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On Wednesday 8 June 2016, SDAEA issued a Media Release to the *Australian Financial Review* and subsequently other boutique media outlets.

It was purportedly addressed to ACTU and Union Secretaries. SDAEA continues to distribute its media release.

This statement is in response to the SDAEA media release.

That ten page media release contains numerous inaccuracies and misleads the reader. This statement deals with some but not all of those inaccuracies.

1. **AMIEU Appealed the EBA Approval**

   SDAEA attempts to malign Duncan Hart and Josh Cullinan for their role in the successful appeal but make no mention that AMIEU was an appellant. SDAEA sided with and supported Coles' attempt to persuade the Tribunal not to allow the AMIEU to appeal. They were unsuccessful and AMIEU was permitted to appeal. ***The Decision is rightfully a Union decision.***

2. **The Test Has Not Changed**

   The SDAEA media release states that the Decision established a new expansive interpretation of the BOOT where the Commission is now looking at each and every employee rather than broad groups or workforces as a whole. That statement is simply wrong: the Commission applied the established, orthodox interpretation of the BOOT that has been fought for and maintained by progressive unions over many years.

   It is well settled that the Better Off Overall Test requires that each employee and prospective employee, individually, be better off – it is simply untrue to suggest this was not already the case.

   The fact is that the test was settled years ago – there are many and numerous examples of progressive unions defending the established interpretation of the test.. The Fair Work Commission's *Enterprise Agreements Benchbook* is littered with them.

   http://benchbooks.fwc.gov.au/enterpriseAgreements/assets/File/EABenchbook.pdf

   In the Coles' case, neither the SDAEA nor Coles attempted to argue otherwise. The test is so well established that any attempt to argue to the contrary would have failed.

   This argument has only arisen after the Decision. SDAEA is treating its members, and other union officials, as fools.

   So well established is the test that recently McDonald's media release defending its SDAEA deal stated:

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> *Enterprise Agreements are subject to the scrutiny of the Fair Work Commission who will only approve an Agreement* ***if each of the employees covered*** *are better off overall compared to the relevant standard. Our Agreement passed this test and that is why it was approved and implemented.*
>
> See http://tenplay.com.au/channel-ten/the-project/top-stories-may-2016/statements

This McDonald's release was issued just prior to Fairfax exposing SDAEA and the AIG would handle media contact on the issue from that point forward.

> http://www.smh.com.au/business/workplace-relations/union-fronts-for-mcdonalds-in-pay-penalties-row-20160520-gp05d5.html

3. **SDAEA Supported Coles' Attempt to Diminish the Test**

In truth, SDAEA supported a practical application of the test proposed by Coles' that substantially undermined the Test – namely, arguing that the "the intrinsic value of work" was worth thousands of dollars to individual employees and could be offset against lost minimum wages and penalty rates.

This is a lengthy point which we won't focus on here: an example will suffice. SDAEA supported Coles' contention that the full value of every benefit needed to be realised in every year and that minimum wages and penalty rates could be diminished by that full value. For example, Coles, with the SDAEA's support, argued that the full value of all forms of leave (including blood donor leave, defence services leave, unpaid leave etc) had to be assigned to each and every worker in each year, even if the worker did not access the leave – and that this notional assignment of the value of the leave could be offset against minimum wages and penalties.

Under Coles' argument, even when it was assumed that workers (every year), were retrenched, took 39 weeks of accident make-up pay after suffering a workplace injury, had an immediate family member die, took defence services leave, blood donor leave, 11 days of carer's leave, 3 days compassionate leave, 3 days natural disaster leave, 4 weeks annual leave, 5 days of pre-approved leave, a week of unpaid leave, and other 'benefits', many remained worse off. The Coles and SDAEA evidence showed this.

Then Coles and SDAEA argued that **every employee** who suffers domestic violence would have lost their job with Coles if it weren't for the domestic violence provisions of the Agreement – provisions that **do not provide** victims of domestic violence with **additional leave** but instead allow victims to use their own leave and to request flexible work arrangements. Coles, supported by the SDAEA, placed a financial value on these employees not losing their job ***and offset this against the lost minimum wages and penalty rates.***

Then Coles and SDAEA argued that **every employee** who works for Coles should have assigned to them the value of half of the future earnings they could earn if they completed tertiary education course on the basis that this represents the value to employees of purported 'flexibility' provisions in the Agreement. This was argued

despite the fact that the Agreement does not provide for paid study leave or payment of tuition fees. Coles, supported by the SDAEA, placed a financial value on those purported future earnings (many thousands of dollars) for every Coles employee ***and offset this against the lost minimum wages and penalty rates***.

This could go on and on. Coles made over 140 pages of submissions on these issues and thousands of pages of evidence. Only Hart and AMIEU fought against these attacks on working people. The most vocal media identities that have reported on these issues sat through all the hearings and heard all the evidence. They are not re-printing media releases, they are reporting from their first-hand experience.

4. **The SDAEA did not complain about the Super Retail Group Sunday penalty rates.**

SDAEA argues it can care about penalty rates when it suits their purposes. SDAEA relies on a purported opposition to Super Retail Group cutting its penalty rates costing thousands of workers, millions of dollars.

The Super Retail Group agreement approval Fair Work Commission file shows that SDAEA National Secretary, Mr Gerard Dwyer, signed a Statutory Declaration on 21 July 2016 identifying two issues with the Agreement and the employer materials. Those issues were the 20-year-old rate of pay and the first aid allowance. SDAEA did not raise the Sunday rate at all.

In any event, SDAEA indicated it supported the Approval of the Agreement.

The Super Retail Group subsequently made an undertaking dealing with the 20 year old rate of pay. Mr Gerard Dwyer then wrote to the Fair Work Commission on 7 August 2015 stating:

Dear Commissioner Bull,

Re: AG2015/3931 Super Retail Group Pty/Ltd – T.A Super Retail Group

I refer to your email on 5 August 2015 in relation to the undertaking provided by the Applicant regarding rates of pay for 20 year old casual employees.

The Union accepts the undertaking as provided by the Applicant. The Union continues to support the approval of the Agreement subject to it satisfying the BOOT test.

Kind regards,

Yours faithfully,

GERARD DWYER
National Secretary-Treasurer

The SDAEA did not dispute the Sunday rate at the Super Retail Group, which specifically cut the Sunday pay from the previous Agreement.

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5. **Coles EBA Provided a Wage Rate Higher Than the Award**

The Fair Work Commission has now resolved the question of whether the Coles Agreement passed the Better Off Overall Test. It did not.

The FWC offered Coles the opportunity to accept an undertaking to pay staff the difference if they were worse off. That Coles was not prepared to accept the undertaking is indicative of the scale of underpayment. We estimate that it is well in excess of $50 million and possibly in excess of $100 million.

Coles and SDAEA fought at every opportunity to stop the provision of rosters and other information which would have allowed a thorough analysis. Of course, we don't need rosters to know one term is worse than another. It is "a matter of simple logic." However rosters allow us to understand just how much worse off employees are under the SDAEA deal.

It should be noted that in the appeal, the FWC was considering a scenario where Coles had already been forced to give undertakings to pay **all casual staff 5% more** and **all 17 year old staff 9% more to get the Agreement approved in the first place.** The FWC required Coles to give these undertakings in June 2015 after the first Cullinan analysis. We estimate that, as a direct result of the undertakings, almost $20 million was returned to the pay packets of our lowest paid, insecure workers, compared to the deal SDA negotiated.

Despite these June 2015 undertakings, most of Coles' 50 000 non-casual workers remained worse off. Coles and SDAEA fought against the AMIEU and Hart attempts to get rosters which would have identified the scale of actual loss. Despite their efforts, Hart and AMIEU were successful in getting the store rosters for one metropolitan Melbourne store and one regional Victorian store.

Coles chose the stores. The Northcote store is one of the smallest in Melbourne, with the smallest staff cohort, narrowest opening hours and no night fill. There were just 49 non-casual staff. In the same Northcote plaza is another Coles store which has much longer open hours, many more staff, and night fill workers. Coles chose not to provide the roster for that second store.

The Benalla store is tiny – with just 33 non-casual staff and no night fill workers.

The **average Coles store** has more than 65 non-casual staff. A store like Gungahlin in ACT has more than 300 staff with 100 on site at any one time.

Even with the stores Coles chose, 31 of 49 non-casual staff at Northcote were worse off. Even on the Coles and SDA calculations, they were worse off by over $1500 per year **each** – just on the penalty rates lost. This doesn't include the substantial loss of overtime pay and other rights.

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Various Hart and AMIEU extrapolations went without challenge by either SDAEA or Coles. Those extrapolations showed between $50 million and $100 million in stolen wages to some 30 000 non-casual staff.

There are numerous other detriments, such as SDAEA giving away rest breaks for four hour shifts at Coles. We found that 24% of shifts at Northcote were 4 hours long.

This statement cannot deal with all the detriments – those detriments were the subject of hundreds of pages of materials before the Fair Work Commission.

In its media release, SDAEA argues "Employee U" is now better off after shifting to a new roster. Mr or Mrs U has escaped the penalty rate theft under their old permanent roster and now has a small benefit (although no mention is made of lost overtime pay). It is remarkable that SDAEA doesn't explain the situation of the 30 000 other workers who have not had a beneficial change in their permanent roster. Those 30 000 workers remain worse off. SDAEA treats us as fools to suggest that one example somehow fixes the tens of millions dollars stolen from tens of thousands of workers.

6. Coles Pays More Under EBA than Award

In various media outlets since the Decision, SDAEA has argued that Coles' wages bill is higher under the Agreement than under the Award.

That is not the test. Every worker needs to be better off.

SDAEA did not put this argument to the Commission, and it has produced no evidence that it is true. If it is true, it is surprising that the SDAEA did not put its evidence before the Commission. The evidence of the conservative Northcote store roster showed that non-casual staff, collectively, remained much worse off even when the 18 who were financially better off were taken into account. The 18 didn't offset the 31. This could only worsen if lost overtime pay was included.

But even if this new argument is true – why should half the workforce, tens of thousands of workers, lose millions for the benefit of others? The insecure, part-time, weekend and weeknight workers, the night fill workers and those working overtime: why should they all earn less ***than the minimum Award pay*** so that the full-time weekday workers earn more?

And, if the SDAEA really believed that this was a good outcome for its members, why didn't it tell its members that some of them would earn less than the Award so that their colleagues could earn more?

7. Actual Evidence

SDAEA did put evidence on during the hearing. Mr Galbraith, SDAEA National Industrial Officer, was cross-examined by Counsel for AMIEU and Hart. Each question is posed by Counsel and the response is by the National Industrial Officer, Mr Galbraith on behalf of the SDAEA:

> Did you explain to the employees that some of them would earn less than the statutory award minimum?---I don't believe that was explained, no.

Did the SDA consider that it wasn't relevant for employees to know that?---I don't think it's that they considered that it wasn't relevant. I think they considered that it was a deal that was generally beneficial to the majority of employees that worked for Coles.

Do you agree that a worker earning, for example, 13.8 percent less under the agreement than the award might consider it a relevant factor when deciding whether to cast a vote in favour or against the agreement?---They might, yes.

You accept that by failing to draw it to their attention, workers may not have, in fact, made an informed decision about whether they wanted to approve the agreement or not?---If they had that information, they may have voted differently.

Was the SDA aware at the time the agreement went out to vote that some employees would earn less than the award minimum?---The SDA's aware that the employees who work predominantly penalty rate times without the compensation of higher base rates of those hours during the week could potentially be worse off.

The SDA was aware of that at the time that the agreement was put out to vote, that's correct?---I imagine so.

The SDA was aware of that at the time that it filed its F18 statutory declaration in support of the agreement?---Yes.

The SDA was aware that a factor that may have changed the way in which employees decided to cast their vote was withheld from those employees?---I wouldn't describe it as withheld. We felt the agreement was a good agreement that benefitted the vast majority of its employees.

But you accept the employees weren't told?---The employees weren't told.

The Tribunal wasn't told was it?---I don't believe so.

Have you seen the evidence of Mr Cecchini?---Yes, I have. I've read it once, not in great detail.

If I could ask that you be given a copy of that report. When I say a copy of the report, I'm referring, Commissioner, to BC5.

THE COMMISSIONER: Yes, yes, I assumed that.

MS KELLY: Thank you, Commissioner. If I can ask you to go page 19 of that document and that is findings in relation to a cleaner employed in Benalla. Have you got that?---Yes, I've got it.

You see on the right hand side Mr Cecchini's analysis, on the left you'll see Mr Cullinan's?---Yes.

Mr Cecchini's representation of Mr Cullinan's. This employee, when we look at non-contingent benefits, so this is wages and penalties and allowances, would earn under the award $24,117 and under the agreement earns $21,769. Was this a good deal for the cleaner at Benalla?---On the basis of the non-contingent benefits, I would say no.

After we factor in the contingent on choice benefits, the worker is still 8.9 percent worse off. At that point, is this a good deal for the Benalla cleaner?---The Benalla cleaner is still behind.

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> I'm not asking whether they're behind. Your evidence is that this is a good deal for workers. Is your evidence that this is a good deal for the Benalla cleaner?---Not for the Benalla cleaner, no.
>
> After we take into account contingent on circumstance, so this is someone who is off work for 26 weeks with an injury, taking 11 days carer's leave, three days compassionate leave, three days emergency services leave, three days natural disaster leave, even after we factor in all of those contingencies on circumstances, this person is notionally $121 better off. At that point, does the SDA maintain that this is a good deal for the Benalla cleaner?---I don't think it's a good deal for the Benalla cleaner.

8. Payroll Deductions

Most unionists identify the importance of payroll deductions. Any cost of payroll deductions might need to be met by an organisation where it lacks the power to enforce free payroll deductions.

That said, any fee should be commensurate with the service provided. That is, the fee should directly derive from the cost of processing such payroll deductions. SDAEA and Coles have never explained how the fees paid are associated with the cost of the service.

It is utterly outrageous that the SDAEA published in its media release a purported payroll fee attributable to a union (AMIEU) to somehow justify its own fee.

9. **Industry Super Funds and HSR Training**

Cullinan, Hart and AMIEU have never criticised SDAEA or any other organisation of employees for undertaking HSR Training or encouraging industry super funds. It is a disappointing stretch to include such material in its media release attacking Cullinan and Hart.

Summary

The unfounded and anti-union attacks on Hart, Cullinan and AMIEU must stop. The union movement risks real damage unless SDAEA is held to account for its actions, which are contrary to the efforts of all progressive unions and the working class.