

Shop Distributive and Allied Employees’ Association

**SUBMISSION**

**Inquiry into the incidence of, and trends in, corporate avoidance of the Fair Work Act 2009**

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Submitted by: Julia Fox

National Assistant Secretary

SDA National Office

Level 6

53 Queen Street

MELBOURNE VIC 3000

Telephone: (03) 8611 7000

Email: julia@sda.org.au

**Introductory comments.**

1. The Shop, Distributive and Allied Employee’s Association (SDA) is one of Australia's largest trade unions, with approximately 216,000 members. The majority of these members are young people and women. Registered in 1908, the SDA has coverage of areas including retail, fast food, warehouse, drug and cosmetic manufacturing and distribution, hairdressing, pharmacies and modelling.
2. The SDA welcomes the opportunity to make a submission to this Inquiry.
3. The SDA supports the submission of the ACTU.
4. Before addressing the terms of reference, it must first be noted that while amendments to the Fair Work Act may assist with limiting or stopping some current practices, they will not satisfactorily address the reality for many workers who do not receive a fair and decent safety net of wages and conditions.
5. The Fair Work Act is limited in its scope and powers to the regulation of traditional forms of employment relationship. However, the reality of work for many does not meet that model. The FWA only applies to persons directly employed by an employer. It does not provide a secure floor of rights of all workers, particularly those in the gig or shared economy.
6. The current ‘safety net’ of the NES and Modern Awards is inadequate because it has no applicability to a significant proportion of workers. Unregulated forms of work have grown because of the desire of employers to unethically reduce wages and conditions in order to maximise profits. As evidenced by the numerous and widespread reports of worker exploitation, this objective has gone largely unchecked.
7. There is presently no disincentive for an employer who chooses to exploit workers and deny them minimum wages and conditions. This is evidence by the 7 Eleven cases of worker exploitation, and the difficultly in seeking appropriate remedies for these workers. The fact that 7 Eleven can choose to ‘self-manage’ the process of underpayments is fanciful and does little to dissuade other exploitative employers from such behaviours.
8. A proper industrial relations system must be able to address all forms of work to ensure there is a genuine safety net of wages and conditions for all workers, regardless whether they are direct employees, dependant contractors, or engaged in the gig, shared services or Uber economy.
9. The level and breadth of worker exploitation in Australia is shocking. Not a week goes by without a report of worker underpayments, non-payments, exploitation and abuse. In addition to the lack of the effective and comprehensive regulation of work, it is also apparent that there is a lack of resources necessary for ensuring compliance and labour regulation.
10. It is no coincidence that with the decline in union membership we have seen the corresponding increase in worker exploitation.
11. Trade unions must be afforded proper legislative powers to ensure effective compliance of the industrial relations system.
12. So while there is merit in making amendments to the Fair Work Act to address common avoidance tactics, much more needs to be done to address and ensure the effective regulation of labour in Australia.

**Terms of reference**

The use of labour hire and/or contracting arrangements that affect workers' pay and

Conditions.

1. The use of labour hire has been steadily increasing in recent decades, as employers seek to minimise and cost shift business risk. Unfortunately, the ‘risk’ is then transferred to the low paid, insecure worker who has limited, if any, legal protections. Labour hire was designed to, and continues to be utilised for circumventing the protections of the Fair Work Act (FWA).
2. Labour hire is used to undermine and undercut the wages of those working in the same classifications, working side by side, in the same workplace. In order to address this, enterprise agreements should be able to include provisions which mandate the terms of the EBA apply to labour hire workers as well as those directly employed.
3. Labour hire workers should be automatically denied the right to vote on an enterprise agreement in their workplace.

Voting cohorts to approve agreements with a broad scope that affect workers' pay and conditions.

1. The FWA must be amended to ensure that employers are not circumventing their legal responsibility to bargain with all their employees and their unions. S181 of the Fair Work Act is being used by employers to create new enterprise agreements by using existing employees to vote on agreements, when those employees are not actually covered by the new agreement at the time of the new enterprise.
2. The SDA recently challenged a Full Bench decision of the Fair Work Commission and were successful in the Federal Court. The issue centred on the incorrect characterisation of what should have been a Greenfields agreement; and therefore the right to union representation in bargaining of that new agreement.
3. Further, the FWA should be amended to ensure that agreements with various classifications should be voted on by employees working in those classifications, particularly where an agreement covers various classifications from a number of different awards.

The use of agreement termination that affect workers' pay and conditions.

1. Termination of expired agreements (union and non union) should be available only at the initiative of the union or an individual worker. Employers should not be able to make agreement termination applications under the FWA.
2. The SDA has come across a number of expired agreements, some from the Work-choices era which have inferior wages and conditions when compared with the underpinning award. A trade union should be able to make application to terminate such agreements to ensure that workers are paid the correct award minimum pay and conditions.
3. Employers should not be able to terminate an expired enterprise agreement and remove wages and conditions which are superior to the award. The ability of employers to take this action, fails to recognise the inherent power imbalance which exists and undermines collective bargaining (Object 3(f) of the Fair Work Act).

The effectiveness of transfer of business provisions in protecting workers' pay and conditions;

1. This SDA case example highlights the deficiencies in the transfer of business laws in protecting workers from unfair dismissal and protecting workers' entitlements.

**Case example 1.**

Independent supermarket

1. Supermarket A took over the operation of Supermarket B. Prior to this Ms X worked at Supermarket B for over twenty years under various employers including Coles, Franklins and Foodworks. Each time the store was taken over by a new employer Ms X’s employment was transferred to the new owners and her entitlements transferred with her.
2. When Supermarket A took over the operation of the store, a staff meeting was held. Present at the meeting was the Director of Supermarket B and the Directors of Supermarket A. The employees, including Ms X, were told that Supermarket A were their new employers and were given contracts by Supermarket B stating they recognised previous service and their entitlements.
3. After working for Supermarket A for around two months, Ms X was summarily dismissed without reason. Ms X sought to lodge an unfair dismissal, however Supermarket A objected on jurisdictional grounds, arguing that Ms X did not have six months’ service. The issue that went to hearing was whether Ms X’s employment had transferred from Supermarket B to Supermarket A and whether she had continuous service.
4. What was revealed during the hearing was that no commercial transaction had occurred between Supermarket A and Supermarket B. Supermarket A had taken over the operation of the supermarkets through licensing and leasing arrangements with Metcash Trading Limited, the licensor of the IGA brand. Because there was no transfer of assets between Supermarket A and Supermarket B, the transfer did not meet the definition of 'transfer of business' under the *Fair Work Act 2009*. Ms X was therefore not entitled to be protected by unfair dismissal.
5. Ms X is now in the position that she may not be able to recover her leave entitlements. Supermarket B has since gone into administration and Supermarket A appears to have no statutory obligation to pay them.
6. Ms X and the other employees were left in the dark about the true nature of their entitlements and the transfer of their employment, despite being told by Supermarket A that their entitlements were looked after.
7. Employees will generally not know the nature of a business transaction between their old employer and new employer. This leaves employees vulnerable to losing their entitlements and not knowing the extent of the statutory rights.
8. The next case example highlights how the use of labour hire arrangements can be used to circumvent transfer of business laws.

**Case example 2.**

Independent supermarket

1. In April 2013 IGA Drummoyne was purchased from Franklins by the Hopper Group. Instead of employing the existing employees directly, the Hopper Group engaged a labour hire firm, Employment Innovations, to employ the existing employees. Due to the separation of the transfer of business from the existing employees, the transfer of business provisions under the *Fair Work Act 2009* did not apply.
2. Prior to the transfer of business, the existing employees were covered by the *Franklins National Retail Enterprise Agreement 2008* ('the Franklins EA'), a union negotiated enterprise agreement with comprehensive conditions. Because the transfer of business provisions did not apply, the Franklins EA did not transfer with them. Instead the employees were employed by the labour hire firm under the *Employment Innovations Pty Ltd Enterprise Agreement 2010* ('the Employment Innovations EA'), a non-union enterprise agreement with poor conditions of employment and arguably should never have been approved by the FWC.
3. Such cases demonstrate the unfair system which presently operates under the FWA. Workers should not lose their entitlements, or suffer a loss in terms and conditions of employment when a transfer of business occurs. A trade union must be able to access documents and information pertaining to the transfer in order to be able to properly inform workers and protect their entitlements.

The effectiveness of any protections afforded to labour hire employees from unfair dismissal.

1. The SDA has had a number of cases where a labour hire employee, who has regular and systematic casual work at the same worksite for a number of years, is treated adversely upon a complaint being raised.
2. Where a complaint is made against the particular labour hire employee (maybe by a manager at the worksite, or by another worker at the site), the labour hire employee is moved from the worksite. Although the labour hire employee remains employed (on a casual basis) by the labour hire agency, they are no longer provided with regular work.
3. The employee and the Union cannot challenge the merits of the action taken or ensure that due process and natural justice has been followed. As the action doesn’t amount to an unfair dismissal, as the employee remains employed, they have however suffered a loss of ongoing work, which is the same thing as losing their regular job. The FWA does not currently provide a remedy for this type of action.
4. There is no mechanism available under the Fair Work Act (FWA) which captures this behaviour. Adverse action provisions are not always suitable to the facts of the situation. And where it’s possible to convince the labour hire employer to reinstate the hours of the employee at the original worksite, that worksite would simply object to having the labour hire employee back. This example points to both the precariousness of labour hire casual employment, but also limitations under the FWA.

The extent to which companies avoid their obligations under the **Fair Work Act 2009**by engaging workers on visas.

1. Please see the attached ***SDA & The McKell Institute Submission on ‘The Impact of Australia’s temporary work visa programs on the Australian labour market and on temporary work visa holders with particular reference to 7 Eleven workers****’.*

Whether the National Employment Standards and modern awards act as an effective 'floor' for wages and conditions and the extent to which companies enter into arrangements that avoid these obligations.

1. As referred to above, the FWA does not provide an effective floor of minimum wages and conditions because of its limited applicability to a significant proportion of workers.
2. The NES and Modern awards do not act as an effective floor. It has become particularly evident that the FWA, the NES and modern awards are not in line with the needs of the contemporary workforce and in particular the needs of women and women’s’ workforce participation.
3. S65 of the FWA; the Right to request flexible work arrangements, is a meaningless and ineffective provision. Companies exploit the notion of ‘reasonable business grounds’ in order to refuse flexible work and ensure flexible working accommodations are not made. This is left unchecked due to the lack of appeal rights under this provision.
4. The modern awards are supposed to be seen as the minimum safety net of wages and conditions, however the reality is that there are expired enterprise agreements continue to live on until replaced or terminated. As referred to earlier, there are limitations on who can seek to terminate an expired agreement. A trade union, if not a party to the agreement, cannot in its own right, make an application to terminate an expired agreement. this should be amended.
5. One of the main issues with expired agreements is that wages rates do not need to be maintained in line with the underpinning award. S206 of the FWA states that the ‘*Base rate of pay under an enterprise agreement must not be less than the modern award rate or the national minimum wage order rate…’*. However, ‘base rate’ does not reflect the ‘floor’ of minimum wages and conditions, as base rate does not include penalties, loadings, overtime and allowances.
6. This provision allows employers to continue to pay below the award rates of pay for an indefinite period.
7. ‘Base rate’, in s206 should be amended to include all penalties, loadings, allowances and overtime. Such an amendment would ensure that workers are not falling below the minimum.
8. Further, the FWA should be amended to allow a trade union, in their own right, to make an application to terminate an expired agreement.

Legacy issues relating to Work Choices and Australian Workplace Agreements.

1. The SDA has seen many examples of enterprise agreements dating back to the early 2000’s which are still operative and contain substandard rates of pay and conditions. Many of these agreements removed significant employee award entitlements, penalty rates, allowances, overtime rates and public holiday provisions. These agreements would not be capable of approval by the FWC if they were put forward now.
2. It is often the case that these agreements contain illegal provisions which many employers continue to operate under.
3. The existence of these expired agreements become difficult to interpret and understand especially when the Fair Work Act overrides some of the redundant provisions, such as Personal leave. Employees must refer to the Agreement and the NES to understand their entitlements.
4. It is the experience of the SDA that employers often believe that the agreement overrides the Act and they are therefore meeting their legal obligations.
5. A trade union should be able to make application to terminate these instruments.

Any other related matters.

1. Another way that companies avoid the Fair Work Act, is through the use of traineeships. The SDA is aware of a number of companies who misuse traineeship programs by keeping workers employed under these arrangements for extended periods so as to avoid paying workers the appropriate award classification rate of pay.
2. Where these sham arrangements have come to light there is often considerable difficulty getting a satisfactory remedy. It can be problematic in determining which jurisdiction and/or government department has oversight and what actions if any, will be taken against the company for misusing government funded traineeship programs.
3. There must be stronger protections in place for workers engaged on traineeships to ensure that these are genuine traineeships.