Clubs Australia
INDUSTRIAL

FAIR WORK ACT REVIEW 2012

Submission to the Fair Work Act Review Panel

by

Clubs Australia Industrial

February 2012

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Submission

1. INTRODUCTION

1.1 Clubs Australia Industrial is the national peak body, representing the industrial interests of Australia's 4000 licensed clubs.

1.2 We are a registered organization under the *Fair Work (Registered Organisations) Act 2009* (Cth) and our board of directors constitutes the Chairpersons/Presidents of each State and Territory association.

1.3 Clubs are not-for-profit community based organisations whose central activity is to provide infrastructure and services for the community. Clubs contribute to their local communities through employment and training, direct cash and in-kind social contributions, and through the formation of social capital by mobilising volunteers and providing a diverse and affordable range of services, facilities and goods.

1.4 Clubs Australia Industrial is committed to assisting Australia's registered and licensed clubs with a focus on promoting better workplace outcomes for the industry and its estimated 90,000 employees. Our organisation considers that one of its primary purposes is to ensure that our members have a voice at the government level, by representing their interests on current and emerging industrial relations issues.

1.5 Clubs Australia Industrial supports the objects of the *Fair Work Act 2009* (**the Act**) and in general terms believe that the legislation has genuinely moved closer to providing a balanced framework for both employers and employees.

1.6 We also acknowledge however that as with all new legislation, the practical operation of some of its provisions may not necessarily be consistent with the intention of its objectives.

1.7 Accordingly, for the purposes of the Fair Work Act Review, Clubs Australia Industrial established an industrial relations sub-committee constituting senior representatives from the major Club Industry State Associations, that is, New South Wales, Queensland, Victoria, Western Australia and South Australia to constructively discuss areas that we consider could be improved in order to meet the objects of the Act.

1.8 Further, we have also had direct consultation with our membership who have had to operate within the new framework.

1.9 It is against the background of the experiences of these stakeholders, that we form the basis of these submissions.

1.10 The key issues that these submissions will address go to the following areas:

a) National Employment Standards and the public holiday provisions;
b) Individual flexibility agreements;
c) Unfair dismissal;
d) Increased litigation avenues available to employees;
e) Bargaining and agreement making;
f) Transfer of business.

2. National Employment Standards

2.1 One area identified as having had a deleterious impact on employers are the public holiday provisions under the National Employment Standard (**NES**). The difficulty appears to arise as a result of the duplicity of State and Federal laws in this area. In particular, the individual States gazetting "additional" public holidays, with the effect on employers essentially paying two separate days of public holiday rates arising out of the same public holiday.

2.2 Clubs Australia Industrial proposes that public holidays remain the sole jurisdiction of the *Fair Work Act*.

3. Individual Flexibility Agreements

3.1 The Act states as part of its Objects at section 3(a) and (d), that the intention is to create flexibility for both employers and employees. As we understand it, one of the instruments established under the Act to promote this goal are individual flexibility agreements (**IFAs**).

3.2 Whilst in principle, we can identify many benefits behind the initiative of IFAs, there are a number of barriers that we believe act against the potential they can achieve.

Lack of Clarity Regarding What Can be Individually Negotiated

3.3 The Model Clause relating to IFAs provides some guidance to employers and employees as to what aspects of an Award or Enterprise Agreement can be altered on an individual basis but is restricted to the following matters:

a) Arrangements for when work is performed;
b) Overtime rates;
c) Penalty rates;
d) Allowances;
e) Leave loading.

3.4 Firstly, there is a lack of clarity around the terms of an Award or agreement that can be varied. In particular, there is no guidance about the scope of "arrangements for when work is performed" and whether this is to be interpreted broadly or narrowly.

3.5 For example, can an IFA be used in the case where there are inflexible part-time provisions in an Award, to allow an employer and an employee to agree to a span of minimum and maximum hours over a four week cycle, which allows for changes in the days and hours worked per four week cycle, to meet the fluctuating demands of the business and the personal needs of an employee who may heavily rely on an employer's ability to be flexible. This is a very live issue for the Club industry where trade demands fluctuate regularly due to functions, events and seasonal changes. Equally, Clubs employ a significant number of females, carers, older generations and university students where personal commitments outside of work necessitates Clubs in being flexible with their rostering to accommodate employees.

3.6 Further, could an employer utilize an IFA to allow an employee the right to request additional hours of work at ordinary rates of pay by agreeing to alter the "overtime rates" provisions and/or "arrangements for when work is performed" in the Model Clause?

3.7 The ambiguity with respect to the latter example is not assisted by some of the decisions that have been determined by FWA with respect to Enterprise Agreements. Whilst these cases do not directly go to the issue of IFAs, they have involved clauses that on the face of it, should be able to be dealt with by an IFA, but have been deemed to fail the requirements of the "no-disadvantage test" as it was at the time of the decisions. Presumably the same determinations would have been made had the "better off overall test" (**BOOT**) applied.

3.8 The Full Bench in April 2010[1] determined that a preferred hours clause, similar to that outlined in clause 3.6 above was a term not capable of satisfying the appropriate threshold test. The relevance of this decision is that the BOOT applies to both IFAs and Enterprise Agreements and the only conclusion that can be drawn in this respect is that if a provision in an Agreement is considered to fail the BOOT, then that same provision, if found in an IFA, would also not satisfy the test.

3.9 A further issue arising from the fact that the Model Clause can be deviated from, is the potential for unions to use the ability to negotiate IFA clauses on a collective basis during bargaining, stymieing productive negotiations regarding more relevant provisions in the Agreement and significantly reducing the scope of the terms of IFA provisions so that employers and employees are afforded little flexibility in relation to what can be agreed between themselves.

[1] *Bupa Care Services Pty Ltd. P & A Securities Pty Ltd as trustee for the D'Agostino Family Trust t/as Michel's Patisserie Murwillumbah and others* - FWAFB 2762 (15 April 2010).

3.10 By way of example, we refer to the Enterprise Agreement negotiated for the Royal Sydney Golf Club[2]. This Agreement covers all employees except for the CEO and there was a significant amount of energy and resources invested by all stakeholders involved. This Agreement was generous to employees in a very substantial way, providing amongst other things a 5% increase which was back-paid to all staff on approval. The employees were represented by a large consultative committee and both the United Voice Union and the Australian Workers Union. Whilst there were a number of areas that required negotiation, generally the parties were able to make concessions in order to provide a fair balance between the needs of the business and the employees.

3.11 What did become a very frustrating event for the Club and the consultative committee however, was the AWUs biggest issue, being the IFA provision. The Club had incorporated the model clause which both United Voice and the employee representatives understood and agreed with. The AWU argued strongly over this one issue over the course of approximately four meetings, the duration of which were about two hours each. When challenged as to what they found inappropriate about the model clause, the union representatives could only state that politically they were opposed to IFAs and they would only accept their version of an IFA provision which allowed for only one area of the Agreement to be altered.

3.12 It was only the result of the great frustration of the AWU's members which pressured the AWU to finally agree to the provision that everyone else was happy with, however this issue was fought in such an unproductive way that wasted a significant amount of time, that all other stakeholders in the process were prepared to give up on the Agreement altogether. Had the Club not persisted, employees would have missed out on extremely competitive wages and conditions to the standard terms of the Award.

[2] Royal Sydney Golf Club Enterprise Agreement AG2010/13414

3.13 If IFA provisions continue to be a mandatory feature of agreements, then we submit the model clause should not be permitted to be varied or alternatively, that the model clause provides the base standard for provisions that can be altered, with parties retaining the right to include additional aspects of an agreement/award that can be varied. If an agreement cannot be reached regarding any additional matters, then the default model clause applies.

Financial versus Non-Monetary Benefits

3.14 Secondly, the Explanatory Memorandum[3] provides an example where an employee, at their request, trades off a financial benefit in order to gain the non-monetary flexibility of being able to leave work early to continue his commitment in coaching a football team. In the example provided, it is considered that this arrangement would satisfy the BOOT.

3.15 Whilst we acknowledge that this is a specific example of the individual needs of one employee using an IFA, there are a number of cases where Clubs have offered other non-monetary benefits, for example heavily subsidized or free gym membership, free flu-shots, accessible to all employees through Enterprise Agreements, yet the practical reality is that these benefits are given limited, if any, weight when determining whether an agreement satisfies the BOOT.

3.16 This highlights a number of issues. Firstly, an inconsistency in the treatment of the BOOT with respect to non-monetary benefits. Secondly, it places an additional burden on Clubs, to find sufficient financial resources in a very difficult economic climate to have an Agreement approved. In real terms, this creates a situation where Agreement making becomes a far less palatable option than remaining on the Award because the approval process only focuses on the financial gains of the employees without taking into consideration more sustainable pay increases together with employee flexibility and benefits which are offered that are difficult

[3] *Explanatory Memorandum to the Fair Work Bill 2008* at page 137

to quantify in monetary terms. Again, benefits are obtained for employees through this process but there are few significant gains from a Club's performance perspective.

3.17 Due to the uncertainty around the weight given to non-monetary benefits under the BOOT, Clubs Australia Industrial would support any clarity in the legislation regarding this matter and/or provisions which provide for a different application of the BOOT for Enterprise Agreements and IFAs.

The Inability of IFAs to be a Condition of Employment

3.18 The protections under s144 and s203 of the Act providing that IFAs must ensure that employees are better off overall in comparison with an Enterprise Agreement or an Award should alleviate any concerns with respect to exploiting prospective employees.

3.19 The Explanatory Memorandum[4] provides that an IFA cannot be a condition of employment for a new employee. There does not appear to be a prohibition however on offering an IFA to a prospective employee which creates some potential ambiguity and risk for an employer. The legislative note to the Act pursuant to section 341(3) is consistent with this and states the following:

"A prospective employee is taken to have the workplace rights he or she would have if he or she were employed in the prospective employment by the prospective employer.

Note: Among other things, the effect of this subsection would be to prevent a prospective employer making an offer of employment conditional on entering an individual flexibility arrangement."

[4] Ibid at para 1373 page 219

3.20 An employer may wish to offer an IFA at the outset to outline the superior terms and conditions available to the employee if they are offered a position, in order to attract the best candidates for a role. There would appear to be a major risk however in employers doing this in the event that they propose an IFA but then decide that the candidate is not appropriate for some unrelated reason. Such an employee may then find an opening to commence litigation under the new general protections provisions relying on the negative inference that the employer did not offer them the job because the employee wouldn't accept an IFA, even if the true reason was due to other factors.

3.21 Difficulties also arise from a broader workplace culture perspective when existing employees obtain the benefit of flexibilities in their IFAs that cannot be made a condition of employment for new employees as the date of their commencement of employment. For example in the case of an area of a Club that operates a rotating roster to ensure that all employees in that area have the benefit of a weekend off every cycle. Employees in that area are all on IFAs at higher rates of pay (in lieu of having to apply overtime rates) in order for this to occur, for both the employees and employer's benefit.

Termination of IFAs with 28 days notice

3.22 Regardless of whether an IFA is negotiated from the Award or via an Enterprise Agreement, either party has the option of unilaterally terminating the IFA with 28 days notice. This contrasts with IFAs predecessors under the *Workplace Relations Act 1996* which were required to reach a nominal expiry date before unilateral termination could occur. This also contradicts basic employment law principles about reaching mutual agreement to enter into a contract of employment and having mutual agreement to substantially alter the terms of that contract.

3.23 The major challenge that this presents for both parties to an IFA is the lack of certainty. For example, an employee may be relying on a higher rate of pay only available under an IFA in order to meet mortgage repayments. An employer who is looking at ways to reduce a wages bill may decide, without any obligation of consultation with the employee, revert to the base Award or Agreement conditions and the employee is placed in a situation where they can no longer meet their mortgage. Employers, particularly Clubs due to the nature of the industry, need certainty that they can rely on the flexible arrangements they have made with an employee for operational reasons and for budgets amongst other things.

3.24 Another challenge faced by employers when employees unilaterally terminate an IFA, is that they are then potentially faced with a multitude of different industrial arrangments, that is employees on Awards, those on Agreements and those who are on IFAs. The rostering obligations, as one example, may be fundamentally different across all three instruments posing enormous difficulties for the operations of business on both a practical and administrative level.

3.25 Clubs Australia Industrial proposes that IFAs continue to operate indefinitely, subject to a mutual agreement to terminate and provided that at no stage during their period of operation would they fail the BOOT. Alternatively IFAs should operate in accordance with a mutually agreed set time-frame. This will create the certainty that both employers and employees mutually desire.

4. Unfair Dismissal

"Go-away" money

4.1 Since the commencement of the Act, the majority of club industry unfair dismissal cases have settled. It is concerning however, that a significant number of those cases would appear to be try-ons, for example in the case of a probationary employee who clearly has no jurisdiction to bring a claim.

4.2 With the rare exception, of all the matters that have settled, Clubs have parted with money in exchange for the claim being discontinued even where their prospects of success would be high if the matter proceeded to hearing. As their representatives, we are constantly hearing from our members that they believe they have followed proper process and had valid reason, but as a question of economics, it is cheaper to pay the applicant and settle at conciliation than arbitrate.

4.3 Whilst we acknowledge that "go-away" money is often a feature of litigation generally, Clubs Australia Industrial believe that there may be a number of ways in which the unmeritorious claims can be reduced (saving both employers and FWA valuable resources), which would in turn reduce the rate at which employers are rewarding bad employees with monetary settlements. We submit that some initiatives which could be adopted to reduce the incidence of frivolous claims are as follows:

a) If matters are not resolved at the first telephone conciliation conference, ensure that a second stage of face to face conciliation occur at FWA which is conducted by a Commissioner;

b) If a matter is not settled at the second phase of conciliation, the Commissioner presiding over the conciliation must provide a written opinion to the parties regarding prospects of success. A certificate which simply states that no opinion can be expressed should not be permissible;

c) Re-introduce the Notice of Election to proceed for unfair dismissal claims (pursuant to section 651 of the *Workplace Relations Act)* requiring an applicant to file such a Notice within 7 days of receiving the certificate noted in sub-paragraph (b) above;

d) In the event that a Commissioner has formed an opinion against one of the parties in their certificate and that party proceeds to hearing and is unsuccessful, the other party is entitled to lodge an application for costs.

Jurisdictional Objections

4.4 Section 396 of the Act specifies that FWA must decide specified jurisdictional matters before considering the merits of the application. We strongly support this provision on the basis that it would allow for the expeditious resolution of matters when an employee has no right to bring a claim to begin with.

4.5 Similarly, we support the provisions pursuant to section 399 which indicates that a hearing "must not" be conducted by FWA in relation to this part of the Act unless appropriate to do so.

4.6 It is our experience however in representing our members that this is not occurring in practice and that in the vast majority of jurisdictional cases brought before FWA, parties are required to expend the same amount of time and resources as if proceeding to full arbitration on the merits of an unfair dismissal case.

4.7 We consider that this is not assisted by the provisions under section 394(3) which provide that FWA may consider an extension of time in an unfair dismissal claim, by considering a number of factors, including the merits of the application[5].

4.8 Clubs Australia Industrial and its related State Associations, has been involved in a number of jurisdictional cases that have proceeded as though the full unfair dismissal claim was being arbitrated. Some of these cases have been uncontentious with respect to the jurisdictional issue at hand. There is a significant concern in relation to the time and resources required to be spent by our members and employers generally in these matters which we submit could have been dealt with on the papers.

4.9 A recent example of this involved the Cronulla Leagues Club Limited[6] who was represented by ClubsNSW in defending a claim for unfair dismissal brought by a senior manager. In summary, the applicant effectively resigned his employment and despite substantial attempts from the Club to have him return to work, the applicant refused. Following requests by the applicant through his solicitors to have his entitlements paid out, the Club requested details of the date that the applicant considered his employment at an end in order to calculate the entitlements. A letter from the solicitor confirmed the date at which the applicant considered himself to no longer be an employee. Twenty days after this date, an unfair dismissal claim was filed, outside the 14 day statutory time frame to bring such a claim.

4.10 Ultimately, the Club was successful in its defence and the matter was dismissed however, the process of getting to this position was long and arduous. Due to the difficulties the applicant faced in attempting to argue that the employment end date that his solicitor's communicated in writing was not correct, the solicitor and the barrister that represented the applicant at the hearing focused on the merits of the

[5] Section 394(3)(e) *Fair Work Act* (2009)
[6] *Brad Linsell v Cronulla Sutherland Leagues Club Limited t/a Sharkies* [2011] FWA 3193

case in an attempt to overcome the time limitation issue. Of course many other arguments were mounted alongside this.

4.11 The main argument for the applicant from a merits perspective was that he had been subjected to serious bullying and harassment at work and accordingly, even if the application was considered out of time, it should be allowed to proceed on this basis. Again there was a significant amount of paperwork from both parties that did not support the allegations.

4.12 The formalistic approach that FWA took in this matter meant that that in order to robustly defend the claim a significant amount of time and resources were spent putting together a witness statement from the Club's President which annexed the paper-trail of events for the months leading up to the lodgment of the claim. Due to the concerns the Club had about the allegations being made and the fact that FWA was required to consider the merits of the application[7] , the witness statement was prepared as though it was for a final unfair dismissal hearing and for the most part dealt with the history of the claim and the allegations mounted against the Club. Due to the serious and complex nature of what had been constructed by the applicant and his representatives as to the merits, the President's statement was 92 pages long.

4.13 We submit that there was a substantial enough paper-trail to have allowed FWA to determine this matter on the papers. If further information was required, we submit FWA should have been able to write to the parties requesting particulars or further documentation that could have been produced in an informal manner. The amount of time, cost and resources spent in defending this matter was entirely inconsistent with the concept of deciding jurisdictional matters early on in the litigation quickly

[7] Section 394(3)(e) *Fair Work Act* 2009

and cheaply, so as to not waste parties or FWAs time in hearing/defending such cases.

4.14 Clubs Australia Industrial supports provisions of the Act that require FWA in the first instance to determine simple jurisdictional matters on the papers and to have the power to request information from parties to assist them in making the decision. We submit that the merits of the case should have no relevance in jurisdictional determinations and that hearings should only be conducted as a last resort if the matters are so highly contentious that FWA is unable to make a decision without the benefit of formal evidence being provided.

5. Litigation Avenues

5.1 We have increasingly been involved in defending clubs in general protections disputes and litigation. These are typically claims lodged when employees are represented by solicitors (as opposed to the union).

5.2 There are a number of significant concerns about these new general protections provisions under the Act and they are outlined below.

5.3 Firstly, we submit that the general protections provisions[8] under the Act are far too broad, adding to the plethora of litigation avenues already available to employees under other parts of the Act and separate pieces of legislation.

5.4 In particular, we refer to section 351 of the Act which provides that an employer cannot take adverse action against an employee on account of a discriminatory attribute. We consider that this is duplication of well established State and Federal

[8] Chapter 3, Part 3-1, Divisions 1-8 *Fair Work Act* 2009

discrimination laws which employees have the choice to utilize if they believe they have been discriminated against.

5.5 Similarly, section 352 prohibits an employer under the adverse action provisions to dismiss an employee who is temporarily absent from work because of an illness or injury.

5.6 Whilst we acknowledge that adverse action does not need to involve termination of employment, the general protections provisions do cover incidence of termination. In this regard, we fail to see the continuing relevance of the unlawful termination provisions found at section 772(1) of the Act which provide the following grounds as being prohibited reasons for termination:

(1) An employer must not terminate an employee's employment for one or more of the following reasons, or for reasons including one or more of the following reasons:

(a) temporary absence from work because of illness or injury of a kind prescribed by the regulations;

(b) trade union membership or participation in trade union activities outside working hours or, with the employer's consent, during working hours;

(c) non-membership of a trade union;

(d) seeking office as, or acting or having acted in the capacity of, a representative of employees;

(e) the filing of a complaint, or the participation in proceedings, against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;

(f) race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin;

(g) absence from work during maternity leave or other parental leave;

(h) temporary absence from work for the purpose of engaging in a voluntary emergency management activity, where the absence is reasonable having regard to all the circumstances.

5.7 The above section substantially mirrors the protections available under the adverse action provisions and we submit that the duplication of litigation avenues for employees unfairly exposes employers to a greater range of liability in areas where employees are already more than adequately protected.

FWA versus the Federal Courts

5.8 The general protections provisions, are arguably not accessible to the majority of employees as they are typically cost prohibitive proceedings to run. We believe this is due largely because of their referral to the Federal Magistrates or Federal Court if they are not able to be settled at FWA during conciliation. In all of the cases that ClubsNSW have been involved in, solicitors and barristers have represented the applicants.

5.9 This has often created a situation where a matter that at its core, is really a simple unfair dismissal claim has evolved into a case with very complex, technical legal arguments which are unnecessarily protracted because of the Courts' difficulties in finding early dates for parties to proceed.

5.10 The complexity which we have seen become a feature of these cases, necessitates the Clubs who are respondents, to also retain counsel to defend these matters, even in unmeritorious claims. The costs arising from this is one that many of our

struggling, smaller and/or regional Clubs cannot afford to bear. The fact that proceedings under the Act are generally fought on the basis that each party wears its own costs, unless section 570[9] of the Act can be satisfied, also means that for

Clubs who are forced to defend such cases are in a financially prejudiced position even if they are successful. In a recent example, ClubsNSW represented the Batlow RSL Club in Federal Magistrates Court proceedings lodged by the former General Manager (**the applicant**)[10]. The applicant had been terminated on grounds of serious misconduct. She brought a significant monetary claim in the Federal Magistrates Court against the Club and its President for non-payment of National Employment Standard entitlements, amongst other things. The Club was forced to pay a substantial financial settlement to the applicant because this was still cheaper than meeting the continuing costs of the litigation, and the club was at serious risk of not being able to continue to trade if it attempted to keep defending the claim.

5.11 Further, we are concerned that although an Industrial Division of the Federal Magistrates Court has been established to deal with adverse action claims, that the Federal Magistrates who preside over such matters are also dealing with bankruptcy cases, discrimination matters, trustee disputes, immigration cases and other unrelated yet significant areas of law. The question arises as to whether these Federal Courts have the resources, understanding and expertise of employment and industrial law to appropriately interpret the legislation and decide these matters.

5.12 We have also experienced an inconsistent approach by Federal Magistrates with respect to rights of appearance by advocates of an employer association. In two matters that we have represented our members before this Court, one of our

[9] Section 570 *Fair Work Act 2009* (Cth) outlines the circumstances in which costs may be ordered by a Court against a party for proceedings arising under the Act.
[10] *Paula Jane Enright v Batlow RSL Club and Robyn Burns* SYG 743/2011

senior lay advocates who has worked in industrial relations for over 10 years was told she had no right to appear. On another occasion, the executive manager of the industrial relations team with close to 20 years experience in the field, who has completed a law degree (but does not hold a practicing certificate) was also told that he would be heard on that particular day but that he was not expected to

appear in any further mentions of the matter because of his lack of standing. This was notwithstanding being told at a Federal Magistrates Court briefing that employer association advocates had the right to appear.

5.13 Clubs Australia Industrial supports a system where FWA is resourced to become the "one-stop shop" for all industrial and employment related matters under the Act to ensure that matters are resolved as simply, expeditiously and cheaply as possible for all parties concerned.

5.14 We further submit that if the Federal Magistrates Court is to retain some jurisdiction over matters under the Act, that the legislation ought to clearly specify the rights of employer and employee association advocates to appear.

Time Limitation

5.15 We consider that the sixty day time limitation to bring an adverse action claim following a termination is excessively long, and are concerned that many employees who find themselves out of time in an unfair dismissal claim are finding it relatively easy to construct a claim that they were terminated for one of the many protected grounds, and using the adverse action provisions to commence proceedings.

5.16 In the initial stages, an employee can face very limited risks and costs in bringing such a claim, knowing they will have the opportunity to conciliate at FWA with the

expectation of extracting a monetary settlement. There is no real disincentive to opportunistic employees under the Act to sift out these types of claims.

5.17 We propose that the sixty day time limitation for adverse action claims in relation to terminations of employment be reduced to 14 days so as to be consistent with the unfair dismissal provisions.

5.18 Similarly, we refer to section 544 of the Act which provides a six year statutory limitation from the time a contravention occurred for a civil remedy provision. This would capture a claim made by an employee who was not terminated but who alleges their employer took other adverse action against them during their employment.

5.19 In the interests of fairness, there is no reason why an employee should have six years from the time of an alleged contravention to bring a claim against an employer and we submit that employees who wait till the end of such a long time limitation are highly likely to lodge unmeritorious claims. We propose that a more balanced approach which would effectively reduce the vexatious and/frivolous claims, should be between 60-90 days after the alleged contravention has occurred.

Double-dipping

5.20 We acknowledge and support sections 725-732 under the Act which serve as the anti-double dipping provisions to prevent employees from bringing multiple claims in relation to their termination of employment.

5.21 There would appear however to be a technical loop hole which would allow sophisticated advocates and/or applicants to issue proceedings under separate

pieces of legislation, but splitting their claims so as to not be in breach of the multiple action provisions.

5.22 For example, there does not appear to be a protection for employers under the Act that would prevent an employee who has been terminated for lengthy absences from work due to illness and is no longer considered by the Act to be temporarily absent, from bringing an adverse action claim for unlawful discrimination under s351 of the Act on the basis of disability. The employee may also bring a claim before the Anti-Discrimination Board under the *Anti-Discrimination Act* (NSW) for unlawful discrimination in the period leading up to but not including termination.

5.23 An employer in this circumstance would have to have very deep pockets to defend both claims or succumb to the pressure of settling for an unfavourable amount because of the excessive costs of having to defend the claims in two different jurisdictions.

6. Bargaining and Agreement Making

6.1 At section 3(f) of the Objects of the Act it is stated:

"achieving <u>productivity</u> and <u>fairness</u> through an emphasis on enterprise level collective bargaining underpinned by <u>simple</u> good faith bargaining obligations…" [emphasis added]

6.2 We are concerned that despite this being a sound object, that in practice it is not being achieved due to a number of factors including onerous paperwork/administrative obligations on employers and FWAs rejection of agreements based solely on administrative errors that have arisen.

6.3 By way of example, in 2009 ClubsNSW represented the Tocumwal Golf Club[11] in their enterprise agreement negotiations with employees. After a substantial amount of effort by all stakeholders in the process, the agreement was voted in favour of by 38 of the 39 employees that voted. The appropriate paperwork was lodged by the Club however a typographical error saw an incorrect date placed on the form which related to the notice of representational rights.

6.4 On 15 January 2010 a decision was handed down by FWA rejecting approval of the agreement. FWA were notified of the typographical error however there was a refusal to take the circumstances into consideration. The notice of representational rights had been issued to employees approximately five months prior to the voting of the agreement.

6.5 The Club could not contemplate any further resources being spent on commencing the process again from the beginning and employees lost the benefit of a generous agreement. The Club were also reluctant to go through the process again as the agreement was originally lodged under the "no-disadvantage test" and would have been re-lodged under the BOOT, where there was much uncertainty as to how it would be applied.

6.6 As at the date of these submissions, this Club's employees remain employed under the *Registered and Licenced Clubs Award*. No further interest has been shown by either the club or its employees to enter into an enterprise agreement.

Productivity Gains

6.7 Further to the concerns about the application of the BOOT highlighted in paragraph 3.15 above, there are limitations for employers when negotiating an enterprise

[11] *Tocumwal Golf Club Ltd* AG2009/23472

agreement with respect to what can be offered to employees that will be considered sufficient off-sets for altering Award entitlements.

6.8 The new provisions under the Act that give the union the power to force an employer to negotiate an enterprise agreement, together with the lack of value placed on non-monetary benefits under the BOOT, has created a situation where there has been an unbalanced shift of power in favour of unions and employees.

6.9 Under the Act, employers are being forced by the union to bargain and invest time, resources and energy, in cases where the Award appropriately serves the needs of many Clubs and employees, and feeling compelled to offer inflated wage increases to meet the BOOT, with no real productivity gains in return. This has a particularly significant impact on our small regional Clubs who do not have the human or financial resources that the larger metropolitan Clubs have available to them.

Processes for Approval

6.10 Whilst it is clear that FWA take its obligations seriously with respect to ensuring that agreements satisfy the BOOT, it is our observation that many agreements across sectors have been rejected on the basis of a failure to meet procedural requirements. The Tocumwal Golf Club example noted above is a case in point for our industry.

6.11 In this regard, Clubs Australia Industrial recommend that FWA be given the discretion to approve agreements notwithstanding minor procedural deficiencies.

Bargaining Orders

6.12 There is a need for clarification as to the timing of applications for bargaining orders pursuant to section 229(3) which states the following:

"The application may only be made at whichever of the following times applies:

(a) if one or more enterprise agreements apply to an employee, or employees, who will be covered by the proposed enterprise agreement:

(i) not more than 90 days before the nominal expiry date of the enterprise agreement, or the latest nominal expiry date of those enterprise agreements (as the case may be); or

(ii) after an employer that will be covered by the proposed enterprise agreement has requested under subsection 181(1) that employees approve the agreement, but before the agreement is so approved;

(b) otherwise--at any time."

6.13 The wording at sub-paragraph (b) in particular requires clarification. There is doubt, for example, as to whether bargaining orders can be sought after employees have already voted in favour of the agreement, or in fact after the filing of the paperwork by the parties seeking for the agreement to be approved.

6.14 At the time of writing, ClubsNSW have been representing the Broken Hill Democratic Club in what started as approval proceedings for an enterprise agreement but has now morphed into bargaining order proceedings before FWA. The history of the matter is set out below.

6.15 Around May 2011, a notice of bargaining rights was distributed to employees. At that time, there was one known member of the Broken Hill Town Employees Union (**BHTEU**) who, in writing, requested that the staff consultative committee be his bargaining representative. The BHTEU ceased accordingly to be the default representative.

6.16 Around September 2011 an information session was scheduled with employees to explain the contents of the negotiated agreement. On the eve of this meeting, the BHTEU demanded the right to be involved in negotiations even though at that stage, negotiations were considered at an end.

6.17 Following this however, the Club in good faith agreed to have a negotiation meeting with the BHTEU and requested in advance of that meeting a list of their demands so that they could be properly considered. This was presented on the day of the actual meeting. There were substantial offers of compromise made by the Club to try and reach agreement with limited success. At the end of that day, there was an agreement between the Club and the BHTEU to hold a meeting with staff the following week and ask the employees whether they wished for negotiations to continue or to put the agreement to a vote. Employees sought to take the agreement to a vote.

6.18 As at the time of the vote, there were 4 union employees out of a staff of over 40. The vote was successful in favour of the agreement and the appropriate paperwork was lodged. The BHTEU in their approval forms, objected to the approval of the agreement and particularized their reasons why. We note that on the same day that The Broken Hill Democratic Club's agreement was filed, a substantially similar agreement for another Broken Hill Club was also filed with no objection from the BHTEU.

6.19 On 11 January 2011, the hearing was listed at FWA in Sydney where the Club's general manager flew from Broken Hill especially to attend on a day of her annual

leave. The BHTEU dialed in through tele-conference together with the staff consultative committee.

6.20 Verbal submissions were made by both parties at that hearing and the decision was reserved. The following day, the BHTEU had written to FWA, without advising the Club or ClubsNSW, that it wanted to put on further submissions. FWA confirmed that further submissions would have to be in writing and granted ClubsNSW the right to reply on behalf of its member.

6.21 It was in the BHTEUs further written submissions, that a plethora of new issues were raised for the first time as to the basis for their objections to the agreement. The BHTEU sought in these submissions that FWA grant an application for a serious breach declaration pursuant to section 234 of the Act.

6.22 FWA wrote to the BHTEU advising that if they wished to pursue these orders that they would have to file a separate application to have it considered. The BHTEU recently filed an application for bargaining orders under section 228 and another hearing date was set for 7 February 2012. Again, the Club flew to Sydney for the hearing and the BHTEU dialed in. The matter was not determined on this occasion and the decision regarding the bargaining orders was reserved. On 14 February 2012 a decision was ultimately handed down in favour of the Club.

6.23 Notwithstanding the final result, the Club and its representatives are at a loss as to how such a basic matter could be allowed to spiral into this complex, drawn-out and extremely inefficient way of dealing with an approval application for an agreement. The fact that the union were able to file for bargaining orders well after employees voted in favour of the agreement and after the paperwork was filed in December last year would seem to fly in the face of a fair and simple agreement making system.

7. Transfer of Business

7.1 We draw from our many years of experience as industrial practitioners and the feedback from our industry, clubs both large and small, when making the submission that the transfer of business provisions under the Act are acting against the interests of both employers and employees.

7.2 The provisions are drafted in a manner which to a large extent are incomprehensible and ambiguous, failing to address some basic issues that arise when transfers of business occur.

7.3 The transfer provisions are critical to the club industry in a climate where many small clubs are being involved in amalgamations with larger clubs. We are also finding that many of our members require advice relating to outsourcing or insourcing parts of the business and in the industry it is not uncommon for this to occur in relation to catering functions and/or security. The complexity of the provisions of the Act that apply to these scenarios make it more enticing for employers to retrench employees rather than transfer them and ultimately this is a lose-lose scenario. The club/business loses the skills and expertise that established employees take with them and employees find themselves out of work.

7.4 Aside from the complexity in the provisions themselves, this area of the law is currently dealt with all over the Act making them difficult to follow. We consider that this adds an unnecessary layer of difficulty in the legislation to have transfer arrangements dealt with at section 22 (5) & (7), section 91, section 122 and then again throughout Part 2-8, Divisions 1-3 of the Act.

7.5 In 2011, we had a senior HR manager at one of our very large and well-resourced clubs express to us that they were contemplating engaging solicitors to deal with the outsourcing of one of the major functions of the business because they could not make sense of the Act and could not justify the time wasted in trying to work it out. The concern about this of course is the situation that arises with small, under-resourced clubs and other employers who do not have the means to fund lawyers to give them advice about the operation of these provisions, which at the end of the day is unlikely to be of great assistance anyway because of the way the Act is framed.

7.6 Areas that we have experienced as creating much confusion amongst our members due to the ambiguity in the Act, arise in relation to transferring employee's entitlements, in particular redundancy payments; other leave entitlements and the application of a different industrial instrument to transferring employees.

Transferable Instruments

7.7 We note that across the club industry, different industrial arrangements apply including enterprise agreements and the Registered and Licensed Clubs Award. We are also aware however that in the case of catering and security functions that many clubs contract out, those contracting businesses have their own industrial instruments that apply to their employees. We submit that the Act does not assist employers in any useful or productive way in relation to the application of transferring industrial instruments.

7.8 We submit that in this regard, the Act should be amended to contain provisions which prevent new employers from having transferable instruments apply to them. To do otherwise creates an impractical, logistical administrative nightmare for new employers which cannot allow a business to operate efficiently and which poses a

major disincentive for a new employer to consider a transfer of business arrangement.

Probationary Periods

7.9 Further, the Act does not provide adequate guidance about a new employer's right to put transferring employees of an old employer on probation. The current body of case law does not provide much assistance in this respect and we consider this arises because the Act does not directly address it. It is critical that a new employer has the ability to review the performance of employees who have just commenced working for them, when they have not otherwise had the opportunity to do so. It is also essential that some clarity around this right is addressed in the legislation as it also has flow on ramifications to unfair dismissal jurisdictional matters.

Definition of Transfer of Business

7.10 With respect to the definition of when a transfer of business has occurred, the Act states the following[12]:

*1) There is a **transfer of business** from an employer (the **old employer**) to another employer (the **new employer**) if the following requirements are satisfied:*

(a) the employment of an employee of the old employer has terminated;

(b) within 3 months after the termination, the employee becomes employed by the new employer;

*(c) the work (the **transferring work**) the employee performs for the new employer is the same, or substantially the same, as the work the employee performed for the old employer;*

[12] Section 311(1) *Fair Work Act* 2009

(d) there is a connection between the old employer and the new employer as described in any of subsections (3) to (6).

We submit that this definition is critical to all other aspects of the transfer provisions and could be amended to reduce the incidence of unintended interpretations of when a transfer has occurred. In this respect we make the following observations:

i) Section 311(1)(a) - termination of employment can arise by way of resignation or by termination of the employer. The definition leaves it open to an interpretation of either of these occurrences which we acknowledge that the Explanatory Memorandum[13] indicates is the intent, however, we submit that subsection (a) should only relate to cases where the old employer has terminated the employee.

It cannot be considered a logical outcome if an employee resigns from an old employer years after a transfer of business has occurred and then within 3 months of that resignation becomes employed by the new employer, that the new employer be burdened with the transfer of a transferable industrial instrument.

ii) Section 311(1)(b) – the three month period from termination to re-engagement needs to also refer to the time at which the business transferred to avoid the scenario outlined in paragraph (i) above.

iii) Section 311(1)(c) – there appears to be an inconsistency with the language used in the Act and the intended scope of what constitutes transferring work. The Act states that the work is to be the *"same or substantially the same…"* however in the Explanatory Memorandum[14] it is stated that *"it may be*

[13] *Explanatory Memorandum to the Fair Work Bill 2008* at paragraph 1215, page 193
[14] Ibid at paragraph 1218, page 193

possible to categorise the work more generally." It then goes on to provide the example of a supermarket employee who stacked shelves for an old employer but works on the checkout for the new employer would satisfy this aspect of the legislation.

We consider this to be an extremely broad interpretation of the words used in the Act and submit that this ought be properly clarified if it is to remain. Further, we submit that the "character of the business" test as considered by the High Court in *PP Consultants Pty Ltd v FSU*[15] should be enshrined in the legislation as an integral feature of whether a transfer of business has occurred.

7.11 We submit that the Act should be amended to incorporate one dedicated chapter which includes all of the transfer of business provisions as opposed to the scattered, piecemeal approach that currently exists. These provisions should be drafted in plain English, reflect language that is consistent with its intent, and in a manner that covers all standard transfer scenarios, including employee's entitlements, probationary periods and coverage of industrial instruments.

[15] *PP Consultants Pty Ltd v FSU* [2000] HCA 59

8. CONCLUSION

8.1 Overall, Clubs Australia Industrial supports the objects of the Act and believes that the legislation has met many of these objectives. The areas outlined above are those which we believe are aspects of the Act which could be improved to produce better outcomes for both employers and employees, and areas that we have directly experienced as problematic in either our capacity of advising members or representing them in proceedings.

8.2 We welcome any positive changes to the Act that remove barriers to flexibility and productivity and which promotes the aims of a balanced and simpler system of industrial relations.