

# MINIMUM HOURS FOR SECONDARY SCHOOL CASUALS IN THE RETAIL INDUSTRY – THE PROBLEM OF DISCRIMINATION AND SOCIAL INCLUSION

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Minimum hours of engagement for casual employees are primarily regulated by modern awards. Recent changes to minimum hours of engagement in some industries, in particular the retail sector, have come about through applications made to Fair Work Australia (now the Fair Work Commission [FWC]) to vary the relevant award. This article examines the decision of *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) and related decisions. In *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* the variation of the General Retail Award 2010 was allowed in order that high school students could be engaged for an hour and a half in certain circumstances. For other casual employees the minimum period of engagement is three hours. This article considers this decision through the lens of two key concepts contained in the legislation: social inclusion and discrimination. It argues, through an analysis of various decisions and commentary, that while discrimination is currently being interpreted narrowly under the *Fair Work Act 2009* (Cth) (FW Act), the meaning of social inclusion is problematic and is still very much open to interpretation with parties currently testing through applications to the FWC its meaning and application.

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## I INTRODUCTION

On 11 May 2012, Tracey J of the Federal Court confirmed the decision of Fair Work Australia (FWA) to vary the General Retail Award 2010 (the Award) to allow for the engagement of high school students for an hour and a half in certain circumstances.<sup>1</sup> The original decision by Vice President Watson to allow for the variation of the award concluded that the variation was necessary to achieve the modern award objective of ‘promoting social inclusion through increased workforce participation’ under section 134(1)(c) of the FW Act. The Federal Court decision reviewed the decision and also considered the issue of when a term of an award might be discriminatory pursuant to section 153(1) of the FW Act.

The decision raises important public policy considerations about entry to the workforce, minimum hours for casuals and the effect that such shifts will have on non-secondary students. The decision can be seen in light of the tension between the perceived need to encourage school students to be employed and a concern that shortened periods of engagement for students could leave older or other employees, including students already working longer shifts, worse off.

This article will consider the background to the case and related decisions to *Shop, Distributive and Allied Employees Association (No 2)*. It also undertakes an analysis of the decision and assesses some of the possible ramifications of the decision. Specifically the article will consider the interpretation given to discrimination and promoting social inclusion through increased workforce as contained in the FW Act.

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<sup>1</sup> *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (*Shop, Distributive and Allied Employees Association (No 2)*) (2012) 205 FCR 227; [2012] FCA 480.

## II BACKGROUND

The recent report of the Independent Inquiry into Insecure Work in Australia highlights the growing number of poor quality, insecure jobs in Australia and attacks on entitlements such as minimum engagements and loss of control over hours of work.<sup>2</sup> The concept of minimum engagement periods for casual employees originates from the idea that employees need to be protected from employer expectations ‘where the cost and inconvenience of attending the workplace [to the employee] outweighs the benefits received from engagement.’<sup>3</sup> Traditionally the retail industry has one of the highest concentrations of casual employees. As a result, any decision concerning minimum hours of engagement in the retail industry has the potential to affect many workers.

### A *Legislative Provisions*

Minimum hours of engagement for casuals are regulated by awards.<sup>4</sup> Section 157(1)(a) of the FW Act provides that FWA (now FWC) may make a determination varying a modern award if it is satisfied that making the determination outside the system of 4 year reviews is necessary to achieve the modern awards objective.<sup>5</sup> The modern awards objective is found in section 134(1) of the FW Act. It provides that FWA must ensure that awards together with the National Employment Standards provide ‘a fair and relevant minimum safety net of terms and conditions’ taking into account a

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<sup>2</sup> Report of the Independent Inquiry into Insecure Work in Australia, *Lives On Hold, Unlocking The Potential of Australia’s Workforce*, (Commissioned by the Australian Council of Trade Unions (ACTU)) released 16 May 2012, <<http://www.actucongress.org.au>>.

<sup>3</sup> *National Retail Association Limited* [2011] FWA 3777, [40].

<sup>4</sup> The National Employment Standards contained in Part 2-2 of the FW Act do not include minimum engagement periods for casual employees.

<sup>5</sup> Pursuant to ss 156 and 616 of the *Fair Work Act 2009* (Cth), FWA must review modern awards every 4 years. The necessity for four yearly reviews was modified in the transitional provisions so that an initial review occurred (in 2012) after the first two years of operation of the Award: see *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth), Schedule 5, Item 6.

number of factors.<sup>6</sup> These include: the relative living standards and the needs of the low paid, the need to promote social inclusion through increased workforce participation, the need to promote flexible modern work practices and the efficient and productive performance of work, the likely impact of any modern award powers on business including on productivity, employment costs and the regulatory burden.<sup>7</sup>

Section 153(1) of the FW Act states that a modern award must not include terms that discriminate against an employee because of, or for reasons including, the employee's age. Section 153(3) provides, however, that a term does not discriminate against an employee merely because it provides for minimum wages for all junior employees or a class of junior employees.

### B *Previous Applications*

It should be explained that prior to *Shop, Distributive and Allied Employees Association (No 2)* the matter of the variation of this Award had come before FWA on numerous occasions. In May-June 2010, Vice President Watson heard the applications made by various parties who sought to reduce the minimum daily engagement of 3 hours for casual employees generally in Clause 13.4 of the Award (the 2010 applications).<sup>8</sup>

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<sup>6</sup> *Fair Work Act 2009* (Cth) s 134(1).

<sup>7</sup> *Fair Work Act 2009* (Cth) s 134(1)(a)-(h). The other factors are the need to encourage collective bargaining, the principle of equal remuneration for work of equal or comparable value, the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards and the likely impact of any exercise of modern award powers on employment growth, inflation and sustainability, performance and competitiveness of the national economy.

<sup>8</sup> *National Retail Association Ltd; Master Grocers Australia Limited; Australian Retailers Association; Jim Whittaker* [2010] FWA 5068. The Award (including the 3 hour minimum engagement period) was made as a result of the award modernisation process conducted by the Full Bench of the Australian Industrial Relations Commission and was made pursuant to the provisions of Part 10A of the *Workplace Relations Act 1996* (Cth) and commenced to operate on 1 January 2010. It replaced a significant number of pre-existing state and federal

The 2010 applications were made by the National Retail Association (NRA), Australian Retailers Association (ARA) and the Master Grocers Australia Limited (MGA).<sup>9</sup> The MGA, NRA and ARA sought to reduce the minimum engagement for casuals generally to 2 hours. The NRA and ARA made application that employers be allowed to employ students for 90 minutes between 3.30pm and 6.00pm Monday to Friday.<sup>10</sup> The 2010 applications were supported by a number of employers and employer groups and opposed by the Shop, Distributive and Allied Employees Association and Allied Employees Association (SDA) and ACTU.<sup>11</sup> During the hearings Vice President Watson heard evidence from two students from Terang Secondary College that they had ‘lost their jobs’ as a result of the introduction of the 3 hour minimum engagement clause. This was because the students could only work for the Terang and District Co-op (a retail outlet in Terang, Victoria) between 4.00pm and 5.30pm - when the retail establishment closed.<sup>12</sup> His Honour dismissed the applications to reduce the minimum hours of casuals generally.<sup>13</sup> Vice President Watson found that the evidence fell ‘well short’ of satisfying the test that the variation was necessary to achieve the modern awards objective.<sup>14</sup>

Two of the applicants, the NRA and the MGA appealed Vice President Watson’s decision to the Full Bench of FWA. The Full

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awards. Prior to the making of the Award the general minimum engagement nationwide for casual retail employees was 3 hours. There were some exceptions. These included, in some circumstances, a 2 hour minimum for to casuals in Victoria, students involved in supermarket trolley collection in Western Australia and juniors in South Australia. See *National Retail Association Limited and Master Grocers Australia Limited*, [2010] FWAFB 7838; BC201070951, [8].

<sup>9</sup> Mr Whittaker, an employer, also made an application to reduce the minimum casual engagement to an hour and a half.

<sup>10</sup> *National Retail Association Ltd; Master Grocers Australia Limited; Australian Retailers Association; Jim Whittaker* [2010] FWA 5068, [11]-[12].

<sup>11</sup> The 2010 applications were supported by the Australian Chamber of Commerce and Industry (ACCI), the Australian Federation of Employers and Industries, the Australian Newsagents’ Federation, VANA Ltd, Queensland Newsagents’ Federation and the United Retail Federation: *ibid* [5].

<sup>12</sup> *Ibid* [17].

<sup>13</sup> *Ibid* [36].

<sup>14</sup> *Ibid*.

Bench dismissed the Appeal.<sup>15</sup> It found that the Vice President had not misapplied the correct test but had rather correctly followed the wording of section 157 of the FW Act and decided the matter on proper evidentiary considerations.<sup>16</sup> Further, the Full Bench found that no evidence was called in support for the reduction of the minimum hours of engagement for casuals other than the two school students and that 'it is hard to imagine a weaker evidentiary case for a general reduction in the minimum period of casual employment.'<sup>17</sup> While the Full Bench dismissed the appeal, they did note that the ARA tendered a detailed proposal concerning minimum hours for student casuals. The Full Bench noted that such a proposal was not put to Vice President Watson for decision but that they could not see any procedural barrier to an interested party making an application to vary the Award to deal specifically with the engagement of student casuals.<sup>18</sup> This opened the way for an application to FWA to vary the Award in relation to the minimum hours of engagement for secondary school students only.

### C *Application to Vary Clause 13.4 for Secondary Students Only*

As a result, on 8 October 2010, the date that the Full Bench decision was handed down, an application was made to FWA by the NRA to vary the Award only in relation to the minimum hours of engagement for secondary school students. The application confined the circumstances of working for one hour and thirty minutes to where the employee was a secondary school student, where the employee was working between the hours of 3 and 6pm on a day which they were required to attend school, and where the employee agreed to work and the parent or guardian agreed to allow the employee to work, a shorter period than 3 hours.<sup>19</sup> The proposed variation was supported by ACCI and the Minister for Employment and Industrial Relations for Victoria (the Minister), and opposed by the SDA.<sup>20</sup> The NRA contended that the variation was necessary to

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<sup>15</sup> [2010] FWAFB 7838.

<sup>16</sup> Ibid [22]-[23].

<sup>17</sup> Ibid [14].

<sup>18</sup> Ibid [29].

<sup>19</sup> *National Retail Association Limited* [2011] FWA 3777, [7].

<sup>20</sup> Ibid [3].

achieve the modern award objective taking into account the ‘promoting social inclusion through workforce participation’ factor.<sup>21</sup>

The matter was heard by Vice President Watson.<sup>22</sup> The main question to be determined was whether the variation was necessary to achieve the modern award objective. The evidence for the NRA application included that provided by Mr Gary Black, Executive Director of the NRA. Mr Black gave evidence that in response to a telephone survey conducted by the NRA, most respondents answered ‘Yes’ to the question: ‘Would the reduction in minimum shift requirements from 3 hours to one and a half hours on school days for casuals employees make it easier for you to employ school kids after school?’<sup>23</sup>

The SDA countered with evidence from some employees, SDA organisers and two academics. The academics were Dr Iain Campbell of RMIT University and Dr Robin Price of Queensland University of Technology. Dr Campbell gave evidence that Australia has a relatively high level of youth employment in comparison with other developed countries. That indicated few barriers to employment for school children. He was of the view that granting the application was more likely to have a negative rather than positive effect on workforce participation.<sup>24</sup> Dr Price gave evidence that in conducting her research she had not heard an employer mention the minimum engagement period as an issue concerning youth employment.<sup>25</sup> Dr Price gave further evidence that a one hour thirty minute engagement period would create ‘an incentive for retailers to replace more expensive forms of labour with school children,’ that students generally wanted to work longer shifts, and

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<sup>21</sup> Ibid [24]. The NRA also submitted that the 3 hour minimum period of engagement was too restrictive for the needs of employers and that Clause 13.4 could be discriminatory in relation to age: at [25]-[26].

<sup>22</sup> *National Retail Association Limited* [2011] FWA 3777.

<sup>23</sup> Ibid [11].

<sup>24</sup> Ibid [15].

<sup>25</sup> Ibid [16].

that the introduction of shorter shifts may put pressure on parents who often had to transport the students to work.<sup>26</sup>

The SDA employee witnesses gave evidence that they would prefer longer shifts and that hour and a half shifts would not be worthwhile for the money considering such factors as travel time and cost of transport.<sup>27</sup>

Vice President Watson took into account in making his decision a House of Representatives Standing Committee Report that listed the benefits of students combining school and work.<sup>28</sup> These benefits include gaining knowledge, self-esteem, organisational skills and contributing to their own financial well-being.<sup>29</sup> His Honour further relied on a report by the Brotherhood of St Laurence which highlighted that students in rural areas, from low socio-economic status communities or from migrant backgrounds may be less able to access employment.<sup>30</sup>

Against this evidentiary background, Deputy President Watson considered whether varying the Award would assist in the promotion of social inclusion.<sup>31</sup> His Honour found that the 3 hour minimum did limit the employment opportunities of some secondary students who lived in rural areas or who were members of low socio-economic groups (for example by the time they travelled to the workplace after school it was only likely to be open for another 90 minutes) and that the reduction to 90 minute shifts would assist these students to get work. He also found some suggestion in the evidence that

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<sup>26</sup> Ibid.

<sup>27</sup> Ibid [12].

<sup>28</sup> House of Representatives Standing Committee on Education and Training, *Adolescent overload? Report of the Inquiry into Combining School and Work: Supporting Successful Youth Transitions*, October 2009: *ibid* [17], [21]-[22].

<sup>29</sup> Ibid.

<sup>30</sup> Response to the stronger futures for all young Victorians discussion paper on the youth transitions systems, Brotherhood of St Laurence, June 2010. Referred to at [2011] FWA 3777, [23].

<sup>31</sup> [2011] FWA 3777, [48].

employment opportunities were often gained by students from better off backgrounds. His Honour reasoned that if a shorter period of engagement were possible, and utilised, then this would create employment for the disadvantaged students. In this way there were benefits of promoting social inclusion and thus the variation was necessary to achieve the modern award objective.

The upshot was that Vice President Watson in his decision of 20 June 2011 attached a draft determination which varied Clause 13.4 to allow for secondary students to be engaged for 90 minutes if certain circumstances applied. The draft clause differed from that sought by the NRA in that the NRA sought to allow for the hour and a half engagement even where the three hour engagement was still possible. Vice President Watson was concerned to restrict the hour and a half minimum engagement period to circumstances where the three hour period was not possible in order that those students who were currently engaged for the three hour minimum would continue retaining the benefit of the three hour shift.<sup>32</sup> By limiting the hour and a half minimum engagement to those situations where only this shorter period was possible ‘employment that would not otherwise be available may thereby become available.’<sup>33</sup> As a result, the final Clause 13.4 provided that the minimum engagement period for an employee would be one hour and thirty minutes if all of a number of circumstances applied. These included that the employee was a full-time secondary student, was engaged to work between the hours of 3pm and 6.30pm on a day which they were required to attend school, the employee agreed to work and a parent or guardian of the employee agreed to allow the employee to work a shorter period than three hours, and that employment for a longer period than the period of engagement was not possible because of the operational requirements of the employer or the unavailability of the employee.<sup>34</sup>

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<sup>32</sup> Ibid [47]-[48].

<sup>33</sup> Ibid.

<sup>34</sup> The SDA made submissions on the draft Determination including that the reference to ‘operational requirements’ is too broad and should be replaced by words which confine circumstances to the period between which an employee can attend for work and the regular closing time of the employer’s business. Deputy President Watson was of the view that the concept of availability

The SDA appealed the variation decision of Vice President Watson to the Full Bench of FWA. The Full Bench dismissed the SDA's appeal.<sup>35</sup>

### III THE FEDERAL COURT DECISION

The SDA appealed to the Federal Court for judicial review of FWA's decision. The NRA submitted that no jurisdictional error had occurred and this submission was supported by the Minister. Because the Full Bench dismissed the appeal from Vice President Watson the SDA needed to provide evidence of appealable error in the original decision of His Honour rather than the Full Bench. Firstly, the SDA submitted that the Vice President had, on the evidence, reached a state of satisfaction that it was necessary for the modern award to be varied in circumstances where it was simply not open for him to do so.<sup>36</sup> Secondly, the SDA submitted that the variation in its terms was discriminatory against school aged persons and as a result contravened section 153 of the FW Act, which meant the decision, was 'beyond the power of FWA to make.'<sup>37</sup>

#### A *Whether the decision was open on the evidence*

On this ground the SDA argued that there was no evidence before Vice President Watson by which he could be satisfied that the variation was necessary to achieve the modern award objective. Specifically the SDA contended that there was no evidence that Clause 13.4 impeded any student from working part time.<sup>38</sup> After reviewing the relevant cases and noting the discretionary nature of the power of FWA to vary modern awards as found in section 157(1)

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should be broader than availability between the hours. See *National Retail Association Limited re General Industry Retail Award 2010* [2011] FWA 6602.

<sup>35</sup> *Re Shop, Distributive and Allied Employees Association* (2011) 211 IR 462; [2011] FWAFB 6251.

<sup>36</sup> *Shop, Distributive and Allied Employees Association (No 2)*, above n 1, [17].

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid* [24].

of the FW Act, Tracey J stated the question this way: ‘Was material before the Vice President upon which he could reasonably be satisfied that a variation to the Award was necessary, at the time in which it was made, in order to achieve that statutory objective?’<sup>39</sup>

Tracey J referred to the Vice President’s decision where he stated that ‘the benefits of promoting social inclusion arising from the variation meant the change [was] necessary to achieve the modern awards objective.’<sup>40</sup> Evidence which was before the Vice President included that many retail establishments especially in regional areas close after 5.30pm or 6.00pm on weekdays, the three hour minimum engagement period operated to the benefit of some secondary students and was not a barrier to their participation but it did limit employment opportunities for others particularly those who lived in rural areas or who were of low socio-economic groups.<sup>41</sup> Tracey J also referred to the Report of the House of Representatives Standing Committee, the paper authored by the Brotherhood of Saint Laurence, and the evidence in the 2010 applications by the students from Terang who had lost their job due to the 3 hour restriction.

In considering the words of section 157(1) that FWA may vary modern awards if *necessary* (emphasis added) to achieve the modern awards objective, His Honour stated that while reasonable minds may differ as to whether action is merely necessary or desirable, it was open to the Vice President to form the opinion that a variation was necessary. Consequently the no evidence ground failed.

## B *Discrimination*

Pursuant to section 153(1) of the FW Act discriminatory terms must not be included in a modern award. A modern award must not include terms that discriminate against an employee because of, or for reasons including (amongst others), the employee’s sex, age,

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<sup>39</sup> Ibid [37].

<sup>40</sup> Ibid [38], referring to [2011] FWA 3777, [23].

<sup>41</sup> Ibid [39].

marital status, family or carer's responsibilities.<sup>42</sup> The SDA accepted that Clause 13.4 of the Award did not adopt age as a criterion for discrimination (being direct discrimination) but instead argued that whilst the clause was 'facially neutral' it practically discriminated on that basis (indirect discrimination).<sup>43</sup> The SDA argued that this was because secondary students were overwhelmingly teenagers and they were the only ones offered to work less than 3 hours on weekdays, therefore they were adversely impacted by the decision.<sup>44</sup> In considering this argument Tracey J noted that not all discrimination is proscribed but what is proscribed is discrimination against an employee, meaning an adverse distinction between employees must be drawn for one of the reasons included in section 153(1) such as age.<sup>45</sup> His Honour found that no attempt had been made in the FW Act to extend the definition of discrimination to that of indirect discrimination and stated that it would be 'highly unlikely' that Parliament intended that section 153(1) could be contravened by indirect discrimination.<sup>46</sup> In reaching this conclusion, His Honour noted that anti-discrimination legislation generally defined both direct and indirect discrimination and that section 153(1) failed to do so. His Honour also relied on the judgement of Dawson and Toohey JJ in *Waters v Public Transport Commission (Waters)*<sup>47</sup> to support the view that 'the prescription of discrimination, without more, is not apt to pick up "facially neutral" [or indirect] discrimination.'<sup>48</sup>

In support of his reasoning that it be 'highly unlikely' that it was the legislative intention that section 153(3) included indirect discrimination His Honour stated:

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<sup>42</sup> *Fair Work Act 2009* (Cth) s 153(1).

<sup>43</sup> *Shop, Distributive and Allied Employees Association (No 2)*, above n 1, [51].

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid* [53].

<sup>46</sup> *Ibid* [55].-[56].

<sup>47</sup> (1991) 173 CLR 349. However, in *Klein v Metropolitan Fire and Emergency Services Board* [2012] FCA 1402; BC201209949 Gordon J is critical of this analysis of *Waters* and states that Tracey J did not analyse the judgment of Mason CJ and Gaudron J (with whom Deane J agreed) which is to the opposite effect: at [95].

<sup>48</sup> *Shop, Distributive and Allied Employees Association (No 2)*, above n 1, [54].

Awards typically contain many provisions that discriminate between employees. Wage rates, for example, are usually fixed by reference to criteria such as length of service and qualifications held. It is unlikely that Parliament intended that such provisions could be impugned on the ground that they indirectly discriminated on the grounds of age because younger employees as a group would not have had the length of service, or the time to obtain the requisite qualifications, in order to qualify for placement in the higher classifications which attract higher wages.<sup>49</sup>

His Honour was also of the view that the exceptions to section 153(1) which are found in section 153(2) and (3), for example minimum wages for junior employees or employees with a disability, all ‘cover terms which would meet the description of direct discrimination.’<sup>50</sup> Finally Justice Tracey observed that the unamended Clause 13.4 which provided for a 3 hour minimum would also be susceptible to a challenge if section 153(1) was to include indirect discrimination. As a result of such reasoning, on 11 May 2012, Tracey J of the Federal Court dismissed the appeal.

## IV ANALYSIS AND RAMIFICATIONS

### A *Discrimination*

The interpretation of Tracey J that a contravention of section 153(1) does not include indirect discrimination is unlikely to clear the already muddy waters in this area. Uncertainty remains about how references in the FW Act to ‘discriminate’ and its derivatives (when undefined) should be read and interpreted and whether and to what extent such words should be informed by reference to anti-discrimination law.<sup>51</sup> In this regard there have been significant

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<sup>49</sup> Ibid [56]. Possibly the exception contained s 153(2) of the Fair Work Act that a term of a modern award does not discriminate if the reason for the discrimination is the inherent requirements of the position could be used to counter this view.

<sup>50</sup> Ibid [57].

<sup>51</sup> See Simon Rice and Cameron Roles, ‘It’s a Discrimination Law Julia, But Not as We Know It: Part 3-1 of the Fair Work Act’ (2010) 21 *The Economic and*

scholarly writings on the question of whether references to ‘discriminate’ in Part 3-1 of the FW Act are to include both direct and indirect discrimination.<sup>52</sup> For example, Rice and Roles are of the view that there are ‘strong indications’ that the reference to discriminate in relation to section 342(1) (d) of the FW Act includes both direct and indirect discrimination.<sup>53</sup> This view has recently received judicial support in the matter of *Klein v Metropolitan Fire and Emergency Services Board* (‘*Klein*’).<sup>54</sup> Gordon J in *Klein* is critical of Tracey J’s interpretation in *Shop, Distributive and Allied Employees Association (No 2)* that ‘the proscription of discrimination, without more, is not apt to pick up ‘facially neutral’ discrimination.’<sup>55</sup>

While *Klein* concerns the interpretation of the provisions in Part 3-1 of the FW Act other cases have interpreted the definition of the term ‘discriminates’ in sections similar to section 153(1) of the FW Act to include indirect discrimination. Of particular relevance here is the decision of *Flight Attendants’ Association of Australia v Qantas Airways Limited* (*Qantas*).<sup>56</sup> That decision was concerned with the interpretation of section 170LU(5) of the Workplace Relations Act 1996 (Cth). Under section 170LU of the WR Act the Australian Industrial Relations Commission had to refuse to certify an agreement if it thought that a provision of the agreement discriminated against an employee ‘because of, or for reasons, including...age.’ This is almost the same wording as that in section

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*Labour Relations Review* 13; Anna Chapman, ‘Reasonable Accommodation, Adverse Action and the case of Deborah Schou’, (2012) 33 *Adelaide Law Review* 39; Anna Chapman, *Australian Anti-Discrimination Law, Work Care and Family* (Working Paper No. 51, Centre for Employment & Labour Relations Law, 2012).

<sup>52</sup> *Ibid.*

<sup>53</sup> In doing so the authors rely on the broad definitions of international treaties and support from Australian and Canadian jurisprudence. See Rice and Roles above n 51, 25.

<sup>54</sup> [2012] FCA 1402; BC201209949.

<sup>55</sup> *Klein*, above n 47, [94]-[95]. In the decision Gordon J is critical of the interpretation given by Tracey J to *Waters* and that such a view is ‘contrary to the historical source of the concept of indirect discrimination:’ see *Klein*, above n 47.

<sup>56</sup> PR972225 (2006) AIRC 282.

153(1). In that decision the Commission was of the view that the discrimination referred to in section 170LU(5) included indirect discrimination.<sup>57</sup> Despite this case and the criticism contained in *Klein*, the decision in *Shop, Distributive and Allied Employees Association (No 2)* at present stands for the proposition that indirect discrimination is not caught by section 153(1) of the FW Act. It will remain to be seen whether the interpretation of different sections of the FW Act will come to accept different meanings of the term discrimination and whether the decision of *Shop, Distributive and Allied Employees Association (No 2)* remains authoritative on this point.

### B *Social Inclusion through Increased Workforce Participation*

Social inclusion is not a self-explained concept.<sup>58</sup> Since May 2008 Australia has had an Australian Social Inclusion Board (the Board) whose activities include the publication of statistical information on social inclusion in Australia.<sup>59</sup> Such data evidences entrenched and multiple disadvantages as experienced by some Australians. According to the Board being socially included means that people have the resources, opportunities and capabilities they need to learn, work, engage and have a voice.<sup>60</sup> Employment can be an important vehicle to increase social inclusion.

The concept of social inclusion as it relates to the FW Act however has received little academic attention.<sup>61</sup> This is despite the numerous references to it in the FW Act. Indeed section 3 of the FW Act provides that the object of the FW Act is to provide a balanced

<sup>57</sup> As noted by Rice and Roles, above n 51, 25, this view was not contested on appeal. See *Flight Attendants Association of Australia v Qantas Airways Limited* - PR973846 (2006) AIRC 537.

<sup>58</sup> Emily Long, 'The Australian Social Inclusion Agenda: A New Approach to Social Policy?' (2010) 45(2) *Australian Journal of Social Issues* 161.

<sup>59</sup> Commonwealth of Australia, *Social Inclusion in Australia How Australia is Faring*, Second Edition Australian Social Inclusion Board (2012).

<sup>60</sup> *Ibid* 12.

<sup>61</sup> However, see Helen Masterman-Smith, 'Labour Force Participation, Social Inclusion and the Fair Work Act: Current and Carbon-Constrained Contexts' (2010) 45(2) *Australian Journal of Social Issues* 227.

framework for cooperative and productive workplace relations that promote national economic prosperity and social inclusion for all Australians. There are also other provisions of the FW Act that refer to social inclusion.

Under the FW Act the Minimum Wage Panel of Fair Work Australia (the Panel) is required to review modern award minimum wages and to make a national minimum wage order. The review of minimum award wages must be carried out in accordance with the minimum wages objective in section 284 and the modern awards objective in section 134 of the FW Act. Section 284(1), which applies to the review of the national minimum wage order and also to the review of modern award minimum wages, provides that FWA must establish and maintain a safety net of fair minimum wages taking into account, amongst other factors, ‘promoting social inclusion through increased workforce participation.’ Similarly, as previously outlined, pursuant to section 134 (which contains the modern award objective) the FWA must ensure that modern awards together with the National Employment Standards provide a fair and relevant minimum safety net of terms and conditions taking into account, amongst other factors ‘the need to promote social inclusion through increased workforce participation.’

The above references (except for section 3) in the FW Act do not refer just to ‘social inclusion’ but to social inclusion *through increased workforce participation*. How then has this been interpreted by the Minimum Wages Panel? While a thorough analysis comparing how the words ‘social inclusion through increased workforce participation’ has been interpreted as evidenced in the various Annual Wage Reviews is beyond the scope of this paper a preliminary view suggests that FWA has taken an expansive view of these words. The Australian Industry Group (AI Group) in its submission to the 2009-2010 Annual Wage Review argued that these words limited considerations relating to social inclusion ‘to those that are associated directly with increased workforce participation.’<sup>62</sup> In the 2011-2012 Annual Wage Review the AI

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<sup>62</sup> Annual Wage Review 2009-2010 (Fair Work Australia, 2010), [252].

Group and the Australian Chamber of Commerce and Industry submitted that the words ‘promotion of social inclusion through increased workforce participation’ meant that the Minimum Wage Panel should focus on the obtaining of employment.<sup>63</sup> Similar submissions had previously been made to the 2009-2010 and 2010-2011 Annual Wage Reviews and in these two previous incidences, and in the immediate incidence, the Panel accepted that social inclusion referred to the obtaining of employment *in addition to* pay and conditions attaching to the job concerned. The Panel stated in the 2011-2012 Annual Wage Review that ‘pay and conditions of work are relevant because they impact upon an employee’s capacity to engage in community life and the extent of their social participation.’<sup>64</sup> This means that both getting a job and the pay and conditions attaching to that job are relevant when considering social inclusion.<sup>65</sup> In the 2012-2013 Annual review it was emphasised that ‘consideration of social inclusion in the context is limited to increased workforce participation.’<sup>66</sup>

An interesting ramification arising from the *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* concerns the interpretation of the modern award objective of ‘promoting social inclusion through increased workforce participation’ under section 134(1) of the FW Act and the way in which this informed the wording of the varied Clause 13.4 of the Award. As Collins notes in his seminal article, social inclusion, (unlike traditional discrimination law) does not depend on a comparison group or individual.<sup>67</sup> Rather social inclusion asks for proof that the rule or practice tends to reinforce the exclusion of an individual or most members of the excluded group without necessarily requiring a comparison.<sup>68</sup> As has already been outlined, Vice President Watson in his decision referred to evidence that many

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<sup>63</sup> Annual Wage Review 2011-2012 (Fair Work Australia, 2012), [192].

<sup>64</sup> Ibid [210].

<sup>65</sup> Ibid.

<sup>66</sup> Annual Wage Review 2012-2013 (Fair Work Australia, 2013), [429].

<sup>67</sup> For an in depth analysis of the meaning of social inclusion and its intersection with anti-discrimination law see Hugh Collins, ‘Discrimination, Equality and Social Inclusion’ (2003) 66 *The Modern Law Review* 16, 32.

<sup>68</sup> Ibid.

retail establishments especially in regional areas close after 5.30pm or 6.00pm on weekdays and that the three hour minimum engagement period did limit employment opportunities for some students, particularly those who lived in rural areas or who were of low socio-economic groups. The information contained in the Report of the House of Representatives Standing Committee and the paper authored by the Brotherhood of Saint Laurence was also taken into account as was the evidence in the 2010 applications by the students from Terang who had lost their job due to the 3 hour restriction. His Honour was keen to ensure that the varying of Clause 13.4 to allow for the possibility of engaging high school students for 90 minutes only created employment opportunities for students rather than reduced them. In this way there would be social inclusion through increased workforce participation. It was on this basis that the prerequisite for the one and a half hour minimum period of engagement under the varied Clause 13.4 of the Award is that employment for a longer period of engagement 'is not possible because of the operational requirements of the employer or the unavailability of the employee.'

### C *Moving Ahead*

The use of Clause 13.4 will be based on interpretation. It remains to be seen how the terms *not possible*, *operational requirements* and *unavailability of the employee* will be interpreted. While the evidentiary onus will be on the employer to establish the operational requirements in reality such requirements will be difficult to refute. The many factors referred to by Vice President Watson create complexity and make it easy for the employer to mount an argument that the hour and a half shift should apply. In addition, because it is the operational requirements of the employer that can determine whether the ninety minute shift can apply (assuming the other conditions of the clause are met) the regulation of minimum hours moves primarily from the Award to managerial prerogative. That is, the prescription of minimum hours of engagement moves from the external source of the Award to the internal source of the employer's request.

If the result of the varied clause is to make it easy for the employer to make an argument that the hour and a half minimum should apply then a number of questions about the possible effect that Clause 13.4 will have on other workers who are not secondary students will remain. Will the engagement of secondary students for short periods mean fewer hours for older and possibly more expensive workers? What of its effect on junior workers other than school students who will not qualify for the hour and a half engagement period? What will be the effect of the varied Clause 13.4 of the Award on their social inclusion through increased workforce participation?

Finally it will be interesting to see whether, given the current narrow interpretation of the discrimination provisions in the FW Act, an application to vary an award (on the basis that it is necessary to increase social inclusion through workforce participation) will provide a means of changing an award for the benefit of a disadvantaged group (this could also be done through the Award Review process). Arguably such an application or review has the potential to address even a provision or practice which amounts to indirect discrimination. An example may be an over-time or spread of hours provision in an award that in effect limits social inclusion through increased workforce participation for those employees with family responsibilities. A casual investigation of the applications being made at present indicates that such applications, to vary an award on this basis, are not generally being made in practice. This is not to say that such applications may not be made in the future. There is some evidence, however, that the applications that are being made to vary an award on the basis that a variation is necessary to promote social inclusion through increased workforce participation are seeking to reduce minimum hours of engagement (be it for secondary students).<sup>69</sup> On its face it seems incongruous that applications to vary awards are being made by employer groups and opposed to by unions. This is particularly so because many would

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<sup>69</sup> See, eg, the decision of *Batch v Animal Care and Veterinary Services* [2011] FWA 3974, where Commissioner Smith varied the Animal Care and Veterinary Services Award 2010 to allow for a two and a half hour minimum hiring period for secondary school students. However, such an application failed in *NRA v Fast Food Industry Award* [2010] FWA 8595.

associate social inclusion with providing a benefit to a disadvantaged group.

The application to vary the Award in *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* can be seen in light of a wider multi-industry move by employers to reduce the minimum hours of casuals and part-timers generally. This was evidenced in the 2010 applications (see above under the heading ‘previous applications’) and a call more widely by employers for flexibility of hours of work. However the decision is constrained in its application to secondary school students in certain circumstances and would appear not be a ‘green light’ for employers to make application to the FWC to reduce minimum hours of casuals more generally. On the other hand, the decision is probably not the ‘breakthrough’ that some may have been looking for either in terms of the meaning of social inclusion through increased workforce participation under the FW Act. *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* remains primarily about workforce participation within the confines of job opportunity and the obtaining of employment in contrast to pay and conditions or any real ‘wider’ meaning of social inclusion.

Social inclusion through increased workforce participation is an exciting concept with some interesting prospects. We will need to await the outcome of further decisions in order to assess what possibilities develop for it in the future.

#### D *Postscript*

The SDA made an application to FWA pursuant to the 2012 Award Review to remove the provision at Clause 13.4 for a casual employee who is a secondary student to be engaged for a minimum shift of an hour and a half. On 7 March 2013 the SDA withdrew this application on the basis that, in its view, the issue would be better

dealt with in the 2014 Award Review.<sup>70</sup> The SDA in its correspondence withdrawing its application noted that there are currently several employer applications on foot which also deal with the issue of minimum shifts for casual employees and that these would be more appropriately dealt with in the 2014 Award Review process. We may need to await the outcome of this Review. In the meantime, the varied Clause 13.4 which allows for the engagement of high school students for an hour and a half in certain circumstances will remain.

It should also be noted that the SDA is currently using social inclusion through increased workforce participation as one of its arguments in support of its application to vary the Award (as part of the Award Review 2012) to remove junior rates for workers 18 or above beginning with the variation of 20 year olds to be paid the full rate of pay. The SDA submission states that being paid the full rate of pay would 'assist' in greater social inclusion for these workers. It submits that being provided with equal remuneration would enable them to participate more fully in all aspects of their lives and that maintaining discounted rates undermines the ability of young workers to maintain a reasonable standard of living and social inclusion.<sup>71</sup> It further submits that discounted rates stereotypes younger workers as less competent which is contrary to the promotion of social inclusion and increased workforce participation.<sup>72</sup>

It will be interesting to assess the impact of the requirement for the FWC to consider the promotion of social inclusion through increased workforce participation when reviewing awards and the balance between the interests of employers and employees over time.

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<sup>70</sup> Correspondence from Ian Blandthorn, National Assistant Secretary to the SDA, to Justice Boulton, Senior Deputy President, Fair Work Australia, 7 March 2013.

<sup>71</sup> SDA submission to FWC in support of application AM2012/196, 21 March 2013; Award Review 2012 - AM2012/102 and Others, Fair Work Commission, [168]-[169].

<sup>72</sup> Ibid [170].