate the agreement. When the agreement was terminated in April 2015 the Khans Group had been avoiding award entitlements of proper penalty rates for seven years.

Alternatively, some pre-existing agreements may provide an improved standard of redundancy pay or improved long service leave. To abolish them would disadvantage employees. It would be unwise to treat all pre-existing agreement made under Work Choices or earlier legislation in the same manner as AWAs. It may result in serious disadvantage to employees. The better approach is to apply the BOOT test to all these agreements and retain them if they pass.

It is proposed that all collective agreements made prior to 1 January 2010 should now be reviewed as the latest expiry of any of these agreements was 31 December 2014. The BOOT test should be applied against the modern award. If any such agreement fails to pass the

BOOT test, the Fair Work Commission will cancel the agreement after consultation with the relevant parties. If FWC decides the agreement fails the BOOT test it shall be given the power to make appropriate transitional provisions to the award (or to an enterprise agreement if one exists) over a short timeframe e.g. six months.

Those agreements that pass the BOOT test shall then be reviewed every three years and FWC shall again apply the BOOT. If they fail BOOT then they should be terminated by FWC after consultation with the parties.

This will see all collective agreements made prior to the Fair Work Act tested against the BOOT. In this way all employees and employers will be able to transition onto the Fair Work Act and receive the benefits of the Fair Work Act.

No-one should continue to be left out of the new system.

Recommendation
All collective agreements made prior to 1 January 2010 shall be reviewed and shall have the BOOT test applied against the modern award. Any agreement which fails shall be cancelled by FWC after consultation with the relevant parties. FWC shall have the power to make appropriate transitional provisions to move employees to the award over a reasonable period e.g. six months maximum. Expired Agreements that pass the BOOT test will then be reviewed every 3 years against the BOOT test. If the agreement fails FWC shall have the power to make appropriate transitional provisions to move employees to the award over a reasonable period e.g. six months maximum.

Agreements made under FWA

The issues that occur with expired agreements made prior to the FW Act are being perpetuated or will be perpetuated again with expired agreements that have been made under the FW Act.

To ensure this problem is addressed agreements need to be reviewed once their expiry date has been passed.

Recommendation

All other collective agreements made under the FWA shall be reviewed 12 months after the nominal expiry date. The BOOT test will be applied. Any agreement which fails shall be called on by FWC and the relevant parties asked to make submissions. FWC shall have the power to make appropriate transitional provisions or cancel the agreement.

Current Agreements

The *Fair Work Act 2009* allows employers to implement an agreement without pay increases which passes the BOOT at approval time. Over time however the relevant base rate in the award can catch up to the rate in the agreement, extinguishing employee benefits that existed at the start of the agreement. The result is employees could be paid the award base rate without the award penalties. This allows employers to legally avoid award entitlements such as the value of penalty rates.

Recommendation

All collective agreements shall be reviewed by FWC when the agreement rate becomes the Award rate. The BOOT test will be applied. If the agreement fails the BOOT test, FWC will notify parties to the agreement and parties will be bound to explore possible remedies. If no remedy is implemented, then the agreement will be terminated and the Modern award applied.

8. Enhancing Compliance Through Bargaining

The poor level of compliance in the non-union areas of the retail and fast food industries has been widely reported in recent years. Enterprise bargaining with a union party has a significant positive effect on lifting compliance levels inside companies. Regular meetings between Union and Company representatives at various levels, an enterprise Agreement which all parties have ownership of, experienced workplace Union Delegates and more open workplace cultures all add to greater levels of compliance.

Whilst the franchising model does bring added challenges, the more direct the union involvement the better compliance outcomes will be.

An Enterprise Agreement **can** drive improved compliance.

Often the underpayment of wages arises from the intersection of visa restrictions with poor compliance procedures in a franchising model. The 7–Eleven scandal is probably the best known but unfortunately is by no means the only one.

The existing provisions of the Fair Work Act do not permit a union to conduct time and wages inspections – as legislation in the past allowed – unless a member's name is specified. Employees who find themselves the victims of wages scandals are extremely reluctant to come forward and put their name to a wage claim and unscrupulous employers take advantage of this reality.

The problem of wage exploitation is now occurring on a growing scale in the 'gig' economy as the work of Unions NSW is uncovering. In its "Lighting up the Black Market – Enforcing Minimum Wages (Unions NSW, July 2017)" 78% of online job advertisements translated from three languages were underpaid – at an average of $5 per hour below the legal minimum. Cleaning, hospitality and retail sectors were the worst affected industries. The paper was based on audits conducted in March 2016 and April 2017 and unfortunately the prevalence of underpayment worsened in that 12 month period.

Union Industrial Support Enhances Compliance

The SDA distributes industrial advice to hundreds of thousands of members each year through a variety of media channels (letters, emails, text messages, website, social media Union Journals etc.) on their rates of pay, workplace rights and membership benefits.

Knowledge is a critical element of ensuring someone receives their correct rate of pay, receives their breaks at work, knows their health and safety rights and knows where to seek proper redress when they or their colleagues are not being treated fairly.

A snapshot of what an SDA Branch provides in Industrial support is now set out:

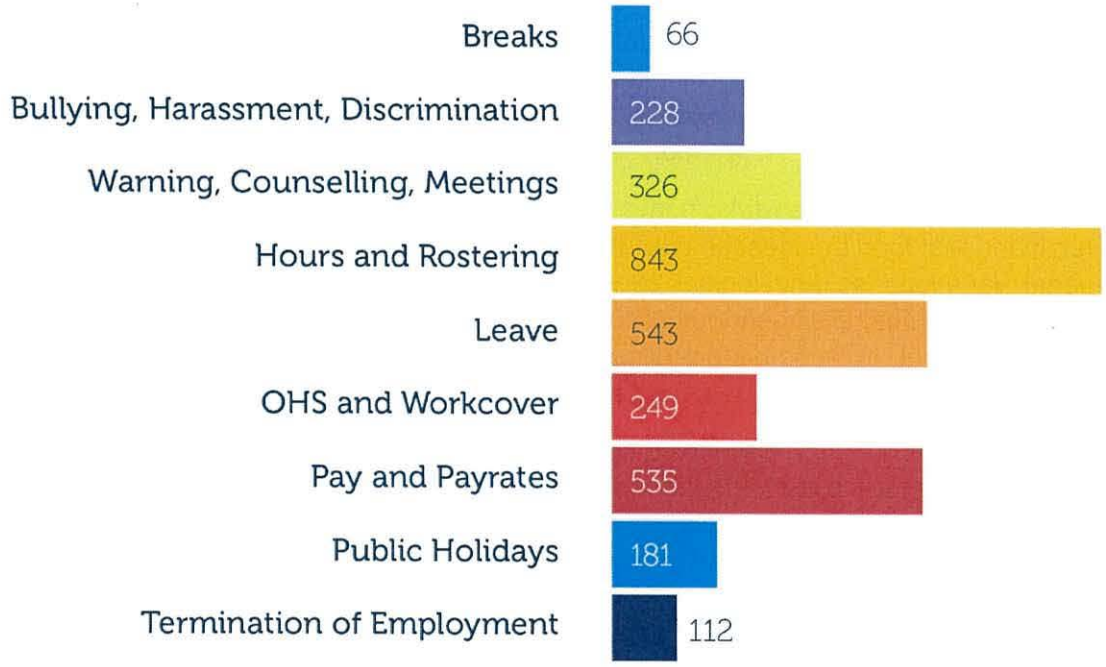
MEMBER SUPPORT TEAM

Over the past 12 months we dealt with over 3158 enquiries in Retail and Fast Food- not all have led to open cases. (86% of these came from retail workers and 14% came from fast food workers).

Union representatives and Organisers submitted over 500 case manager referrals and we received over 591 enquiries online.

ENQUIRIES RECEIVED IN THE PAST 12 MONTHS: 3,158

TYPES OF CASES



These statistics are from the median sized SDA South Australian Branch - this support is replicated in Branches across the country.

9. Conclusion

The past 35 years has seen unrelenting extensions to retail trading hours and during the last 25 of those years this has occurred concurrently with radical industrial law reform by Liberal/National Party Governments targeting lower paid Australians. During this tumultuous period the SDA has intelligently and determinedly navigated a path to secure proper protections and good industrial outcomes for its members and all those who work in retail and fast food.

The SDA's Enterprise Bargaining has been a central plank in successfully defending the take home pay of Australian retail and fast food workers during this period. Defending and advancing Award wages and conditions has been the other important plank in protecting employees in these two major industries. The passing of WorkChoices in 2005 threatened the very existence of our Award system but the Australian trade union movement and the Australian people refused to allow this to happen and rejected WorkChoices at the ballot box in 2007.

The SDA rejects claims that large employers have somehow received a competitive wage advantage over smaller businesses through enterprise bargaining in the industries covered by the union. History has shown that in a deregulated labour market it is small business that quickly takes advantage of the opportunity to cut wage costs. History also shows that even when enterprise bargaining is made readily accessible to smaller businesses few take it up if wage costs are maintained or enhanced.

Wages must be understood as take-home-pay over a roster cycle, a month, a quarter or a year. Retail and fast food businesses operate across 7 days of the week and are also subject to seasonal variations so any logical examination of wage costs must be made across appropriate time frames. Disingenuous arguments which call out rates on specific days in an enterprise agreement, but completely disregard the higher wage rates paid at other times across the roster cycle should be rejected as self-serving.

Enterprise bargaining in Australia, including in the retail and fast food industries, has often utilised loaded rates which transfer the value of some penalties into the base rate of pay. These loaded rates have been a part of the Australian industrial relations landscape for decades and the underlying reference point has always been 'take-home-pay' of employees.

If greater compliance and inspection powers were restored for industry unions like the SDA, then the take home pay of employees in the non-union sector would receive a significant lift.

The SDA has been a union that has remained diligent in its Award work even as the focus of our IR system turned to enterprise bargaining in the 1990's. It has been the effective pursuit of this two-pronged strategy that has resulted in Australian retail workers being amongst the best paid in the world.

Appendix "A"

Summary of findings

Average retail industry wage on a Purchasing Power Parity equivalent basis

The table below shows the ranking of the average retail industry wage on a PPP equivalent basis for the 13 countries in the study.

Ranking	Country	Average monthly retail industry wage (PPP) (USD)
1	Denmark	$6,327
2	Australia	$4,054
3	Germany	$3,592
4	USA	$3,033
5	Japan	$2,723
6	New Zealand	$2,656
7	Canada	$2,440
8	Britain[1]	$2,025
9	Hong Kong	$1,644
10	Spain	$1,633
11	South Africa	$341
12	Russia	$155
N/A	Czech Republic[2]	N/A

Key observations

- Australia ranks 2nd out of 12 countries when comparing the average monthly retail industry wage on a PPP equivalent basis.
- In reviewing the findings, SDA may wish to consider the following in relation to Denmark's ranking:
  - Denmark has a high sales tax (~25%) and a high net average tax rate (~35.9%)[3] against comparable countries. However, company tax is low against comparable countries. As a result, employees may demand a higher wage to support a comparable standard of living and employers may have the resources to pay employees a higher wage.
  - Income differences across industries are low in comparison to comparator countries. Retail industry workers have a comparable wage with many other industries in Denmark.
  - Denmark does not have minimum wage laws but has a high level of trade union membership. A significant proportion of Denmark's (minimum) wages are negotiated through unions. This may lead to improved results for the retail sector employees.

1 As PPP data is not available for Britain, the PPP conversion for Britain is based on the United Kingdom PPP data

2 Purchasing power parity data not provided.

3 Figures derived from the OECD. The average single worker net average tax rate across the OECD was 25.5% relative to Denmark's 35.9%.

Penalty Rates
Submission 8

February to June 2016 comparison: 2014 vs Award

APPENDIX "B"

Coles Employee U - Better Off Under The Coles EBA

Employee U is apparently the worst case example used in the FWC decision of not being better off overall, with the decision listing them as suffering an annual loss in earnings of $3,506 per year.

Below is a reconciliation using employee U's roster that was printed in the decision to see whether they are better off overall or not based on their total remuneration package including superannuation (both the EBA and Award have superannuation clauses) and only accrued leave that must be paid to the employee (ie annual leave and non-working public holidays, but not personal leave, blood donor leave etc).

The period looked at is the three months immediately before the FWC decision, 13 weeks of work and one week of annual leave that fully accrued in that period.

Quarterly Reconciliation 29/2/16 - 5/6/16 (14 week period):

Number of hours Awd	Type of hours Awd	Rate of pay Awd	Total pay for hours Awd	Number of hours EBA	Type of hours EBA	Rate of pay EBA	Total pay for hours EBA
(14h x 13)	100%	$18.99	$3,456.18	(28h x 13)	100%	$21.605	$7,864.22
(6h x 13)	125%	$23.74	$1,851.72	(7h x 13)	150%	$32.40	$2,948.40
(4h x 13)	200%	$37.98	$1,974.96	(1h x 13)	200%	$43.21	$561.73
(8h x 13)	OT 150%	$28.49	$2,962.96				
(4h x 13)	OT 200%	$37.98	$1,974.96				
Quarterly pay			$12,220.78				$11,374.35
Difference in weekly wages 13 weeks							**-$846.43**
Annual leave accrual on ord hrs including leave loading/ penalties	24 hours		$560.22 $12,781.00	2.77 hours	36 hours		$1,011.06 $12,385.41

February to June 2016 comparison: 2014 vs Award

APPENDIX "B"

Number of hours Awd	Type of hours Awd	Rate of pay Awd	Total pay for hours Awd	Number of hours EBA	Type of hours EBA	Rate of pay EBA	Total pay for hours EBA
Non-rostered public holiday benefit Labour Day, Easter Mon & ANZAC Day			$12,781.00	(7.2h x 3)	100%	$21.605	$466.66 $12,852.07
Difference in total wages payable for the 14 week period							**$71.07**
With Super of 9.5% on ordinary hours			$691.87 $13,472.87				$1,080.56 $13,932.63
Difference including superannuation paid							**$459.76**
Difference on total quarterly remuneration							**$459.76** **Better off**

A quarterly reconciliation for the quarter at the time of the Decision shows Employee U better off overall under the 2014 EBA compared to the Award by $459.76.

In this quarter Employee U received three additional days pay for non-rostered public holidays.

Across the year, based on Employee U's roster, they will be paid 8 additional days pay for non-rostered public holidays, with at least one non-rostered public holiday payable to Employee U in each quarter of this year.