SDA SUBMISSION

Secure Jobs, Better Pay Review

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Submitted by: Gerard Dwyer
National Secretary-Treasurer

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About the SDA

The Shop, Distributive and Allied Employees' Association (SDA) is one of Australia's largest trade unions, representing over 200,000 members nationwide. Our members work in retail, warehousing, fast food, hairdressing, beauty, pharmacy, online retailing, and modelling.

The majority of SDA members are women (60%), under 35 years (57%), and low-income. Retail and food services are two of the three lowest industries for median weekly earnings.

The SDA has a proud history of advocating for the rights and interests of workers in these sectors, many of whom are young, part-time, or casual employees. We do this through enterprise bargaining, making submissions regarding Awards and the National Employment Standards (NES) to provide a relevant safety net, and through numerous submissions made to parliamentary and government inquiries and other important reviews.

A significant proportion of our membership comprises women and individuals with caregiving responsibilities, making the issue of flexible working arrangements particularly relevant.

The SDA has 10 policy principles that guide our engagement in these reviews. A list of these principles is attached to this submission at Appendix A.

Executive Summary

The SDA welcomes the opportunity to make a submission to the review of the operation of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 (Secure Jobs, Better Pay Act)* and of the amendments made by Part 16A of Schedule 1 of the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023 (Closing Loopholes Act) (the Secure Jobs, Better Pay Review).*

We strongly support the amendments, particularly the expansion of the rights of employees to request flexible working arrangements and strengthening the obligations of employers in responding to such requests.

These amendments represent a significant advancement in promoting equitable and fair working conditions, particularly for workers in the retail, fast-food and warehousing industries. By broadening eligibility criteria and strengthening the dispute resolution mechanism, the changes address longstanding challenges faced by our members, including balancing work with caregiving responsibilities, managing health issues, and responding to domestic violence.

In this submission, we provide several real life case studies that illustrate the positive impacts of the amendments for our members.

This submission also addresses the issue of Zombie Agreements and how best to incorporate undertakings in Agreements.

1. Introduction

The Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2023 introduced significant changes to the Fair Work Act 2009, particularly regarding flexible working arrangements under Section 65. These amendments are part of the Albanese Government's commitment to modernising workplace laws to reflect the evolving needs of the workforce. In light of shifting demographics such as the increased participation of women, an aging population and the changing life circumstances of workers in Australia, there amendments have addressed the increasing need of workers to access flexible work arrangements.

The working arrangements that have evolved following the COVID-19 pandemic further underscored the importance of flexible work arrangements, as many workers adopted new working arrangements to balance work responsibilities with caregiving duties, as well as health and domestic concerns. Many of our members face challenges that make flexible working arrangements not just desirable but essential for their continued employment and wellbeing.

2. Expanded Protections Under Section 65: Positive Impact for SDA Members through Broadened Eligibility Criteria

The amendments to Section 65 have expanded the categories of employees eligible to request flexible working arrangements. Previously, eligibility was limited to employees who were parents or had responsibilities for the care of a child, were carers, had a disability, were 55 or older, or were experiencing family or domestic violence.

The new categories include:

- **Pregnant Employees:** Recognising the need for adjustments during pregnancy, such as attending medical appointments or modifying duties to reduce physical strain; and
- **Employees Experiencing Family or Domestic Violence:** Providing essential flexibility to access support services, attend legal proceedings, or relocate for safety reasons.

These new categories acknowledged the diverse circumstances that may necessitate flexible working arrangements and aligned with the Government's commitment to support vulnerable workers.

The following real-life examples typify common requests for flexible work arrangements made by workers in the retail industry to accommodate child-care responsibilities. Without the Act’s requirement for employers to respond within 21 days, many of these requests for flexible working arrangements for legitimate care reasons would remain unresolved.

Case Study 1

An SDA member, Jane1*, a single mother working in a retail store, faced unexpected changes in her childcare arrangements when her sister-in-law could no longer provide care on Sundays due to personal commitments. Jane's roster included Sunday shifts, which now conflicted with her childcare availability. Utilising the expanded provisions under Section 65, Jane submitted a formal request for a flexible working arrangement to shift her workdays from Sundays to Wednesdays.

Jane's employer engaged in a discussion as required by the amended Act. Within the stipulated 21-day period, the employer provided a written agreement to adjust her schedule. This accommodation allowed Jane to maintain her employment without compromising her ability to care for her child.

Case Study 2

Mary*, an SDA member and single mother of a three-year-old child, worked at a retail store on Mondays, Tuesdays, Fridays, and Sundays. She relied on her sister-in-law to care for her child on Sundays. However, due to her sister-in-law's changed commitments, she was no longer able to assist on Sundays, and childcare services were unavailable on that day. With no partner or other family support, Mary faced a significant challenge.

Utilising the expanded provisions under Section 65, Mary submitted a formal request for a flexible working arrangement to change her Sunday shifts to Wednesdays or Thursdays, days when childcare was accessible. Her employer was required to engage in a genuine discussion as required by the amended Act.

Within 21 days, the employer provided written confirmation of the new arrangement. This accommodation allowed Jane to maintain her employment without compromising her ability to care for her child, demonstrating the positive impact of the broadened eligibility criteria.

Strengthened Employer Obligations

The amendments have introduced more rigorous obligations for employers when responding to requests for flexible working arrangements:

- **Genuine Discussion Requirement:** Employers are now obliged to meet with the employee and genuinely try to reach agreement if they want to refuse a request for flexible work arrangements.
- **Comprehensive Written Responses:** If a request is refused, the employer must provide detailed reasons based on reasonable business grounds and outline any alternative arrangements that can be offered.

These requirements promote transparency and collaboration, reducing the likelihood of arbitrary refusals and fostering a fairer working environment.

Case Study 3

Lisa*, an SDA member employed at a large retail company in a non-customer facing role, was diagnosed with multiple sclerosis. The condition caused fatigue, mobility issues, and other symptoms impacting her daily functioning.

The company's existing policy permitted employees to work from home one day per week. Recognising that working an additional day from home would significantly help her manage her symptoms while

[1] * All of the names in these case studies have been changed for privacy.

maintaining her effectiveness at work, Lisa submitted a formal request for a flexible working arrangement under section 65 to increase her remote workdays to two days per week.

Her employer engaged in a discussion as mandated by the strengthened obligations of the amended Act. They considered her health needs alongside the operational requirements of the business and provided written confirmation of the approval within the 21-day response period.

This adjustment enabled Lisa to better manage her multiple sclerosis and to continue in her role. The employer's compliance with the strengthened obligations highlights the positive impact of flexible working arrangements on employee well-being and retention.

Case Study 4

Tom*, an SDA member over the age of 55, worked late shifts at a retail store, often finishing at 10 pm on Tuesdays. The late finish times exacerbated his fatigue and impacted his well-being. Seeking to improve his work-life balance, Tom requested a change to finish at 6:30 pm instead.

His employer met with Tom to discuss the request, and considered the reasonable nature of his request and the impact on staffing. Within the 21-day period, the employer agreed to adjust his Tuesday finish time. This change allowed Tom to better manage his fatigue levels, demonstrating the effectiveness of the strengthened employer obligations in promoting employee health.

Enhanced Dispute Resolution: Protecting the Right to Flexibility

One of the key changes introduced by the amendments to Section 65 is the empowerment of the Fair Work Commission (FWC) to arbitrate disputes related to flexible working arrangement requests. This development provides employees with the ability to seek a final determination through arbitration if they believe their requests have been unreasonably refused. This amendment is highly significant, as it enhances worker confidence in exercising their rights to request flexibility.

The possibility of taking a matter to a hearing at the FWC has had a marked impact on employers' attitudes towards flexible working arrangement requests. Knowing that their decisions can be scrutinised and potentially overturned by the FWC has meant employers have had to seriously consider each request on its merits. This heightened level of accountability has motivated employers to engage in genuine discussions with employees and provide well-founded reasons when refusing a request.

The right to arbitration acts as both a deterrent against unreasonable refusals and an incentive for employers to adopt fair and transparent processes. It has made a real difference in how employers have approached flexible working arrangements, leading to more constructive discussions and better outcomes for workers and businesses.

The possibility of FWC intervention has motivated employers to carefully consider requests and engage in genuine discussions. It has helped to ensure that refusals are not made lightly and that employees' circumstances are given due consideration.

Case Study 5

Maria*, an SDA member responsible for caring for her elderly mother, requested a reduction in her working hours to better manage her caregiving responsibilities. Initially, her employer was reluctant to approve the request, citing staffing constraints and potential impacts on service delivery.

Aware of her rights under the amended Act, Maria raised the option of referring the matter to the FWC to arbitration, in the event that an agreement couldn’t be reached. This caused her employer to reconsider her request and engage in a more thorough discussion with Maria to understand her situation and work through other possible solutions.

Ultimately, Maria and her employer agreed to a compromise that adjusted her hours without significantly impacting the employer's operational needs.

This outcome illustrates how the strengthened dispute resolution process can lead to mutually beneficial solutions without having to go to arbitration. Maria was able to provide the necessary care for her mother while remaining in employment.

Case Study 6

Michael*, an employee of over 40 years at a major retailer and an SDA member, is the primary carer for his wife, who suffers from a debilitating illness that increases her risk of falls. His longstanding roster had him working early morning shifts, allowing him to return home by early afternoon when his wife needed more assistance.

When his employer proposed a new roster with later start and finish times, including Sunday shifts, it conflicted with his caring responsibilities. Michael was concerned about the changes and felt intimidated by the store manager's insistence. Seeking assistance from the SDA, Michael submitted a flexible working arrangement request under Section 65 on the grounds of his caring duties.

Highlighting the potential for FWC arbitration led the employer to agree to a roster that accommodated Michael's needs. The successful use of the dispute resolution provisions ensured that Michael could continue to care for his wife without sacrificing his employment, and he expressed great satisfaction with the outcome.

Providing Recourse for Vulnerable Workers

The demanding nature of customer service roles, coupled with irregular hours, can contribute to stress and burnout. Flexible working arrangements enable employees to balance work demands with self-care and recovery time. For older workers, a gradual reduction in working hours can help ease the transition to retirement.

Case Study 7

John*, a retail employee and SDA member with multiple sclerosis, experienced varying levels of fatigue and mobility challenges. The unpredictability of his condition made standard scheduling difficult. Through a flexible working arrangement request under Section 65, John was able to adjust his shifts and incorporate remote work where feasible.

His employer, recognising the strengthened obligations and the potential for FWC arbitration, engaged in a genuine discussion to accommodate his needs. This arrangement allowed John to manage his condition effectively, highlighting the importance of flexible work options for employees with health conditions.

Case Study 8

Susan*, a 60-year-old SDA member working at a supermarket wished to reduce her hours to spend more time with her grandchildren and prepare for retirement. She had been working full-time with a complex rotating roster. Susan requested a flexible working arrangement to move to part-time hours, maintaining specific set shifts that averaged 13 hours per week.

Her employer granted her request within the 21-day period. This accommodation assisted Susan in her transition towards retirement and enabled her to remain in employment for a longer period and mentor new staff members.

3. Elimination of "Zombie" Agreements: Supporting Fair Employment Standards

The SDA strongly supports the amendments introduced by the Fair Work Legislation Amendment (Closing Loopholes) Act, which automatically terminated so-called "Zombie" Agreements. These workplace agreements, made prior to the commencement of the Fair Work Act 2009, continued to operate under transitional provisions, often to the detriment of employees. The imposition of an automatic "drop-dead" date was a necessary measure to eradicate these outdated agreements that undermined fair work conditions.

Zombie Agreements frequently contained inferior terms compared to modern awards, lacking essential provisions such as penalty rates, overtime pay, and adequate rostering conditions. Employees working under these agreements were often denied fair compensation for evening, weekend, and public holiday work, minimum conditions that are standard in awards.

For example, retail employees covered by Zombie Agreements were sometimes required to work late nights and weekends without receiving any additional remuneration. This not only disadvantaged the workers but also created an uneven playing field for employers. Businesses adhering to modern awards faced unfair competition from those exploiting outdated agreements to reduce labour costs. By automatically terminating these Zombie Agreements, the legislation has helped eliminate substandard conditions and promote a more equitable and competitive environment.

The termination of Zombie Agreements has also benefited employers who were committed to fair employment practices. By ensuring that all businesses operate under the same set of modern awards and conditions, the amendments have fostered fair competition based on service quality and innovation rather than on the undercutting of employee entitlements.

Challenges with Post 2010 Agreements

Despite the progress made, there remains a cohort of Zombie Agreements made between 2010 to 2016 that continue to operate. These agreements, although established under the Fair Work Act, may still contain terms less favourable than the relevant modern awards. Unlike the pre-2010 agreements, these are not automatically terminated by the legislation, necessitating proactive action to address them.

The SDA has been actively lodging termination applications for these agreements where possible. The process requires an individual employee to make the application to terminate the agreement. This is often a step that employees find difficult and confronting. It can expose them to retaliation by the employer which could include reduction in hours of work, or changes to rosters that the employee cannot work. This process also requires considerable resources and relies on the union's capacity to identify and challenge each agreement individually. Without automatic termination, employees under these agreements may continue to miss out on improved conditions, such as penalty rates and better rostering provisions.

It is imperative that measures are taken to address the remaining Zombie Agreements to ensure all workers have access to fair and equitable working conditions. The automatic termination of pre-2010 agreements set a positive precedent, but disparities persist with the continued existence of post-2010 agreements. The SDA urges for mechanisms that can facilitate the termination of these agreements without placing the onus solely on an employee to initiate the process. A union who has interest in an industry should be able to make an application to terminate an agreement where there is no union party to an agreement.

4. Dealing with Errors in Enterprise Agreements – Inserting Undertakings Before Relevant Clauses

An important aspect of ensuring clarity and enforceability in enterprise agreements is the manner in which undertakings required by the Fair Work Commission (FWC) are incorporated into the agreement.

When the FWC identifies issues during the approval process and requires undertakings from an employer to address these concerns, it is important that any undertakings are accessible and comprehensible to all parties covered by the agreement.

To enhance understanding and access of undertakings in an agreement, we recommend that undertakings be inserted by the FWC into the text of the enterprise agreement, prior to the relevant clause. This will help draw attention to the impact of the undertaking on the clause, thereby reducing the potential for confusion or misinterpretation of any terms of an Agreement modified by an undertaking.

5. Conclusion

The amendments to Section 65 of the Fair Work Act represent a significant step forward in promoting fair and flexible workplaces. By expanding eligibility, strengthening employer obligations to consider and respond to employee requests and enhancing the dispute settling mechanism, the changes have helped to address critical work and care issues faced by workers in the retail, fast-food and warehousing industries.

The elimination of Zombie Agreements through automatic termination has also been an important step in upholding fair employment standards and protecting workers' rights. It has eradicated substandard conditions, reinstated essential entitlements like penalty rates and proper rostering, and promoted a more equitable environment for employers. The SDA encourages continued efforts to address the remaining outdated agreements set between 2010 and 2016, to ensure that all workers benefit from fair and current employment conditions.

Finally, inserting an undertaking prior to the relevant clause in the body of an Agreement will help reduce misinterpretation and misapplication of those terms modified by an undertaking.

The SDA appreciates the opportunity to contribute to this review.

For further information, please contact:

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Shop, Distributive and Allied Employees’ Association (SDA)

Appendix A: Principles underpinning SDA policy positions

SDA policy is driven by providing value to our members whose work is regulated by an industrial system that has been reformed but had failed them for decades.

Australians need to be supported by an economic system that has working people at its centre. Our predecessors built an industrial system which provided the foundations for shared prosperity. It is now our responsibility to utilise the reformed industrial framework for the current and future generations. Decades of concerted attacks on our industrial relations system saw inequality grow, and economic and political power has further concentrated in the hands of a few.

The world of work has changed and will keep changing. There is an unprecedented intersection between work and care. Income and gender inequality have combined to increase disadvantage. Predictable, secure hours of work that provide a living wage are at the centre of decent work. But there has been growth in insecure work, digitalisation is now a matter of course, safety concerns have persisted, and automated, digital and generative technologies must be shaped to enhance, not undermine, decent work.

We believe that fundamental not incremental change is needed. In contributing to policy, we seek to drive a new system that acknowledges the change that has occurred and will be fit for purpose in the emerging world of work.

The SDA engages in topics that help drive this agenda and we are guided by ten principles that we believe will create value for our members.

Those principles are:

1. **Address Inequality & Enshrine Fairness**
   Minimum expectations must be set and adhered to.

2. **Equity & Empowerment**
   All workers must be supported to progress so that no-one is left behind.

3. **Mobility & Security**
   A socially successful economy must provide opportunity for all, regardless of their background. Systems must be built in a way that support success and adaptation in a rapidly changing world of work.

4. **Delivering Prosperity & Growth For All**
   A foundation for prosperity and economic growth must be achieved.

5. **Protection in Work & Beyond**
   Workplaces and the community must be healthy and safe for all workers and their families during and beyond their working lives.

6. **Workers' Capital & Superannuation**
   Workers' capital and superannuation must be an industrial right for all workers and treated as deferred earnings designed for dignity and justice in retirement.

7. **A Strong Independent Umpire**
   A strong, independent, cost effective and accessible industrial umpire and regulator must be central to the future system of work in Australia.

8. **Protection & Support for Our Future**
   Protecting and supporting our future requires a strong and vibrant retail industry and supply chain providing decent work and jobs with fair and just remuneration and contributing to the economy including through skilled workers.

9. **Work & Community**
   Work is a fundamental human activity that provides for personal, social and economic development. Work as it operates in community must build and protect a balance between life at work and life so that workers can contribute to society through the wider community.

10. **Institutional Support for Collective Agents**
    Institutional support must provide for collective agents (registered organisations) in all industries so that they are recognised, enshrined and explicitly supported as central to the effective functioning of the system.

Details of specific policy positions can be discussed by contacting the SDA National Office.

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