

**Centre for Employment and Labour Relations Law**  
**The University of Melbourne**

**Student Working Paper No.10**

**TOWARDS FAIRNESS AND EQUALITY FOR  
YOUNG WORKERS: YOUTH WAGES AND  
MINIMUM SHIFT LENGTHS**

*Lee Carnie*



ISSN 1837-1418

The Centre for Employment and Labour Relations Law gratefully acknowledges the support of the following major legal practices and organisations:



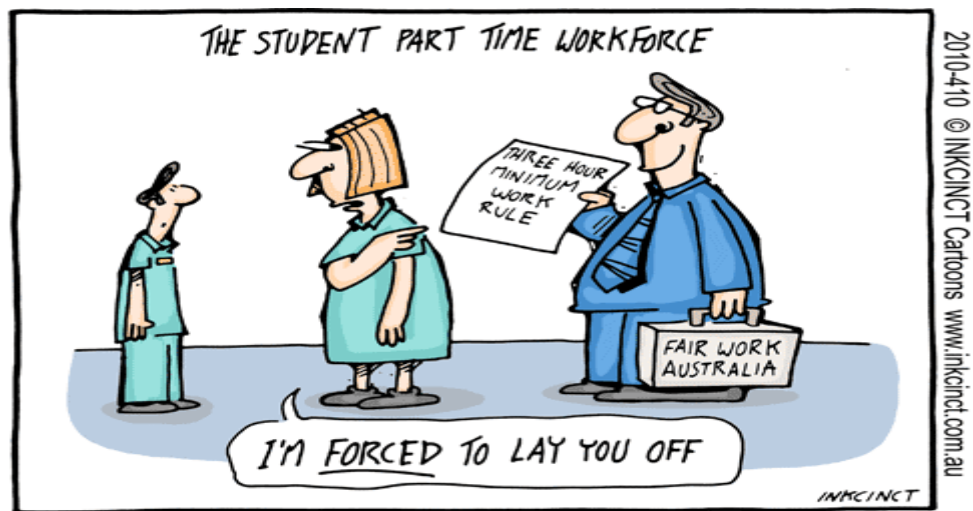
## CONTENTS

### **Towards Fairness and Equality for Young Workers: Youth Wages and Minimum Shift Lengths**

<b>INTRODUCTION.....</b>	<b>2</b>
THE CURRENT REGULATION OF YOUTH WAGES AND MINIMUM SHIFT LENGTHS UNDER AUSTRALIAN EMPLOYMENT LAW .....	3
DESTABLISING THREE FUNDAMENTAL ASSUMPTIONS WHICH UNDERPIN YOUTH WAGES AND REDUCED MINIMUM SHIFT LENGTHS.....	9
ARE YOUTH WAGES AND REDUCED MINIMUM SHIFT LENGTHS FAIR AND EQUAL? .....	15
<b>CONCLUSION .....</b>	<b>20</b>

## TOWARDS FAIRNESS AND EQUALITY FOR YOUNG WORKERS: YOUTH WAGES AND MINIMUM SHIFT LENGTHS

LEE CARNIE



\*John Ditchburn, 'The Student Part Time Workforce' (12 July 2010) *Inkcinct Website*

<<http://www.inkcinct.com.au/web-pages/cartoons/past/2010/2010-410--student-part-time-workforce-.gif>>.

# TOWARDS FAIRNESS AND EQUALITY FOR YOUNG WORKERS: YOUTH WAGES AND MINIMUM SHIFT LENGTHS

LEE CARNIE

## I INTRODUCTION

The *Fair Work Act 2009* (Cth) ('FW Act') abolished a number of provisions under the *Workplace Relations Act 1996* (Cth) ('WorkChoices') which disproportionately harmed young workers.<sup>1</sup> However, the differential treatment of young workers persists under the FW Act through youth wages and reduced minimum shift lengths. In 1999, the Australian Industrial Relations Commission ('AIRC') found that youth employment was 'relatively scarce, increasingly casual and part-time, fragmented, and dependent upon retail and service industries'.<sup>2</sup> This remains the case for young workers in 2011.<sup>3</sup>

This paper addresses the question of how effectively youth wages and reduced minimum shift lengths promote fairness and equality. It focuses on the majority of young workers employed on a casual or part-time basis in the retail, hospitality and fast food industries<sup>4</sup> under the *General Retail Industry Award 2010*<sup>5</sup> ('Retail Award'), the *Hospitality Industry (General) Award 2010*<sup>6</sup> ('Hospitality Award') and the *Fast Food Industry Award 2010*<sup>7</sup> ('Fast Food Award'). The relevance of the recent *National Minimum Wage Order 2011*<sup>8</sup> is briefly discussed in relation to young workers not covered by an award. This paper uses the term 'young workers' for national system employees under 21 years of age, 'youth wages' for the graduated percentage of adult rates of pay allotted to young workers and 'minimum shift lengths' for the minimum amount of time an employee can be required to work each day. This terminology is preferred over the Modern Awards' use of 'junior employees', 'junior rates' and

---

<sup>1</sup> Andrew Stewart, *Stewart's Guide to Employment Law* (The Federation Press, 3<sup>rd</sup> ed: 2011) 128; Paula McDonald, Sandra Backstrom and Aaron Allegretto, 'Underpaid and Exploited: Pay-Related Employment Concerns Experienced by Young Workers' (2007) 26(3) *Youth Studies Australia* 10, 15-16.

<sup>2</sup> Australian Industrial Relations Commission (Justice Munro, Deputy President Duncan and Commissioner Raffaelli) *Junior Rates Inquiry: Report of the Full Bench Inquiring Under Section 120B of the Workplace Relations Act 1996* (4 June 1999) ('AIRC Junior Rates Inquiry') [8](i).

<sup>3</sup> Andrew Stewart, above n 1, 128.

<sup>4</sup> Australian Government Department of Education, Employment and Workplace Relations, *Australian Jobs* (2011) <<http://www.deewr.gov.au/Employment/ResearchStatistics/Documents/AustralianJobs.pdf>> 14, 22; Australian Government, *Submission to the Fair Work Australia Annual Wage Review 2011* (March 18 2011) 76; Australian Bureau of Statistics ('ABS'), Australian Social Trends 4102.0, *Are Young People Learning or Earning?* (March 2010) 3; ABS Australian Social Trends 4102.0, *Casual Employees* (December 2009) 3; ABS Australian Social Trends 4102.0, *Are Young People Learning or Earning?* (June 2009) 18; Nadine Levy, 'Employment and Income' (Young Workers Legal Service) <[http://www.ywls.org.au/Employment%20and%20income%20-%20Final%20\(2\).pdf](http://www.ywls.org.au/Employment%20and%20income%20-%20Final%20(2).pdf)> 2.

<sup>5</sup> *General Retail Industry Award 2010*, PR985114 (as at 23 September 2011)

<[http://www.fwa.gov.au/documents/modern\\_awards/pdf/MA000004.pdf](http://www.fwa.gov.au/documents/modern_awards/pdf/MA000004.pdf)>.

<sup>6</sup> *Hospitality Industry (General) Award 2010*, PR985119 (as at 4 October 2011)

<[http://www.fwa.gov.au/documents/modern\\_awards/pdf/MA000009.pdf](http://www.fwa.gov.au/documents/modern_awards/pdf/MA000009.pdf)>.

<sup>7</sup> *Fast Food Industry Award 2010*, PR985113 (as at 21 June 2011)

<[http://www.fwa.gov.au/documents/modern\\_awards/pdf/MA000003.pdf](http://www.fwa.gov.au/documents/modern_awards/pdf/MA000003.pdf)>. Note: the Fast Food Award is subject to an application by the SDA to vary the award for greater clarification on overtime

<<http://www.fwa.gov.au/documents/awardmod/var010110/AM201132.pdf>>.

<sup>8</sup> *Annual Wage Review 2010-2011* (C2011/1), PR062011 (June 20 2011)

<<http://www.fwa.gov.au/sites/wagereview2011/downloads/PR062011.pdf>>.

‘minimum engagement periods’ because it provides more accurate and appropriate descriptions for contemporary Australian employment relations.

The AIRC’s 1999 Junior Rates Inquiry found that although youth wages are discriminatory, the non-discriminatory alternatives suggested were not feasible at the time.<sup>9</sup> This report remains the primary authority for justifying youth wages today. The Australian Fair Pay Commission (‘AFPC’) conducted a more limited inquiry into youth wages in 2006, which was aborted prior to conducting a full-scale investigation. In contrast, young workers’ minimum shift lengths within the retail industry were recently varied by FWA. After a series of applications and appeals, the National Retail Association Ltd (‘NRA’) was granted permission to halve the minimum shift length from three hours to 90 minutes under the Retail Award. This is restricted to full-time secondary school students working between 3:00pm and 6:30pm between Monday and Friday, where a longer shift would otherwise be impossible due to ‘operational requirements’. In 2012, FWA will conduct an interim review of Modern Awards and focus on youth, training and apprentice wages in making the 2012 National Minimum Wage Order<sup>10</sup> (collectively, the ‘2012 Reviews’). FWA is empowered to vary youth wages under the Minimum Wage Order and both youth wages and minimum shift lengths under the review of Modern Awards, provided FWA is satisfied such variations are necessary to achieve the minimum wage and modern awards objectives under the FW Act.<sup>11</sup>

The objective of this paper is to critically analyse the justifications for the continued use of age-based discriminatory measures within Australian employment law which affect young workers. This paper draws on growing empirical evidence to de-stabilise three key assumptions consistently used to buttress the differential treatment of young workers. The first assumption is that youth wages and reduced minimum shift lengths are necessary to ensure high levels of youth employment. The second assumption is that young workers do not need as much money as adult workers. The third assumption is that young workers’ contributions to the workplace are of a lesser value, standard or quality than adult workers’. After considering the inherent problems with these assumptions, this paper queries whether paying young workers a percentage of the adult wage and allowing employers to reduce students’ shift lengths satisfy fundamental principles of fairness and equality within Australian employment law.

## II THE CURRENT REGULATION OF YOUTH WAGES AND MINIMUM SHIFT LENGTHS UNDER AUSTRALIAN EMPLOYMENT LAW

Part II outlines the existing framework for regulating youth wages and minimum shift lengths.

---

<sup>9</sup> AIRC Junior Rates Inquiry, above n 2, ix.

<sup>10</sup> Fair Work Australia, *Annual Wage Review 2010-2011 – Juniors and Trainees* [2011] FWA 619 (31 January 2011) <<http://www.fwa.gov.au/sites/wagereview2011/decisions/2011fwa619.htm>>.

<sup>11</sup> *Fair Work Act 2009* (Cth) s 157(1)-(4).

## A Youth Wages

Youth wages are explicitly exempt from age discrimination provisions under both the FW Act and the *Age Discrimination Act 2004* (Cth).<sup>12</sup> This paper provides a brief overview of the policy debates which shape the justifications behind this exemption.

### 1 Prior Authorities: The 1999 Junior Rates Inquiry and the (Aborted) 2006 Review

The 1999 Junior Rates Inquiry found that youth wages were particularly necessary for the retail and hospitality industries<sup>13</sup> given young workers' precarious and vulnerable position in relation to economic fluctuations in the labour market.<sup>14</sup> The Inquiry stated that 'discounted' pay rates were justified for relatively easy to perform entry-level work in these industries<sup>15</sup> because paying young workers adult wages would 'overvalue' their work.<sup>16</sup> The AIRC determined that increasing youth wages beyond their 'real value' to employers would result in increased youth unemployment, particularly in regional Australia.<sup>17</sup> The AIRC adopted the conventional labour theory model in asserting that abolishing youth wages would increase youth unemployment, as employers would offset increased labour costs by hiring adult workers instead of young workers or reducing workers' hours altogether.<sup>18</sup> The status quo was upheld under arguments that the current system of youth wages has been effective for decades in ensuring active youth employment as youth wages are easy to understand and administer (unlike the proposed competency-based alternatives).<sup>19</sup> Young workers' access to entry-level employment was predicated on their need to be competitive against adult workers in the labour market, and the AIRC determined that the best way to ensure young workers remained competitive was to discount their wages.<sup>20</sup>

The majority of submissions to the 2006 AFPC review of youth wages similarly argued for retaining the youth wages exemption from age discrimination, with the Howard Government submitting that '[d]isturbing the relativities between adult and junior pay rates risks distorting the labour market'.<sup>21</sup> The AFPC retained the existing system of youth wages but did not engage in a comprehensive review as initially planned.<sup>22</sup> Thus, the 1999 Junior Rates Inquiry remains the key authority for justifying age-based discrimination in youth wages.

### 2 Youth Wages under the FW Act

Most young workers in the retail, hospitality and fast food industries are regulated by Modern Awards. Where no award or agreement applies, youth wages are covered by

---

<sup>12</sup> *Fair Work Act 2009* (Cth) s 153(2); *Age Discrimination Act 2004* (Cth) s 25(2).

<sup>13</sup> AIRC Junior Rates Inquiry, above n 2, xiv.

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

<sup>15</sup> *Ibid* xiii, xvi, 140-141, 189, 191, 201.

<sup>16</sup> *Ibid* ix, 151, 154, 168-172, 199, 206-212.

<sup>17</sup> *Ibid* xiii, xiv, 151, 154, 199.

<sup>18</sup> *Ibid* xiii, xiv, 157, 165, 207.

<sup>19</sup> *Ibid* x, xv, 65-66, 138.

<sup>20</sup> *Ibid* x, 15, 157, 165.

<sup>21</sup> Australian Government, above n 4, 180.

<sup>22</sup> Australian Fair Pay Commission, 'Section 6: Junior Employees' (October 2006) *Wage-Setting Decision and Reasons for Decision*, 100-103.

the *National Minimum Wage Order 2011*. Although overlap with various agreements and National Employment Standards is relevant, this paper does not discuss these in any detail.

The following table summarises youth wages under the key instruments which influence young workers.<sup>23</sup>

**Table 1: Comparison of Youth Wages under Minimum Wages and Modern Awards<sup>24</sup>**

Age (in years)	Miscellaneous Award 2010 / Minimum Wage Order %	Fast Food Award %	Retail Award % (and most Modern Awards) <sup>25</sup>	Hospitality Award % (not office employees)	Hospitality Award % (office employees)
Under 16	36.8	40	45	50	45
16	47.3	50	50	50	55
17	57.8	60	60	60	65
18	68.3	70	70	70	75
19	82.5	80	80	85	90
20	97.7	90	90	100	100

Youth wages are fairly standard across the Retail Award, Hospitality Award and Fast Food Award with a few exceptions.<sup>26</sup> The recent *National Minimum Wage Order 2011*<sup>27</sup> sets the same percentage as the *Miscellaneous Award 2010*,<sup>28</sup> despite submissions to increase it to the Retail Award amounts. Thus, minimum wages are consistently less favourable to young workers.<sup>29</sup> On the minimum wage, a 15 year old young worker is paid \$5.71 per hour of work (at 36.8 per cent of the \$15.51 minimum wage). Thus, an hour's wage is less than the cost of a daily concession Melbourne metropolitan ('zones 1+2') public transport ticket of \$5.80.<sup>30</sup> Although many young workers receive a casual loading, they are not entitled to a range of other benefits, protections and payments available to full-time and part-time employees.<sup>31</sup>

<sup>23</sup> Australian Government, above n 4, 74.

<sup>24</sup> See Annual Wage Review 2010-2011, above n 8; Fast Food Award, above n 7; Retail Award, above n 5; Hospitality Award, above n 6.

<sup>25</sup> The Retail Award amounts are also the most common youth wages paid under Modern Awards. See, Australian Government, above n 4, 75.

<sup>26</sup> Office employees receive a greater percentage under the Hospitality Award. Wage differences tend to be slightly more pronounced for young workers aged under 16 and for workers aged 19 and 20. Youth workers aged over 18 and employed as liquor service employees under the Hospitality Award are paid at adult rates: *Hospitality Industry (General) Award 2010* [2010] FWA 1940 [21]-[24].

<sup>27</sup> Annual Wage Review 2010-2011, above n 8.

<sup>28</sup> Ibid 4.

<sup>29</sup> Except for 20 year olds under the Retail or Fast Food Awards: See Table 1.

<sup>30</sup> Annual Wage Review 2010-2011, above n 8, [4.1]; Metlink Melbourne, *Public Transport Fares Guide*, <<http://www.metlinkmelbourne.com.au/assets/PDFs/Brochures/PTFaresGuideweb.pdf>> 3.

<sup>31</sup> Retail Award, above n 5, clause 28.4.

## B Minimum Shift Lengths

The exemption for youth wages under the *Age Discrimination Act 2004* (Cth) is broad.<sup>32</sup> Instead of interpreting this exemption broadly, FWA applied equal opportunity law to find that while *adverse* discrimination is unlawful, discrimination *in favour of* young workers is lawful.<sup>33</sup> This paper questions the finding that halving school students' minimum shift lengths works 'in favour of' young workers.

### 1 Tracing FWA Appeals: Halving Student Workers' Minimum Shift Lengths

Prior to Modern Awards, most casual workers across Australia were guaranteed a minimum shift of at least three hours.<sup>34</sup> Under WorkChoices, the AIRC held that the 'no net detriment' test was satisfied by reducing the four hour minimum shift length to three hours for school students, but a significantly shorter shift would not satisfy the test.<sup>35</sup> On 9 July 2010, Watson VP dismissed applications by the NRA, Master Grocers Australia Limited (MGA), the Australian Retailers Association (ARA) and Mr Whittaker to reduce all casual workers' minimum shift lengths under the Retail Award from three hours to two hours.<sup>36</sup> Watson VP also rejected the variation to reduce secondary students' after-school shifts from three hours to 90 minutes.<sup>37</sup> The retail organisations had not established that the variation was necessary to achieve the modern awards objective.<sup>38</sup> In the media, the ARA 'blasted' FWA for imposing a 'one size fits all' model that keeps retailers 'beholden' to regulation that will 'cost thousands of jobs', whereas the ACTU said the decision would 'guarantee wages for younger workers'.<sup>39</sup> On 8 October 2010, the Full Bench denied permission to appeal<sup>40</sup> and upheld Watson's findings and interpretation of the modern awards objective.<sup>41</sup> Following this, Watson VP rejected the NRA's application to reduce minimum shift lengths under the Fast Food Award on 10 October 2010.<sup>42</sup>

---

<sup>32</sup> *Age Discrimination Act 2004* (Cth) s 25(1).

<sup>33</sup> *Shop, Distributive and Allied Employees Association* [2011] FWAFB 6251 [30]-[31], [33].

<sup>34</sup> A two hour minimum shift length applied for 'casuals in Victoria, junior casuals in South Australia and students involved in trolley collection in Western Australia.' See *National Retail Association Limited and Master Grocers Australia Limited* [2010] FWAFB 7838 [8].

<sup>35</sup> *Child Employment Principles Case* (2007) 163 IR 41 [51]-[52], [295]-[296]; Joellen Riley, 'Employing Minors in New South Wales: The Industrial Relations (Child Employment) Act 2006 (NSW) (2007) 20 *Australian Journal of Labour Law* 295, 299-300.

<sup>36</sup> *National Retail Association Ltd, Master Grocers Australia Limited, Australian Retailers Association & Jim Whittaker Re General Retail Industry Award 2010* [2010] FWA 5068 [34].

<sup>37</sup> *National Retail Association Ltd, Master Grocers Australia Limited, Australian Retailers Association & Jim Whittaker Re General Retail Industry Award 2010* [2010] FWA 5068 [34].

<sup>38</sup> *National Retail Association Ltd, Master Grocers Australia Limited, Australian Retailers Association & Jim Whittaker Re General Retail Industry Award 2010* [2010] FWA 5068 [15].

<sup>39</sup> Kirsty Needham, 'Youth Jobs Will Be Lost, Say Retailers', *The Age* (online), (10 July 2010) <<http://www.theage.com.au/national/youth-jobs-will-be-lost-say-retailers-20100709-10461.html>>; Patrick Stafford, 'Retail Association Slams Fair Work for Upholding Minimum Three Hour Shift Requirement', *Smart Company* (online), (12 July 2011) <<http://www.smartcompany.com.au/economy/20100712-retailers-association-slams-fair-work-for-upholding-minimum-three-hour-shift-requirement.html>>; NRA Media Statement, 'Young Employees the Victims of Fair Work Minimum Hours Decision' (9 July 2010) <<http://www.nra.net.au/images/MediaStatement9July.pdf>>; ACTU Media Release, 'Minimum Hours Decision Confirms Award Safety Net; Now Abbott and the Liberals Must Do the Same' (9 July 2010) <<http://www.actu.org.au/Media/Mediareleases/MinimumhoursdecisionconfirmsawardsafetynetnowAbbottandtheliberalsmustdothesame.aspx>>.

<sup>40</sup> *National Retail Association Limited and Master Grocers Australia Limited* [2010] FWAFB 7838 [28].

<sup>41</sup> *National Retail Association Limited and Master Grocers Australia Limited* [2010] FWAFB 7838 [23].

<sup>42</sup> *National Retail Association Limited Re Fast Food Industry Award 2010* [2010] FWA 8596 [31].

On 20 June 2011, Watson VP allowed the Retail Award to be varied to include a qualified 90 minute minimum shift length exemption for full-time secondary school students working between 3:00pm and 6:30pm from Monday to Friday, provided they and their parent or guardian agrees<sup>43</sup> and longer employment is impossible 'either because of the operational requirements of the employer or the unavailability of the employee.'<sup>44</sup> The Full Bench upheld the decision on 14 September 2011<sup>45</sup> in rejecting the Shop, Distributive and Allied Employees Association's ('SDA') arguments that Watson VP failed to consider whether the variation was necessary, did not consider the modern awards objective as a whole, and adopted an incorrect view of social inclusion.<sup>46</sup>

In making orders, Watson VP rejected the SDA's application on 23 September 2011 to limit the scope of 'operational requirements', providing guidance that a student worker could work a reduced shift provided that it started between 3:30pm and 6:00pm (for example, a shift between 5:00pm and 7:00pm).<sup>47</sup> Watson VP emphasised the diverse operational requirements of retail employers, who 'vary widely in their size, needs and resources ... [and] should be free to develop processes that are suited to their circumstances.'<sup>48</sup> Any 'practical problems or incidents of unfairness' should instead be considered in the 2012 Reviews.<sup>49</sup> A Federal Court appeal was lodged on 29 September 2011 to be heard in late 2011.<sup>50</sup>

## 2 *Conflicting Evidence about the Effect of the Variation on Young Workers*

In general, retail unions and organisations (including the NRA, MGA, ARA, the Australian Chamber of Commerce and Industry ('ACCI') and the Australian Federation of Employers and Industries (AFEI)) argued that reducing the minimum shift length would promote social inclusion through the increased workforce participation of secondary school students. They argued it would assist students in balancing employment and school commitments, particularly in 'regional areas where opening hours are often not as long as in cities and suburbs.'<sup>51</sup> They also contended that the modern award objective prevented negative impacts on 'productivity, employment costs, regulatory burden, or jobs and business viability' which would remain if variation was not granted.<sup>52</sup>

The initial applications were rejected for lacking evidentiary grounds, with the Full Bench stating that it would be 'hard to imagine a weaker evidentiary case'.<sup>53</sup> Yet when

<sup>43</sup> Ibid [1]; Retail Award, above n 5, clause 13.4(a)-(c).

<sup>44</sup> *National Retail Association Limited* [2011] FWA 3777 [1]; Retail Award, above n 5, clause 13.4.

<sup>45</sup> Fair Work Australia, *Determination: General Retail Industry Award 2010*, MA000004 (September 23 2011) <<http://www.fwa.gov.au/awardsandorders/html/PR510566.htm>>.

<sup>46</sup> *Shop, Distributive and Allied Employees Association* [2011] FWAFB 6251 [14], [23]-[26].

<sup>47</sup> *National Retail Association Limited* [2011] FWA 6602 [7].

<sup>48</sup> *National Retail Association Limited* [2011] FWA 6602 [8].

<sup>49</sup> *National Retail Association Limited* [2011] FWA 6602 [8].

<sup>50</sup> See Fair Work Ombudsman, 'Hours of Work', *Fair Work Ombudsman Website* (online) <<http://www.fairwork.gov.au/industries/retail/hours-of-work-rosters-and-breaks/pages/hours-of-work.aspx>>.

<sup>51</sup> *National Retail Association Ltd, Master Grocers Australia Limited, Australian Retailers Association & Jim Whittaker Re General Retail Industry Award 2010* [2010] FWA 5068 [22]-[27].

<sup>52</sup> *National Retail Association Ltd, Master Grocers Australia Limited, Australian Retailers Association & Jim Whittaker Re General Retail Industry Award 2010* [2010] FWA 5068 [25].

<sup>53</sup> *National Retail Association Limited and Master Grocers Australia Limited* [2010] FWAFB 7838 [14].

the NRA, the ACCI and the Victorian Government<sup>54</sup> provided more evidence about the ‘social inclusion’ element of the modern awards objective (through securing employment opportunities for young workers),<sup>55</sup> the decision was reversed. The NRA led evidence that a number of employers would employ more school students if the minimum shift length was reduced,<sup>56</sup> consistent with previous retailers’ concerns at ‘being unable to hire teenagers to work for short periods after leaving school for the day’.<sup>57</sup> There was no evidence provided concerning employers’ motives for wanting school students to work for less than three hours.<sup>58</sup>

In opposition, the SDA and the Australian Chamber of Trade Unions (‘ACTU’) argued that the proposed variation would ‘undermine the safety net applying to all casual employees.’<sup>59</sup> The SDA argued that young people already benefit from social inclusion from high participation in education. The high level of young worker employment indicates that three hour shift lengths are sufficient. In addition, the SDA put forward the unintended consequence that school students may be given preferential treatment over other employees (such as unemployed young workers not undertaking full-time education) to circumvent the standard three hour minimum shift rule.<sup>60</sup> The SDA led evidence from employees, SDA organisers and academics that reducing the shift would make working not worthwhile due to relative increases in cost, effort and time for less pay.<sup>61</sup>

### 3 *The Effect of Reducing Minimum Shift Lengths*

The variation was allowed despite the admitted dearth of evidence on the impact of reducing minimum shift lengths (such as whether young workers would substitute or replace adult workers or whether it would be abused where not essential to operational requirements).<sup>62</sup> Further, it is ‘not clear what impact may flow to other employees from any such change’.<sup>63</sup> The Full Bench justified the decision on the basis that it is ‘inherently difficult to demonstrate’ the employment effects of reducing minimum shift lengths, ‘let alone quantify those effects.’<sup>64</sup> Particular emphasis was placed on the limited retail opening hours regional retailers<sup>65</sup> and the protection the ‘operational requirements’ qualifier provided.<sup>66</sup> Interestingly, the SDA was more concerned with the consequential effect of variation for non-school student casual workers, including young workers not in full-time education.<sup>67</sup> In practice, a 15 year old young worker in the retail industry would receive \$11.50 for a 90 minute minimum shift instead of \$23

---

<sup>54</sup> *National Retail Association Limited* [2011] FWA 3777 [27]-[31].

<sup>55</sup> *National Retail Association Limited* [2011] FWA 3777 [24].

<sup>56</sup> *National Retail Association Limited* [2011] FWA 3777 [11].

<sup>57</sup> Andrew Stewart, above n 1.

<sup>58</sup> *National Retail Association Limited* [2011] FWA 3777 [42].

<sup>59</sup> *National Retail Association Ltd, Master Grocers Australia Limited, Australian Retailers Association & Jim Whittaker Re General Retail Industry Award 2010* [2010] FWA 5068 [29]-[30].

<sup>60</sup> *National Retail Association Limited* [2011] FWA 3777 [32]-[36].

<sup>61</sup> *National Retail Association Limited* [2011] FWA 3777 [12]-[16].

<sup>62</sup> *National Retail Association Limited* [2011] FWA 3777 [19], [46].

<sup>63</sup> *Shop, Distributive and Allied Employees Association* [2011] FWAFB 6251 [9].

<sup>64</sup> *Shop, Distributive and Allied Employees Association* [2011] FWAFB 6251 [24].

<sup>65</sup> *National Retail Association Limited* [2011] FWA 3777 [18].

<sup>66</sup> *National Retail Association Limited* [2011] FWA 3777 [48].

<sup>67</sup> *National Retail Association Limited* [2011] FWA 3777 [32], [33], [35].

(earning \$7.66 per hour at 45 per cent of the Level 1 adult wage of \$17.03 per hour).<sup>68</sup> Therefore, the \$5.80 cost of public transport (as calculated above) would cost over half the 15 year old's daily wage.<sup>69</sup>

### **III DESTABILISING THREE FUNDAMENTAL ASSUMPTIONS WHICH UNDERPIN YOUTH WAGES AND REDUCED MINIMUM SHIFT LENGTHS**

Interestingly, neither the 1999 Junior Rates Inquiry nor the FWA minimum shift cases addressed employers' vested interests to secure the same labour value for lower wages and shorter shift lengths to maximise profits, instead framing the issue around youth unemployment.<sup>70</sup> Part III seeks to critically analyse and destabilise the three key assumptions used within these authorities to justify youth wages and reduced minimum shift lengths.

#### **A Assumption One: Abolishing Youth Wages and Protecting Minimum Shift Lengths Will Result in Decreased Social Inclusion through Lower Youth Employment**

The core assumption justifying the differential treatment of young workers is that youth wages allows young workers to be competitive in the labour market. This is viewed as particularly the case for the retail, hospitality and fast food industries which employ the majority of young workers, and small businesses.<sup>71</sup>

##### *1 Using Conventional Labour Market Theory to Justify Youth Wages*

The dominant assumption is based on conventional labour market theory.<sup>72</sup> Put simply, paying young workers adult wages would overvalue their work, thus increasing levels of youth unemployment as employers would 'have no choice' but to replace young workers with adult workers.<sup>73</sup> Abolishing youth wages will decrease casual workers' employment, reduce working hours in general (which will again disproportionately affect casual employees) and decrease working conditions by placing greater pressure on employees to work harder and faster.<sup>74</sup> In a similar vein, reducing minimum shift

---

<sup>68</sup> Retail Award, above n 5, 17.

<sup>69</sup> Metlink Melbourne, above n 31, 3.

<sup>70</sup> *National Retail Association Limited* [2011] FWA 3777 [42].

<sup>71</sup> Australian Government, *Submission to the Australian Fair Pay Commission Minimum Wage Review 2009* (March 20 2009) 27.

<sup>72</sup> Australian Chamber of Commerce & Industry Submission ('ACCI'), *Fair Work Australia: 2011 Annual Wage Review* (March 18 2011) <[http://www.fwa.gov.au/sites/wagereview2011/submissions/ACCI\\_sub\\_awr1011.pdf](http://www.fwa.gov.au/sites/wagereview2011/submissions/ACCI_sub_awr1011.pdf)> 106. See also, Australian National Retailers Association, *Post-Budget Submission to the Fair Pay Commission: Minimum Wage Review 2009* (June 2009) 5, 107; Mark Wooden, 'Impediments to the Employment of Young People' (National Centre for Vocational Education Research and Australian National Training Authority: 1999) 26; Ann Daley et al, 'Youth Wages and Employment' (1999) *Productivity Commission Research Paper* 1, 65; Philip E T Lewis, 'Minimum Wages and Employment', *Research Report No. 1/06: Report Commissioned by the Australian Fair Pay Commission* (2006) 1, 24; Philip E T Lewis and Ben McLean, 'The Junior Rates Inquiry: An Overview' (2000) 32(4) *The Australian Economic Review* 386, 388. See also, Alison Anlezark and Nhi Nguyen, 'Identifying Research Priorities for the Longitudinal Surveys of Australian Youth (LSAY), 2008-2010: A Discussion Paper' (NCVER: 2009) 13.

<sup>73</sup> National Retail Association, 'Submissions to Fair Work Australia', *Annual Wage Review 2010-2011*, above n 8. [8]-[9]; ACCI submission, above n 71, 180-181; Australian Government, *Submission to the Australian Fair Pay Commission Minimum Wage Review 2009* (March 20 2009) 27.

<sup>74</sup> ACCI submission, above n 71, 180-181.

lengths increase student workers' competitiveness in the workplace to increase social inclusion through higher rates of youth employment.<sup>75</sup>

## 2 Alternative Approaches: Positive Employment Effects of Non-Discriminatory Measures

Conventional labour market theory has been increasingly destabilised, particularly for young workers in entry-level casual positions in the retail, hospitality and fast food industries. Card and Krueger argue that increasing youth wages would actually increase youth employment.<sup>76</sup> They argue that conventional labour market theory models fail to take into account the capacity and effect of large corporations' strong market power (in the context of fast food chains in the United States).<sup>77</sup> Although this theory remains the minority opinion, it has received increasing support.<sup>78</sup>

Following New Zealand's recent reform and gradual abolition of youth wages,<sup>79</sup> there was 'no consistent and robust evidence of any adverse effects' on youth employment.<sup>80</sup> Eradicating youth wages did not have any direct behaviour effects on minimum wages, and did not reduce low-wage employment.<sup>81</sup> If anything, there was 'stronger evidence of positive employment responses to the changes' for young workers. Against contradictory predictions prior to the reforms,<sup>82</sup> there were 'significant increases in labour earnings and total income of teenagers relative to young adults.'<sup>83</sup> However, one of the negative outcomes discovered was consistent evidence of employers failing to comply with the reforms, with young workers increasingly reporting sub-minimum wages.<sup>84</sup> Addison and Blackburn also argue that predicting the effect of minimum wage increases is often more complex than at first anticipated,<sup>85</sup> in finding that increasing the minimum wage in the United States has a 'poverty-reducing effect' on teenagers and 'high school drop-outs'.<sup>86</sup>

---

<sup>75</sup> *National Retail Association Limited* [2011] FWA 3777 [11].

<sup>76</sup> David Card, 'Do Minimum Wages Reduce Employment? A Case Study of California, 1987-89' (1992) 46(1) *Industrial and Labour Relations Review* 38; David Card and Alan B Krueger, 'Minimum Wages and Employment: A Case Study of the Fast-Food Industry in New Jersey and Pennsylvania' (1994) 84(4) *American Economic Review* 772; David Card and Alan B Krueger, *Myth and Measurement: The New Economics of the Minimum Wage* (Princeton University Press, Princeton:1992); David Card, 'Do Minimum Wages Reduce Employment? A Case Study of California, 1987-89' (1992) 46(1) *Industrial and Labour Relations Review* 38.

<sup>77</sup> David Card and Alan B Krueger, *Myth and Measurement: The New Economics of the Minimum Wage* (Princeton University Press, Princeton: 1992).

*Wage*, Princeton University Press, New Jersey.

<sup>78</sup> See Lewis, above n 71, 20; Richard Dickens, Stephen Machin and Alan Manning, 'The Effects of Minimum Wages on Employment: Theory and Evidence from Britain' (1999) 17 *Journal of Labor Economics* 1; Stephen Machin and Alan Manning, 'The Effects of Minimum Wages on Wages Dispersion and Employment: Evidence from the UK Wages Councils' (1994) 47 *Industrial and Labor Relations Review* 319; Stephen Machin and Alan Manning, 'Employment and Introductions of a Minimum Wage in Britain' (1996) 106 *The Economic Journal* 667; John Mangan and James Johnston, 'Minimum Wages, Training Wages and Youth Employment' (1999) 26 *International Journal of Social Economics* 415; Alan Manning, 'The Equal Pay Act as an Experiment to Test Theories of the Labour Market' (1996) 63 *Economica* 191.

<sup>79</sup> Dean Hyslop and Steven Stillman, 'Youth Minimum Wage Reform and the Labour Market' (March 2004) *New Zealand Treasury Working Paper 04/03*, i, 2.

<sup>80</sup> *Ibid* 16.

<sup>81</sup> Tim Maloney and Gail Pacheco, 'Interpreting Changes in Minimum Wage Incidence Rates' (2010) 13(3) *Australian Journal of Labour Economics* 219, 220.

<sup>82</sup> *Ibid* 16.

<sup>83</sup> Hyslop and Stillman, above n 78, i, 6.

<sup>84</sup> *Ibid* 16.

<sup>85</sup> John T Addison and McKinley L Blackburn, 'Minimum Wages and Poverty' (1999) 52(3) *Industrial and Labor Relations Review* 393, 394.

<sup>86</sup> *Ibid* 406-407.

### 3 The Relevance of De-Stabilising the Conventional Labour Market Theory for the Australian Employment Context

This paper suggests that alternative theories are increasingly destabilising the previously 'taken-for-granted' correlation between low youth wages and high youth employment. The key criticism of these alternative theories is that they have 'little value to policy debate in Australia.'<sup>87</sup> Methodology and results differ across jurisdictions.<sup>88</sup> This paper suggests that mixed results indicate just how problematic basing wide-reaching policy decisions on predicting future trends can be.<sup>89</sup> The Australian labour market does have unique characteristics. For example, the ageing of the Australian population will mean that young workers will comprise a decreasing proportion of the total workforce. Yet perhaps this will lead to positive short-term outcomes for young workers 'as employers have a smaller pool of young people to choose from.'<sup>90</sup> Assumptions that youth wages 'protect or substantially improve the competitive position' of young workers must be empirically proven, not 'overstated and unproven'.<sup>91</sup>

The crucial causal gap is proving that there are sustainable means of replacing young workers. For example, where are the adult workers who will work jobs currently predominated by young workers?<sup>92</sup> In the minimum shift length cases, retailers did not advance evidence about adult workers who would be employed in entry-level positions in these industries. The retail, hospitality and fast food industries often operate with long, unpredictable and rotating working hours and requirements, poor working conditions of high stress and low status, and low wages. In the fast food industry, there are likely to be 'difficult relations with customers and managers; repetitive work tasks; low occupational status and small paychecks; continual workplace surveillance; ... hot, greasy, and often dangerous work environments', as well as being high pressure and fast pace environments.<sup>93</sup> Young workers in Australia are employed in jobs with high levels of menial labour, disproportionate levels of workplace bullying and harassment, poor working conditions, little bargaining power and limited knowledge about employment rights.<sup>94</sup> The potential positive employment effect on adult workers also goes unexplored.<sup>95</sup>

---

<sup>87</sup> Lewis, above n 77, 1, 21, 24; Ehrenberg, 'Review Symposium on Myth and Measurement: The New Economics of the Minimum Wage' (1995) 48(4) *Industrial and Labour Relations Review* 827; A Robson, 'A Labour Market Fable' (2004) 20(4) *Policy* 25.

<sup>88</sup> James Ted McDonald and Anthony E Myatt, 'The Minimum Wage Effect on Youth Employment in Canada: Testing the Robustness of Cross-Province Panel Studies' (May 18 2004) *Department of Economics, University of New Brunswick* 1, 4.

<sup>89</sup> *Ibid* 18.

<sup>90</sup> Anlezark and Nguyen, above n 71, 14.

<sup>91</sup> Natasha Stott Despoja, 'Junior Rates of Pay: Myths and Missed Opportunities in the Youth Labour Market' (1999) 32(4) *The Australian Economic Review* 400, 400.

<sup>92</sup> McDonald and Myatt, above n 87, 21.

<sup>93</sup> Stuart Tannock, *Youth at Work: The Unionized Fast-Food and Grocery Workplace* (Temple University Press: 2001) 42.

<sup>94</sup> Vera Smiljanic, *Fast Food Industry: A Research Study of the Experiences and Problems of Young Workers* (May 2004) <<http://www.jobwatch.org.au/images/stories/pdf/129459fastfoodreport.pdf>>.

<sup>95</sup> McDonald and Myatt, above n 87, 21.

## **B Assumption Two: Young Workers Do Not Need as Much Money as Adult Workers**

The second assumption is that it is justified to pay young workers lower wages and to employ them for shorter shift lengths because they do not need as much money as adults.<sup>96</sup>

### *1 'Teenagers Just Work for Pocket Money': The Assumption that All Young Workers Receive Family Financial Support*

Whereas many low wage workers live in relatively high income households, low income households are usually poor because their members are unemployed (rather than on low paid jobs).<sup>97</sup> This statistic is used to further the assumption that *all* young workers live at home with their parents, do not have the same family responsibilities as adult workers, and thus do not have to support themselves financially. Youth wages 'are not at a level intended for young people to live independently. It is implicitly assumed that young people will be supported by their parents.'<sup>98</sup> Both the 1999 Junior Rates Inquiry and the recent FWA minimum shift cases drew on this assumption that young workers are 'affluent' and 'undeserving' children of middle-class parents working 'purely for discretionary income to spend on luxury purchases.'<sup>99</sup>

### *2 The Real Living Requirements of Many Young Australians*

Young workers in Australia today face the prospect that many lower skilled, entry-level jobs are no longer available, with a greater demand for technically focussed employment.<sup>100</sup> They are increasingly forced to balance study and work in the increasingly casualised retail, hospitality and fast food industries.<sup>101</sup> Young workers living in low income households often supplement their families' financial well-being and young workers living in middle to high income households are not 'well-off' as it is their *parents* who own the wealth.<sup>102</sup> There is 'a small but significant proportion of [secondary school] students who are working out of financial necessity rather than for discretionary spending.'<sup>103</sup> Approximately 10 per cent of working secondary school students come from disadvantaged socioeconomic family backgrounds and combine school and work to provide income for their family, support the family business or to support their continued study.<sup>104</sup> This is compounded by the fact that 'students from disadvantaged backgrounds also have disproportionately high rates of early school leaving', are more likely to be working to support themselves and face fewer prospects of ongoing stable employment.<sup>105</sup> One in six Australians aged between 15 and 24 is

---

<sup>96</sup> Stott Despoja, above n 90, 400.

<sup>97</sup> Lewis, above n 77, 22.

<sup>98</sup> National Youth Commission Inquiry into Youth Homelessness, *Australia's Homeless Youth* (National Youth Commission: 2008) <[http://www.theoasismovie.com.au/pdfs/Homeless\\_report.pdf](http://www.theoasismovie.com.au/pdfs/Homeless_report.pdf)>122.

<sup>99</sup> Tannock, above n 92, 2.

<sup>100</sup> Anlezark and Nguyen, above n 71, 16.

<sup>101</sup> Ibid; House of Representatives Standing Committee on Education and Training, 'Adolescent Overload?: Report of the Inquiry into Combining School and Work: Supporting Successful Youth Transitions (Commonwealth of Australia: October 2009) <<http://www.aph.gov.au/house/committee/edt/schoolandwork/report/fullreport.pdf>> 9.

<sup>102</sup> Tannock, above n 92, 2-3.

<sup>103</sup> House of Representatives Standing Committee on Education and Training, above n 100, viii.

<sup>104</sup> Ibid 11, from L Robinson, *School Students and Part-Time Work* (LSAY Research Report No 2, ACER: October 1996) 5.

<sup>105</sup> Ibid 128.

living in poverty, and young people are vastly over-represented in statistics of homelessness.<sup>106</sup> Young workers are disproportionately represented in subminimum and minimum wage statistics<sup>107</sup> and are taking longer to leave home and gain independent living status for financial reasons.<sup>108</sup> What is apparent is that young workers are not a homogeneous group. While the increased flexibility of reduced minimum shift lengths will arguably assist young workers in more stable financial situations, it will further disadvantage young workers from disadvantaged socioeconomic backgrounds.<sup>109</sup>

### ***C Assumption Three: Young Workers' Work is of Less Value to Employers***

Another core assumption explicit in youth wages (and implicit in minimum shift lengths) is that the work done and the contributions made by young workers are of lesser value, quality or standard than adult workers.<sup>110</sup>

#### ***1 The 'Less Pay for Less Value' Argument***

A recurring theme from both the 1999 Junior Rates Inquiry and ongoing industry and government submissions is that paying young workers adult wages would 'overvalue' young workers.<sup>111</sup> As the Australian Government submitted in 2011:

If junior employees are to be competitive in the labour market, their minimum wages must reflect that on average, they have lower skills and experience, including general life experience, than adults and are therefore of less value to employers.<sup>112</sup>

However, the 1999 Junior Rates Inquiry accepted that the tasks or 'measurable competencies'<sup>113</sup> required to be performed in entry-level positions within the retail, hospitality and fast food industries could be mastered relatively quickly by young workers.<sup>114</sup> The difference was not the work requirements themselves but the fact that 'age discounted rates' were desired by employers to offset perceived 'general workforce competencies'<sup>115</sup> or 'maturation or training deficits'.<sup>116</sup> Similarly, McDonald's submitted to a 1997 Parliamentary Inquiry that:

---

<sup>106</sup> Homelessness Australia, 'Fact Sheet: Homelessness and Young People'

<<http://www.homelessnessaustralia.org.au/UserFiles/File/Fact%20sheets/Fact%20Sheets%202011-12/Homelessness%20&%20Young%20People%202011-12.pdf>>; Australian Bureau of Statistics, 'Position Paper: ABS Review of Counting the Homeless Methodology' (August 2011).

<sup>107</sup> Andrew Leigh, 'Does Raising the Minimum Wage Help the Poor?' (November 2005) *ANU Centre for Economic Policy Research: Discussion Paper No 501*, 10.

<sup>108</sup> Anlezark and Nguyen, above n 71, 14; Australian Bureau of Statistics, 'Home and Away: the Living Arrangements of Young People, *Australian Social Trends* (June 2009).

<sup>109</sup> Joellen Riley, above n 34, 301.

<sup>110</sup> See eg, Reg Hamilton, 'Threatening Junior Employment with Obscurantism' (1999) 32(4) *The Australian Economic Review* 395, 396.

<sup>111</sup> Australian Government, above n 4, 80; AIRC Junior Rates Inquiry, above n 2, 168-169.

<sup>112</sup> *Ibid* 69-70.

<sup>113</sup> House of Representatives Standing Committee on Employment, Education and Training, *Youth Employment: A Working Solution* (1997) <<http://www.aph.gov.au/house/committee/edt/youthrep/report/CHAPTER5.PDF>> 78.

<sup>114</sup> Australian Industrial Relations Commission (Justice Munro, Deputy President Duncan and Commissioner Raffaelli) *Junior Rates Inquiry: Issues Paper* (22 December 1998) C No 33985 of 1998, 54.

<sup>115</sup> *Ibid*.

<sup>116</sup> *Ibid* 57. These perceived deficits include responsibility, reliability, work ethic, application and concentration, punctuality, commitment, judgment, general life experience, attitude to authority, and diligence.

young employees can learn skills related to the tasks they perform quite quickly ... [and] develop other more general work skills in their employment which are valuable to employers such as teamwork, organisation and planning, responsibility, punctuality, customer awareness, communication, initiative, self-confidence and a healthy work ethic. These skills and attributes are not easily measured objectively but, as young people are generally less proficient in them than older workers, age based wage rates represent a simple, rational and intelligible proxy for competency based rates [citations omitted].<sup>117</sup>

## 2 Underestimating the Value of Young Workers

In contrast, a Human Rights and Equal Opportunity Commission report supported the opposing view that:

There is no evidence to show that adult capacity and productivity in a particular industry is greater than that of young people. Employers inevitably want the best person for the job. As such, if given a chance to choose between an adult with little skills and a youth with skills, the employer would choose the youth notwithstanding that they would need to pay adult wages.<sup>118</sup>

In practice, the 'productivity gap between youth and adult workers in these industries (and occupations) is narrower than the wage gap.'<sup>119</sup> The fact that the difference in youth and adult wages is not proportionate to differing productivity at work provides a loophole for employers to structure employment arrangements in a way that minimises labour costs.<sup>120</sup> This is particularly the case for young workers aged 18 years and over.<sup>121</sup>

In the retail, hospitality and fast food industries, the extent to which perceived and unquantifiable 'maturation or training deficits' are relevant to performing workplace duties in the 'subordinate or low-level' positions young workers occupy<sup>122</sup> is highly questionable. The difference between youth wages and competency-based wages is that youth wages arbitrarily apply to all young workers irrespective of the quality of work, whereas competency-based wages can account for individual differences in work contributions. Young workers' ability to attract young customers, ability to perform strenuous physical activities, willingness to work long and irregular hours, 'flexibility and quick-learning ability makes them a perfect workforce for these sectors and they should be remunerated on the basis of the work they perform, not according to their age.'<sup>123</sup> While there are legitimate concerns that competency-based wages may be more

---

<sup>117</sup> House of Representatives Standing Committee on Employment, Education and Training, above n 112, 78.

<sup>118</sup> Louis Schetzer, Jan Payne and Ingrid Scher, *Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999 and its Effects on the Employment Rights of Young People* (National Children's and Youth Law Centre: August 1999) 10.

<sup>119</sup> Mark Cully, 'Youth Wages, Training Wages and Productivity: The Economic Anatomy of Traineeships', *2008 Minimum Wage Research Forum Proceedings* (Australian Fair Pay Commission Research Forum, October 2008) 267, 272.

<sup>120</sup> Ibid 276.

<sup>121</sup> Australian Council of Trade Unions, *Submission to the Annual Wage Review 2010-2011* (March 18 2011) <[http://www.fwa.gov.au/sites/wagereview2011/submissions/ACTU\\_sub\\_awr1011.pdf](http://www.fwa.gov.au/sites/wagereview2011/submissions/ACTU_sub_awr1011.pdf)>.

<sup>122</sup> Zana Bytheway and Vera Smiljanic, 'Bullying and Violence: Young Workers still Exposed' *Jobwatch* 61, 62.

<sup>123</sup> Stott Despoja, above n 90, 402.

difficult to implement<sup>124</sup> or may be used as a proxy for age in a way which is indirectly discriminatory,<sup>125</sup> youth wages as they stand are *directly* discriminatory.

#### **IV ARE YOUTH WAGES AND REDUCED MINIMUM SHIFT LENGTHS FAIR AND EQUAL?**

Part IV tests youth wages and reduced minimum shift lengths against legal principles of fairness and equality in light of the problems inherent within the three key assumptions currently deployed to justify the continuing differential treatment of young workers. Equality provides a stronger theoretical argument, but the weakness of equality-based and human rights legal protections in Australia make it more difficult to pursue institutional change through arguments based on equality. In contrast, the enforceability mechanisms and institutional sway of the FW Act make it a more accessible avenue for change, but the interpretive vagueness and fluidity of fairness make it difficult to present a strong theoretical argument without being forced to engage with the hegemony of conventional labour market theory.

##### **A Testing Fairness under the Fair Work Act 2009 (Cth)**

The first question is whether youth wages and reduced minimum shift lengths are ‘fair’ under the FW Act, which was initially heralded as creating ‘an environment for greater fairness’.<sup>126</sup>

##### *1 Fairness as a Just Balance between Competing Interests*

This is not an attempt to revive the infamous ‘fairness test’ under WorkChoices, but a consideration of the principle of fairness within the FW Act ‘to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians’.<sup>127</sup> The FW Act reveals the increased influence of market neoliberalism – such as economic efficiency and productivity and securing employment rather than protecting conditions of employment – within Australian employment law.<sup>128</sup>

Under the FW Act, fairness requires a just balance of competing interests, including employers’ business interests, economic stability, and employees’ job opportunities and working conditions. In short, employment policies must be fair to working Australians while flexible for business and prosperous for the national economy. Yet in recognition of workplace imbalances, the FW Act protects a ‘guaranteed safety net of fair, relevant and enforceable minimum terms and conditions’. This concept of fairness as balance is

---

<sup>124</sup> Reg Hamilton, above n 109, 397.

<sup>125</sup> Joint Governments’ Submission, ‘Junior Rates Inquiry’ (November 1998) 104.

<sup>126</sup> Paul J Gollan, ‘Australian Industrial Relations Reform in Perspective: Beyond Work Choices and Future Prospects under the Fair Work Act 2009 (2009) 47 *Asia Pacific Journal of Human Resources* 260, 269.

<sup>127</sup> *Fair Work Act 2009* (Cth) s 3.

<sup>128</sup> Richard Mitchell et al, ‘The Evolution of Labour Law in Australia: Measuring the Change’ (2010) 23 *Australian Journal of Labour Law* 61, 88.

also apparent in the modern award objective's requirement to consider 'relative living standards and the needs of the low paid'<sup>129</sup>, equal remuneration<sup>130</sup> and social inclusion.<sup>131</sup> FWA must also consider the need to 'promote flexible modern work practices and the efficient and productive performance of work',<sup>132</sup> 'encourage collective bargaining'<sup>133</sup> and consider the likely impact on business<sup>134</sup> and the national economy.<sup>135</sup> In addition, the modern award system must be 'simple, easy to understand, stable and sustainable', without unnecessary overlap.<sup>136</sup> The minimum wages objective similarly requires balancing of competing interests and explicitly requires FWA to take into account 'a comprehensive range of fair minimum wages to junior employees', absent from the modern awards objective.<sup>137</sup> While the minimum wages objective more strongly favours effective safety net for living standards than the modern award objective, because most young workers are covered by Modern Awards. Thus, fairness under the FW Act is highly dependent upon different interpretations of the relative weight and importance of competing interests.

## 2 Are Youth Wages Fair?

Under the first assumption, youth wages allow young workers to remain competitive in the labour market and face greater possibilities of employment, allow employers to profit from being able to hire young workers to do the same tasks as adult workers for cheaper pay and ensures the economy can thrive off the benefits of boosting the economy for lower costs. This model assumes that the best way of facilitating social inclusion is to increase youth employment, without regard to having a living wage and the *quality* of social inclusion.<sup>138</sup> It fails to take into account the wider welfare effects of youth wages, such as reliance on social security benefits and effects of income inequality.<sup>139</sup> Yet as demonstrated above, abolishing youth wages will ensure young workers are paid for the value of the work they perform and may have an overall positive effect on youth employment.

Contrary to the second assumption, not all young workers are teenagers working for pocket money; empirical evidence (outlined above) demonstrates the precarious living situation for a significant proportion of young workers in Australia. Competency-based wages can be tailored to the particular requirements of each industry<sup>140</sup> while paying young workers for the work they perform and increasing the living standards of young workers. They would also allow employers to retain young workers who are effective and proficient at these jobs, and ensure the economy is supported by fair pay rather than exploitation of young workers. Crucially, the statutory scope of the 1999 Junior

---

<sup>129</sup> *Fair Work Act 2009* (Cth) s 134(1)(a).

<sup>130</sup> *Fair Work Act 2009* (Cth) s 134(1)(e).

<sup>131</sup> *Fair Work Act 2009* (Cth) s 134(1)(c).

<sup>132</sup> *Fair Work Act 2009* (Cth) s 134(1)(d).

<sup>133</sup> *Fair Work Act 2009* (Cth) s 134(1)(b).

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

<sup>135</sup> *Fair Work Act 2009* (Cth) s 134(1)(h).

<sup>136</sup> *Fair Work Act 2009* (Cth) s 134(1)(g).

<sup>137</sup> *Fair Work Act 2009* (Cth) s 284(1).

<sup>138</sup> New South Wales Young Labor Action, *Submission to the Fair Pay Commission 2009 Minimum Wage Review* (March 19 2009) 5.

<sup>139</sup> McDonald and Myatt, above n 87, 3.

<sup>140</sup> ACCI Submission, 'Review of Minimum Wages for Juniors and Apprentices' (16 September 2010) *ACCI Submission to Fair Work Australia – Annual Wage Review 2010-11* 1, 2-3.

Rates Inquiry precluded the AIRC from developing suitable feasible alternatives to age-based discriminatory measures, instead limiting them to assess the suitability of the limited alternatives raised at the time.

### *3 Are Reduced Minimum Shift Lengths for Young Workers Fair?*

In line with the first assumption, FWA determined that varying the Retail Award was necessary for 'social inclusion' of secondary school students.<sup>141</sup> The Full Bench rejected SDA's appeal that Watson VP had placed undue weight on social inclusion without balancing other factors under the modern award objective. Implicit (and notably absent) was employers who would profit from being able to pay lower wages for shorter shifts to young workers, and the economy benefit of increased employment levels. This paper suggests that FWA did not properly balance the competing interests and failed to take into account the flow-on effects on other workers. The SDA consistently argued that allowing retailers to employ secondary school students for less than three hours would 'jeopardise rather than encourage greater employment opportunities for youth and other casual workers in the sector'.<sup>142</sup> In addition, school students would be given preferential treatment – because they can be paid lower wages for shorter periods of time – over young workers who rely on minimum part-time shifts, women working around family responsibilities and 'other regular casuals and part-timers who cannot compete with school casual rates and hours'.<sup>143</sup> While more young people may be employed, they will face underemployment and receive less money for their work because they can be hired for shorter shifts.

In addition, FWA did not take seriously the practical effect of reduced minimum shift lengths, given inequalities in bargaining power between employers and young workers. As Unite recognises, 'young students have no choice about where they work, no say in their working conditions and no control over their wages'.<sup>144</sup> Although 90 minute shifts are only supposed to be available where 'a longer period of employment is not possible', this is likely to be used more broadly. As most young workers are employed as casuals, they have fewer concrete employment rights and less bargaining power.<sup>145</sup> Young workers often have very limited knowledge about their employment rights and obligations,<sup>146</sup> are reluctant to pursue their rights<sup>147</sup> and often work undesirable hours and shifts because they feel unable to say no<sup>148</sup> without facing negative repercussions.<sup>149</sup> One study of the fast food industry found that just under a quarter of young workers did not receive a 30 minute meal break during a 5 hour shift, over a quarter were not paid overtime, 53 per cent had worked longer than 8 hours in a shift, and only 13 per cent were union members.<sup>150</sup>

---

<sup>141</sup> *Fair Work Act 2009* (Cth) ss 3, 134(1), 284(1).

<sup>142</sup> Shop Distributive and Allied Employees Union, 'SDA Warns about the Real Impact of New School Casuals' Minimum Hours Shift' (14 September 2011) <[http://www.sda.org.au/images/news\\_pics/news\\_71.pdf](http://www.sda.org.au/images/news_pics/news_71.pdf)> 1.

<sup>143</sup> *Ibid.*

<sup>144</sup> Unite website, *Fair Work Cuts Minimum Shift for Young Workers* (June 22 2011) <<http://www.unite.org.au/2011/06/22/fair-work-cuts-minimum-shift-for-young-workers/#more-527>>.

<sup>145</sup> Bytheway and Smiljanic, above n 121, 61.

<sup>146</sup> House of Representatives Standing Committee on Education and Training, above n 100, 63.

<sup>147</sup> *Ibid.*

<sup>148</sup> *Ibid.* 69.

<sup>149</sup> *Ibid.* 70.

<sup>150</sup> Smiljanic, above n 93, 1-2.

Another indication of unfairness is the failure to consider that while the potential effect on the business<sup>151</sup> is small, and the impact on the national economy<sup>152</sup> miniscule, the difference for young workers is significant. Young workers' living costs (including rent, food, bills and petrol) are not correspondingly discounted. In this context, the destabilisation of the second assumption that young workers do not need much money reveals that the modern award objective's commitment to consider relative living standards and needs of the low paid and that the guaranteed safety net be fair, relevant and enforceable, has not been fulfilled.<sup>153</sup> Thus, FWA prioritised social inclusion (and implicitly favoured employers and the economy) but did not sufficiently balance all of the potentially affected parties' interests as required by fairness under the FW Act.

## **B Testing Equality using Human Rights Principles**

Finally, this paper questions whether youth wages and reduced minimum shift lengths satisfy the right to 'equal pay for equal work'.

### **1 Equal Pay for Equal Work**

The Universal Declaration of Human Rights recognises that '[a]ll human beings are born free and equal in dignity and rights.'<sup>154</sup> Article 23(2) provides that '[e]veryone, without any discrimination, has the right to equal pay for equal work.' This is supported by article 7(a) of the International Covenant on Economic, Social and Cultural Rights,<sup>155</sup> which imposes an obligation to support 'fair wages and equal remuneration for work of equal value without distinction of any kind...with equal pay for equal work'. It also protects the 'right of everyone to the enjoyment of just and favourable conditions of work' and 'enough money for a decent living'.<sup>156</sup> In addition, the Convention on the Rights of the Child sets out States' commitment to the 'right of the child to be protected from economic exploitation' and to 'a standard of living adequate for physical, spiritual, moral and social development'.<sup>157</sup> These international obligations are not binding in Australia unless they have been implemented into domestic laws.

In the employment context, equality prevents unjustifiable discrimination between employees. Under the modern awards objective, 'equal remuneration for work of equal or comparable value'<sup>158</sup> is restricted to gender pay inequity for the purpose of an equal remuneration order.<sup>159</sup> Equal remuneration under the FW Act increases wages based on undervaluation, rather than proving discrimination through a male comparator.<sup>160</sup> Although equal remuneration does not apply for age, the principle of equality and 'equal

<sup>151</sup> *Fair Work Act 2009* (Cth) s 134(1)(f).

<sup>152</sup> *Fair Work Act 2009* (Cth) s 134(1)(h).

<sup>153</sup> *Fair Work Act 2009* (Cth) s 134(1)(a).

<sup>154</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III) art 1.

<sup>155</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966 (entered into force 3 January 1976) art (7)(a).

<sup>156</sup> See also, article 7(3) of the Minimum Age Convention 1973, opened for signature 26 June 1973 (entered into force 19 June 1976).

<sup>157</sup> Convention on the Rights of the Child, opened for signature 20 November 1989 (entered into force 2 September 1990) arts 32(1), 27.

<sup>158</sup> *Fair Work Act 2009* (Cth) s 134(1)(e).

<sup>159</sup> *Fair Work Act 2009* (Cth) s 300.

<sup>160</sup> Meg Smith and Andrew Stewart, 'A New Dawn for Pay Equity? Developing an Equal Remuneration Principles under the Fair Work Act' (2010) 23 *Australian Journal of Labour Law* 152, 161-162.

pay for equal value' remains within human rights obligations. Importantly, under human rights law the onus rests with the party seeking to impose discriminatory treatment to prove that it is justified.

## *2 Are Youth Wages Equal?*

The first assumption seeks to justify age-based discrimination because it increases social inclusion through youth employment. Significant advances in equal pay for women during the 1970s did not lead to women losing their jobs.<sup>161</sup> There is insufficient evidence to establish the conventional labour market theory, and even if there was, young workers should not be paid less for equal work. This assumption clearly violates the equal pay for equal work test.<sup>162</sup> Under the rubric of equality, the second assumption that young workers do not need as much money as adult workers becomes irrelevant in the same way that arguments that women did not have the same financial needs as men was rejected to achieve gender pay equity.<sup>163</sup> In addition, the justification for arbitrary age-based wages under the third assumption do not withstand evidence that young workers in casual and part-time entry-level positions in the retail, hospitality and fast food industries perform in their jobs as effectively as adult workers.

## *3 Are Reduced Minimum Shift Lengths for Young Workers Equal?*

The 'equal work for equal pay' principle applies indirectly to reduced minimum shift lengths, where young workers receive less money because they can be employed for half the minimum length of adult workers. In practice, youth wages and 90 minute shifts mean that young workers receive a lower income. The majority of young workers work in the retail industry, earning between \$6.75 (14 and 15 year olds) and \$13.50 (20 year olds) per hour.<sup>164</sup> The NRA argued that if school students had to be employed for at least three hours per day, they were discriminated against because they would be less likely to find employment for short term shift requirements within the retail industry.<sup>165</sup> Although shorter minimum shifts are discriminatory, FWA justified them because they were discriminated in favour of school students. Whereas fairness could take into account unrelated parties and groups, the test of equality is limited to the group claiming discriminatory treatment. The effect on other workers who would lose shifts or employment because of the variation holds less weight under the 'equal work for equal pay' test. The SDA argued that halving minimum shift lengths for school students would cause discrimination against school students as employers are likely to offer shorter shifts even where there are no barriers to a full three hour shift.<sup>166</sup> Adult workers in the retail industry can work for shorter than three hours, but employers are nonetheless required to pay them for the full three hour shift. Once the second and third assumptions are problematised, it becomes increasingly difficult to justify reduced minimum shift lengths for young workers.

---

<sup>161</sup> Maloney and Pacheco, above n 81, 237-238.

<sup>162</sup> Human Rights and Equal Opportunity Commission, 'Age Matters: A Report on Age Discrimination' (May 2000) <[http://www.hreoc.gov.au/pdf/human\\_rights/age\\_report\\_2000.pdf](http://www.hreoc.gov.au/pdf/human_rights/age_report_2000.pdf)> 61-63.

<sup>163</sup> Maloney and Pacheco, above n 81 237-238.

<sup>164</sup> ACCI submission, above n 139, 7.

<sup>165</sup> *National Retail Association Limited* [2011] FWA 3777 [25]-[26].

<sup>166</sup> *National Retail Association Limited* [2011] FWA 3777 [34].

## V CONCLUSION

In Australia, young workers face the increased likelihood of work inequities, particularly for the majority of young workers employed in casual and part time entry-level positions in the retail, hospitality and fast food industries. This paper suggests that once the key assumptions buttressing the discriminatory treatment of young workers is destabilised, youth wages and reduced minimum shift lengths need to be critically re-examined through principles of fairness and equality. Although this paper concludes that age-based discrimination against young workers is neither fair nor equal, the practical obstacles to ensuring substantive fairness and equality are nonetheless daunting. The 'equal pay for equal work' test is theoretically sound, but there is a concerted lack of institutional mechanisms to enforce equality in Australia. On the other hand, while the Australian employment law system retains more favourable institutional avenues, the vagueness of fairness means that the hegemony of conventional labour market theory is likely to prevail unless the core assumptions discussed in this paper are sufficiently destabilised. In addition, there is much greater scope to question the validity of recently varied reduced minimum shift lengths, whereas youth wages have become more firmly entrenched through the taken-for-granted assumptions discussed in this paper.

In conclusion, the lived experiences of young workers need to be considered, not assumed. Young workers are not a homogeneous group, but face differing levels of 'socio-economic status, family support, geographic isolation, discrimination, access to services and support, and engagement in education.'<sup>167</sup> Unsurprisingly, the voices and experiences of young workers are largely absent from the legal and policy decisions affecting them. If you asked young workers in Australia what they think of getting paid less money for the same work through discounted wages and shorter shifts, how many would say it was fair and equal?

---

<sup>167</sup> Youth Affairs Council of Victoria Inc, *Submission to the Australian Fair Pay Commission 2009 Minimum Wage Review* (2009) 11.

## OTHER WORKING PAPERS IN THIS SERIES

1. R Read, *Recognition, Representation and Freedom of Association under the Fair Work Act 2009* (August, 2009)
2. V Kaufman, *Protection of Independent Contractors under WorkChoices and the Fair Work Act: Improvement or Continuity?* (April, 2010)
3. A Piper, *Correcting Power Imbalances in Australian CEO Remuneration: Aligning the Interests of Shareholders and CEOs* (June, 2010)
4. Y Mijic, *Enforcing Workplace Rights: Evaluating Fair Work Reforms to the Federal Compliance Regime* (November, 2010)
5. B Waugh, *Trade Unions and the Freedom of Association – A Comparative Analysis of Work Choices and the Fair Work Act 2009* (November, 2010)
6. T Malone, *Vulnerability in the Fair Work-Place: Why unfair dismissal laws fail to adequately protect labour-hire employees in Australia* (May, 2011)
7. C Kelly, *The Problem of Workplace Bullying and the Difficulties of Legal Redress: An Australian Perspective* (May, 2011)
8. S Fentiman, *Discrimination, Work and Family: Recent Regulatory Responses to Promote Equality* (June, 2011)
9. N Markovic, *Healthy Working Time: Evaluating Australia and its available Industrial Instruments* (September, 2011)