Senate Standing Committee on Education, Employment and Workplace Relations

Inquiry into:

FAIR WORK ACT AMENDMENT BILL 2013

SUBMISSION BY

SHOP, DISTRIBUTIVE & ALLIED EMPLOYEES' ASSOCIATION

16 April 2013

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1. INTRODUCTION

1.1 This submission is made by the Shop, Distributive and Allied Employees' Association ("SDA").

1.2 The SDA is Australia's largest trade union 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.

1.3 The SDA supports the ACTU submissions in response to the *Fair Work Act Amendment Bill 2013* ("the Bill").

1.4 The SDA previously made submissions during the Fair Work Act Review and welcomes the opportunity to make this submission in regards to the proposed amendments contained within the Bill.

1.5 This submission will address the changes sought and provide key recommendations in regards to amendments concerning:

a) Special Maternity Leave
b) Concurrent Parental Leave
c) The Right to Request Flexible Working Arrangements
d) Consultation Regarding Rosters
e) Transfer to Safe Work for Pregnant Employees
f) Modern Awards Objective
g) Bullying

1.6 The SDA would welcome any further opportunities to appear as a witness and discuss its submission in greater detail with the Standing Committee.

2. SUMMARY OF SUBMISSION

2.1 The SDA welcomes the Bill proposed by the Minister for Employment and Workplace Relations, the Honourable William Shorten, to amend the *Fair Work Act 2009*. The proposed amendments to Australia's industrial legislation will strengthen the safety net for employees.

2.2 However, whilst the SDA is supportive of the proposed amendments on the whole, there is still need for further improvement in the legislation in some of the areas addressed by the Bill. In particular, the SDA would note that some of the changes sought do not go far enough to effectively address the difficulties which many employees face in the workplace.

2.3 A key concern for the SDA remains the lack of access to arbitration for employees where matters concerning their rights are in dispute. In particular, the right to request flexible working arrangements cannot be appealed to the Fair Work Commission ("FWC"), resulting in a 'hollow' right.

2.4 Each recommendation will be addressed throughout this submission and is summarised below.

2.5 The SDA commends the Government and particularly the Minister in seeking to implement these changes, as amended in our recommendations, into the safety net for the benefit of Australian employees.

3. KEY RECOMMENDATIONS

3.1 The SDA makes the following recommendations to amend the Bill to ensure that the industrial legislation for Australian workers is fair and just:

Recommendation 1

That s 65(2) of the *Fair Work Act 2009* be deleted.

Recommendation 2

The SDA recommends that (e) and (f) be amended to:

(e) those experiencing domestic or family violence; or

(f) those providing care and support to a person who is experiencing domestic or family violence

Recommendation 3

The SDA recommends that s 351(1) and s 772(1)(f) of the Fair Work Act 2009 be amended to include 'status as a victim of domestic violence'.

Recommendation 4

That the Bill remove the exclusion of section 65 from being a matter about which the Commission may arbitrate.

Recommendation 5

That Sections 145A (2) and 205 (1) (c) are reworded as follows:

to **genuinely** consider any views about the impact of the change that are given by an employee.

That an additional subclause is inserted into the proposed s. 145A (2) and s. 205 (1):

(d) to make reasonable efforts to accommodate the needs of the employee.

Recommendation 6

That (da)(ii) should read:

employees working irregular or unpredictable hours;

That (da)(iii) should read:

employees working on weekends or public holidays **and unsocial hours (including evenings, nights and early mornings)**

Recommendation 7

The Bill should be amended so as to include cumulative conduct by an individual or individuals or a group or groups which amounts to repeated unreasonable behaviour towards the individual being bullied.

The provisions of s.789FF to also be amended to provide for a remedy for such cumulative bullying behaviour.

Recommendation 8

That the following words be inserted into s789FF(2)(a):

(a) if the Fair Work Commission is aware of any final or interim outcomes arising out of an investigation **(including the nature, scope and process of that investigation)** into the matter that is being, or has been, undertaken by another person or body – those outcomes; and

3.2 Important to note, however, is that despite the few areas where the SDA believes improvements can be made, overall this Bill is regarded as containing many positive, welcome changes to Australia's industrial relations legislation.

3.3 The SDA commends the Government and particularly the Minister in seeking to implement these changes into the safety net for the majority of Australian employees.

4. SCHEDULE 1 - FAMILY FRIENDLY MEASURES

4.1 A significant aspect of the Bill concerns a range of changes to the provisions within the National Employment Standards. The Minister's explanatory memorandum stated that;

> *The Bill will make amendments to:…*
>
> - *introduce new family friendly arrangements, including expanding the right for pregnant women to transfer to a safe job, and providing further flexibility in relation to concurrent unpaid parental leave, ensuring that any special maternity leave taken will not reduce an employee's entitlement to unpaid parental leave and expanding access to the right to request flexible working arrangements to more groups of employees;*
> - *require employers to consult with employees about the impact of changes to regular rosters or hours of work, particularly in relation to family and caring responsibilities*[1]*…*

4.2 Australia ranks low compared to other OECD countries when it comes to offering family friendly workplaces for carers. The most common solution for carers is to find casual or part time work and Australia remains in the lowest third of OECD countries in respect of workforce participation of mothers.[2]

4.3 Increases in dual income and sole parent families means that most children live in households where all the adults work in paid employment.

4.4 An aging population means that many of us will be carers or rely on being cared for during our lives.

4.5 The SDA supports the amendments and congratulates the Minister for acknowledging the importance of family friendly work arrangements.

4.6 There is overwhelming evidence surrounding the pressures that Australian employees experience in balancing work and family responsibilities. The ACTU Working Australians'

[1] Hon. W Shorten MP, Minister for Employment and Workplace Relations, *Explanatory Memorandum*, [1]
[2] OECD Family database, Maternal Employment, November 2009

Census survey of more than 41,000 employees in 2011 found that balancing work and family responsibilities was the second highest priority for both men and women (second only to a wage rise)[3].

4.7 Climate surveys conducted by large retail companies have found similar results.

4.8 Other findings from the ACTU Census were that:

- 44% of mothers say that they do not feel comfortable taking time out from work to care for their children because their workplace is not family friendly.
- 50% of women with two year old children are forced to choose between family and work and remain unemployed.

4.9 In Australia in 2009, 4.1 million employees had responsibilities for unpaid caring work[4].

4.10 The government policy objective to maximise labour market participation will only be achieved if workplaces make an effort to recognise and accommodate the personal needs of their employees, especially at critical life stages.

4.11 These family friendly amendments have little or no cost impact on employers and by helping parents and carers to continue to do their valuable caring work, whilst staying in quality, secure employment is a key element to strengthening the Australian economy.

Part 1 - Special Maternity Leave

4.12 Ensuring that women who require time off work whilst pregnant, as a result of health concerns for the mother or baby, do not then lose the equivalent time from their parental leave once it commences is unquestionably fair. Parental leave is about parents being able to take the necessary time to care for their child and this time should not be diminished if the health of the mother or baby has meant that the mother has required time off work during the pregnancy.

[3] ACTU, *Voices from Working Australia*, Findings from the ACTU Working Australia Census at [42].

[4] Australian Bureau of Statistics, Survey of Disability, Ageing and Carers, Australia 2009, Basic CURF, Version 3, CD-Rom (2009). Findings based on SPRC's analysis of ABS CURF data.

4.13 The note under this section that a female employee who has an entitlement to paid personal/carer's leave may take that leave instead of taking unpaid special maternity leave, is useful clarification.

Part 2 – Concurrent leave

4.14 Sections 12 – 15 of the Bill increase the quantum of concurrent parental leave from 3 weeks to 8 weeks, and provide flexibility as to when this leave can be taken. We congratulate the government on both aspects of these amendments.

4.15 The SDA supported and provided witness statements to the ACTU submissions to the Family Friendly Provisions Test Case in 2005, where 8 weeks' concurrent parental leave was awarded. This provision was subsequently removed from awards by the Howard Government's 'WorkChoices' legislation.

4.16 SDA witnesses provided examples of families where additional concurrent leave had been required and had not always been provided, such as when a mother suffered post natal depression, where the mother had experienced a caesarean and consequent limitations to her physical ability, where there was a need for the mother to have post birth operations several weeks after the birth and the father needed to take time off work to care for the child/children.

4.17 We continue to support an increase in concurrent parental leave recognising:

- that both parents do have an important role in raising a child,
- the bonding benefits in these early weeks,
- the benefits to maternal and child health and well being.

4.18 Flexibility as to when the partner chooses to take concurrent leave, and the ability to take the leave in separate blocks, are very good initiatives as they allow each couple to decide what suits their personal situation best. Potentially it could also be better for business, because the flexibility could allow the employee to better accommodate business responsibilities.

Part 3 - Right to request flexible working arrangements

4.19 Items 16 - 18 of the Bill amend sections 12 and 65 of the Fair Work Act to extend the scope of employees entitled to request flexible work arrangements and clarify the business grounds upon which employers may reasonably refuse such requests.

4.20 Item 17 of the Amendment Bill increases the groups of employees able to formally request flexible working arrangements to include:

(a) parents, or those who have responsibility for the care, of a child who is school age or younger;
(b) carers (within the meaning of the *Carer Recognition Act 2010)*;
(c) those who have a disability;
(d) those who are 55 years or older;
(e) those experiencing violence from a member of the employee's family; or
(f) those who provide care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because the member is experiencing violence from the member's family.

4.21 The SDA supports the broadening of the groups of employees able to make a formal request for flexible working arrangements.

4.22 The SDA believes that the right to request flexible working arrangements should be available to all employees and should not be dependent on length of service or employment status. Often employees returning to work after a lengthy absence need to make adjustments as they transition back to work. Employees with a disability, a mental illness or those experiencing domestic violence may well have had a disrupted work history, and as such we are concerned that the employees most in need of this entitlement will be precluded from accessing it.

RECOMMENDATION 1

The SDA recommends that s 65(2) of the *Fair Work Act 2009* be deleted.

RECOMMENDATION 2

The SDA recommends that (e) and (f) be amended to:

(e) those experiencing domestic or family violence; or

(f) those providing care and support to a person who is experiencing domestic or family violence.

4.23 This wording encompasses violence which can occur in various domestic relationships, and is consistent with the wording in other jurisdictions, including State and Territory legislation.

4.24 The SDA supports the protection of employees experiencing domestic and family violence from discrimination. It is appropriate and timely to include the personal characteristic of 'status as a victim of domestic violence' into the *Fair Work Act 2009*, under s351 (1) in the list of attributes where an employer must not take adverse action against an employee, and in s 772(1)(f) as a ground on which employers must not terminate an employee's employment.

RECOMMENDATION 3

The SDA recommends that s 351(1) and s 772(1)(f) of the *Fair Work Act 2009* be amended to include 'status as a victim of domestic violence'.

4.25 The employees of a business are an essential element without which the operation would not be profitable. While employees have responsibilities to the business, so too does the business have responsibilities to its employees. These employer responsibilities should include giving serious consideration to employee requests to change their times of attendance at work.

4.26 Enlightened employers make every effort to accommodate employee requests because they know it is good for their business, and they reap the rewards of retention of skilled employees, employee loyalty, good morale and additional effort.

4.27 Employees with unsympathetic employers should have some recourse if their employer is unwilling to give serious consideration to their requests and refuses them without any good business reason.

4.28 The SDA has first hand experience of the difficulties many employees have faced when requesting flexible working arrangements. For example:

- A female employee at a large national retailer returned to work after having premature twins, who still had special needs. She was rostered to work 45 hours every week and requested to reduce her weekly hours to 43 to facilitate addressing the children's special needs. She was refused by three levels of management.
- A female employee at a large national retailer had three children – one toddler requiring care from its grandparents, one child at primary school and one child at secondary school. Her husband worked elsewhere and did not have predictable hours of work. She had worked at the store for more than 25 years. She requested to work between 10am and 2pm, Monday to Friday to accommodate the time required in the morning and afternoon to drop off and collect her children from three separate locations. The company refused. Instead, it offered her shifts from 5pm to 10pm.

4.29 In the cases above and countless other cases the SDA has been involved in, these employees ultimately have no recourse to have their reasonable requests for flexible working conditions enforced. This is because of the limitations which the *Fair Work Act 2009* has imposed, which excludes the Commission from being able to arbitrate these matters. The result is that the right to request becomes a 'hollow' right. Provided the employer responds in writing within 21 days with reasons against the request (which do not have to be demonstrated), employees can have each and every request ignored. This more often than not results in the employee losing hours, relocating to a store further away (if a feasible option), or leaving their employment entirely. The "Right to Request Flexible Working Arrangements" is not a 'right' if there is no right to appeal an unreasonable refusal.

4.30 The SDA does not assert that every request should be accommodated, it merely seeks that the Commission be given the power to deal with a dispute under this section and arbitrate the matter as it sees fit.

4.31 For this reason, the SDA makes the following recommendation:

RECOMMENDATION 4

That the Fair Work Act Amendment Bill 2013 remove the exclusion of s65 from being a matter about which the Commission may arbitrate.

4.32 Item 17 of the Amendment Bill also clarifies that an employee who:

(a) is a parent, or has responsibility for the care, of a child; and

(b) is returning to work after taking leave in relation to the birth or adoption of the child;

may request to work part-time to assist the employee to care for the child.

4.33 This right does already exist in s65 of the Fair Work Act 2009 but specific identification of this point may assist in highlighting its availability. However, once again, if there is not a right to appeal an unreasonable refusal, then it is a 'hollow' right.

Part 4 - Consultation about changes to rosters or hours of work

4.34 The SDA supports the amendments requiring modern awards and enterprise agreements to include a term which requires employers to consult about a change to their roster or ordinary hours of work and which allows for representation in that consultation.

4.35 Sections 145A (2) and 205 (1) require the employer:

(a) to provide information to the employees about the change; and

(b) to invite the employees to give their views about the impact of the change (including any impact in relation to their family or caring responsibilities); and

(c) to consider any views about the impact of the change that are given by the employees.

4.36 When we talk about work/life balance, rostering is fundamental, in terms of predictability and ability to plan, ability to care in a practical sense, to get children to their activities, or a parent to their doctor's appointment, to 'have a life', or even to have another job to earn enough to make ends meet.

4.37 The SDA, since the mid 1990's, has successfully negotiated to have clauses inserted in most of our enterprise agreements providing that employers consider their employees' family responsibilities when establishing or changing rosters. That provision has generally worked well, although there have been instances of where individual industrial commissioners have ruled in favour of the employer, who has flatly refused to try to accommodate the employees' family needs, because all the employer was required to do was consider the situation. There was no requirement to *genuinely* consider the situation, nor to demonstrate genuine business reasons for not being able to accommodate the employee's family responsibilities.

4.38 An example of this is as follows:

- A male employee employed at a large national retailer for more than eight years is responsible for the care of his three and seven year old children on a Friday and Saturday. For three years his roster has required him to work Monday to Thursday and Sundays. His wife works at another large retailer on Fridays and Saturdays. His company decided it wanted to introduce rotating rosters and subsequently provided him with a roster to work Tuesday to Saturday, despite his unavailability on Fridays and Saturdays.

4.39 The SDA has frequently experienced that many large retailers subject their employees to 'blanket' rostering changes which apply across their stores on a state or national level, without any consideration of the family responsibilities or personal circumstances of their employees. Therefore, the requirement that employers must consult with employees before making such changes is very welcome.

4.40 However, of concern to the SDA is that although the Explanatory Memorandum refers to 'genuine' consultation, the proposed wording in the Bill does not use the term 'genuine'. The Explanatory Memorandum states:

> *Part 4 of Schedule 1 to the Bill inserts new content requirements in both modern awards and enterprise agreements in relation to employers consulting with employees about changes to regular rosters or ordinary hours of work before making any decision to change rosters or working hours. These additional requirements will also require employers to* ***genuinely*** *consult with affected employees about the*

impact of the changes on their family and caring responsibilities should employees raise them.[5] (own emphasis)

4.41 The SDA is concerned to ensure that amended s.145A (2) and s.205 (1) constitute a genuine obligation to consult with employees about proposed roster changes. To this end, we advocate the following:

RECOMMENDATION 5

* rewording of Sections 145A (2) and 205 (1) (c) as follows:
to **genuinely** consider any views about the impact of the change that are given by the employees.
* the insertion of an additional sub clause to proposed s. 145A (2) and s. 205 (1):
(d) to make reasonable efforts to accommodate the needs of the employee.

Part 5 - Transfer to a safe job

4.42 The SDA supports the amendments in the Bill which will extend the right of pregnant employees to be transferred to safe work, if there is an appropriate safe job available. It is a long standing and appropriate OHS principle, that all employees are entitled to be safe at work. Length of service should be irrelevant.

4.43 In its submission to the Fair Work Act Review, the SDA advocated that the government should provide all pregnant employees with the right to safe work, given that it is a legal requirement under OHS legislation and an obligation under the ILO Maternity Protection Convention. Furthermore, the SDA also argued that it was a right provided under previous industrial legislation.

4.44 The government should be congratulated on this response.

4.45 Currently, the 'Transfer to safe work' clause is not causing problems in regard to eligible pregnant employees and therefore it is not expected that it will now be a problem to accommodate those with less than 12 months' service.

[5] Hon. W Shorten MP, Minister for Employment and Workplace Relations, *Explanatory Memorandum* at [6]

5. SCHEDULE 2 - MODERN AWARDS OBJECTIVE

5.1 In regards to the proposed addition to the Modern Awards Objective ("the MAO"), the Minister's explanatory memorandum stated that the Bill would;

- *amend the modern awards objective to require that the Fair Work Commission (FWC), when ensuring that modern awards together with the National Employment Standards provide a fair and relevant minimum safety net of terms and conditions, take into account the need to provide additional remuneration for employees working overtime; unsocial, irregular or unpredictable hours; working on weekends or public holidays; or working shifts;*[6]

5.2 The SDA congratulates the Government in taking the step to enshrine the entitlement to loadings and penalty rates for the many employees who work "overtime; unsocial, irregular or unpredictable hours;… weekend or public holidays; or… shifts."

5.3 All too often the SDA has been required to defend the rights of its members, particularly within the retail and fast food industries, to receive compensation for the hours which they work that fall outside of the traditional 'business hours'. A large swathe of the SDA's members work weekends, public holidays, evenings, nights and early mornings. A large proportion of retail and fast food employees are casual and many are subject to frequent roster changes and/or unpredictable hours of work.

5.4 Just recently, the SDA successfully defended a large number of applications by employer associations to reduce and, in some instances, entirely remove, penalty rates, casual loadings and shift loadings. A Full Bench of the Fair Work Commission ("the Commission") overwhelmingly found that the changes sought by the employer associations were lacking in evidence to substantiate their claims[7]. Whilst the SDA was heartened by this Decision, it is cognisant that the campaign from such employers to eradicate the right to compensation for working such hours or for casual work will not desist. Further attacks against the wages of some of the lowest paid workers in the country will regrettably continue.

[6] Ibid

[7] [2013] FWCFB 1635, Modern Awards Review 2012—Penalty Rates Decision at [122]

5.5 The Bill's proposed amendment to the MAO will provide a clear indication to the Commission that the Government values the right to compensation for such work, in line with the long-standing industrial norm of providing such payment and in keeping with the majority of Australians who continue to support this practice. As a new consideration in the MAO, the Commission will be required to consider this right when assessing the need to vary an award. As such, the SDA applauds this amendment.

5.6 Of concern, however, is the lack of clarity regarding unsocial hours. The SDA would note that specifically, nights, evenings and early mornings are not included in the list of areas to be considered in the terms currently proposed:

> (da) the need to provide additional remuneration for:
> (i) employees working overtime; or
> (ii) employees working unsocial, irregular or unpredictable hours; or
> (iii) employees working on weekends or public holidays; or
> (iv) employees working shifts; and

5.7 Under both the retail and fast food industry modern awards, many employees work during the late evening, night and early morning, yet do not fall within the definition of 'shift worker'. Therefore, many employees in these industries would not be captured by (iv) 'employees working shifts' of the proposed amendment. This leaves (ii) 'employees working unsocial, irregular or unpredictable hours' to address the needs of retail and fast food employees working during such times. This is where the SDA has concerns about the adequacy of the clause to capture such employees without incurring a debate before the Commission.

5.8 The SDA is concerned that the lack of specification of these times will leave the door open for employer applicants to argue within the Commission that they are not 'unsocial' times. Given that many employees in these industries are not employed as shift workers, but work during hours traditionally considered as 'shift work', to circumvent any future arguments that these times are not 'unsocial' and that work performed during such times will not fall under this consideration of the MAO, the SDA would urge that the following recommendation is adopted.

5.9 Furthermore, the inclusion of the term 'unsocial' in (ii) does not correlate with the other two terms specified in this placitum. The SDA would submit that the notion of 'unsocial' hours is more closely aligned with the terms of (iii), i.e, weekends and public holidays, which are, by nature also unsocial hours to work.

5.10 Therefore, the SDA urges that the following recommendations be adopted:

RECOMMENDATION 6

That (da)(ii) should read:

employees working irregular or unpredictable hours;

That (da)(iii) should read:

employees working on weekends or public holidays **and unsocial hours (including evenings, nights and early mornings)**

6. SCHEDULE 3 – ANTI-BULLYING MEASURE

6.1 The SDA believes this Bill is an important step forward in removing the inherent failings of the current regulatory framework for dealing with bullying in the workplace. Workplace bullying is widespread across the retail industry and the impacts are significant and profound for the victim and the workplace culture in general. It is fundamental that workers have access to a jurisdiction which allows for an individual complaints resolution which is fast, effective and low cost.

SECTION 789FD

6.2 Proposed Section 789FD fails to implement the policy objective of the Government as outlined in the Explanatory Memorandum to the Bill. In particular the Explanatory Memorandum says:

> *New section 789FD – When is a worker bullied at work?*
>
> *107. New subsection 789FD(1) provides that a worker is bullied at work if, while the worker is engaged by a constitutionally-covered business, another individual, or group of individuals, repeatedly behaves unreasonably towards the worker, and that behaviour creates a risk to health and safety.*
>
> *108. This definition reflects the definition of workplace bullying that was recommended in the Workplace Bullying "We just want it to stop" report. The Committee considered the existing definitions used by State, Territory and federal jurisdictions and expert evidence and concluded that there were three criteria that*

were most helpful in defining bullying behaviour – the behaviour has to be repeated, unreasonable and cause a risk to health and safety.

109. The Committee went on to note that 'repeated behaviour' refers to the persistent nature of the behaviour and can refer to a range of behaviours over time and that 'unreasonable behaviour' is behaviour that a reasonable person, having regard to the circumstances may see as unreasonable (in other words it is an objective test). This would include (but is not limited to) behaviour that is victimising, humiliating, intimidating or threatening.

110. New subsection 789FD(1) covers bullying behaviours carried out by an individual or a group of two or more individuals.

6.3 The Proposed s.789FD(1) provides that:

(1) A worker is ***bullied at work*** if:
(a) while the worker is at work in a constitutionally-covered business:
(i) an individual; or
(ii) a group of individuals;
repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member; and
(b) that behaviour creates a risk to health and safety.

6.4 The disconnect between the Explanatory Memorandum and the language used in s.789FD is shown by the following example:

Jason is a new employee at ABC Money P/L where he works as part of a group of 10 employees who need to work closely together. The other nine employees do not like Jason who is a keen rugby supporter as all of the other nine are fanatical soccer players and supporters. The group of nine agree to make Jason's life miserable in a very short time. Each workday for nine straight days a different member of the group has the job of bullying Jason. The group believe that in only nine days they will be able to get Jason to quit.

6.5 Jason is clearly subject to repeated bullying but this repeated bullying is not covered by s.789FD(1).

6.6 Where each member of the group bullies Jason once then such individual conduct is not repeated behaviour by an individual and falls outside s.789FD(1).

6.7 Also, the cumulative bullying by the members of the group is not repeated behaviour by the group of individuals because the group, as a group, has not engaged in repeated group behaviour.

6.8 The SDA therefore makes the following recommendation:

RECOMMENDATION 7

The Bill should be amended so as to include cumulative conduct by an individual or individuals, or a group or groups, which amounts to repeated unreasonable behaviour towards the individual being bullied.

The provisions of s.789FF will also need to be amended to provide for a remedy for such cumulative bullying behaviour.

SECTION 789FF(2)

6.9 Under section 789FF(2) the FWC must, when considering the terms of an order, take into account certain matters as detailed in s789FF(2)(a)-(d).

6.10 Under subsection (a) consideration must be given to 'any final or interim outcomes arising out of an investigation into the matter that is being, or has been, undertaken by another person or body…'. While it is important to consider what, if any, investigation has taken place, it is fundamental that any such investigation is carried out in accordance with the principles of natural justice. It is the SDAs' experience that most employers lack an understanding of basic investigation processes and procedures, while nearly all employers will have a policy and procedures that are rarely adhered to.

6.11 When an employee raises a complaint regarding bullying and the employer conducts an investigation, it will normally be undertaken by a company representative, such as an area manager or Human Resources Manager, rather than an impartial or independent person. Unfortunately, it is our experience that the investigation process will take several months; will not follow basic principles of natural justice; and will not follow the company's own policy and procedures. The SDA has many examples where the employer fails to actually interview the claimant or any witnesses. Instead, the employer will simply ask the respondent if the behavior occurred. The respondent will deny that any such behavior occurred and that will conclude the investigation.

6.12 It is important that when considering matters under s789FF(2)(a)-(d) the FWC is able to ascertain the true extent of such an 'investigation' and an opportunity is afforded to the claimant to detail any concerns or failings of any such investigation. It is important

that the FWC is able to consider whether such an investigation was conducted by an independent party; whether basic investigation principles where adhered to and whether the investigation process was conducted in a fair and timely manner. The FWC should not issue an order without consideration and scrutiny of the actual investigation process and outcomes.

6.13 The SDA recommends that the following words (in bold) be added to s789FF(2)(a) to read as follows:

RECOMMENDATION 8

(a) if the FWC is aware of any final or interim outcomes arising out of an investigation **(including the nature, scope and process of that investigation)** into the matter that is being, or has been, undertaken by another person or body – those outcomes; and

7. CONCLUSION

7.1 The SDA commends the Minister and the Government for the changes proposed within the Bill.

7.2 The SDA has raised several concerns and urges the Minister and Government to consider these fully, in light of ensuring that Australia's workplace relations system is fair and equitable.

7.3 The SDA reiterates its offer to provide witness evidence to the Standing Committee in order to elucidate its key points or provide further evidence or information as requested.