



Australian Government
Productivity Commission

PRODUCTIVITY COMMISSION

**INQUIRY INTO WORKPLACE
RELATIONS FRAMEWORK**

MR P HARRIS, Presiding Commissioner
DR R LATTIMORE, Assistant Commissioner

TRANSCRIPT OF PROCEEDINGS

AT STAMFORD PLAZA HOTEL, ADELAIDE
ON TUESDAY, 15 SEPTEMBER 2015, AT 9.03 AM

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MR HARRIS: Good morning, welcome to the public hearings for the Productivity Commission National Inquiry into Workplace Relations Systems in Australia. I'm Peter Harris, I'm the presiding Commissioner for the inquiry. The purpose of this round of hearings is to facilitate public scrutiny in a number of capital cities and regional centres of the Commission's work to get comment and feedback. Following this hearing in Adelaide, hearings will also be held in Sydney, Ipswich and Melbourne. We'll be completing our final report for government in November 2015.

Participants and all those who've registered their interest in this inquiry will be advised via email of the final reports released by the government, which may be up to 25 parliamentary sitting days after completion; that is, early next year. We'd like to conduct all hearings in a reasonably informal manner, but I remind participants a full transcript is being taken. For these reasons, comments from the floor can't be taken, but at the end of proceedings of the day I'll provide an opportunity for any persons wishing to do so to make a brief presentation and that will around midday by the rough look of people we've got coming to these hearings today.

Participants are not required to take an oath but should be truthful in their remarks. Participants are welcome to comment on issues raised in other submissions as well as their own. I might remind people because we're recording and publishing this, try not to defame anybody. While we don't permit video-recording or photographs to be taken during the proceedings, social media such as Facebook and Twitter may be updated throughout the day. We do ask all members of the audience to ensure their mobile devices are switched to silent as I've done for mine too.

(Housekeeping matters)

I think our first witness today is the Working Women's Centre from South Australia. If you please identify yourself for the record.

MS DANN: I'm Sandra Margaret Dann, the director of the Working Women's Centre South Australia Incorporated.

MR HARRIS: Sandra, do you want to put anything on the record by way of an opening statement or comments of that kind?

MS DANN: Yes, I'd like to. Thanks for the opportunity to present today. We did make a detailed submission in March 2015. We stand by the recommendations in that submission. We will be expanding our written responses to the draft report by Friday. I guess I'd like to just emphasise that the group of workers that we are representing are, on the whole, low paid, not exclusively, low paid, non-unionised women. I'm here representing the three Working Women Centres in Australia; so South Australia, Queensland and the two centres in the Northern Territory, one in Darwin, one in Alice

Springs. We're very small agencies. We're funded by both the Commonwealth and the state to deliver services that assist vulnerable working women whatever their age and status. It's a free service to those women and it's a confidential service.

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We gather very rich data from the stories that women tell us every day and, where we can, we provide submissions such as to inquiries like this but also to government when we feel there's a policy correction that could be made that would assist vulnerable women workers. I did do a summary – and I hope you got that – of what I hope to talk about today. I can go through some of that or put myself in your hands to ask questions. There were two additions, I guess, two dot points that I'd like to add to that summary.

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The first is around recommendation 6.2 around the definition of a “workplace right”. I think the draft report seeks some further information about that. We would like to see a better definition of what a workplace right is. Our clients have variously argued that such things as making a complaint about workplace bullying was a workplace right but it's not clearly spelled out in the Act. We know there's another jurisdiction for workplace bullying. But there are many workers who are not picked up who are not eligible to take their matters to that jurisdiction. Several of our recommendations in our initial submission were to do with bullying and we accept that we'll have an opportunity when the stop bullying jurisdiction is reviewed to raise those again.

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The other workplace right that many of our clients experience when, unfortunately, they're working in roles, organisations where they're directed to do things that, to them, appear illegal or fraudulent. So they might be asked to sign delivery orders that they know haven't gone out. They might be asked to sign invoices for goods that they know have not been received by organisations. When they refuse to follow those orders, they are subject to termination of their employment. They have had a great deal of difficulty arguing that it was their workplace right not to follow an unreasonable direction. But it seems that, our experience anyway, is that following the direction of your supervisor or manager is a reasonable direction even if it's unlawful or results in unlawful acts or behaviour. So we wanted to strengthen that one.

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I guess we were quite disappointed that the draft report did not pick up, in our view, a very good analysis of women generally as workers. We made a number of recommendations around things like returning to work after parental leave, the right to request flexibility, which remains only the right to ask. There's no right of appeal when women are denied flexibility on their return after parental leave. We believe there are systemic and structural issues embedded in the laws that govern Australian workplaces, not just the Fair Work Act. We believe that this is a great opportunity to address some of those structural barriers. But we don't see it reflected as yet in the draft

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report.

5 We also have a major focus in this country at the moment on domestic violence. The Working Women Centres in Australia are credential to deliver training to workplaces. So our particular interest, we're not DV specialists, but our interest is in when domestic violence impacts on workers and their workplaces. We're seeing almost two women a week dying in Australia due to violence against women. Some of those women are subject to violence within their own workplace, some are subject to violence in other people's workplaces.

10 We believe that, again, there's an opportunity to beef up, if you like, some of the protections that we could embed in Australian law to protect women at their workplaces. I note the recent decision by Commissioner Roe in an unfair dismissal case which found that – it was in July this year – which found that a woman worker who worked in the same place of employment as her partner was found to have been dismissed. Commissioner Roe found that it was harsh given the issues surrounding their domestic relationship. He found that the workplace did not give due consideration to how she could continue to work in that workplace at the same time as her partner because an intervention order had been put in place.

15 I think if we're going to accept as a community in Australia that we have a responsibility to all address violence against women, workplaces are important parts of the community to make those statements. They are also places where perpetrators know that targets will be. So it's easy to find women. I think any modern Australian workplace that doesn't put in place something to protect their workers is going to find themselves on the back foot very soon. I'll leave it at that and happy to answer any questions.

20 **MR HARRIS:** Thanks, Sandra. Just let's stick with this Commissioner Roe decision which I'm not familiar with. Was the worker reinstated?

25 **MS DANN:** No. I think the outcome of that was that she had found other employment. She was awarded a settlement amount of – I've got a summary of it here.

30 **MR HARRIS:** No, that's fine. The point is one about reinstatement. See, you've actually highlighted that example, something that we're trying to address in the draft report. I'll go to the other things further where, as you note, we don't perhaps take on women as an issue per se. I'm interested in this. I want to ask you some questions about that. But just on this one, we had pointed out in the draft report that reinstatement, whilst it's considered a primary objective, is often very hard to accomplish in the circumstances. While we are not proposing to get rid of it, certainly we find it hard to imagine how, given the damage that generally occurs if there has been a dismissal that's subsequently proven to be unfair, that reinstatement can

5 plausibly work. So I like to ask everybody who comes up with one of these whether in fact they've got an example that shows that it can be accommodated. In yours in particular, if there was a domestic violence intervention order in place, it's very hard to imagine how you could possibly recommend reinstatement.

10 **MS DANN:** There was a discussion about that with Commissioner Roe and it was felt that the organisation hadn't even considered how they could continue the employment of both parties. It did seem to be possible. The woman was confident that her husband wouldn't perpetrate domestic violence at the workplace. They had different roles, they worked in separate areas. Commissioner Roe in his questioning seemed to consider that it would have been possible if efforts were made. But no efforts were made.

15 **MR HARRIS:** Let's just invert this. I'm not asking you to be an expert on this, but I'm interested in it, so I'll just ask the question. If you don't know, that's fine, it's not your role to know. But no effort was made by the employer to consider whether the male partner should remain in the business?

20 **MS DANN:** Well, I can't comment on that, but that would be an obvious question. In our experience where women report to us that their partner is either at the same workplace or is making threats or phoning the workplace repeatedly, coming in to the workplace, it's the woman who gets dismissed. Often the argument that's used is, "Well, you know, we can easily replace you, but your partner is an engineer, he's much harder for us to replace, so bad luck."

30 **MR HARRIS:** Did the woman divulge that she was being subject to domestic violence prior to the dismissal?

35 **MS DANN:** She had been overseas to attend some family business. She'd been away from the workplace for some time, I can't remember how long. She flew back into the country in the very early hours of the morning. An incident took place at the family home. Her phone was taken from her and smashed. So she wasn't able to ring the workplace and say, "I can't come in today." Her partner, however, rang the workplace and said, "Neither of us will be in today." The police had been called and the police had made a time for the parties to attend a Magistrates Court to get an intervention order. The woman did manage, as I believe, to get a message to a workmate via Facebook message to say that she wouldn't be coming in. But whether the workplace knew that there was domestic violence – in fact, if there had been domestic violence I'm not aware of that beforehand.

45 Back to the reinstatement, we do make comments on that in our written response to the draft report. We believe it's really important to keep that there. We see that there are many areas of law that are aspirational. I think if

we hold up the workplace arrangement as something worth preserving, it's a signal to both employers and employees that this is something serious, that if someone is not performing at a certain time for a certain reason, that there are things that the workplace can consider to assist that employee. Similarly, there are protections there for employers if things are going really wrong.

But in Australian practice I think holding up that workplace relationship as something that's worth preserving, worth working towards, worth achieving well is a great thing.

MR HARRIS: I think a problem with aspirational law is it misleads people when they're considering how the system operates. The first time that you encounter the system you find that its preference is to reinstate somebody. Imagine both parties never really had an engagement in this and they think – I would have thought both of them would potentially think, "That's actually not what I'm after here." The person who thinks they're unfairly dismissed thinks, "I should be better treated than this." But the idea of sending them back to the workplace as an outcome seems, on its face anyway, reasonably irrational. And the same for the employer.

We're examining this from the point of view of saying, "What's the way that the system, which appears to have credibility problems" – and I think as long as we use the word "appear" I think everybody can agree on that – unfair dismissal appears to have credibility problems that aren't necessarily related entirely to substance. But the appearance is just as important and, in part, is fed by this possibility that says, "Return to work is an outcome, possibly I'd prefer something quite different."

MS DANN: In our experience, there's a range of what people want out of an unfair dismissal. We rarely find ourselves asking for reinstatement because once – the aspirational part is sort of what workplaces should work towards in terms of keeping a workplace relationship going. If something goes terribly wrong, you're in a different ballgame. It's our experience that by that stage you're right, the relationship is pretty well broken down. There's not a lot to be gained in returning someone.

Our experience is that those things need to be considered on a case-by-case basis and it's our experience that they are. So applicants have the opportunity to say if they want to go back to work. For some women it's really, really important. If they're living from week to week and they need the money, they want to keep that job. It's often our experience that when they go back to work the relationship may break down in another six weeks or so anyway. But we have confidence in the way conciliation conferences are being conducted that due consideration is given to whether you want to go back or not.

If the relationship is so tarnished, then there's not a lot to be gained

from going back. I think the parties accept that. But it's important that they go through that process to consider what the outcomes they want are, what they can live with after the conciliation and move on.

5 **MR HARRIS:** As I said earlier, we're not trying to take reinstatement away. The reality is that reinstatement is rarely provided as a solution and probably wisely so, as you say. It's more impression that is left with the system and you hear these criticisms. So it's not just about the "go-away money - - -

10 **MS DANN:** Yes. We don't hold any truck with those - - -

MR HARRIS: But you understand the purpose.

MS DANN: Yes.

15 **MR HARRIS:** So our purpose in this whole process is to try and find a way by which the law is well-respected by all the parties and where it isn't respected because of perception rather than reality, we still feel a need to try and address that.

20 **MS DANN:** I guess there's other ways that can be addressed through better education, better awareness. Often those comments are made from a very ill-informed position from people who – there's a lot of people that get really annoyed if they get caught speeding too. They think there's something
25 wrong with the system. But there are laws, there are limits to behaviours that we as citizens accept. If you're engaging in practices that aren't giving people natural justice and a fair go in terms of maintaining their employment, then there are consequences to that.

30 **MR HARRIS:** We should move on from this because I'm sure that wasn't your primary purpose in presenting today. But that's been very useful. Thank you for that. On this appeal right, how would you see an appeal operating? Could we envisage the circumstances somebody is seeking more
35 flexible employment arrangements, possibly, for example, late in a pregnancy – would that be the kind of thing I - - -

MS DANN: No, it's more at the point of return to work.

40 **MR HARRIS:** So with a baby and feeding arrangements or - - -

MS DANN: Childcare, yes.

45 **MR HARRIS:** That's what I was actually trying to get to. Once there is a formal system of childcare available, is it really the employer's responsibility to provide flexibility when you know that by paying a fee you could have your child looked after? I was assuming you were thinking in the period where it would be either putting a three-month-old baby into childcare is not

probably considered a desirable practice and it's yet I need to return to work, I don't have income, what can you do to help me feed the baby at work, that kind of – I'm trying to stick with an example where we could all say this is a reasonable contention. Because I'm trying to work out how an appeal mechanism would work. Is that a reasonable one for me to mentally envisage or tell me if you've got a better one.

MS DANN: I'll expand on it a little bit I guess. A woman has had her baby, she's ready to return to work. She discovers that she can't get the childcare that she thought she was going to get. She may have had some problems settling the baby down in those few months before she goes back to work. She may have been hit with the realisation that parenthood is much more than she thought it was going to be and trying to juggle that role with her working role is not going to be what she thought it was going to be. So there is the right for her to request flexibility.

So she does that. The business owner or the employer then is obliged to consider that on business grounds. The way we see that operating is that the employer goes, "Let me think about that for a moment. No." That's about the extent of the consideration that's given to many women's requests. There is nowhere that request gets logs. Perhaps with a body like the Fair Work Commission that says, "This woman has made this request. This employer has refused the request for these reasons." That's often not spelled out to the woman seeking flexibility. There's no obligation to provide flexibility.

So what we see happening is that women go, "Well, I can't return." So they can't extend their leave, they have to get another job. That seems to be not a good business model. If her request was logged somewhere and there weren't adequate reasons given for the refusal of that, she would then have the right to appeal and say, "I've talked with all my co-workers. They believe that this situation could work," and she would appeal that decision.

MR HARRIS: By the Fair Work Commission?

MS DANN: Possibly.

MR HARRIS: Do you think the Fair Work Commission is equipped with capability to make such a judgment?

MS DANN: I think so. They've introduced the new jurisdiction on bullying. That took resources and training. I recognise that. It's possible that an appeal such as that could be seen as a dispute. The Commission is well-equipped to deal with workplace disputes. But there's no mechanism at the moment for a woman to take that as a dispute. And it's pretty resource-intensive for an individual to do that as well.

DR LATTIMORE: How many times has this occurred? Do you have an idea of the frequency with which businesses refuse?

5 **MS DANN:** I couldn't quantify it for you today, but it is – I guess if I could say that discrimination against women is probably the fourth biggest area of complaint for us. Out of that – sorry, fifth biggest area at the moment. Out of that, the majority of complaints have to do with trying to get back to work after parental leave. So negotiating something that will work for the workplace, for the worker.

10 **MR HARRIS:** Do you believe that there's much difference between small and large businesses in your experience in this?

15 **MS DANN:** It's sometimes easier for larger enterprises to accommodate a part-time return. It may be that the woman agrees to work in a different role for a while. But a lot of women get very upset about that too. They do have the right to return to their position, their original position. They may have to work in a different area and that raises problems, again, with childcare and transport and so on. Obviously if you've got more people it's easier to accommodate those sorts of request for flexibility. But it's not out of the realm of small organisations to do that either.

20 **DR LATTIMORE:** I guess one issue that arises whenever these sort of statutory interventions occurs the risk that women are subject to discrimination.

25 **MS DANN:** Yes.

30 **DR LATTIMORE:** We encountered that when we looked at paid parental leave arrangements and there was a concern for us. What do you feel might be the risks entailed by that?

MS DANN: Sorry?

35 **DR LATTIMORE:** What do you consider might be the risks entailed by a - - -

40 **MS DANN:** Look, in 2015 is it really realistic to keep saying being a woman in Australia is a risk for no other reason? I think there's a whole process for Australia to grow up, I guess, and accept some of the systemic – gender pay equity, for instance, is entrenched in Australia. We haven't seen any improvement, any noticeable improvement in that since something like 1988. It's still sitting at a pretty poor level. So there's a lot to be done to address some of those. Some of the ways of addressing them, because they do remain intransigent, is through the structural processes that we have.

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The argument that there will be a backlash against women we're very

5 cognisant of. It comes up every time we talk about pregnancy. I just had a conversation yesterday around concerns that an older group of women workers had about even talking about menopause or consideration of that, because we know that once women start talking about that they're seen as the problem in the same way that a domestic violence victim is seen as the problem for the workplace. They're the ones who suffer the backlash from that.

10 **DR LATTIMORE:** I might raise a question about the domestic violence issue.

MR HARRIS: Yes.

15 **DR LATTIMORE:** As you say, it's gained increasing prominence in a few cases. I mean, you've raised some issues about it. But a number of parties have talked about additional leave arrangements and that poses a number of questions whether it should be added to personal leave, or it should be a specific provision, how long, the likely uptake. Do you have any views about those?

20 **MS DANN:** Yes. We found that probably the most effective way is for enterprises to bargain and get a clause into an enterprise agreement. But we'd like to see something perhaps a little bit stronger in the NES as well really to flag the issue. There is a sort of gold standard model clause supported by the ACTU and the business community about what should be included in there. We've adopted that in our own enterprise agreement. In South Australia we're about to deliver a number of high-level sessions on the impact of domestic violence at work to government managers. Our premier has directed all government departments to become accredited under the White Ribbon Workplace Accreditation system.

35 We see that as a really good opportunity to talk with lots of people about whether they're happy with a policy. We don't think that's strong enough, but it's a start. We recognise that this is a new area for many people to turn their minds to. So we're very happy to support workplaces in considering what's the best way for them to address domestic violence as a workplace issue.

40 **MR HARRIS:** Let's think about the private sector with this. I can see the premier directing government departments, and that's all reasonably plausible. Indeed, public sector organisations have quite a lot of flexibility in carer-related leave and that sort of thing. Thinking about the private sector, so we understand from testimony given to us that possibly a million workers are already covered in some form by domestic violence leave or leave that is able to be taken in the context of domestic violence might be a better way of putting it. There's a wider proposition now to extend this.

Let me ask you, if you could, to consider the two alternative pathways for this. One is to see it happen as it has been happening via enterprise bargaining negotiations and possibly therefore extended into award provisions, but that's impossible. The other is by black letter law legislation. Indeed, this is true of most of the regulation issues that we look at. Those are the two rough pathways. There are other ways going about it.

Do you have a view on – I could see – I'm not setting this up so you can clearly say, "I would prefer black letter law." I'm really asking to gain acceptance of this, which has got to be at least partially important – maybe the principle is not capable of division but in practice it might be possible – would you see any value in seeing it better managed via the Commission itself, if I could call it that, either the Commission in terms of receiving enterprise bargains or, indeed, even reviewing award structures? Would you see any great ability in doing that than through a black letter law process for acceptance purposes?

MS DANN: I go back to the aspirational area of the law. I guess there's something symbolic about having something embedded in a law that signals to people this is a serious issue at your enterprise, you need to do something to make sure you don't run foul of the law. So there's an encouragement there. That's where I see the strength of a lot of laws. In terms of working within an organisation to carefully consider how domestic violence might enter their workplace, that's best done at the enterprise level.

But if it's black letter law that gets an enterprise to that point rather than the death of someone in their workplace as the motivator for doing something – we don't want to see that – then that's a great pathway. I think there's a lot of strength for everyone in an enterprise to be on board with why it is a workplace issue. And we're a long way from that awareness. I'm currently talking with a number of organisations, both private, not-for-profit organisations as well as the government ones I've mentioned, local governments as well who have said to me, "We want to do something. We want help. What have other people done? What could you deliver? How could you help us? But we're not ready yet. We've still got to take it to our board," or, "We've formed a subcommittee," or, "We've got a group of people working on it." It's the same sort of process that we saw with the rise and awareness around workplace bullying.

Organisations came to it tentatively. "Why should we be worried about this? Why is it an issue? What can we do? Why should we have to do that?" So we got over that hump. Then probably within six months to a year, organisations were contacting us directly and saying, "Quick, quick, we need a policy or we need a training program," because the competitors down the road were doing it or an issue blew up in their workplace that they didn't know how to manage and they had no policies or procedures to point to to manage the situation.

5 With the issue of domestic and family violence becoming something that's highlighted in workplaces, I see a similar sort of pattern. There's always great symbolism in having laws that point to the seriousness of the issue, but it can't end there.

10 **DR LATTIMORE:** You envision something that might be in the NES but more aspirational rather than specific in terms of days of leave, more along the lines that an employer should consider domestic violence when granting - - -

MR HARRIS: Or must have a policy.

15 **DR LATTIMORE:** Or must have a policy. That's the sort of thing you envision.

20 **MS DANN:** Yes, except we wouldn't be happy with must have a policy. It's a start. We know that it's easy to purchase a policy from someone else, stick it in a folder on the shelf and it's only there for when you get into trouble. You can pull it out and say, "Look, we have a policy." But if it's not introduced in the workplace, talked about, people don't understand there's a policy and why there is one and how they can access it, then it's as good as useless.

25 **MR HARRIS:** Can I question you on that? I'm not sure that it really is completely like that. If you have a policy document of your firm and you don't observe it, then in principle at least there's a breach of a contract, if you like, or the concept between - so it can't be - let's imagine a large organisation to start with, a bank, have a domestic violence policy. It's in your charter of corporate social responsibility. It's very hard to imagine a large organisation just ignoring it. If your interest is consciousness, raising an awareness and that kind of thing, we can pick up the large groups. So I guess you're thinking again about the smaller and medium enterprises who - - -

35 **MS DANN:** Yes, and many banks do now have - there was a sort of epidemic of banks adopting a domestic violence clause or policy because the competitors were doing it. So they were doing it to keep their competitive edge, to retain staff, to be good corporate citizens. Many of the chiefs of banks, certainly here in South Australia, are members of that's been run out of the Equal Opportunity Commission and they're considering violence against women as part of a raft of things to improve access for women in their organisations. Many of them are White Ribbon ambassadors. So they saw the value in adopting those.

45 Unless policies are revisited, unless there's practices embedded in things like induction training and people don't know about them, nothing is a

5 problem until it's raised as a problem. Many women, many, many women will not raise with their employer that they're experiencing domestic violence. They will do other things if they're not confident that talking to the boss is a good idea. They'll take long service leave. They'll access other ways of annual leave.

10 **MR HARRIS:** I guess you can see our conundrum is more obligations – and I note your comment earlier is this is not about making women the issue. But the conundrum is ultimately the more – how can I put it without being
15 offensive – the more potential liabilities you attach to a particular worker, the less you make them overall attractive to an employer. Now, a good employer will look past that. A bad employer won't and law can't really help that kind of behaviour. That's why I asked you earlier the question about enterprise bargaining, is it a process whereby there is an exchange and it's not just awareness raising then, but it's actually written into a document and whether that wouldn't be a better way - - -

20 **MS DANN:** Perhaps a better way of wording it is pointing out to employers the danger of employing perpetrators of domestic violence in their workplaces because there's quite a body of evidence coming out of Canada which looks at the cost to an organisation of usually men, unfortunately, using workplace resources to perpetrate threats of violence. So using the workplace mobile phone to continually text or harass someone with phone
25 calls, jumping in the workplace car when they're fired up and angry, having an accident, causing damage to the vehicle through the way they're driving, using the company car to go and sit outside the woman's workplace. Those things are now starting to be quantified as a cost to business. It's sort of outside the Fair Work Act I think - - -

30 **DR LATTIMORE:** Would that be the case? I mean, if you engaged in some of those behaviours it would be a misconduct charge which would be a reasonable basis for dismissal, for example.

35 **MS DANN:** Only if it's found out.

DR LATTIMORE: But that's the other question. Would you know as an employer whether a male in fact was engaging in violence? Because, just as women are probably reluctant to indicate it, clearly a perpetrator is equally, if not more, reluctant to indicate that they are.

40 **MS DANN:** Yes. But if we continue to make women the focus of additional burdens, if that's the right term, to the Fair Work Act, then you're right. Women have for hundreds of years paid the price for being women. Maybe it's time for a different conversation.

45 **MR HARRIS:** The final point in your suite of points, you've expressed support, I think by implication at least, but also I think in your submission

itself, that arrangements that are currently in place on bullying in the workplace. This is not just a women's issue; it's a generic issue in workplaces. But it does exemplify this area of putting something in black letter law, seeing the resourcing develop. In our draft report we observe that
5 it's a bit too early to be able to say whether this was a worthwhile step or not. But the performance in terms of complaint to the Commission has been far less than was anticipated. Again, you can say – and driven by, therefore, perception rather than reality.

10 But, first, there was this great perception that it will be a serious problem. It resulted in quite a lot of resourcing. The resourcing probably wasn't well allocated. Because of that we worry about resource allocation. So that's an issue for us. That said, you can understand the principle. No one's going to dispute that something that's generic across workplaces
15 shouldn't be somehow better addressed. This question of whether it's better in black letter law versus an inducement to agree but workplace by workplace does rise persistently in this. We're not making an adverse judgment obviously on bullying. We think it's too early to be able to say at this point what the story is.

20 But I wanted to ask you about your own experience, if I could. You earlier said you had a hierarchy of complaints. I'm not trying to make you the sole decision-maker obviously on this. But where does bullying rank in the hierarchy of complaints?

25 **MS DANN:** Very high.

MR HARRIS: So it's not the fifth highest - - -

30 **MS DANN:** No. It's consistently number 2 or number 3 of the most complained about issues. Again, it's an issue that doesn't seem to be shifting despite the introduction of the stop bullying jurisdiction. I think that's an important signal. But for many of our clients the point at which they start to raise issues about bullying is shortly before they're dismissed. Once you're
35 dismissed, you have no remedy in the stop bullying jurisdiction. People will tough it out, people will blame themselves for what's happening to them at work for months and months and months before they're able to articulate, "I'm in strife. I'm crook," or, "I don't know what else to do. I've tried to hang in there. I've tried to solve this issue. I've tried to talk to the boss but
40 the bullying continues."

45 Once you're dismissed, you have no remedy there. For us, also many of the complaints come from non-constitutional corporations, which workers from there don't have access to the stop bullying jurisdiction. So a lot of community-based organisations that have their management is a committee structure, perhaps they're under-resourced, small community groups where well-meaning people make up the board, but perhaps don't have the skills to

manage such charged issues as workplace bullying or they may be perpetrating the bullying themselves.

5 **MR HARRIS:** I mean, the contra view can be the system has proven to be quite acceptable in the sense that there weren't a lot of complaints and therefore it didn't result in very large interventions, if you like, by the Fair Work Commission continuously in management across the country that one of the perceptions was raised that might be the case. Now, that may also be true. We're I think too early in the process to be able to make the call on that
10 as well. But it presumably, in your view, did increase consciousness and awareness and that kind of thing. Would you say that's a larger benefit than potentially seeing the Fair Work Commission involved in a continuous series of hearings on this? I guess that's the worry with all the black letter law stuff. Can you envisage the Commission actually solving the problem?

15 **MS DANN:** Look, years ago I advocated this concept – I know it's a superficial term but a one-stop shop for issues like bullying where there may be elements of discrimination, there may be bits of other bits of law. A person may have an injury as well. So we see that for many people who
20 experience bullying their particular situation spans a number of jurisdictions. To go to one and lodge a complaint – I mean, complaint lodging, in our view, takes enormous energy and resources. When you're depleted from bullying, it's a really difficult decision to make.

25 People don't lightly enter into any process to resolve the issue if they don't feel up to it. So that knocks out a lot of potential claimants anyway. But if there was somewhere that people could go and have the bits of their bullying situation dealt with in a holistic way, that may be a better way of
30 doing it. I know at the state level our employment tribunal here is looking to something like that, not necessarily in relation to bullying complaints, but trying to consider the situation where someone has perhaps a discrimination claim and a WorkCover claim on foot at the same time.

35 What often happens is that one of those complaints drops off in preference to the other. But going through a workers comp appeal, for instance, will address some of the issue. But if you walk away feeling that that workplace never acknowledged the discrimination issues that were part of my situation, part of the reason why I got sick, then people don't feel too
40 happy about that.

DR LATTIMORE: I might pose a question about the Fair Work Commission. You weren't enamoured with our proposal for a merit-based panel appointment process, which you felt it might disadvantage women. Why did you feel that compared to the current system in which appointments
45 are simply made by the responsible minister?

MS DANN: Okay. I think the added words in the draft report were

5 something like we could look at other boards and committees to draw people with expertise from. Now, we know that the representation of women on boards and committees is not good in Australia. So there are immediately structural barriers there for women. People will then say, “Well, why don’t women put themselves forward more?” There are many arguments why they don’t do that and it’s not about merit. Women are meritorious.

10 We, I guess, feel, as many other parties would, that the whole area of workplace law, industrial relations is a complex area and it’s necessarily complex because workplaces are complex environments, people are complex, and that if you don’t have a background or an understanding or a knowledge built up over time of the complexities that can arise, then there’s, I guess, a danger of oversimplifying approaches and not giving due consideration to – I note you raised questions about history and precedents as well. Not giving
15 due considerations to precedents at law, which are really important in terms of future decisions.

MR HARRIS: I don’t know whether – I don’t want to assume you may have misunderstood what we had in mind, but just for clarification purposes.
20 What we had in mind is that expertise gets you onto the Fair Work Commission, not incumbency in the industrial relations system. That expertise should be directed towards the two primary functions; one is I have experience in dispute resolution, particularly increasingly amongst individuals rather than the waterside workers versus the waterside employers kind of thing because that’s where the work is going for the Fair Work
25 Commission, very clearly.

The other side is minimum standards where it’s a question of social and economic analysis of the circumstances of increased flexibility in labour
30 markets, for example. So what got you there was merit. I would have thought surely you would support the principle that says increasingly let’s put this out with competencies attached to it so that, regardless of gender, it’s your experience that gets you hopefully to be considered. The group that was going to consider that agreed – I think we had in mind drawing them from
35 some field that, again, didn’t give advantages to incumbent members of the industrial relations system one way or the other. That’s what we had in mind, to open up the field and make it more attached, as I said, to competencies that are relevant to the future tasks of the Fair Work Commission. I guess I would have thought, to the extent we considered this, it would have been
40 gender irrelevant.

MS DANN: Well, it should be but that’s not often the experience in practice.

MR HARRIS: But you’re saying (indistinct) might draw those people from
45 the selection panel who will get to be making recommendations, I guess, from, inter alia, high-level board positions and that, that we will be disadvantaging them because their gender was not strong enough. I mean, is

it only 25 per cent of women on boards – a rough figure, it's probably even less than that in some areas and more in others. But why does it mean because we're taking from that cohort that we're automatically going to find people who are biased against selection of women? Why does it mean that?

5

MS DANN: I guess it's been the practice even in merit-based selection that gender blindness occurs. That's the experience of women.

10 **DR LATTIMORE:** Why would it be different if an employment minister was making the choice and most of those have been men and at least common practice merit is an invisible aspect of that choice?

15 **MS DANN:** Okay. I guess I go to what is the problem we're trying to fix. Are we trying to encourage equal gender representation or are we trying to change the skill base of appointments? If we're trying to have an equal balance, then that's something that can easily be considered. If we're worried about the skills of appointments to the Commission, then that can be corrected, yes, partly by selection, but partly by induction, education, performance management, supervision, proper processes in place for debriefing and collaboration and so on.

20

MR HARRIS: I think we've commented some of those are quite deficient at the moment as well, particularly performance management.

25 **MS DANN:** If that's the problem that needs to be addressed, then perhaps that's where the solution should go.

30 **MR HARRIS:** Anyway, I appreciate your time and effort in making yourself available today. We have had relatively limited opportunities to talk to somebody with the kinds of perspectives that you bring. So it's actually been very valuable for us.

MS DANN: Thank you.

35 **MR HARRIS:** You might find yourself quoted in the final report. There's a fair possibility of that I think in the circumstances because we are quite interested in this aspect. Once again, thanks for your time.

MS DANN: I look forward to it. Thanks.

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MR HARRIS: I think we're going to go to the South Australian Wine Industry Association, if they're available. Brian, is it?

MR SMEDLEY: Yes, good morning.

45

MR HARRIS: You're a sole presenter today?

MR SMEDLEY: I am, indeed.

MR HARRIS: We can start off with you. Can you identify yourself for the record, please?

5

MR SMEDLEY: Brian Smedley, chief executive of the South Australian Wine Industry Association.

MR HARRIS: I should tell you, Brian, for technology purposes, these things will record what you say, others are going to find it hard to hear you. So feel free not to look at us, we'll listen closely. Feel free to look at others if you want to try and get the words across because usually in these larger rooms it's quite difficult for everyone to pick up everything and these don't broadcast to everybody concerned. Do you need to do a little opening statement kind of thing?

15

MR SMEDLEY: Yes.

MR HARRIS: That will be great.

20

MR SMEDLEY: First of all, I'd just like to say that we are here today as a result of a collaborative effort in the wine industry. The South Australian Wine Industry Association has particular expertise in industrial relations areas. However, our counterparts, both the National Winemakers Federation of Australia and other state bodies, do not have that expertise. So we have worked collaboratively towards putting our submission and the reason why we are here today. I'd just like to perhaps provide some general comments on the draft report, if I can.

25

MR HARRIS: Yes.

30

MR SMEDLEY: The inquiry presents, I guess, a unique opportunity to not only evaluate the current system, but, more importantly, to be able to bring new innovative and creative thinking to the task. The Wine Industry Association has recognised that the design and content of regulatory systems are influenced by history, tradition and culture. We also recognise that when reforming the system one of the aims should be to minimise unnecessary disruption to employers and employees, to minimise the cost associated with it and also get an understanding of changes and implementation.

35

40

Taking the terms of reference of the inquiry into account, the Wine Industry Associations argue that the focus should be the design of a new workplace relations system which, on the one hand, balances the need for fair and equitable pay and conditions for employees, including the maintenance of a relevant safety net, with the need for reducing red tape and the compliance burden for employers, enabling employers to flexibly manage and engage with their employees and encourage productivity competitiveness

45

and business investment.

5 In our view, many of the draft report's recommendations will lead to
modest improvements of the current system, particularly in relation to unfair
dismissal and adverse action claims in chapters 5 and 6 of the draft report.
We also support the recommendations in chapter 15 in relation to enterprise
bargaining to simplify the bargaining process and approval process of
enterprise agreements. However, we'd make the comment that a great
majority of wine industry employers who are not covered by enterprise
10 agreements, the recommendations of the draft report will make very little
difference in terms of reducing the compliance burden and the complexity of
the system that remains. Even if all of the recommendations were to be
implemented by the federal government, the workplace relations system
would still remain to be highly complex and also challenging for small
15 business.

I wanted to make some comments in relation to the outline of
submission that I provided to the Commission. I can continue to do that if
you wish.

20 **MR HARRIS:** Yes, no, I'm happy for you to do that. Just as you go though
– you're suggesting that the recommendations as currently stand don't alter
the complexity of the system because you're not involved in enterprise
bargaining - - -

25 **MR SMEDLEY:** On the one hand.

MR HARRIS: Okay. So in making your comments I hope you will address
the enterprise contract, which was deliberately designed for the purposes of
30 looking just at that. We have seen this word "modest" used many times. I'm
quite happy for us to be modest, if indeed that's where we are. Those who
want to be immodest, I'd like them to be specific.

35 **MR SMEDLEY:** Sure.

MR HARRIS: I've made that plea to the Business Council of Australia,
amongst others. You're not the only person here that I've asked this of. We
need to be able to get something that can improve the system rather than
simply say, "I'm dissatisfied with it and I can't show how to improve it and
40 you should find some way of doing that." It's very hard for us to do that
without somebody putting forward some evidence.

MR SMEDLEY: Perhaps let's continue with some of the things that we've
been able to gain from our memberships. We conducted a survey in January
45 2015 of membership to determine the issues with the workplace relations
systems that are of most concern to our employers. Asking them to nominate
the aspects of the workplace system that are the main sources of the

organisation's compliance costs, modern awards are the number 1 issue. The following comment I think is instructive from one of the survey participants.

5 Basically, they comment, "As a result of its complexity, it is not easy for employers and employees to follow the framework. Compliance costs include management time to interpret and determine what the statutory requirements actually mean and require. There is a need to seek legal advice and also guidance from my employer association on a frequent basis to ensure compliance in the terms of the award. There is also management time
10 to ensure employees abide by prescriptive requirements, e.g. breaks, and cost of payroll administration time in deciphering payments required following what has transpired by way of time worked, breaks taken and penalties that are applicable. Our current payroll system is not capable of processing the complex contingencies within the award. The prescriptive working arrangements, labour costs, overtime penalty payments and allowances inhibit business competitiveness. The framework is actually a distraction from our core business."

20 I guess going to some other complexity and compliance costs, particularly about multiple and overlapping modern award coverage, wine industry employers are predominantly covered by the Wine Industry Award 2010 which covers vineyard staff, cellar door staff, production, laboratory, warehousing involving staff. So a fully integrated aspect of our industry. However, the following additional modern awards commonly apply: Clerks
25 Private Sector Award for clerical administrative employees, as well as manufacturing-associated industries for trade-qualified maintenance staff.

30 In addition, in order to enhance many businesses the cellar door experience of a winery are increasingly offering additional products and service which are subsequently covered by other modern awards. This could include the provision of light meals and beverages such as a tasting platter to a fully-operating restaurant that employs chefs, kitchen hands and waiting staff. As a result, in addition to the above modern awards, the restaurant award may also apply. This means that a wine industry employer must be
35 able to determine which of those awards may or may not apply to their business, including other awards, to understand at what point the provision of additional service may result in additional new award coverage and the expertise and skills to manage instances of overlapping modern award coverage.

40 From a practical perspective, this means managing instances where an employee may perform work under multiple modern awards ensuring compliance under all of those modern awards and reconciling often conflicting requirements. For example, as part of the expansion of services a
45 cellar door employee may perform wine tasting, sales and associated service but also might take up work offered by modern awards which could include making and serving coffee and food service. For a small business employer

it may not be feasible to employ separate persons for these roles, meaning that the person or the work performed may be covered by multiple awards for one person.

5 Modern awards commonly have a standard prescription. The Wine Industry Award is no different and deals with the situation with multiple award coverage. However, in reality it's not that simple. Which modern award provides the most appropriate coverage may vary over time. It may well be that in any given day in the case of a cellar door employee a person
10 may be predominantly performing coffee and food service on one day and the next they may be performing wine tastings. Within a day, however, they could be interchanging and going backwards and forwards for all of those tasks.

15 I think that's just simply an illustration in our industry of some of the complexities that employers need to deal with from the day-to-day situation. There is also, I guess, a large lack of clarity of expression in the interaction of multiple base rates, loadings and penalties between those awards as well. For a large employer with a sophisticated payroll system, dedicated payroll
20 expertise, the effort involved in interpreting awards and agreements to determine applicable rates of pay and loadings, et cetera may be relatively small. However, for a family-operated small winery business, carrying out the relevant wages calculations involved considerable effort, time and resources. Even with a payroll system that can handle all these calculations,
25 understanding the formulas that result in the pay can be challenging as applying the award.

During vintage period in our industry, which can take place for a considerable period of time of three months probably from January of each
30 year, the issue is then exacerbated with numerous additional employees working over a 24/7 roster. Wine industry employers are required to navigate many aspects of the award, how they interact, how they apply to each other and how they apply differently to whether they are a permanent employee or a casual employee or part-time. There are examples, I guess, in
35 terms of where the system, from our perspective, are still complex and need to be addressed.

I guess just looking at the simplification processes that have been taking place over many years, you could almost say the last 30 years of our system
40 has been some form of simplification, I think we're still far away from having simplified awards that are easy to understand, easy to apply and that everyone feels that they are complying.

45 Conflicting and contradictory requirements, I guess, in modern awards place additional regulatory requirements on top of already legislated standards. For example, as recently as last month, the Fair Work Commission decided to introduce yet another modern award provision, which

is inconsistent with and overrides relevant state and territory legislation. In its decision referenced at 2015 FWCFB 3523, the transitional provisions Full Bench introduced a model provision in modern awards which requires employers to disregard relevant state and territory workers compensation and during the first 26 weeks an employee is in receipt of a workers compensation payment to maintain the employee's pre-injury wage.

Further, I guess another example is in another award where under the Superannuation Guarantee (Administration) Act employers are not required to make superannuation contributions where the employee earns less than 450 in a calendar month, yet under the Restaurant Industry Award employers are required to disregard this as the threshold has been lowered to \$350 or more. It just simply provides illustrations that employers need to know where to look and many times they don't know where to look and inadvertently breach awards. Therefore, there is a myriad of situations where employers need to be aware of what they are seeking.

I note the draft report doesn't really address the issue of duplication and inconsistency and we think that it's worthy of being dealt with. Moving to overly prescriptive and inflexible. In many instances the modern award system attempts to micromanage the employment relationship. For example, frequency of pay provisions may prevent an employer from determining the most appropriate frequency of pay. Another example is where a minimum engagement provision which prevent employers and employees from agreeing the working of shifts that are shorter than four hours for minimum engagement provisions. There is instances in our industry where that is really relevant in the sense that the cellar door employees, if you're going to bring in an additional employee to cover a lunch period, which might be for a two-hour period, the employer decides they can't do that because they've got to engage them for a minimum of four and therefore that doesn't happen. The other aspect is requiring the payment of a higher rate of pay for a whole day where the employee performs two hours of work at a higher classification level. In effect, there's something that lots of employers don't understand the reasons why those things happen.

We also move to understand the issue of part-time employment. Part-time employment in our industry has been a relevant provision for many years. But if you look at the take-up of our part-time provision it's actually quite minimal. I think the issue that we have is where common provisions in many awards require agreement in writing for a regular pattern of work specifying at least the number of hours worked each day, which days of the week the employee works and the actual starting and finishing times. What I would like to make the point is that where those prescriptive nature occur, employers simply opt for casual employees because there is flexibility in being able to do that because if you have to change suddenly because an employee is ill or you need to cover off or you have an additional order, you simply are looking at the best way in which to handle that. Part-time

employment generally doesn't allow that to happen.

Again, the draft report, from our perspective, doesn't really address the issue of inflexible and rigid working conditions in any great detail.

5

MR HARRIS: Sorry, can I stop you just before - - -

MR SMEDLEY: Sure.

10 **MR HARRIS:** You've listed a lot of problems with awards. I asked you, could you please refer to the enterprise contract concept at some point because this is the generic proposition that says if you don't like your award or interactions of awards, here is a way for you to redesign your award to suit the circumstances of your business. While by all means we're happy to get onto the record the problems that people have, we're not unaware of these problems. We have done five months of work – in fact a year's worth of work prior to this to get across the detail. Whilst your detail is still not irrelevant at all, it's just conceptually – if you can imagine an inquiry like this taking every one of 122 current awards and saying, "Here is a simplification. We're going to cross out this clause, we're going to vary that clause," you can see how that's a reasonably improbable scenario unless a government is actually going to go through and pass legislation to knock out all those things.

25 We can otherwise tell the Fair Work Commission to do that work itself. We can describe all these things or we could invert it and say as an industry, a set of firms, raise it as an individual firm, you could vary your award or awards to instead describe a class of employees and the way you'd like to treat them in future. I guess for our hearings we're trying to get people on the record as saying not just where you think we've failed – we will fail. Clearly we're going to fail everybody who doesn't like their current award because they don't like the current award. Yet, conceptually it's very difficult to go through and say, "This clause should disappear and this clause should be replaced by some new revised simple clauses."

35

Instead, we're trying to say firms should be able to create a flexibility option for themselves. Even as you go through – and I'm quite happy for you to keep going, but if you could somehow refer to solutions rather than just problems, that'd be great.

40

MR SMEDLEY: Okay. I guess we were going through the draft report in its order and the enterprise contract comes up at the end, but I'll advance to the enterprise contracts to deal with it now.

45 **MR HARRIS:** If, indeed you're going to get to it, I was just sort of thinking we've got 50 minutes and I was hoping you could get to things that we could actually discuss whether a solution is a solution, because that's really what

we're trying to find out here. Are solutions solutions as we propose them in recommendations rather than are we kidding ourselves and must do better in the solutions phase? We accept the complexity. But I'm not trying to get you not to put on the record if you're desiring to do that. It's just that I want to have enough time to be able to have an exchange with you about the solutions.

DR LATTIMORE: And on the solutions, we advance another stream to look at awards, which is this hotspots approach. So identify those features across awards that are the source of complexity, confusion to business. So we don't have to specify all the hotspots, but they are some of the things that you've mentioned. It would be envisioned through that process that you might also get resolution of some of these rather than us effectively doing a Fair Work Commission job in a very short period of time.

MR SMEDLEY: I'll move to the enterprise contracts because I think there is some solutions in that. The Wine Industry Associations do welcome the discussion of the so-called enterprise contracts and would strongly support its introduction. Whereas large employers in our industry have entered into and are covered by enterprise agreements, smaller employers are less likely to engage in enterprise bargaining and more commonly retain their modern award. There may be several reasons for this. They may think that it's not worthwhile negotiating a comprehensive enterprise agreement for a small operation with just simply a few employees and those employees may vary, depending upon vintage. They may expand during vintage.

It may also be an inability to compensate with higher rates of pay and the modern award to pass the better off overall test. Enterprise bargaining is often seen as too complex and too time consuming and is not a realistic, practical and suitable arrangement for the small business. I think one of the things that we do agree with was in relation to your assessment that small businesses, by and large, don't relate to enterprise agreements as being a solution for their business.

The enterprise contract canvassed in the draft report is an interesting model for several reasons. It recognises an arrangement for an individual or a class of employees or particular groups of employees. It recognises that current collective enterprise bargaining may not be a viable option for small business. The proposed process appears to be and looks like it's easy to understand and comply with for small business. The process really appropriately balances the need for simplicity with some safeguards for employees particularly. But while it does not require the Fair Work Commission approval, the fact that it can be terminated unilaterally by the employer after 12 months would ensure that an employee would not be locked into arrangements that did not meet their needs.

The lodgement and access to existing enterprise contracts would guide

employers and employees on appropriate content. The requirement on the enterprise contract passing the new no disadvantage test would also ensure that employees could not be disadvantaged. The Fair Work Ombudsman could take samples of enterprise contracts having been lodged and expect the compliance. However, to ensure that the enterprise contract operates as intended, the following issues, in our view, would need to be addressed.

During the operation of the enterprise contract, protected industrial action shouldn't be taken or wouldn't be taken. Upon lodgement with the Fair Work Commission, the employer could be required to complete an online check to ensure all mandatory requirements are met. Very often in our industry we find that if we give employers an ability to check their processes they will either ask the question before lodgement or that they will simply tick it through and recognise that they've complied or met the obligations.

The Act should also make it clear that the enterprise contract must not require the approval or consent of a person other than the employer and the employee or employees that will be subject to the enterprise contract. This is to ensure that other parties do not seek to interfere with the contract or hinder a contract from being negotiated. The Act should make it also clear that it is unlawful for enterprise agreements or any other arrangement to specifically exclude anyone from seeking, negotiating or entering into an enterprise contract. There should be appropriate penalty that should be provided to prevent such acts and behaviour.

On balance, we would certainly support the enterprise contract concept as it enables the flexibility that we would be seeking that in many cases within awards is not relevant or isn't present.

MR HARRIS: Can I stop you at this point and ask you a few questions about this generally? When you say no protected action during the period of the enterprise contract, you're trying to import – this is not a critical comment, this is just a clarification. You're trying to import a sort of concept from the enterprise bargain, which is once you've got an enterprise bargain in place, I want to get the cessation of that, can there be a protected action kind of period. So I see that. I must say we had designed primarily for small to medium enterprises because that's the area where statistically it looks like there is no – not a substantial take-up of what is the primary flexibility option. So we're trying to design a flexibility option for that particular group.

Would you think that they are genuinely exposed to the possibility of action, industrial action? I guess I was thinking of the – taking your example of someone who's running a winery and has a group of employees – you might have field hands kind of as one kind of category. That's a one line in an enterprise contract what the field hands do and how they are managed. That could be imported from different awards. As long as you specified the

different awards, you could actually import the conditions that you wanted for your set. Then you could have your winery employees in terms of customer-facing service and food and things like that. If I run with that vision, is it likely that you would face industrial action?

5

MR SMEDLEY: Currently in the way our industry is structured, no.

MR HARRIS: Your businesses tend to be very community-oriented, if I can put it that way.

10

MR SMEDLEY: I guess I was thinking not only in terms of possibilities but also in relation to the whole supply chain.

15

MR HARRIS: Correct. So I see that. In other words, take it out of wineries and into something that's more - - -

MR SMEDLEY: Like a warehouse.

20

MR HARRIS: Transport logistics.

MR SMEDLEY: Yes. I'm taking my wine to a warehouse for export and I can't unload.

25

MR HARRIS: A fair comment. I see your point.

30

DR LATTIMORE: To undertake industrial action you'd have to be at the point of negotiating. I mean, the way we'd envisaged that is that you had to have started genuine bargaining before such action could be taking place. Therefore, also you'd had to have a majority support determination to do so. During the life of an enterprise contract, that initial 12-month period, I don't think we'd envisaged that you would have scope for a majority support determination. That would be a matter at the end of it that that could occur. At least under current law you wouldn't be able to take industrial action.

35

MR HARRIS: The concept of the 12 months is so that employees could actually experience what the employer has in mind and see whether they do perform as they say, therefore, in which case there'd be no reason not to persist, one would assume, with that. But there's always the fallback to the pre-existing award at the end of the 12 months if you felt that; in other words, not necessarily a need to take industrial action at any point. You can, as it were, just envisaging that your formerly only award covered it as a workplace, you could fall back to the award. Anyway, it is something worth examining.

40

45

DR LATTIMORE: What about the mandatory requirements tick? Just go through how that exactly would work.

MR SMEDLEY: I think it's just simply a matter of getting a process to the point where it can be ticked whether you've actually done X, Y and Z.

5 **DR LATTIMORE:** But the actual implementation of a no disadvantage or BOOT, it would - - -

10 **MR SMEDLEY:** Well, not necessarily that, but I think the issue for our employers is generally what they say to us is that legislation is often very complex. If you can distil it down to give us a few points on a piece of paper that actually says, "Tick this box if you've done this. Tick this box if you haven't done that. If you haven't looked at that, you need to look at that. Get that form," et cetera. So that's what we're really talking about in endeavouring to provide a checklist for employers and employees to understand that they actually have gone through the process so that when they do seek to lodge they don't have any surprises.

15 **MR HARRIS:** I understand that. I guess conceptually we had seen in the initial stages the Fair Work Ombudsman would see them when they are lodged. They go to the Commission but the Fair Work Ombudsman would receive them from the Commission and could quickly assess whether an employer is likely to be compliant. Quickly, that may be wishful thinking on our part, although we've had some discussions with the FWO about this; so maybe not. But the advice would then potentially come from the FWO straight back to the aspirant employer.

20 **DR LATTIMORE:** Just one comment as well in answering, we're having problems with the recording. So you'll need to speak up.

25 **MR SMEDLEY:** Okay, thank you.

30 **MR HARRIS:** You said an online check. Because we had in mind – these are, as you say, quite complex documents. It's hard to envisage an online check for a – where a complex document is written down to a simpler set of conditions, which is I think what you would have had in mind.

35 **MR SMEDLEY:** Probably not. Probably what I'm talking about is to say, "Have you done X, Y and Z?" In other words, the things that go along with the process, not the process itself.

40 **MR HARRIS:** Of course. Okay. So you're looking at, yes, the process checks rather than the content checks.

45 **MR SMEDLEY:** Yes, absolutely. I recognise that the content will be absolutely difficult.

MR HARRIS: Fair enough. That's worth noting as well. And now I've lost where I wrote down my other things. Have you got any questions more,

Ralph, while I look at this?

5 **DR LATTIMORE:** The second part of my question was we've advocated a process for addressing award conditions over time. Would that, to some extent, resolve some of the issues that you discussed about award complexity?

10 **MR SMEDLEY:** I think the question from our perspective is, does it need to be in a legislative framework or does it need to be as part of a recommendation from the Commission? I think there is two different outcomes that will arise from each of those scenarios.

15 **MR HARRIS:** So you're thinking more – the FWC would need some guidance to be able to take this on rather than rely more, as we have in the draft, on the idea that if you change the nature of the Fair Work Commission Commissioners you will then change the organisation and it will become more aggressive in terms of running a reform process rather than reactive.

20 **MR SMEDLEY:** I think anyone that's been involved in a change process with an organisation such as the Fair Work Commission or as large as that would possibly recognise that it does take significant time to get cultural change invoked. I think employers probably don't have – and employees – the luxury of time.

25 **DR LATTIMORE:** What legislative changes would you be recommending, given that many of the matters here are very interlocking and complex?

30 **MR SMEDLEY:** I think the recommendations of the Productivity Commission need to be looked at in the sense of where there is a recommendation, can it be legislated?

35 **MR HARRIS:** In other words, on balance, your preference is to go the legislative route rather than the request for the Fair Work Commission to reform itself under the support via legislation of changes to appointment processes. You're saying there just isn't enough time, in your view, to be able to allow that to occur and it would be better for it to be directed at - - -

40 **MR SMEDLEY:** I mean, the change of appointment process is simply just one aspect of a whole change process that would need to be involved in terms of other processes. Even if you reflect back on the current award, modern award reviews, they've taken significant time, significant resources and I guess many organisations are finding it difficult to put in the necessary time and allocating money to undertake all of those processes. That, from our perspective, has simply been an ongoing situation, depending upon which system you've been looking at, over a number of years. If you've been
45 involved in a system in the last 15 or 29 years you probably had a number of award reviews that you've had to do both at a state level and then the national

system.

DR LATTIMORE: Just to clarify, in black letter law, can you give us some examples of what you'd want specified?

5

MR SMEDLEY: I guess I was going to go on and say, for example, with the issue about compliance burden and giving employers increased flexibility, I think we've given some options of some of the things that have been raised. I think we need to really ask the questions, why are certain provisions there and do they actually add value to the organisation or do they inhibit flexibility and productivity in the workplace?

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DR LATTIMORE: So it might be exclusions from awards that you might seek.

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MR SMEDLEY: It may be that or it may simply be recognition of provisions that give appropriate safeguards but still enable the employers to be flexible. That probably needs to be done on an industry-by-industry basis. Other than that, get to - I guess we had a couple of options in our paper in relation to the way in which you could simply tear down awards, increase the national employment standards or vice-versa. So I think there is a number of options that could be looked at in relation to trying to do that. As I said, ultimately we're trying to make sure that employers have – and employees can understand the conditions that they have to work under rather than read them and scratch their head and say, "I don't understand that. I better ring someone." Then we tell them that they can't do the things that they want to do within their workplace in terms of how they want to structure their work.

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For example, if we have a vintage period and we have the optimum time to pick grapes for quality purposes, they're not going to sit there and work out that Sunday is not the right day to get ripe. For employers that have to get harvest workers, et cetera in or machinery, that represents simply the day you have to do it. In other awards such as the Horticultural Award there is provision whereby those situations are taken into account. Yet in our award they are not take into account.

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MR HARRIS: This is why we looked at both solutions. The Commission, as you say, persisting perhaps with a different process, facing an awards but acknowledging one that does take a lot of time to emerge and to get a conclusion out of, and firms taking action themselves under the enterprise contract. Well, here is the simplified model that I'd like to apply and seeing the FWO look at it and go, "Won't pass sniff test," or, "Looks all right to us." I mean, I'm know I'm grossly simplified in saying that, but it was an attempt to have a description that provided – or a reform option at either end of the system and over time to see which would – and some may better suit the circumstances of larger suites of firms and some may better suit the circumstances of small firms that don't have the ability to participate in those

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more complex processes.

MR SMEDLEY: I think they're particularly attractive even for larger employers where they might have small classes of employees.

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MR HARRIS: I think we've heard that already and it's worth getting on the record. That's right, that larger firms could still take advantage of it where it applied in a particular set of circumstances. As you say, perhaps particularly for new aspects of new developments, where they're trying to hand into -
10 involving themselves in a new market where they haven't actually got current coverage in their EA.

MR SMEDLEY: Sure.

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MR HARRIS: We have heard of that too. When you also ask for no approval required from third parties – I must say I hadn't envisaged that. I can't imagine – you can see in the description we've given in chapter 17 of the report that we hadn't actually envisaged third parties being involved at all. It was for a firm to determine, then to lodge, FWO to give a response, if
20 necessary, but otherwise perhaps not. And the firm would proceed to engage an employee and say to existing employees, "We've got a new model, if you'd like to adopt this, or you can stay on your existing arrangement." That's what we had in mind.

25

You're envisaging a circumstance, I think, where a third party might, on seeing the lodgement occur, I'm assuming, seek to intervene for some other purpose. You think there should be a prohibition on that occurring.

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MR SMEDLEY: I think it detracts from the employee/employer actually sitting down and working out what's best, because in many cases I think employees actually do come to employers and ask for certain arrangements only to be told, "No, we can't do that." So the issue is that in many cases it's an equal opportunity for both the employer and the employee to move
35 towards something that suits them both in relation to the way in which they want to structure their work to meet their own set of circumstances.

DR LATTIMORE: You'd envisage, of course, that they could seek advice.

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MR SMEDLEY: Absolutely.

DR LATTIMORE: It's a question of whether they are at the table or not.

MR SMEDLEY: Yes.

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DR LATTIMORE: I mean, one issue that's been raised with us about the enterprise contract is a related one to IFAs, which is that sometimes businesses are weary of entering arrangements in which there's an ex-post

test of the BOOT on the no disadvantage test and would actually be comforted by an ex-anti tick by the Fair Work Commission. What's your view about that in relation to both IFAs and proposed enterprise contracts?

5 **MR SMEDLEY:** I think IFAs haven't been really working as they were envisaged, first of all. I think, in general terms, it's very difficult to get representatives of government, however they are structured, to provide you with an indication. So I guess employers generally want to understand that the arrangements that they've come to would comply with laws. They don't
10 want to necessarily have a situation of one or two years down the track of getting someone coming in and saying, "Well, that doesn't comply." So I think it's a good opportunity for employers to get that comfort, if you like.

15 There is a number of processes that you've built into the enterprise contract which would seemingly do that. I'm not sure exactly how that process would play out in reality. But certainly employers generally, as I said too about the checklist, all they really want to do is tell us how we've got to do this, give us some comfort about complying and we'll be doing the business or getting back to the business that we're actually in the business of.

20 **DR LATTIMORE:** We raised the issue of changes to the governments and appointment processes for Fair Work Commission. What are your overall views of those recommendations?

25 **MR SMEDLEY:** In general terms, I think we would be very supportive of those changes. I think the important thing is to ensure that there are the skills and expertise required to do the task that's required of them and to ensure that they've got that background that can actually add value to the process. Because, invariably, when there are disputes, the people that are actually in
30 dispute are the worst possible people to try and solve it. Therefore, it does require a person with some demonstrated skill in resolving issues between people such that the resolution can represent a win-win or at least an acknowledgment that you've done the wrong thing and this is the way it should have worked.

35 **MR HARRIS:** I'm sorry when I cut you off earlier to make sure I could get questions in the timeframe we've allowed for this discussion with you. If I have cut you off from saying anything about unfair dismissal, could you tell us about unfair dismissal?

40 **MR SMEDLEY:** Yes. Look, in general terms, I think the area for unfair dismissal does concern us in relation to the matters that can go to the Commission that seemingly lack merit but still get a hearing, that still result in a payment of money to either make the case settle or that it's seen as being
45 an appropriate thing, this is what you do. I think many practitioners operating in that sphere do have that vision that this is the way it works; you lodge a claim, irrespective of the validity of that claim, with a view to getting

some form of settlement from your employer. And that they'll do it because they don't want to have the expense related to defending it or proceeding with it.

5 I think those things need to be – we were told that the new system would address some of those things and we wouldn't have that situation occurring. But that system seems to have perpetuated into the life of the new national system. I guess we're looking certainly for safeguards that can either have a process whereby the merit needs to be determined early and so
10 therefore minimises the costs so that employers don't need to go through extensive issues of briefing either an advocate or a counsel to defend it and the fact that it may then settle.

15 **MR HARRIS:** In practice, we've suggested that the system be varied such that the Commission should first decide on the papers whether or not there is a prospect of a merit-based claim before proceeding to involve an employer and/or an adviser to a party, that is, before incurring expense. And continue down a path which says examine the merits rather than the observation process. Can I draw your attention to the fact that we've suggested that if
20 this kind of look at the merits and not the form kind of approach is adopted, that Small Business Code, which I don't know whether you're familiar with it, but the Small Business Code which attempts to advise employers, small business employers obviously, how to, again, proceed with process, we're suggesting that can mislead some small business employers into thinking
25 they are fully protected if they go down a path which simply observes the process and in practice that isn't the case.

We're suggesting if the triumph of form over substance is removed from in a way unfair dismissal is approached, that that Small Business Code
30 could then be eliminated because of this possibility of people being misled. Particularly small business is part of your – it's your industry. Do you feel that the removal so the Small Business Code is a bad thing in that sort of circumstance?

35 **MR SMEDLEY:** Look, I'll probably just take a step back from that and say the Small Business Code actually hasn't done much – hasn't been of much help at all. I think you're right, we do have a significant number of small businesses and they endeavour with their resources to do the right thing in relation to terminating or to ceasing the employment relationship in a valid
40 way. Invariably, there are too many issues that can trip them up and what could seemingly be reasons for dismissal end up being reasons to get a payment or to, in minor cases, getting the person back.

45 **DR LATTIMORE:** A prominent issue I guess in the press recently has been the issue of migrant exploitation through the vehicle of labour hire companies. In many cases the person who actually engages the labour is not aware of the terms and conditions that applies at the labour hire level. A

question would be what solutions might be adopted to address this issue? Do you have any views on that?

5 **MR SMEDLEY:** Look, I guess we can only talk for our industry. Our industry does use labour hire primarily because if you need to prune a hundred hectares of vines Monday you need a ready-made staff to be able to do that because certainly in regional areas it's very, very difficult to get say 20 workers at once in one place. Our industry, I guess, has been addressing and working with the Fair Work Ombudsman in relation to the Harvest Trail Program. I guess we're certainly also endeavouring to work with our winery and grape-grower members to ensure that the people that they engage, that they are understanding their obligations when they engage them. So it's not as simple as you deciding to engage someone to do work on your property. It's a much more complex issue of understanding the ins and outs of whether in fact a contract price that you might accept is actually meeting minimum standards under awards.

20 I think, invariably, there may have been an issue in the past where people understood that if you could get someone else to do it, you didn't need to worry about anything. But far from that. So we do have regular engagement with our winery members to ensure that they are aware of the obligations and also to encourage their labour hire operators, the principals of those businesses, to attend workshops and also training sessions to understand the obligations that they have, both in terms of the Migration Act but also in relation to the Fair Work Act but also in relation to Discrimination and Equal Opportunity Acts and things of that nature.

25 **MR HARRIS:** Penalty rates. It's an unusual set of businesses you've got as to whether or not they fall into the category that we had recommended be addressed in reviewing whether Sunday rates should fall back towards Saturday rates. Does that coverage problem – is it of concern for you?

30 **MR SMEDLEY:** It does in the sense that I think your report – the draft report actually highlights a number of industries which, for whatever reason, we would say we are similar. In the hospitality, entertainment, retail, restaurant and café industries, what we would say in that instance is that many of our cellar doors provide a tourism food and wine experience and that we too have similar issues with that Sunday rate, as you've highlighted in the report. Penalty rates do provide an area of concern such that, I guess, some of our businesses are reducing hours on the weekends. And bearing in mind that the visitor numbers to regions for tourism purposes primarily peak on weekends and public holidays.

35 **MR SMEDLEY:** But they find that they've reduced hours on weekends. In some cases, probably extreme cases, they are sharing so that one weekend you might open, the other weekend we open as a means of still trying to have a facility open in their region for business rather than incur the cost. We would

certainly request, I guess, that the wine industry employers that are providing that cellar door experience should be considered in relation to the penalty rates.

5 **DR LATTIMORE:** Would they not be covered by one of the awards that we'd actually specify under the work that we've identified in the sense that they are providing a set of services that involve food and drink?

10 **MR SMEDLEY:** That just exacerbates the penalty issue. For example, if they are currently – if I could sort of use this analogy. If you're a casual employee in our industry and you're wine tasting, it's 225 per cent. If you're serving a cup of coffee, it's 175. Currently I've got to weigh up what I do. In many cases they'll pay the higher rate because it's simply easier because you don't want to actually work out are you predominantly going to do
15 coffee service today or food service? If you look at many of the establishments that have a diverse offering, you could be doing wine tasting, someone could come in for a cup of coffee or a meal or a piece of cake and a coffee and you're suddenly doing that. Then you're going back wine tasting. The issue that we face is that there's going to be a disparity between the
20 actual penalty rate, depending upon the task or the activity you're doing. So we do think that that's been an exclusion from necessarily part of our business that is very similar to what's been done in other awards.

25 **MR HARRIS:** This is the reason I was trying to draw you straight onto the enterprise contract. Because the concept we had in mind, although we didn't have your particular highly-complex shifting of servers in mind, but in fact we had the restaurant – well, in my case anyway – where it can, again, see employees working from one kind of work to another. You describe that as being the function of a person who is primarily in service level 1 in your
30 restaurant business but might shift from being a front-of-house employee to a back-of-house employee even on your stove and then off again. It's that concept of trying to create your class of employee that we had in mind, which, again would apply potentially here by the enterprise contract.

35 But you're also noting that if there is variation in Sunday – Sunday rate moved back to a Saturday by the Fair Work Commission you'd also want to try and see that adopted in your set of business as well. I guess what I'll take from what you've said here is we should be thinking further about how do we move from what you might call generic reforms at the Fair Work
40 Commission level and firm level reforms and enterprise contract and how do we connect the two. That's what I might take out of that. It's not something that I had thought of, but I see your point.

45 You have both kinds of problems. (1) You're not necessarily covered in the suite of industries we're currently talking about in penalty rates reform. You may be covered – probably not covered in such circumstances. The enterprise contract wouldn't necessarily deal directly with that because it

wouldn't pass the no disadvantage test.

MR SMEDLEY: Well, it's unlikely to.

5 **MR HARRIS:** It would be a simple reduction. So that linkage needs to be better thought through.

10 **DR LATTIMORE:** Penalty rates are regulated flaws. They are not precluded from raising a rate on a weekend. Would you expect in labour market circumstances that you would still be obliged for market reasons to pay a higher amount on a Sunday than a Saturday or do you think you'd still get enough labour that you would be able to pay the Saturday rate?

15 **MR SMEDLEY:** Saturday rate. Look, I think the issue – and I'll describe it this way: in employment in regional areas it's sometimes challenging to get sufficient applicants to say you've got a shortlist. Therefore, you may have people that are well-known to you that don't pass the skill base or the competency test for your business. You may find that in larger regions, what I call forum shopping – they start at the bottom of a valley and they go from
20 each business to each business to say, "I'm available. What are you going to pay me?" Invariably, the large businesses that have enterprise agreements that can pay significantly over the award, which may or may not include comprehensively the penalty rates, you'll find that that's the attraction and that's where the labour gets filled.

25 Invariably, if we're looking at trying to fill positions in a peak period, you'll find that they will go and be attracted to the highest rate of pay and those positions will be filled first and then you'll go back down and up until you find there may or may not be some places that are certainly not fulfilling
30 any of their quotas. We've certainly had that in past years whereby we haven't had sufficient interest to fill the available positions that are vacant.

DR LATTIMORE: That's not a problem per se.

35 **MR SMEDLEY:** Well, it is a problem in the sense that if you've got X number of positions and you haven't got people to work, you then have to do something about that.

40 **DR LATTIMORE:** Pay more though.

MR SMEDLEY: Well, yes, I guess that's an easy suggestion and I suspect that small businesses that may be considering – and our industry certainly has had a number of studies done on profitability. If you look at some of the studies that are coming out at the national level which might say that 70 per
45 cent of small businesses are unprofitable, the question of paying more is an easy solution, I understand that; it may not be a solution for those businesses if ultimately everyone loses their job, including the owners.

5 **MR HARRIS:** What is it that – because I did cut you off earlier in order to get the central topic – what is there that I haven't allowed you to get on the record? Because I think we're at the end point of our questions for you from the previous - - -

10 **MR SMEDLEY:** Probably the only thing we were going to talk about was really in terms of understanding the aims of establishing the minimum standards division. I think we were simply going to highlight, I guess, that the previous experience that we've had with award simplification, it needs to be different, because if it's not, we're probably just simply sick and tired of different names being applied to the same type of solution resulting in not much change.

15 **MR HARRIS:** The only item in our report that got universal applause – and I literally mean applause when we announced it – was the ending of the four-year modernisation process as a recommendation. That included all parties, if I can observe, all parties at stakeholders meeting, apparently applauded the end of the four-year modernisation process. I think we have squeezed everything that can be squeezed out of the kind of structure that was used there. Our intention, therefore, was to move to this model which said pick an issue and a series of orders that were affected by it and review that. But we note your earlier comments about how long that eventually could take on even such a revised structure.

25
The minimum standards division, from our perspective, was really about increasing the capacity of the Commission to become its own adviser. In other words, rather than simply deciding on the submissions of the parties and picking a point between them, it was to become the initiator of change via analysis and research they conduct for themselves, which we have heard from some previous witnesses may, again, take quite a long time, too long in their view. But this was about how to undertake a cultural reform of a process which is including via recruitment not just of commissioners for the Fair Work Commission but also for the staff and to undertake that. So that's what we had in mind with the minimum standards division. They would be employed primarily for the purpose of dealing with the kinds of functions that go in relation to that, minimum wage and other minima affected by Fair Work Commission decisions and that the tribunal's division would look at dispute resolution in particular. That's what we had in mind there. Clearly if we've not conveyed that sufficiently - - -

MR SMEDLEY: No, I think that's all conveyed. I think the issue again we come back to is really about the time that these things will take.

45 **MR HARRIS:** It's going to take a long time. Therefore, there's an uncertainty about whether or not it will deliver a result.

DR LATTIMORE: If you had to choose the priorities, what would you choose?

5 **MR SMEDLEY:** I certainly think the modern award process of review now is taking far too long and so, therefore, there needs to be a circuit-breaker, if you like, of some description to get that process moving. I think the other aspect is really the small business. The inflexibility of the system needs to be addressed, complexity of the system. I mean, when you have a number of employers who may have simply a handful of employees that may have a number of awards that they need to respond to, you can hear their pain when they ring you for advice because they are simply saying, "Look, we've read this. It doesn't make sense to us. Tell us what we have to do. This is the working pattern we want. What's the solution to that? What's the options for us?"

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20 Invariably, in many cases they don't know the question that they're asking and, therefore, they can't be expected to be experts in something that's taken many practitioners many years to understand how awards operate, how shift work operates. It gets much more complex when it happens once a year such as vintage for employers to understand how does a 24/7 shift pattern work, what is going to be the problems that I'm going to envisage at start of midweek. It stopped because vintages sort of started and stopped. All of those things don't respond easily to the way in which awards are structured because they envisaged a pattern of 24/7 that can go on for a number of months or weeks or whatever. Those types of issues are really practical issues that are the day-to-day that are frustrating and cause many employers and employees great difficulties.

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30 **MR HARRIS:** That's been very useful to get on the record. Thank you for your time and attendance today and the effort you've obviously put into the revised propositions that you put forward and for your help in answering questions. Thank you very much.

35 **MR SMEDLEY:** Thank you.

MR HARRIS: We're going to have a five-minute break for everybody and then we'll start up.

40 **ADJOURNED** [10.57 AM]

RESUMED [11.10 AM]

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MR HARRIS: So I think we have Professor Andrew Stewart now for the next hour or so. Professor, could you identify yourself, please, for the record?

5 **PROF STEWART:** Professor Andrew Stewart, University of Adelaide Law School.

MR HARRIS: Do you have opening comments to make, or - - -

10 **PROF STEWART:** A couple of brief ones, and I guess I'll ask a question in a minute about how you'd like to proceed.

MR HARRIS: Sure.

15 **PROF STEWART:** First of all, just briefly, I'm here, I guess, in three distinct capacities. Two of them involve speaking on behalf of groups of academics who have made submissions in response to the draft report, and I gather you've received a copy of each of those. I'm also happy, really, to take questions on any aspect of the draft report, but I guess I'd just like to stress that in doing that, I'm then speaking on behalf of myself, rather than necessarily on behalf of these groups. One of the groups, the shorter of the two submissions, really mainly just for the information of the Commission, 20 this is the submission on behalf of Mark Bray, Johanna Macneil, Sarah Oxenbridge and myself, which simply alerts the Commission to what we think is some very, very important research we've been doing on some very innovative things that have been happening in the Hunter Valley over the last 25 20 years, and some innovative things which are very much developing within the Fair Work Commission right now, in terms of taking the Commission beyond the traditional Industrial Tribunal role of waiting for disputes to come to it, but instead, being more proactive in looking to help organisations 30 improve their workplace cooperation.

We've indicated in that submission that we have some research that we've been writing up, which isn't currently publicly available, but which 35 we'd be happy to make available to the Commission on request. This will be moving into the public domain at some point; just that we may be able to share some of our results with you while you're still working on this report before we otherwise publish.

40 **DR LATTIMORE:** We'd certainly request that.

MR HARRIS: Music to our ears.

45 **PROF STEWART:** So should I assume, therefore, that if I or one of my colleagues gets in touch directly with the Commission to discuss that?

DR LATTIMORE: Yes.

5 **MR HARRIS:** Yes, and we'll work out how to do it without causing you equal difficulties in return, but particularly getting access to information we've researched and already conducted is incredibly valuable for us at this stage.

10 **PROF STEWART:** Great. Thank you very much. The more substantial submission is by almost the same group that put in a submission to the Commission earlier this year, some slightly different lead authors, but I'm happy really to speak to any part of that submission. We've covered 10 main issues in this submission. I suppose I have my own views about the ones I think might be more important or of more interest to the Commission, but I'm in your hands. I can run through, give a quick summary of main points, but I'm also happy if you just want to go straight to picking out issues and talking about them, or indeed, asking questions right away.

MR HARRIS: Okay. I'd prefer to just pick bits and pieces - - -

20 **DR LATTIMORE:** So would I.

25 **MR HARRIS:** - - - rather than go through it, because particularly with these sorts of things, we'll almost certainly run out of time. First off, one of the hardest things to provide government with better advice on, and we have already included in the draft report, is this question of going back to a no disadvantage test from a better off overall, and moreover, how to define a no disadvantage test. You will notice from the submission, we've gone with the general preference of not just submitters, but other commentators which said there was greater clarity around no disadvantage. That's almost a statement of principle, because in practice, it's very hard to draw down specifically what was clearer.

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35 Conceptually, people seemed to be able to grasp no disadvantage more readily than better off. Is it better off by a dollar, is it better off by a minute, is it better off by some ephemeral concept, and how do I trade ephemeral for less than ephemeral, for something quite certain. Better off overall seems to have imported great uncertainty than no disadvantage, but if we came to describing how, it's actually quite difficult. Do you have perspectives on that, that you'd be able to put on the record for us?

40 **PROF STEWART:** Sure. Well, first of all, I think the assertion that the no disadvantage test had greater certainty, I know of no evidence which would substantiate that. I mean, it seems to me that's just a claim based on I don't know what. We've indicated in the report, we've pointed you to really I think one of the best and most useful bits of empirical research that labour lawyers have done on the Australian system, which is the series of studies done on the operation of the no disadvantage test under the Workplace Relations Act as applied both by the Office of Employment Advocate to

AWAs and by the Commission, the then Industrial Relations Commission, to certified agreements.

5 That test I think unequivocally demonstrated what any practitioner at
the time would have told you anecdotally, which is that you got different
answers depending on who was applying the test and what type of agreement
they were looking at. The research showed that union agreements, that the
application of the test tended to be about right, although there was also a
10 tendency in some cases for Commissioners to assume that if a union was
involved, it must be okay, and I think there is an argument that, over the
years, some union agreements have slipped through when perhaps they
shouldn't have.

15 Non-union agreements, on the other hand, which weren't contested by
unions and individual Australian Workplace Agreements, there were horrific
examples of agreements being approved that should absolutely have failed.
More generally, we had very little case law on the no disadvantage test. It
wasn't clear whether it was a test that had to be applied to every individual
employee or to classes of employees, although the routine extraction of
20 undertakings tended to, in a sense, cover up that problem. I'm happy to be
corrected by someone pointing to some body of research which counters
those findings and which counters all of my anecdotal experience as
somebody who works not just as an academic, but as a consultant advising
employers, to suggest that the NBT, that there was a huge amount of
25 uncertainty.

I think, well, I'm absolutely convinced that the uncertainty has reduced
under the BOOT, not because of any difference between the BOOT and the
NDT, but simply because the Commission's processes, inheriting some good
30 practices from the Workplace Authority. There's a lot about the current Fair
Work Commission that's actually a melding of the old Industrial Relations
Commission, the Workplace Authority and the Fair Pay Commission. I think
now you've got far more consistent scrutiny of agreements. Yes, there's still
uncertainty, but that's because no matter how you frame either an NBT or a
35 BOOT, you're still left having to answer difficult questions like, if as an
employee you have less control or less certainty over rostering, does an
increase, in \$1.50 an hour on your basic rate of pay compensate you for that?
It's pretty easy to see that you can't possibly write an equation or an
algorithm which will answer that question. It's a matter of impression.

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MR HARRIS: Well, but then why is it that employees voting for that aren't
sufficient? In other words, why is it that it isn't acceptable that, you know,
they make that trade-off rather than somebody else trying to find wisdom
under guidelines? Why wouldn't we just accept the vote?

45
PROF STEWART: Well, the answer is lack of information because in most
cases, employees will not know enough about the operation of the relevant

award and understand enough about the operation of the relevant enterprise agreement to be sure. Look, I don't think anyone - leave aside the suggestions that we should abandon the idea of a safety net and I think in your draft report, you're absolutely clear that the award safety net is to be maintained. It seems to me to follow inexorably that you need an independent assessment of an agreement against the relevant award. You can't leave it to the employer to self-declare, you can't leave it to employees to be sufficiently informed to make that decision.

10 We're talking about a group of my colleagues at my own primary workplace, a group of academics. Would you expect them to be able to make those judgments? Yes, of course. Even then, I'd suggest that you might expect them to and many of them would know very little about the intricacies. But of course, as in the higher educations in many instances, 15 enterprise agreements are so far above the award safety net it kind of doesn't matter, and that's the point. It's really, I suppose, in many enterprise agreements, this isn't an issue because the gap between the safety net and the enterprise agreement is sufficiently great.

20 When we get down to the major retail agreements or agreements in community services, or in hospitality, where you find employers trying to get advantages, trying to get flexibility, but either not willing or not able, indeed, to offer very much in return, and certainly not to rely on a significantly higher base rate of pay. Always going to be a difficult decision, and to me, 25 it's a difficult decision whether you're talking about the BOOT or the NDT. Now, I think we've conceded in our submission that, symbolically, it might be right that a BOOT of its nature is considered to set a higher threshold than an NDT, even though legally that's clearly not the case.

30 Legally, the only distinction between the two, as we point out in the submission, is that if you have an agreement that incorporates the award word-for-word, it must pass the NDT and it must fail the BOOT. Everything else, we're just in the realms of this uncertain value judgment. As long as we're going to have the safety net, I just don't see that we can avoid there 35 being a degree of uncertainty. I think what we can do and what the Commission has done is get a lot more professional and consistent about using staff within the Commission rather than relying on members solely or primarily, getting staff within the Commission who are very experienced at being able to compare instruments, understand the awards they're dealing with, have seen plenty of agreements before. Yes, there are still some 40 puzzling, perplexing and occasionally downright wrong decisions by members, but they tend to get picked up on appeal.

45 So, look, it's not that there's anything inherently wrong about going back to an NDT, it's just that I don't see it solving the problem of certainty.

DR LATTIMORE: So if we went back to an NDT on the basis of that symbolic issue, would it be possible to maintain the growing certainty that surrounded the BOOT and import it into that new arrangement - - -

5 **PROF STEWART:** Yes.

DR LATTIMORE: - - - or would it be at risk?

10 **PROF STEWART:** Absolutely. I don't see why that would - that improvement in decision-making processes and consistency of outcomes, which again, to be fair, I'm supposing because it would be great if - I mean, one clear option here will be for the Commission itself or the Ombudsman or the government, to commission some independent research of the Mitchell et al type, to actually just go through and make an independent assessment to see whether agreements do appear to be passing the BOOT or not. But, you know, I don't have a problem personally with shifting back to an NDT. I would expect the current system to continue and work reasonably well; just that I don't think we'd expect to see any dramatic changes.

20 **MR HARRIS:** Although the two aren't - moving on, but sticking to the theme of perception, which is reasonably important in public policy when it comes to credibility of systems and particularly really complex systems, so the NDT might create this perception which is quite important, of confidence in the system. In other words, do I have to satisfy something that I am slightly more confident about than something I am slightly less confident about.

PROF STEWART: Yes.

30 **MR HARRIS:** We did the same in unfair dismissal. In unfair dismissal, it appears to be the case that dismissals really don't - aren't the great impediment to future recruitment that people might have suggested, but there is a perception that I am at greater risk because of an unfair dismissal system, of ending up with an employee that I either can't dismiss or I'll have to pay, you know, to go away. So, again, we went with a proposition that said - increasingly empower the Fair Work Commission to first make a decision in the papers where we note, again, it has the same problem of, and how much more certain is that than the current system, and I guess the idea is it will increase people's level of confidence that they will, first, have an examination which does not involve them having to appear with an advocate and devote business time to turning up at the Commission and that kind of thing.

45 In other words, it's again, to increase confidence in the system. Would you have the same general perspective, that this is probably not going to make a lot of difference, or - - -

PROF STEWART: No, I think this raises some different issues. There's an interesting echo in some of the Commission's proposals with unfair dismissal to the original Forward with Fairness policy that Labor released in 2007. That policy spoke about the idea of a much simpler and much quicker system, wouldn't necessarily require a hearing, you might have a conference where - not necessarily held at a Commission, but perhaps held at the workplace, in which a Commission member would make a quick assessment of the merits and if they could resolve the matter quickly, they would.

10 That vision disappeared during the drafting of the legislation and it disappeared because it simply wasn't practical without throwing the concept of procedural fairness out of the window. The difficulty is, if you're going to allow the Commission to throw out claims, procedural fairness requires - by "procedural fairness" I mean the general rules about how administrative or
15 decision-making processes should run, as required by the courts, yes. Procedural fairness requires that a person be given an opportunity to have a say before their case is thrown out. That's one problem. The other problem is that in a category of unfair dismissal cases, you've got contested evidence.

20 You've got she said/he said issues, you've got perceptions very much at variance. Frequently, personal issues between supervisors and the dismissed worker or between dismissed workers and co-workers. In a practical sense, how is the Commission going to be able, just by reading the papers, to get to the bottom of those things? Particularly where - - -

25 **MR HARRIS:** Can I suggest, switching to anecdote is, you know, it's what we're necessarily going to have to do if I can - and we all know that's not a sound basis for making a decision, so I'm not going to make - try and suggest we're going to use these as examples by which we would then justify a
30 policy, but there are - many of the notorious examples that have been drawn to our attention are ones in which, if the Commission had started out from the proposition which said, "Did this aberrant behaviour occur and if so, is it the kind of thing that a reasonable person would think there's no solution to this but dismissal." That's what we had in mind, and it's the celebrated cases that
35 create this perception that unfair dismissal, and possibly validly, too, but that unfair dismissal is unreasonable.

40 So starting from that proposition, you know, the intoxicated Sydney Ferry captain, sort of thing, but start from the proposition and say, is there really any solution here other than that, would enable you to potentially then subsequently look at, and if indeed there is some horrible egregious breach of process, well then, we've suggested you might fine the employer for breach of process, but it wouldn't be a reward to the dismissed person. So that's conceptually what I think was in mind.

45 **PROF STEWART:** Yes.

MR HARRIS: And it would try and empower the Commission to look there first, but not otherwise dismiss the idea that process wouldn't still have to be observed. The question is, who really benefits from the failure of process?

5 **PROF STEWART:** So being clear here, we're talking about two different process issues. What I've previously been talking about by "process" is the Commission's process being fair, not the employer's processes. So perhaps I might just go back and clarify what I was saying before, clarify the problem I'm seeing, and then come back to the other issues about process as opposed to substance from the employer's point of view.

MR HARRIS: Right.

15 **PROF STEWART:** So the problem I'm - we say in the submission that we see no reason why a merits-based conciliation couldn't be an option in the right case, and we see no reason why there shouldn't be an encouragement to the Commission to do more screening on the papers, to do more triage, effectively. If you look at the way that the Commission's been running the Anti-Bullying jurisdiction, that seems to have been working very effectively with a fairly sophisticated set of responses which don't assume that every case goes forward, but which can involve some quick advice: "Look, maybe you'd be better taking this somewhere else" or "No, we really don't see the merit."

25 So, in fact, our response is not meant to suggest that there's nothing in these suggestions, it's just that the limit that you hit is the limit of procedural fairness as imposed by the courts on a body like the Commission. If you have the Commission throwing out a case before properly hearing from the applicant or purporting to make findings of fact before hearing any witnesses, those decisions are going to be readily overturned by a court. You could anticipate that problem by writing into the legislation that the Commission is not required to observe the rules of procedural fairness, but in a jurisdiction which is meant to be all about the fair go, that's a very odd thing to do, and that's what, as I understand, essentially brought the original forward with fairness vision for how the Fair Work unfair dismissal process good work

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35 undone. They just couldn't reconcile those problems.

40 But again, I'm stressing, I think, in a category of cases earlier screening and an earlier focus on merits would actually be perfectly feasible, but it will tend to be in cases where you're not arguing about the facts and it will tend to be in cases where both parties are adequately represented. And by "adequately represented", I don't necessarily mean with lawyers. You've got big employers with experienced HR people and you've got someone who's got a union acting for them or someone in a - a senior employee who knows what they're doing, that kind of process can work more effectively.

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DR LATTIMORE: So just on that, conciliation process, as currently conducted, is relatively cheap.

PROF STEWART: Yes.

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DR LATTIMORE: It doesn't involve a member, it involves the staff person who's familiar with the conciliation process, it's undertaken by a phone, undertaken very quickly. We've actually observed one. If you have a filter of the kind that you've described, with representation, some assessment of the merits, so to speak, in a process that involves both parties putting forward their side of the story, that could actually be more expensive than conciliation and a party might say, "Look, I don't really want to go through that merit-based approach, I'll go straight to conciliation", and as far as an employer is concerned, paying \$3000 might be a lot cheaper than, you know, adopting that filter process.

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PROF STEWART: Look, I think that's absolutely right and that's why our submission, we've spoken about this, is giving the option to the parties to do that. An employer that felt fairly strongly that it wanted to contest a claim of unfair dismissal was not inclined to make the usual commercial calculation and pay some go-away money, might well decide that it would rather get on and get to the merits of the matter quicker. Another employer might well decide, well, no, no, why don't we just follow this quick and easy process?

20

The current process we've got, I would characterise as one which dispenses very, very rough justice, not in the sense of working unfairly, but it typically results in the under-compensation of people with really serious claims and the over-compensation of people with marginal claims. But that's just a function of the way the economics of these cases work out. People make those calculations.

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30

MR HARRIS: But it adds seriously to this credibility problem and we can't deny that, can we? I mean, unfair dismissal has such a poor reputation, even though the data doesn't actually support that it should, and so we've got to deal with the poor reputation problem. So, okay, if I take your point about the Federal Court may overturn a Fair Work Commission decision that, on its face, appears to have ignored due process for each of the disciplines, and that is a risk, but I would say risk, that might attach to a revised process, a legislatively-supportable revised process which says first decide on the papers whether or not there is sufficient merit to allow this to go forward.

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One would assume that a Commissioner of the Fair Work Commission or, I guess, even if it could be made a staff member, might well just judge the risk and say, "On the face of this, having been duly authorised by legislation to determine a first-round view, my view is this", and like every part of the law, take the risk that someone goes off to the Federal Court and bumps you off on unfavourable due process. Every part of the administrative law of the

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Commonwealth is exposed to risk, and the reason you might take the risk in advising this process is simply because of the credibility problem. You know, where the data doesn't support it, but the credibility is an exposure.

5 **PROF STEWART:** Yes. Look, I'm actually attracted to the idea of putting
more time and effort into considering the merits of these claims earlier, but
we need to understand that unless that's done in a way that quite explicitly
disregards due process, what it's going to do is it's actually going to slow the
system down. It's actually going to mean that claims, on average, take longer
10 to be resolved and it's also going to give a very strong incentive to the parties
to put more resources into preparation. Because if you know that your claim
might be thrown out at the very early stage, or as an employer, you know that
you might get an adverse recommendation at an early stage, isn't that going
to suggest that you're going to put more time and effort into the very early
15 parts of the process?

At the moment, the current system hums along resolving claims faster
than we've ever seen before. The system is currently working very
efficiently at disposing of unfair dismissal claims. Relatively few go through
20 to arbitration, a great majority are withdrawn or settled, costs, the work that
Ben Freyens and Paul Oslington have done, suggest that the costs aren't
particularly great. I agree about the perception problem and personally I'd
like to see the system putting more emphasis on getting the right result as
opposed to getting a quick and cheap settlement, but we need to understand
25 that if you do that, it's likely going to slow the system down and somewhat
increase the costs. So look, because really, I think it's important that we talk
about solutions and alternative solutions.

I do think expanding the range of options available to the Commission,
30 I think the idea of allowing the Commission to make early recommendations
which then have a stronger effect in terms of the costs lever so that, for
example, it's easier to claim costs if you had a recommendation in your
favour, the other party has refused to fold. This, of course, would work both
ways, both against applicant and respondent. I certainly think there's
35 something in that. It's just that the idea that there's a simple change which
makes the whole system work not only better, more fairly, but without having
costs or delay implications, I think it's that path that may be misconceived.

Can I come back to the other process issue which is dismissals that are
40 found to be unfair purely because the employer follows the wrong process.
In my experience, those cases are relatively rare. Of course, you can find
examples, but I must confess I didn't have the time to follow through and
look at each and every one of the examples that ACCI gave in their
submissions for the 2012 review which is quoted in the draft report, but as
45 soon as I start looking at a few of those examples, it's quickly apparent that
they're certainly not all cases of substantively fair, and the only thing the
employer is pulled up on is process.

5 The much more common thing, and the ferry captain example is a perfectly good one. The much more common thing that makes unfair dismissal rulings, and indeed, predicting unfair dismissal rulings, difficult is the proportionality issue. Okay, it's clear that an employee has done something wrong, but is it so seriously wrong that it warrants dismissal even if their record is a good one. It's that balancing against their record. You also have to think about treatment of other employees. Is this employee being singled out? Sometimes someone's done something very badly wrong, and yet, what's unfair about their treatment is not that they didn't deserve dismissal, it's just that the employer has been letting these things go or not been applying its own policy on a consistent basis.

15 So the point is a lot of the more difficult cases are not as simple as substantively fair, procedurally unfair. Occasionally, that happens, but more often than not, it's the proportionality question and weighing up what else the employer should have taken into account. Again, and I stress this is not the submissions, this is a personal view, I wouldn't be adverse to a tweak of the legislation to put more weight on there being a valid reason for dismissal compared to some of the other factors which were listed as being relevant. I think you could tweak the legislation to give an indication to the Commission that the main thing to be considered is whether someone's done enough to deserve to be dismissed.

25 But if you reduced it solely to that, I think it would potentially wreck injustice in a range of cases. As always, you can improve certainty, but it's often at the expense of justice.

30 **MR HARRIS:** Okay. Can I ask about the enterprise contract?

PROF STEWART: Of course.

35 **MR HARRIS:** I don't know whether you were present for the earlier exchange, but - - -

PROF STEWART: I did. Yes, I did, yes.

40 **MR HARRIS:** Okay. So I think in your most recent submission you're unsure what problem it is we're trying to solve with the enterprise contract, so I was describing this possibility of dealing with complexity from the firm's end, and in the alternative, under a different proposition, reviewing awards by issues, you know, a hot spot kind of thing, at the what I might call the general workplace relations system and then somewhere between the two is more of this complexity which is a continuous claim could be examined, either by self-initiated work at the individual firm level, particularly amongst those sets of firms that do not appear to have taken up the other fee flexibility option which for 20 years has been available in the enterprise bargaining.

5 But you could, between the two, see complexity addressed in a way
that otherwise we can't envisage how public policy could deal with it. All
the public policy could otherwise say is, "It's pretty complex here and
somebody should do something." So we're trying actually to come up with
propositions which say, "Here is an avenue", but in both cases, we're trying
to have, as we said in the submission throughout, where we offer a reform,
we've looked at the safeguards and in the case of the broader review, it's by
10 the Fair Work Commission, so definition, is an institution that you could
have confidence in. In the case of the enterprise contract, multiple
safeguards, but a particular one to emphasise in this case would be
transparency.

15 In other words, where an employer does determine to try and vary an
award, or indeed, as we were talking to the Winemakers Federation about, the
interaction of a suite of awards, and saying I'm going to borrow this clause
out of this award and this clause out of this award, and this clause out of this
award. That's how I'll have my pay and my rosters and my work hours. Is
that disadvantage on balance? I think not, because they apply in each of three
20 awards, but it's my firm's award now and I'm going to send that off to the
Fair Work Commission and they're going to ask the Ombudsman, "Shall we
let this go through to the keeper or not?"

25 **PROF STEWART:** Yes.

MR HARRIS: That was the concept. Transparency would be your friend.
So the problem we are trying to solve is one of the intense complexity which
is a continuous argument, so in terms of proffering that as an answer, your
response would be?

30 **PROF STEWART:** Okay. Well, a number of different things. Firstly, in
saying in the submission that we weren't sure what problem the Commission
was trying to solve with this proposal, in a sense, that's probably slightly
misleading. I think we do understand the problem the Commission believes
35 it's trying to solve, it's just that the proposed solution has some elements of
perhaps incoherence or perhaps incompleteness, that then make us doubt
whether we're reading the intention correctly. I would characterise the
enterprise contract as the wrong solution to the right problem. In other
words, I think there is a problem, I think it's capable of finding - possible to
40 find a solution. The enterprise contract is, with respect, the wrong way to go
about it.

45 Perhaps before I talk about the solutions which I think would be more
sensible though, just a couple of preliminary comments which, in a sense,
hark back to some of the things I heard about in the previous session, about
what the problems are with awards. Some of the problems that some
employers have, and this is not a comment on the wine industry, this is a

generic comment. Some of the problems that some employers have with some awards can only be solved by drastically rewriting them in favour of the employer, or indeed, by abandoning the safety net concept altogether.

5 I think the draft report recognises that really well, and I haven't said this today, we've said it in the submission, but I do want to put it on record, the general approach which the draft report takes, the entire workplace relations system, is one with which I and my colleagues are not just comfortable, but would applaud because it seems to me that the values that
10 you're looking for out of the system, value as we would say would be really, really important to. The second point about awards and complaints about awards, it's very, very difficult to talk right now about the modern award system because the modern award system isn't with us yet in any meaningful sense. We're still transitioning to it.

15 I tried to explain this a little bit in the submission, but to all intents and purposes, modern awards started in 2010, except they weren't - they were ready to go in the sense that they could take legal effect, but the Commission hadn't at that stage had a proper opportunity to resolve every issue. It's still
20 in the process of doing that. While we've been speaking this morning, another major decision has been handed down by the Commission on annual leave provisions in awards. Now, I don't know what it is, because I could see the alert but I haven't had a chance to read the decision yet. Some of the issues that were being talked about in the last session about overlapping
25 award coverage, my understanding is that there are live proposals in the current review that would involve attempting to solve some of those problems.

30 Now, they may not solve every problem and they certainly may not necessarily solve the wine industry's problems, but I think it's important the Commission acknowledge that we're still in the process of - the system right now is still in the process of bedding down the modern award system. I expect that the new suite of the modern awards that will take effect
35 progressively from the end of this year through into 2016 will, by and large, be much less complex than their predecessors. They'll be much better at dealing with overlaps. Many of them will have pay rates schedules in them which will enable an employer to look up and say, "If I'm employing a casual on a Sunday, how much do I pay them?" And instead of having to read the award and do all the calculations, the pay rate will be right there.

40 There's a lot of innovations happening in the award system. So some of the problems that I think many employer groups have legitimately identified with the award system either are in the process of being addressed or they are complaints which can never be resolved unless awards were
45 fundamentally rewritten to, for example, allow employers to have any length of shift that they like. Having said that, I accept that, yes, there's a problem, but then what's the solution? The enterprise contract solution inherently

5 makes the system more complex because you've got a new type of instrument. You've got interaction rules which you now need to worry about. So now we've potentially got, within the one enterprise, awards which of course even if they don't actually apply, are still relevant, they still cover the workers and they're the backstop of the - - -

MR HARRIS: They're the fall-back.

10 **PROF STEWART:** Yes. So you've got the awards, you've potentially got enterprise agreements, enterprise contracts, high FAs and common law contracts. So in the version that's presented in the draft report it actually increased the layering problem and increased the complexity problem. The version presented in the draft report gives employers, particularly larger employers, the incentive to make enterprise agreements and then contract out of them, and I think we've explained why we think that's a problem. So one
15 of the main points that we push is that it did proceed with the enterprise contract system, we just don't see why that's something that should be available to an employer that's got an enterprise agreement.

20 It doesn't fit your starting point, which I heard you express again this morning, of this being intended to fill the gap for SMEs. If this is about filling the gap for SMEs who can't do enterprise agreements, or think they can't, and sometimes it's the former and sometimes it's the latter, but if that's the problem, why would enterprise contracts be available to employers that
25 have got agreements, enterprise agreements?

MR HARRIS: The only circumstance that I could envisage and so, as you can tell, the enterprise contract wasn't a recommendation - - -

30 **PROF STEWART:** Yes, it's an idea, yes.

MR HARRIS: It was an idea and it needs this level of critiquing, which is why we welcome your comments. If a firm has an enterprise agreement and wants to expand into a new area, it's enterprise agreement currently covers all
35 its current employees, it's got two choices here: it can vary the enterprise agreement by conscious agreement or it could, as it were, experiment with the enterprise contract because it's not sure whether it's going to remain in that field or not, and we have had this proposition put to us by - well, in this forum, hearing, for this process - - -

40 **PROF STEWART:** Yes.

MR HARRIS: By at least one large firm, saying that their enterprise agreement system had become so unwieldy in itself, they had multiple
45 enterprise agreements and every time they acquired another - I won't go into the firm, but you can imagine a large firm that covers a lot of service industries, and weren't sure whether they wanted to create another entire - or

review their entire enterprise agreement which might cover this set of employees, just for the sake of experimenting whether in 12 or 18 months they could make a go of this new aspect of business they wanted to go in.

5 So it was for that purpose they had in mind; in other words, everything is driven in the end by how can we make the system flexible so that you can experiment and innovate and therefore - because this is a desirable feature of a modern economy in relation to this and was tested.

10 **PROF STEWART:** Yes.

15 **MR HARRIS:** But would you really want to redo your entire enterprise agreement for the fact that you've entered into a new area where you either have to determine the enterprise agreement is extended to cover that, or you just want to (indistinct). Admittedly, that may be a pimple on a pumpkin, it may be such a trivial example as to not be relevant, versus the - I think the question of principle that you've raised, really, you're really raising a principle which is on the other side of the coin. You have decided to go down the path of setting one form of contract called an enterprise bargain, why should you have access to another form of enterprise contract to enable you to basically get out of that if you discover you've over-reached.

20 **PROF STEWART:** Yes.

25 **MR HARRIS:** I'm not saying, you know, one is dominant over the other, but that, I think, was one of the rationales.

30 **DR LATTIMORE:** I don't think we envisioned that with an enterprise agreement - - -

35 **MR HARRIS:** Would actually do what you've said.

40 **DR LATTIMORE:** - - - would replace its current instrument with an enterprise contract - - -

45 **MR HARRIS:** But we see, we haven't written it out in text because we didn't - at this point, we're running an idea to see what we could get back by this kind of process.

50 **PROF STEWART:** Yes.

55 **MR HARRIS:** Your comments are well-received.

60 **PROF STEWART:** Let me just talk about the situation that you mentioned was the concern. It doesn't inexorably follow that if a firm has an enterprise agreement and it starts doing something new, that the enterprise agreement applies. It depends how the agreement is drafted. A firm - I mean, this

situation does come up. If you open a new workplace, does your existing enterprise agreement apply? It depends what the enterprise agreement scope clause says. If you've drafted it to say that it applies only to certain workplaces, and assuming we're not talking about a transfer of business - - -

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MR HARRIS: No.

PROF STEWART: - - - then the enterprise agreement doesn't constrain you. It's then a matter of saying do you do a new enterprise agreement or do you extend the old one or do you operate on a different basis?

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Having said that, I could certainly envisage circumstances in which employers might get caught in the way that you've suggested. But it's not at all unusual for an employer to regret an enterprise agreement that it has previously made, often under previous management, often under a very different culture in the past, or indeed, to regret an enterprise agreement it's inherited when it's acquired somebody else's business. Of course those things happen.

15

But if you start having a rule that says, as some employee groups are actually seeking, explicitly seeking, not in the context of enterprise contracts, more generally, they want a rule that says enterprise agreements apply only until something changes and then we want the capacity to get out of the agreement. You have to ask, "Well, what does that do to the whole system of enterprise agreements?" If employers can either terminate agreements whenever they like or if they're allowed to use an enterprise contract to contract out by hiring new workers, what does that do for the idea of an enterprise agreement giving certainty and stability?

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Flexibility is great, but it comes at a cost. The cost is certainty. It also potentially tips the bargaining power massively towards employers. So I think we'd strenuously argue that the enterprise contract concept, if it makes sense, make sense for employers who've not chosen to go down the enterprise agreement. In the submission we've proposed what we firmly believe are two perfectly valid alternatives to enterprise contracts which don't come with the same risks and problems that the enterprise contract idea does. It certainly doesn't come with complexity and also, more importantly, provides the safe harbour. The enterprise contract proposal, as I read it – and, again, of course, I'm really going on what's in the draft report - - -

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MR HARRIS: The very best that we could create ourselves.

PROF STEWART: Yes, I understand that.

MR HARRIS: We need the critiquing.

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5 **PROF STEWART:** Yes, I understand, but the – there is obviously in the proposal there’s no ex-anti assessment. Seemed to envisage the Fair Work Ombudsman doing assessments when that’s not their skill set. If you ask the ombudsman I’m sure she’s going to say that they could do that if they were given the resources. But the question has to be asked, “Why would you have the ombudsman doing that work when the Commission has staff and members with precisely that expertise?” So the two alternatives.

10 **MR HARRIS:** Let me come back and answer that question soon.

15 **PROF STEWART:** Okay. The two alternatives. One of them is to look at pre-approved enterprise agreements. In fact, I’m going to use the same example, I think, for both of the two options. As you may know, here in South Australia the SDA and Business SA have negotiated a template enterprise agreement for use in the retail industry. It attracted quite a lot of comment. It doesn’t appear, as far as I know, to have attracted a lot of takers so far. What it’s endeavouring to do is actually get at the very problems which you’re getting at in the report. It’s recognising that the kind of deal that will work for a really big retail employer – Coles, Woolworths, David Jones or whatever – won’t necessarily work for a smaller store. It’s intended to give a different set of options as to how you balance basic pay rates against penalty rates, shift loadings and so on.

25 One of the problems with that agreement right now is that we don’t know whether it’s lawful or not. I can’t see why you couldn’t have a system where the Commission is asked to approve a template agreement to say, “Yes, this works. This passes,” whether it’s the BOOT or the NDT, to approve an explanation of the agreement which can be put to workers. Given too that there are suggestions in the draft report and indeed in my group’s original submission we made suggestions about simplifying some of the procedures for enterprise agreements, we think there’s some real possibilities there in terms of making the enterprise agreement system more attractive. Of course, you then have the safe harbour and you have stability.

35 Having said that, accept this point about perceptions, the perception that enterprise bargaining is too hard, I did once go through an enterprise bargaining process with a very small employer. It was a community childcare centre. I happened to be the director of the management committee at the time. It’s fair to say the childcare centre had an unusually qualified expert available to them to help them go through the process. But as a user of the process, I found that it wasn’t too hard. All we were doing was actually fixing one problem where there was a traditional condition at that centre that involved a trade-off where employees got less of one thing and more of another. All the employees wanted to keep – all we did was simply place the award into the agreement and then modify the key clauses, go through the procedure. So I don’t think it’s as scary and as difficult as some smaller employers think.

5 But accepting that there'll always be a perception barrier there, the
alternative is to have clauses or schedules built into awards which contain,
again, what are in effect clear proved alternatives. This is taking I think the
very ideas that you're talking about but giving them even greater certainty by
having them available as part of the award system. So if you want to have a
system where you don't pay weekend penalties but you do pay penalties for
evening work and you want to have two-hour shifts rather than three-hour
shifts, then here is a set of revised award standards which the Commission is
10 saying satisfied that sets an appropriate safety net for that kind of operation.

15 Now, obviously you can't have endless flexibility, but it seems to me
that if we discount the demands that some employers are making, which is
essentially just to rewrite awards on their terms, if we discount them and if
we look at the genuine plea, which is, "I want to do this but I don't know
how I can do this," I can't see why awards couldn't be expanded to include
those kinds of alternatives. It seems to me we haven't explored that yet.
Again, one of the reasons why the Commission hasn't explored that is it
hasn't had the time or the resources to do that. It will be in a position to start
20 thinking to start doing more creative and innovative work on awards.

25 From the middle of next year, which is around – or from 2017, which is
around the time when, hopefully, the Commission's recommendations will be
taken up by whichever government is in power at the time. I firmly believe
there are some really good answers to the problems that you've posed in
those areas rather than let's add yet another new instrument and let's have to
work out all of the difficulties about industrial action, all of the difficulties
potentially about rights of entry, all of the hierarchy of instrument questions
which arise, some which we've highlighted in our report. It's a simple
30 solution and it gives greater certainty to employers.

MR HARRIS: I think, as you will have heard the winemaker say, it's not
the sole objection to such a process. But the time that the Commission takes
to arrive at its mandated list of alternatives of flexibility will be a potential
35 presentation, I would have thought. The ultimate question that is triggered by
that though is whether the Commission itself is capable of becoming the
reforming option that you have described. How we tried to address that was
to suggest change to the nature of the Commission's appointment processes
and indeed the nature and people that they employ over time. Not attempting
40 to critique any individuals of working within what we still consider to be the
broad structure of the old system they're in as assiduously as some can but
not by all. So our model was that.

45 The way I guess the enterprise contract was meant to offer was an
option which says you can start to try and apply this now. The reason, by the
bye, for using the ombudsman rather than Commission is because the
Commission is the current approving process for enterprise bargains and it

imports with it this continuous appearance and some reality of a suspicion that without the union involved in an agreement every individual term must be deeply scrutinised and inherently is in doubt. Whereas the ombudsman is perhaps viewed, I think – certainly the evidence to us – has been viewed as being a more progressive organisation than the Commission has been to date.

That doesn't say anything about their substantive roles, that just says again this is mostly about whether you can see the option of being in employment could be taken up by the sets of firms we're talking about. It's more the medium enterprises and their lack of confidence in the nature of the system. That's not to say that your points are invalid, it's just that was the ultimate rationale for I think going down that path. But on the overall question – sorry, the next comment you've got, that's fine, but then we should probably switch to how to reform - - -

PROF STEWART: The Commission. Well, indeed, I'm a big supporter of the ombudsman and I think it's worked really, really well. But people can also have short memories. It's only a few years ago there were a lot of complaints around the employer community about not being able to get consistent or accurate advice out of the ombudsman on the transitional provisions in modern awards. That criticism was, I think, as unfair as some of the criticism of the Commission in the draft report, because I think it failed to take account of the context. The context actually happens to be the same; a hideously complex and necessarily difficult process of transition.

If you went with the enterprise contract option, the Fair Work Ombudsman then is put in a very difficult situation. We're not now talking about can it do the work; of course it could. But what does it do if it says, "This looks okay," then the matter goes to court and it isn't? You would expect the ombudsman would have to start taking – it would be almost impelled to take pretty conservative views. It would always issue disclaimers. It would say, "We think this is okay, but you can't be sure."

MR HARRIS: I think we envisaged it not doing anything.

PROF STEWART: Right. But in which case then how does - - -

MR HARRIS: Only acting when it appears to it to breach a standard that it otherwise - - -

PROF STEWART: I see what you mean. So there's no automatic - - -

MR HARRIS: It wouldn't be clearing it.

PROF STEWART: So it's only on the basis of a complaint.

MR HARRIS: And therefore it's not bound by a previous decision. It just didn't make one.

5 **DR LATTIMORE:** But not just on the basis of complaint. I mean, this is only an exploration of the ideas. But also that they would look at what were publicly disclosed enterprise contracts and see if some of them stood out as clearly disadvantaging employees and then would act unilaterally without a complaint.

10 **MR HARRIS:** Correct. They can act against but not clear. No one is clearing these things. In fact, it is a criticism we've heard from other parties that shock, horror, no one is clearing them. But the idea is to create an incentive by which small and medium enterprises might actually see that as being a positive. In other words, I have used the statutory form, I have made
15 it transparently available, employees have voted with their feet to take it up and the Fair Work Ombudsman hasn't protested. I am in a safer place than I would otherwise be just creating a common law contract. Those are the sort of benchmarks that we had in mind. But, I agree, they come with
20 uncertainties.

However, the ombudsman would not be fettered by its previous inaction if on subsequent discovery an employer was found not to be doing what was said in the enterprise contract or that the way a clause had been written was deceptive and didn't actually deliver what it appeared to deliver
25 on its face. Those sorts of things are still within the hands of the ombudsman.

PROF STEWART: I think you've actually just answered some of the questions we put in the draft submission where we were trying to figure out
30 from what was in the draft report.

MR HARRIS: We kept it deliberately very simple in the draft report because we weren't trying to rule out things, we were actually – it was almost like an invitation to please fill the gaps that are conceptually obvious in the
35 logic here that we hoped there were better ideas out there.

PROF STEWART: I think we would still say that it doesn't make sense to have the ombudsman responsible for adjusting contracts. We'd still say that's not its proper – that's not within its general skill set and
40 responsibilities. But having now understood that it's not a system of automatic assessment but if there's a problem, whether by complaint or the ombudsman's own scrutiny, they see a problem, they take something up, I think that makes more sense. I still come back, however, to the fact why wouldn't you look at the option of creating greater certainty. I think that's
45 where we segue into the next question, which is why can't the Commission do this?

MR HARRIS: We might in fact look at both because the sorts of things that you've described are quite plausible. I mean, one of the other things that we were sort of seeking comment on is what are these hotspots in awards? Because, of course, it's very hard to make a generic statement about hotspots.
5 Every industry will have its own version of hotspots. But your own model about creating flexibility clauses and appending them to an award – in other words, if you want to vary the roster, here are two ways of varying the roster – that's actually a very useful version of a hotspot if rostering is indeed a controversial issue across these half a dozen kind of awards.

10

You could envisage that as being a task that the Commission itself would undertake and it would meet this model of reform from either end. Down in the small business you could potentially undertake the enterprise contract. But up in the Commission you're probably otherwise going on with how to make awards more available for variation to the small/medium enterprise who otherwise haven't gone into enterprise bargaining and are sitting there with lots of unhappiness with the complexities of awards but a fear and loathing about standard tools for varying that, which is an enterprise bargain.

20

PROF STEWART: I think that does take on to the Commission. Again, I think it's important that I stress that what we regard as unfair in the draft report in what's said about the Commission is not the set of ideas for how the Commission should work. It's the suggestion, which may well not be intended, but which certainly seems to come through, that the Commission should have been doing things differently. What we would say is we need to understand how the Commission has operated over the last six years in the context of the legislative mandate that it was given. That included for the original modernisation process the requirement to comply with a ministerial request which insisted that nobody be worse off as far as possible, which was an impossible objective, but one which in meeting it the best that it could very significantly constrained the Industrial Relations Commission's options for modernising awards.

35

What we'd also say is that it's very difficult to assess the capacity of the Commission to be proactive and innovative without the Commission (a) having the kind of research resources which you have suggested and we strongly agree it should have. The fact is it hasn't had those resources available to it. Secondly, it's been burdened with this massive job of, as I put it, not reviewing but actually completing the award modernisation process. The middle of next year I think that's when we can start to see what – assuming that the government fills vacant positions on the Commission and assuming there's no radical cut to its budget, I think we can start to see what the Commission is capable of.

45

But in terms of the ideas, we've said in the submission that we absolutely agree there should be a broader range of expertise on the Commission. Some

of that could be met by giving the expert panel expanded responsibilities. It is hard to see why it is that you have expert part-time assistants brought in on annual wage cases and supposedly for superannuation default funds, although that process currently is being frustrated by the government's refusal to
5 appoint the person needed to be able to allow the expert panel to operate. It's an interesting story in itself.

But why couldn't or shouldn't it be possible to bring in the expertise of – to take one person at random – Sue Richardson to look at award standards and not just annual reviews. Why shouldn't there be more business people
10 who aren't simply employer association advocates? Why shouldn't there be more academics? Why shouldn't there be more people whose expertise is in public policy rather than very specifically in workplace relations? All of those things we agree with. Should there be a more transparent process?
15 Yes. The idea of a selection panel putting forward shortlisted candidates seems to us to have a great deal to commend it.

The specific difficulties we have are with the division of the Commission into minimum standards and tribunal. We think that understates
20 the or is a mismatch or a poor fit for the range of work the Commission does. Again, I don't think a lot of even experienced practitioners have really stopped to reflect on how different the current Commission is. We all know the standard stats about – and they're rolled out in the draft report and the 2012 Fair Work review happened as well – about the shift to individual
25 dispute resolution. That's clear.

But I think what isn't often appreciated is the range of other things the Commission does that are not about dispute resolution at all. Approving
30 enterprise agreements is occasionally about resolving a dispute but more often than not it's actually a process of checking one instrument against another and checking to see if processes have been followed. It doesn't necessarily need the skill set of somebody who's used to resolving disputes but nor does it need the skill set of an economist or a social scientist either. It's a different set of skills.
35

To very briefly go back to the other submission on the Commission's role in facilitating productive cooperative workplace relations, the skill set that's involved in proactively seeking to assist enterprises to manage their work relations and improve their work relations, again, the skills involved
40 aren't necessarily the ones that have traditionally informed appointments to the Commission, but nor are they the ones necessarily which would make sense for a minimum standards division either.

MR HARRIS: I think we do see the validity in what you've put forward
45 there.

PROF STEWART: Do we want to talk about tenure, which is the other aspect?

5 **DR LATTIMORE:** Can I just clarify on the appointment process, so we had an appointment panel in mind which would be selected through state arrangements. I think you were concerned about that particular process or is it really just tenure? Because if you have a merit-based appointment process and it was run through literally government, then that is directly subject to politicisation. It's true to say that a panel may also be subject to that but
10 you'd think with less likelihood.

PROF STEWART: It's that last point that I'm not sure I see the logic there. I think the logic here is politicisation. It's unavoidable. Our concern is not in fact with the mechanics you've suggested. It's with the idea that the
15 mechanics that you've suggested solve the politicisation problem.

DR LATTIMORE: Reduce it.

PROF STEWART: Possibly but it just seems to me it then shifts to a
20 different stage, which is choosing the members of the selection panel.

DR LATTIMORE: That would involve a number of states – it's really only a question of whether it might be best – I mean, I think we've been frank that no system here is perfect. And the tenure issue is another one altogether
25 because that also involves – we perfectly understand the logic we are talking about and attempt to also deal with politicisation. It's just a question of whether the appointment process might itself be a partial way of addressing these concerns.

PROF STEWART: It's the combination of the appointment process and the limited tenure. Again, our problem is not with your suggested process, it's
30 with the belief that the suggested process solves the politicisation problem.

MR HARRIS: It's just that the incumbent system clearly doesn't and it
35 involves perpetuity of tenure. Yet we have demonstrably a sort of – well, until actually the last two years where we're not quite sure what system we have right now for appointments, because we appear to have none – but otherwise that involves a shift from one side to the other. Unless you can go
40 back somehow, as people have wistfully said, to a circumstance where governments of all political persuasions were sort of picking from one side as an employer and then the next record being from unions and yet that's the antithesis of what we have in mind here; for skills based selection rather than representative based election.

PROF STEWART: What we would say is the idea of having the selection
45 panel and having it insistent on a broader range of skills which doesn't mean, as I think, Peter, you clarified in some comments I've seen, doesn't mean not

5 appointing people with an industrial relations or a legal background. It just means saying that they're not the sole constituency; absolutely. So by all means do that, by all means have transparency, have this written into the legislation rather than, as in the current system, where – the current Act which allows the current minister, whoever that may turn out to be as of the end of this week, it allows the current minister to pick any process they like.

10 Our objection isn't at all to the appointments process. Our objection is to the tenure proposal. What we see is that the – what we suggest is that your suggested process will not prevent politicisation. I absolutely concede it might reduce it or make it a little harder. But we put the alternative in the submission of looking at perhaps an appointment until a certain age or until a certain period of time has been reached, which it's the reappointment which is the major problem here.

15 Can I draw your attention in particular to that study that we'd cited from the US on so-called recess appointments in the US. Admittedly, the numbers are small, but it's a really interesting study because they had a natural experiment of comparing voting records on Supreme Court of judges who'd been appointed with tenure and those who'd been appointed on a temporary basis but then subsequently had to go through what of course in the US is a highly political confirmation process. The study found there were different voting patterns, that once a person was given tenure, once a judge is given tenure and they're now no longer – the job is no longer the government's to give or take away, their voting record changed.

20
25 **DR LATTIMORE:** It's not so much tenure, you chose on a particular period of time which is longer than what we had in mind. It is the reappointment issue.

30 **PROF STEWART:** Yes.

DR LATTIMORE: That is the real source of the difficulty here.

35 **PROF STEWART:** Yes, absolutely. I do think too that if you find someone worthwhile getting only five years out of them, you then expect a lot of churn, which in turn means that you might have a lot of instability. So I think what we're talking about here is tweaking what you're suggesting rather than throwing it out. In fact, we're expressing agreement with a lot of the principles behind changing the approach to appointments on the Commission.

40
45 **MR HARRIS:** I'm conscious we're well past time. Nominally I'm supposed to be getting a flight. Anyway, we'll see how we go. It probably won't happen. I'm going to thank Andrew first for his time and effort today and say we'll be in continued contact with you. And thank your colleagues as well for the second round of submissions you've put in. It's been exceptionally useful and today's discussion has been very good. Is there

anybody else here today who was going to – I did ask earlier at this point if you wanted to come up and make a brief comment on the record about something you've heard, I'm happy for that to take place. If not, thanks, everybody, for making the time and effort here today. We'll adjourn to
5 wherever we are next, which I've forgotten, but anyway, someone else will remind me. Sydney. Thank you very much.

10 **ADJOURNED AT 1225 UNTIL
THURSDAY, 17 SEPTEMBER 2015**