




Australian Hotels Association (AHA)
And
Accommodation Association of Australia (AAoA)

Joint Submission to:

Workplace Relations Inquiry
Productivity Commission

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1 About AHA and AAoA

The Australian Hotels Association (AHA) is an organisation of employers in the hotel and hospitality industry registered under the *Fair Work (Registered Organisations) Act 2009*. Its membership of more than 5,000 licensed hotel businesses includes pub-style hotels plus three, four and five-star accommodation hotels located in each state and territory. The AHA has branches located in every Australian capital city and a Canberra-based national office.

The Accommodation Association of Australia (AAoA) represents accommodation operators of all sizes and standards. Member-owned and not-for-profit, AAoA represents owners, operators and employers in the accommodation industry and has been a voice for the accommodation sector for over 40 years. AAoA has members in all regions across Australia and has a Sydney based national office.

The hotel industry is a significant employer, with more than 278,000 persons employed between the pub sector (188,000)[1] and the accommodation sector (90,000)[2], and an annual wages and salaries contribution of $5.41 billion.

Although some hotels are large-scale operations with hundreds of employees that form part of national or international chains, many AHA and AAoA members are small, locally owned businesses serving their surrounding communities. In 2005-06 only 145 of 65,197 businesses in the ABS Accommodation, Cafes & Restaurants sector employed more than 100 people.[3]

AHA and AAoA members operate highly labour-intensive businesses and as such are significantly impacted by cost increases relating to employment. The Australian Fair Pay Commission identified that wages amount to 24 per cent of total expenses in the hospitality industry compared to the average across all industries of 15.8 per cent.[4] The average member therefore has relative wage costs that are nearly 52 per cent higher than the average Australian business.

2 The Review

As set out in its five Key Issues Papers, the Productivity Commission will be assessing the performance of the workplace relations framework including the *Fair Work Act 2009* with a focus on key social and economic indicators that are important to the wellbeing, productivity and competitiveness of Australia.

The capacity for the workplace relations framework to adapt over the longer term to issues arising due to structural adjustments and changes in the global economy will be a key consideration. A primary consideration will be the improvement of labour productivity and economic efficiency. It is proposed that an effective workplace relations framework involves having a flexible but fair workplace relations framework. A number of recommendations will then be made for reform based on this proposal.

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[1] PricewaterhouseCoopers (2009) *Australian hotels: More than just a drink and a flutter*
[2] Australian Fair Pay Commission (August 2008), *Accommodation, Cafes and Restaurants Industry Profile, Research Report No.1/09*
[3] Australian Bureau of Statistics (2007), Australian Industry 2005-06
[4] Australian Fair Pay Commission (August 2008), *Accommodation, Cafes and Restaurants Industry Profile, Research Report No.1/09*, p31

3 Response to PC Issues Papers

The Productivity Commission issued five Issues Papers. Responses to those Issues Papers are set out below.

3.1 Federal Minimum Wage

Under the *Fair Work Act*, the Commission must establish and maintain a safety net of fair minimum wages, taking into account:

> (a) the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth
> (b) promoting social inclusion through increased workforce participation
> (c) relative living standards and the needs of the low paid
> (d) the principle of equal remuneration for work of equal or comparable value
> (e) providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability

There is significant historical importance attached to the minimum wage (as outlined in issues paper number 2). However, there is concern with the way in which modern award minimum wages are set.

It is recommended that either of the following options be considered:

Option One

1. The expert panel considering the FMW decision should be a separate panel to that which sets the modern award minimum wages.
2. The minimum wages objective at section 294(1) be expanded to include the following specific criteria:
    a. Ensuring phased annual instalment increases to the mandatory superannuation guarantee levy are offset in future increases to the Minimum Wage
    b. Consideration of other wage related cost increases
    c. Consideration of underemployment levels (eg those employed workers who want more hours) as well as unemployment levels – both nationally and on a state by state basis
    d. Consideration of industry specific circumstances – worded in such a way so the FWC is not restricted any longer by the approach taken from the 2011-2012 decision – and that the onus on the applicant for modern award specific changes is not so restrictive.
    e. Take into account economic and business conditions and capacity to pay
    f. Linking any increases to increases in productivity
    g. Consideration of events that impact on locations and that capacity to pay eg cyclone Marcia in Rockhampton, Yeppoon, Gympie and surrounding areas, so that it is not necessarily modern award specific – it may be location specific.

Option Two

It is rare for the increase to the national minimum wage to be less than CPI. Therefore, a simple mechanism is set out below:

- The Federal Minimum wage increase could just be the CPI increase.
- Abolish the relevant sections of the Act, just each year increase wages by CPI
- Use the CPI adjustment to 30th June and incorporate increases from 1st September of each year

Observations include:

- Simple system with no red tape
- Eliminates wasting time and cost on ambit claims, surveys, submissions, etc
- Everyone is aware of the structure and reduces government costs by having less staff

3.2 National Employment Standards

We note the Productivity Commission's position in relation to the National Employment Standards ("NES") and that the Commission does not propose to undertake a holistic analysis of the NES, unless submissions present solid grounds for review.

The NES represents a minimum conditions document for national system employers and employees. It is recognised that the NES must be clear, concise and easy to understand. We have reviewed the NES and present below a number of recommendations designed to improve the NES with respect to its clarity and intention.

Averaging Hours of Work

Averaging hours of work was a feature of the *Workplace Relations Act 1996* and allowed industries with unique trading hours characteristics to better manage its operations. For example, within the hotel and hospitality industry, there are a number of seasonally based workplaces that rely on a significant number of hours to be worked in a short period, followed by periods where significantly less than 38 hours per week are required. By restoring the ability to average hours over a period of up to 52 weeks, those workplaces can organise its workforce according to its specific requirements, and not be restricted to only engaging casual employees for short periods (as seasonal or other work demands dictate).

It is recommended that section 64 of the Fair Work Act 2009 be amended to allow the averaging of ordinary hours to extend to over a 52 week period.

Continuous Service

With respect to the NES covering termination and redundancy payments, the definition of continuous service at section 22 means that a period of casual service during employment is counted for the purposes of those payments. Specifically, this definition means that for a permanent employee who has a period (or periods) of casual service within their employment history, that period of casual service counts toward the employee's total service.

Casuals receive a 25% loading on top of the permanent rate of pay, and this loading includes compensation for paid entitlements including notice of termination and severance payments. The definition of continuous service has the unintended consequence of doubling up on entitlements so that in addition to receiving notice of termination and severance in the casual loading, where the employee finishes employment as a permanent employee, their notice of termination and severance payment entitlement includes the period of casual service for which the employee has already received an entitlement.

It is recommended the Act requires amendment at Division 11 to confirm that a period of casual service does not count for notice of termination and redundancy.

Flexible Work Arrangements

Division 4 of the Fair Work Act details the circumstances where an employee can seek a flexible working arrangement. Section 65(3) requires the request to be in writing and to set out the details of the change sought and the reason for the change. Iin addition to the above written requirements, a request for a flexible working arrangement must also detail the duration of the flexible working arrangement to provide clarity and certainty for both the employee and the employer. This is also relevant for the purposes of section 65(5A) and assessing whether the request can be granted.

It is recommended to add a requirement at section 65(3) for an employee to state the period/duration for which the flexible work arrangement will apply.

Parental Leave

It is recommended that the NES:

- Better define what an employee couple is (section 72).

This section is ambiguous and confusing for the layperson to interpret and understand, and as a result could lead to an incorrect application of the NES.

- Address the conflict between section 84A (replacement employee) and the exclusions from being able to make an unfair dismissal claim.

Currently there is an exemption from unfair dismissal for fixed term and seasonal contracts. In circumstances where a productive and valued employee that has exercised their entitlement under this division, wishes to return early, the employer can be restricted from approving such a request because the termination of the replacement employee may bring rise to an unfair dismissal claim.

- Amend section 81A (paid no safe job leave) and 82A (unpaid no safe job leave) to allow for pro rata alternative work, for example, a part time job can be offered at 10 hours less per week. The Fair Work Ombudsman's advice has been is that unless the full hours can be offered, the employee is entitled to proceed on this form of leave for the entire hours they would ordinarily work, as opposed to for the 10 hours that have not been made available.

This is a disincentive for an employer to explore alternative options, and disadvantages employees as it breaks their connection with the workplace.

Notice of Termination

The NES details at subdivision A of Division 11 the notice of termination an employer must give to a permanent employee. It is silent on the notice a permanent employee must give to an employee, and it is noted that modern awards generally proscribe the notice a permanent employee must give. The NES as an important base terms and conditions document should also contain a notice period for employees covered by subdivision A. It is noted that while a contractual notice period may still apply, enforcing such provisions requires civil action.

It is recommended that the Act be amended to include the notice periods an award/agreement free employee has to give when they are terminating their employment. Further, perhaps this notice schedule should be the 'default' in the event a modern award is silent on notice. Notice would be same as the notice an employer has to give, save for the additional week that is applied when an employee is over 45 years of age and has more than 2 years of service.

Deductions for Notice not given

Modern awards generally allow an employer to deduct from monies owed to an employee the value of notice of termination not given. The NES should contain a clause enabling for the same deductions to be made where the required notice of termination is not given to an employer. In the hotel and hospitality industry, due to the nature of the industry, many employees do not give the appropriate notice. The *Hospitality Industry (General) Award 2010* does not cover all classifications in the industry, nor does it cover senior positions. The inclusion of a deduction clause in the NES would provide consistency with respect to those employees not covered by the modern award.

It is recommended that the Act should be amended to allow an employer to deduct the value of any notice not given by an employee.

Reducing a Notice Period

A genuine agreement between both parties to reduce a notice period would allow the employment relationship to end at a time that suits both and is equally beneficial. For the employee this may mean transitioning into new employment earlier than expected, which would lead to increased productivity for the new employer. Conversely, such an arrangement might allow an employer to move on an employee whose productivity has significantly reduced without the financial burden of a payment in lieu of notice.

It is recommended that a provision be inserted to allow an employer and employee to agree to reduce a period of notice without payment/deduction.

Termination in Writing

It is recommended that the requirement for notice of termination to be in writing (section 117) be removed or amended to reflect that circumstances may arise where a written notice of termination cannot be provided on the day of termination.

Redundancy

The amendment proposed below still provides a mechanism for the employee to submit that an alternative employment was not suitable however it would allow employers and employees to confidently reach a genuine agreement on a redeployment option at the workplace level. It may also transpire that such an amendment may act as an encouragement for employers to more actively pursue redeployment options for valued and skilled employees.

It is recommended to amend section 120 so that in the situation where an employee obtains acceptable alternative employment, the employer has a scale by which they can reduce the redundancy pay. Rather than the employer having to make an application to the Fair Work Commission to do so, the employee would make an application if they believed the acceptable alternative employment was not that.

Workers' Compensation

The application of section 130 is not consistent across states and territories due to provisions in state or territory based workers' compensation legislation. In Queensland for example, leave still accrues due to its workers' compensation legislation. Such a legislative setting could be viewed as a disincentive for injured employees to promptly return to the workplace. It is also an unproductive drain on the employers financial resources.

It is recommended to amend section 130 to clarify that that leave does not accrue when an employee is receiving workers' compensation, effectively providing that the FW Act overrides State or Territory provisions.

Cashing Out of Annual Leave

The NES provides that modern awards and Enterprise Agreements can include a term relating to the cashing out of annual leave. Not all modern awards contain a cashing out clause, for example, the *Hospitality Industry (General) Award 2010* does not contain a cashing out provision, and not all employers are in a position to bargain for an Enterprise Agreement.

In addition in the hotel and hospitality industry, a number of classifications and senior positions are award/agreement free, meaning those employees can apply to have their annual leave cashed out within the limits stated by the NES.

Such a situation creates inequity across employment classifications, often in the same workplace. Every national system employee should have the right to request to cash out annual leave, and submit that for equity purposes, the cashing out of annual leave should be a right that is not limited in the way it currently is.

It is recommended to amend Division 6 to clarify section 94(1)-(4) applies as the cashing out arrangements for all employees to whom the NES applies.

3.3 The award system & flexibility

The Productivity Commission's issue paper discusses the modern award system, the wage review process and the modern awards objective. The modern awards objectives are addressed in this section. Comments relating to the wage review process have been provided under the relevant heading elsewhere in this submission. Section 134 of the *Fair Work Act* sets out the Modern Awards Objective:

> *(1) The FWC 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:*
>
> *(a) relative living standards and the needs of the low paid; and*
>
> *(b) the need to encourage collective bargaining; and*
>
> *(c) the need to promote social inclusion through increased workforce participation; and*
>
> *(d) the need to promote flexible modern work practices and the efficient and productive performance of work; and*
>
> *(da) the need to provide additional remuneration for:*
>
> *(i) employees working overtime; or*
>
> *(ii) employees working unsocial, irregular or unpredictable hours; or*

(iii) employees working on weekends or public holidays; or

(iv) employees working shifts; and

(e) the principle of equal remuneration for work of equal or comparable value; and

(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and

(g) 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

(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

It is submitted the objectives are not sufficient for ensuring that a modern award appropriately reflects the unique characteristics of an industry the modern award purports to cover. For example, the *Hospitality Industry (General) Award 2010* (HIGA) does not reflect the nature of the industry's trading hours, nor does it provide the flexibility necessary for better reflecting workplace needs.

With respect to flexibility, our concerns are addressed under the heading Individual Flexibility Agreements. The issues paper also refers to the mechanism for amending modern awards each four year period, as well as within that period. No comment is made on these review/variation processes.

It is recommended that section 134 of the *Fair Work Act* be expanded to include a requirement for the Fair Work Commission to take into account the nature and characteristics of the industry in which a modern award operates when making or varying a modern award.

3.4 Penalty rates

AHA/AAOA is not asking for the abolition of penalty rates. It is agreed that additional remuneration should be provided for employees working overtime, weekends and public holidays. However, a better balance is required to enable more businesses to open their doors. Workers end up suffering most of all by venues not opening despite workers being available and willing to work. The simple fact is that while lifestyles have changed, workplace conditions haven't changed to reflect the new environment.

Whilst in principle the employee remuneration objectives might be being met under provisions of the Award, the societal, workforce and business related objectives in the Act are clearly not. Particularly on Sundays and public holidays, fewer opportunities for work are being created due to venues not being opened. This is due to high wage rates making it impossible for the venue to make a profit, resulting in underemployment. Workers are adversely affected as they are not able to earn income on these days.

We understand the difficulty for the Fair Work Commission (FWC) having to adopt a "one size fits all" approach so as to devise award structures that are simple for employers and employees to manage and understand.

Unfortunately, a "one size fits all" approach does not cater for those workers currently missing out on work and income who would otherwise be prepared to work at rates less than the current prohibitive rates which cause businesses not to open. A more flexible system is sought that minimises underemployment and maximises return on investment.

Penalty rates history

In 1950, the Industrial Relations Commission of New South Wales confirmed that "employers must compensate employees for the disturbance to family and social life and religious observance that weekend work brings". A key intent of penalty rates was to discourage employers from working employees on weekends.

In 1947 the Commonwealth Conciliation and Arbitration Commission found Saturday work should be remunerated at 125% of the base rate, and the rate for Sunday work should be 200% of the base rate. Nearly 70 years later, and with an economy and society that is operating 24 hours per day 365 days per year, work conditions are still based on a model that was reflective of life in 1947.

Back then, penalty rates were designed to discourage employers from working employees on weekends. Today, a vast number of people want to work on weekends due to family reasons, study commitments or lifestyle choices. However, they are prohibited from working because venues are penalised for opening.

Replace the term "Penalty Rates" with "Additional Remuneration"

The term penalty rates is a reflection of the puritan views prevailing in the early 1900's where penalty rates were used as a tool to penalise businesses from opening. Such a term is inconsistent with the demand for services 24/7 in today's society and the shift to a more flexible and non-traditional working and business environment.

It is recommended that the words "Penalty Rates" are substituted with the words "Additional Remuneration" wherever applicable.

Three-way loss

The imposition of high penalty rates is discouraging employers from opening on weekends and public holidays, and as a consequence do not meet the Modern Objectives relating to social inclusion in the workplace, flexibility and productivity.

The majority of customer demand for hospitality falls outside the 9am to 5pm Monday to Friday period on which the current industrial system is based. Trading on evenings, Saturdays, Sundays and on public holidays is subject to a punitive penalty rate and overtime regime. Hospitality venues are often unable to trade profitably and therefore don't open resulting in a three-way loss:

1. The community are deprived of being able to purchase or enjoy the products or services they wish
2. The workers are deprived the opportunity to earn income
3. The business owner is deprived of maximising the return from his or her investment

To reduce exposure to higher labour costs on public holidays, hotels reduce service offerings including for example:

- closing restaurants for lunch and/or dinner
- reducing access to room service
- closing or reducing bar trading hours
- limiting menu offerings
- minimising the servicing of rooms and amenities

Casual employees are often not rostered to work on public holidays and therefore miss out on income they would otherwise have received. The reduction of services on offer impacts the ability of Australian hotels to compete against other international markets for tourist visitations. If penalty rates were better balanced on these days, normal operations and services would be provided, employment increased, and the negative impacts highlighted above would be removed.

Example

Many hotels operate on the "cost of wages" at about 25% of total sales. On a Monday to Friday, if a venue grosses $1,000 in sales, it would expect to pay about $250 in wages. The remainder would be allocated to paying all the other costs. On a public holiday with gross revenue of $1,000, the cost of wages could climb as high as nearly $700. That would leave only about $300 left to pay for all the other costs e.g. GST, cost of goods, fixed costs, depreciation, electricity and profit. Even if a surcharge is able to be added, it is very difficult to open the business.

It is recommended that a full review of the current penalty rate structure be conducted by the Productivity Commission.

3.5 BOOT Test

The issue is that bargaining is not appealing to small business due to the fact that the employee has to prove that a proposed agreement is "better off" for the employee as at the time of the application. The uncertainty and need to be "better off" or have to pay more overall discourages small business wanting to get into bargaining. (BOOT is also addressed in the sections on Multi Hire s3.8 and Individual Flexibility Agreements s3.9)

It is recommended that the Better Off Overall Test be removed from the *Fair Work Act* and the No Disadvantage Test that applied at the time the *Workplace Relations Act 1996* was repealed be inserted into the *Fair Work Act* as the test to be applied.

3.6 Public Holidays

The concept that a reasonable amount of public holidays is a valid reward for employees is supported. It is also agreed that increased rates of pay are warranted for those working public holidays. However:

- there is no consistency regarding the number of public holidays
- business bears the cost when excessive numbers of dates are sanctioned

The National Employment Standards set out eight (8) days on which all Australians must have a public holiday. The States/Territories are then able to declare any number of additional public holidays to the eight (8) provided by the Commonwealth. Unfortunately, there is inconsistency between the states and territories on the number of public holidays each year. Productivity and labour costs are highly impacted by the public holiday penalty rates (casuals 275% & permanents 250%).

The number of public holidays is the domain of the Federal and State/Territory governments. However, the rates of pay on public holidays are the domain of the FWC. The number of public holidays varies from state to state and year to year. Good public policy provides certainty, but the

current system does not achieve that. State governments often add public holidays, but never subtract one in return. The cost is borne by business, e.g.

- Queensland Government gazetting a public holiday in Brisbane on Friday 14 November 2014 for the G20 – then complaining when businesses failed to open their doors for the international visitors
- Victorian Labor Party offering AFL Grand Final Eve as a public holiday as a pre-election promise with zero due diligence having been conducted on the cost to business
- State/Territory governments declaring Monday 28th December 2015 as an additional public holiday despite the history of the Monday after Boxing Day being a substitute day in the past when Boxing Day has fallen on a weekend.
- South Australia gazetting half day holidays on Christmas Eve and New Year's Eve.

The range of the number of the public holidays amongst the states varies significantly. Please see "Appendix A" for a list of public holidays.

It is recommended that the NES be amended by establishing a different penalty rate for the eight (8) public holidays set out in the National Employment Standards, with a lower rate for all other public holidays set by the states.

3.7 Part time employment

It is apparent that the modern award system does not provide an adequate part-time employment mechanism for service oriented industries such as the hospitality industry. Approximately only 2% of operational employees are employed on a part time basis. Part-time employment provides workers with a higher degree of certainty regarding the number of hours they will receive work. This job security helps them when applying for loans or renting a home.

However the current arrangements are too restrictive and more flexibility is required. Generally, modern awards allow employees to be employed in one of three categories of employment, namely:

- Full-time;
- Part-time; or
- Casual.

Apart from the omission of the word 'regular' immediately before 'part-time', this is consistent with s.139 (1) of the *Fair Work Act 2009*, which sets out the matters that a modern award may include terms about. These include, *inter alia*:

> *"(b) type of employment such as full-time employment, casual employment, regular part-time employment....."*

Where a modern award provides for a type or category of employment, the parameters of that type or category of employment must be of utility for the industry or occupation the modern award covers.

The part-time provision set out at clause 12 of the *Hospitality Industry (General) Award 2010* ("the HIGA"), which is common to many modern awards, is as follows:

> *12.1 An employer may employ part-time employees in any classification in this award.*
> *12.2 A part-time employee is an employee who:*

(a) works less than full-time hours of 38 per week;
(b) has reasonably predictable hours of work; and
(c) receives, on a pro rata basis, equivalent pay and conditions to those of full-time employees who do the same kind of work.

12.3 At the time of engagement the employer and the part-time employee will agree in writing on a regular pattern of work, specifying at least the hours worked each day, which days of the week the employee will work and the actual starting and finishing times each day.

12.4 Any agreed variation to the hours of work will be recorded in writing.

12.5 An employer is required to roster a part-time employee for a minimum of three consecutive hours on any shift.

12.6 An employee who does not meet the definition of a part-time employee and who is not a full-time employee will be paid as a casual employee in accordance with clause 13—Casual employment.

12.7 All time worked in excess of the hours as agreed under clause 12.3 or varied under clause 12.4 will be overtime and paid for at the rates prescribed in clause 33—Overtime.

12.8 A part-time employee employed under the provisions of this clause must be paid for ordinary hours worked at the rate of 1/38th of the weekly rate prescribed in clause 20—Minimum wages, for the work performed.

(underline added)

This clause is not adequate for service industries, such as the hospitality industry. While the definition of a part-time employee in clause 12.2 refers to the employee having reasonably predictable hours of work, the effect of clause 12.3 is to require the employer and employee to agree to a regular pattern of work specifying the exact days and times that the employee will be required to work at the outset of the employment. Although, there is some capacity to vary the regular pattern of work, subject to there being agreement between the employer and the employee (see clause 12.4), a part-time employee's hours of work are otherwise fixed and more certain than a full-time employee's, which may vary from one roster cycle to the next.

The requirement to specify the exact days and times of work for a part-time employee at the outset, with a very limited capacity to change those hours, is a disincentive to employing part-time employees in operational roles in service industries and is a key factor in the high level of casual employees in these industries. The highly inflexible nature of part-time employment leads to higher labour costs, and is not consistent with the following aspects of the modern awards objective set out in s.134 of the Act:

(d) the need to promote flexible modern work practices and the efficient and productive performance of work;

.....

(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden;

Part-time Employment: Application Issues in modern awards

a) Rostering Clause

A consequence of the inclusion of a clause requiring a regular pattern of work for part-time employees in modern awards is that it renders the rostering clause for part-time employees redundant.

Leaving to one side the issue of the purpose of the roster for part-time employees, as they have a regular pattern of work established in writing from commencement of their employment, the ability for an employer to change a roster by giving seven days notice[5] is in conflict with the requirement under clause 12.4.

This conflict arose in the context of an application to vary the *Aged Care Award 2010*. On appeal, a Full Bench of the Fair Work Commission held that "*the specific provisions of clause 10.3 should be read as prevailing over other more general provisions of the Award in the case of inconsistency unless the context dictates otherwise."*[6]

The conflict between two fundamental provisions regarding the employment of part-time employees is not consistent with the modern awards objective in s.134 (1) (g) of the *Fair Work Act* 2009, namely, *"the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards."*

(b) Casual Conversion and part-time employment

Another example where the modern award system does not adequately allow for flexibility is in the context of the conversion of a casual employee to a part-time employee. A number of modern awards contain a casual conversion clause which allows a casual employee who has completed a period of service on a regular and systematic basis, to request that their employment be converted to either full-time or part-time.[7] The number of hours the employee is currently working (above or below 38 hours) will dictate whether or not they convert to full-time or part-time.

In *Yaraka Holdings Pty Ltd v Giljevic*[8], the term 'regular' was found to *"imply some form of repetitive pattern rather than being used as a synonym for "frequent" or "often". However, equally, it is not used in the section as a synonym for words such as "uniform" or "constant"."*[9]
Furthermore, the term 'systematic basis' was found to imply *"something more than regularity in the sense just mentioned, that is, frequency. The basis of engagement must exhibit something that can fairly be called a system, method or plan".*[10]

In the absence of a clear pattern or roster, Fair Work Australia has found evidence of regular and systematic employment where there is an established process of the offer and acceptance of work.[11] It is unequivocally clear that these authorities do not require a casual employee to be 'locked in' to the specific days and times each roster cycle in order to be working on a regular and systematic basis.

In other words, despite there being a degree of movement in the days and times a casual employee may work on a week to week basis, they can be classified as working on a regular and systematic basis. That is irrespective of whether the reason for the differing days and times is operational from the employer's perspective, or for personal reasons from the employee's perspective.
The issue arises when an employee, who has been working less than 38 hours on a regular and systematic basis for at least 12 months, requests that their employment be converted to part-time employment.

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[5] See clause 30.1 of the HIGA
[6] *Leading Age Services Australia NSW - ACT [2014] FWCFB 129* at [19]
[7] In the case of the HIGA, the period is 12 months (see clause 13.4)
[8] [2006] ACTCA 6
[9] *Ibid* at [68]
[10] *Ibid* at [91]
[11] *Ponce v DJT Staff Management Services Pty Ltd T/A Daly's Traffic [2010] FWA 2078*

The conversion of that employment will require the employer and the employee to determine a regular pattern of work in writing, removing any flexibility or movement that was available to the employer and the casual employee, or alternatively requiring the employer and employee to go through the arduous process of amending and retaining the written pattern of work each time a change is agreed.

This issue arose in the context of a dispute under the *Food, Beverage and Tobacco Manufacturing Award 2010*, where the employer expressed concern about losing flexibility due to the rigid part-time provisions.[12] It was observed by Fair Work Australia that in considering casual conversion requests *"the operation of the part-time provisions of the modern award is a factor to be considered, depending upon the extent of variation in the actual work demands from week to week."*[13]

It is recommended that all the deficiencies above can be addressed in modern awards through the inclusion of a part-time mechanism that provides flexibility for employers, yet is balanced with appropriate safeguards for part-time employees to maintain confidence in managing their affairs, whether that is other employment or personal commitments.

3.8 Multi-Hire

It is understood that only one of the 122 modern awards contain multi hire provisions. Employers can, however, bargain and have multi hire provisions contained within an enterprise agreement. Small business has a reluctance to enter into bargaining due to the cost, certainty, better off overall test, and the risk of unions becoming involved.

In remote areas, off-shore island resorts and in areas where employers cannot readily find suitable and reliable employees, there are frequently requests from permanent employees to seek additional hours within the business and in another department of the business, on days when they are not rostered to work shifts as part of their permanent roster.

We also hear of employees working full time with one employer and then seeking casual employment with an opposition employer on their rostered days off. Ideally the employer would prefer to have a good and reliable employee working with them rather than casually with the opposition. The Hospitality (General) Award 2010 and most other modern awards do not permit such multi hire employment flexibility.

It is recommended that under the modern award system, multi hire arrangements should readily exist wherein:

- Permanent employees may request the opportunity to undertake additional cross functional work for the employer in order to supplement an employee's remuneration.
- Employees working under this provision will be engaged and paid as a casual per additional employment contract
- Such additional cross functional work will be only offered to permanent full time employees outside of:
    - The work areas assigned to the permanent employee by their existing rosters
    - Their usual classification (according to modern award classification definitions)

[12] Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers' Union (AMWU) v Christie Tea Pty Ltd [2010] FWA 10121 (3 December 2010) at [10-[12]

[13] *Ibid* at [16]

    - Their regular rostered hours
- The hours worked in accordance with this provision shall not count as service for the purpose of annual leave or personal leave accruals and leave accrued in an employee's permanent position will be paid at the rate applicable to that position
- Work performed under this clause will be at the option of the employee at all times.
- Work performed under this clause shall be paid at the appropriate level for the work performed and shall be paid at the applicable rate
- Any full time employee will be restricted to working no more than two shifts totalling 10 hours per week under this clause
- The employee will request in writing to the employer that they shall be paid and engaged as a casual worker

3.9 Individual flexibility agreements

Independent Flexibility Agreements (IFAs) do not exist independently of an award or enterprise agreement, but rather as enforceable terms of those instruments. IFAs must also ensure that the employee is better off overall in comparison to the terms of the relevant modern award or enterprise agreement. IFAs were a central part of the former Labor Government's workplace relations policy. It was indicated that:

- the 'aim of the flexibility clause is to enable individual arrangements which are genuinely agreed by the employer and an individual employee'
- IFAs 'will remove the need for any individual statutory agreements and the associated complexity and bureaucracy attached to those agreements'
- workplace flexibility for the benefit of businesses and employees is also invoked in the objects to the *Fair Work Act*.

Under modern awards, IFAs are only able to be made in relation to hours of work, overtime rates, penalty rates, allowances and leave loadings. This restriction impedes the making of meaningful flexible arrangements.

In theory, enterprise agreements are able to permit the making of IFAs in relation to any matters pertaining to the employment relationship. The Government has indicated that 'the terms of [flexibility] clause[s] are best decided at the enterprise level in the bargaining process'. However, in practice, flexibility clauses often unduly restrict the scope of IFAs.

Many employers are wary of entering into IFA's due to a lack of certainty in their standing if challenged and this is reflected in a very limited uptake of IFA's in the industry. Unions often oppose the inclusion of broad flexibility terms in enterprise agreements, instead limiting their scope so as to render any meaningful IFA illusory.

It is recommended that the operation of IFAs must be an integral part of the *Fair Work Act:*

- trade-offs between financial and non-financial benefits be permitted
- increasing the scope of flexibility terms to include a greater number of matters to which an IFA may relate
- should be able to be made in relation to any aspect of a modern award
- be able to be offered as a condition of employment prior to commencement

Other matters relating to IFAs

Other aspects of the IFA regime under the *Fair Work Act* make them an unattractive and uncertain alternative to modern awards and enterprise agreements. The fact that IFAs can be terminated at 28 days' notice discourages employers from going to the trouble of making special arrangements for individual employees. The fact that IFAs cannot be made a condition of an offer of employment (without breaching the adverse action provisions of the *Fair Work Act*) also means that flexibility arrangements are less likely to be negotiated.

The greatest disincentive to making an IFA is the fact that there is no certainty as to whether it in fact leaves an employee better off overall in relation to the modern award or enterprise agreement. IFAs which do not meet that test are not void, but may be terminated by not more than 28 days written notice and expose an employer to breach of the flexibility clause of the modern award or enterprise agreement, which could lead to the imposition of civil penalties under Part 4-1 of the *Fair Work Act*, or even to an adverse action claim under Part 3-1.

However, because there is no external agency via which an employer may verify whether an IFA does leave an employee better off overall, employers are left with significant contingent liabilities about whether they have breached the *Fair Work Act*. Understandably, this makes employers wary about entering into IFAs.

It is recommended that there must be an independent approval test conducted by a third party of IFAs. The FWO would be best placed to provide such a service, which could act as a guarantee that the FWO would not prosecute an employer in relation to a breach of a flexibility term under a modern award or enterprise agreement. The FWO could provide an independent approval mechanism to determine whether an IFA passes the better off overall test in relation to a modern award or enterprise agreement.

3.10 Resolving disputes

The Fair Work Regulations 2009 at Schedule 6.1 proscribes a model dispute resolution clause for Enterprise Agreements. Likewise a model dispute resolution clause appears in all modern awards. The dispute resolution clause in the *Hospitality Industry (General) Award 2010* provisions have been applied on a range of disputes including Terms and Conditions of Employment, and have proven very practical and successful in resolving disputes at the workplace.

While the AHA/AAOA, with United Voice have participated in these disputes as mediators/negotiators and representatives, all of these disputes have been resolved at the workplace without the need for the Fair Work Commission's powers to be accessed pursuant to the provision of Sections 735 to 740 of the *Fair Work Act*.

It is recommended that there appears no particular reason or need to vary the dispute resolution model clauses, nor the processes contained within them.

3.11 General Protections and 'adverse action'

There is duplication of legislation when it comes to section 351 of the *Fair Work Act* (General Protections – Discrimination). Both state and federal legislation currently exists in the area of EEO & Discrimination and such legislation clearly outlines the areas in which it is unlawful to discriminate (i.e. sex, race, pregnancy etc) and also outlines where it is unlawful to discriminate in the workplace. It is unnecessary to deal with the area of discrimination in employment under the general

protections provisions of the *Fair Work Act*, as it is already adequately dealt with under state and federal discrimination legislation.

Reverse onus of proof

One of the biggest areas of concern under the general protections provisions is the reverse onus of proof obligations on employers. If for example an employee lodges a general protections dispute claiming that they have been terminated because they are a member of a trade union, the onus is on the employer to provide appropriate evidence to prove that they didn't terminate the employee because of the employee being a member of a Trade Union.

It is recommended that the onus of proof should be on the employee to provide evidence to prove that they have been terminated for reasons such as being a member of a trade union.

3.12 Compliance Costs – "a bog of Technicalities"

The Productivity Commissions Issues Paper seeks to look at the compliance costs issue from a broader perspective, i.e. Management time, cost of paying for expertise, delays in making decision.

The cost of management time, i.e. by the business to implement the obligations of the legislation, is not readily able to be quantified. The costs to business will depend on their size and internal Management structure to implement legislative requirements. The cost on small businesses of implementing legislative obligations can well be significant due to no actual knowledge or experience in implementing the particular legislative obligations.

It is recommended to reduce the prescriptiveness of compliance and ability for complaints/disputes to be lodged for little or no reason against the employer, or due to secondary options, such as the general protections provisions when no eligibility for an unfair dismissal claim is available.

3.13 Unfair dismissal

The current Unfair Dismissal laws are often a hindrance to business, create red tape and in the circumstances are not resolved in a timely manner. In 2013/2014:

- Of the 14,797 unfair dismissal claims filed with the Fair Work Commission
- 2,273 were settled prior to conciliation
- 8,659 were settled at conciliation
- 49% of the matters settled by conciliation were settled for an amount of less than $4,000.

"Go away" money

Unfortunately, it is our view that the Fair Work Commission remains a jurisdiction of 'go away' money, where reinstatement remains impracticable.

Becoming more prevalent are lawyers and IR consultants who work on a 'no win - no fee' basis, and they are the only real winners (Commercial decisions are made more often than not to pay the 'go away money' because the cost of defending the matter is usually higher, regardless of the facts of the matter).

There is growing anecdotal evidence that the needs of business in the hotel industry (especially small businesses) not being met. The procedures for dealing with unfair dismissal are neither quick,

nor flexible, nor informal. Compliance is not easy, nor free of significant cost. Employers are forced to spend time and money defending often speculative claims, with the vast majority being resolved through commercial (go away money) settlements.

There is concern that the increase in administrative costs faced by business, especially small business, since the introduction of the new unfair dismissal system, may reach a level that jeopardises productivity growth and redeployment of labour. This is especially true in the hotel industry given the below average profitability levels of hotels.

Timeliness

The initial conciliation conferences are generally not being held until three of four weeks following the alleged unfair termination has taken effect, meaning it is often already too late for reinstatement as the position has been filled. A formal conference or hearing outcome is generally several further months on, making reinstatement completely impracticable. This is borne out in the statistics, with less than 1% of unfair dismissal applications resulting in a FWC ordered reinstatement.

Reasonable grounds: Unfair Dismissals

The Explanatory Memorandum for the Fair Work Bill 2008 stated that the overall focus under the new IR laws was to be on early intervention and informal processes' making it 'simpler and easier for all parties to use'. Conferences were intended to be able to be conducted at alternative venues such as the employer's place of business, which was to minimise the cost in time and lost earnings an employer could face in defending a claim. Legal representation would only be allowed where FWC deemed it appropriate.

In practice, the only substantive change between the old and new systems has been that more employees are making unfair dismissal claims and conciliation conferences are now done by telephone, rather than face-to-face. Where matters are not resolved by commercial settlement the matter then proceeds often significantly later to a formal hearing or conference. Expensive legal representation remains the norm, with cases reaching appeal stages.

Furthermore, the objective of early intervention would be aided by placing a greater obligation on the unfair dismissal applicant to demonstrate in their application (i.e. Form F2) that reasonable grounds are held for asserting an unfair dismissal has occurred. Whilst recognising that not all claims lack merit, too often, employers are forced to go to the time and trouble of defending baseless and speculative claims, the details of which are only disclosed at the conciliation stage. Putting greater onus on unfair dismissal claimants to demonstrate reasonable grounds prior to a matter going to conciliation is therefore an important first step.

It is recommended that:

- A greater onus be placed on unfair dismissal applicants to demonstrate they have reasonable grounds for their claim
- Providing that the FWC may only consider issues relating to the employment relationship when determining claims
- Giving the FWC discretion to make costs orders and issue penalties against applicant employees and/or their representatives where the claim is determined by the FWC to have been false or vexatious

Definition of Small Business

Under the previous unfair dismissal system, employers with less than 100 employees were exempt from unfair dismissal claims. Now, section 23(1) of the Fair Work Act defines an employer as a small business employer if 'the employer employs fewer than 15 employees at that time', including within associated entities (s23(3)).

Small business has long been defined as a business employing fewer than 20 people. The current definition used in the Fair Work Act therefore fails to capture many legitimate small businesses and should therefore be amended.

The definition of small business should be changed to a business employing less than 20 people; and should not include related entities. Related entities are often operationally and financially distinct. It does not follow that an employer will have sufficient resources to justify being described as other than a small business simply because they are related to other organisations, which in the aggregate employ 15 or more people. See for example Australian Bureau of Statistics, Small Business in Australia 2001 where they define a business is not a small business if that business is a: "Businesses employing more than 19 people".

It is recommended that:

- the definition of a small business be increased to an entity that employs fewer than 20 people (not including related entities)
- a true unfair dismissal exemption for small businesses be provided

3.14 How well are the institutions doing?

The questions posed by the Commission in the issues paper are addressed below.

How are the FWC and FWO performing? Are there good metrics for objectively gauging their performance?

The measures used to gauge the performance of the FWC and the FWO seem to be based on the timeliness of resolving complaints after they are received by the respective institution. While it may be said that 'justice delayed is justice denied', respondents to claims often find they are unable to have a conciliation or mediation conference rescheduled to a more convenient date if the applicant has already advised the institution that the proposed date is suitable to them. This process can result in unfairness and injustice to the respondent, and can detract from the intention of the conciliation or mediation – to see if the matter can be resolved.

The respondent in FWC unfair dismissal proceedings is already at a considerable disadvantage in only having seven days to respond to the applicant's claim while the applicant has 21 days in which to lodge the unfair dismissal application from the date of dismissal. Many employers, particularly small business operators, do not have sufficient time and/or resources to prepare an adequate response within 7 days. This disparity in response times is inequitable and unfair to respondents.

The 2013 amendments to the FWA that increased the time limit to lodge an unfair dismissal application from 14 days to 21 days has resulted in a considerable increase in the number of matters filed.

There are concerns with the content of the FWC's 122 Modern Awards. These instruments clearly contain the best provisions of their multiple predecessors in favour of employees at the expense of employers. The provisions of the modern awards being overly in favour of the employee discourage employers from employing staff. In particular, in the hotel and hospitality industry, the provisions are overly punitive to employers and fail to contemplate the realities of operating a business in a 24/7 industry. The FWO has been highly visible in the community and places considerable emphasis on community education in order to achieve award compliance.

Should there be any changes to the functions, spread of responsibility or jurisdiction, structure and governance of, and processes used by the various WR institutions?

These comments are limited to the operation of the Fair Work Commission and the Fair Work Ombudsman. The processes for listing matters for conciliation of unfair dismissal and award enforcement matters should be changed.

It is recommended that rather than the institution allocating conciliation dates before contacting the parties, and then being disinclined to grant the respondent's request to amend the date if it is suitable to the applicant, the institution could initially write to the parties asking them to advise of available dates within a certain time period prior to listing of the matter for conciliation. The institution could then list the matter for conciliation at a mutually convenient time.

Are any additional institutions required; or could functions be more effectively performed by other institutions outside the WR framework?

It is recommended that the structure of the FWC should be legislatively amended to provide for appeal processes from decisions of a FWC Full Bench in regards to modern awards to another independent body. For example, appeals could be referred to the Federal Court of Australia for determination.

How effective are the FWO and FWC in dispute resolution between the parties?

Statistically the existing FWO and FWC dispute resolution processes appear to be effective. However, these statistics alone mask the dissatisfaction that many employers feel towards the process. A major factor in the high percentage of matters settling at mediation is due to the prevalence of 'go away money' being paid by a respondent to an applicant in order to settle the matter.

While the FWO and FWC's telephone mediation processes may assist in the expediency of resolving a complaint, it is arguably being achieved at the expense of justice to respondents. The mediator conducts the telephone conference with an applicant who merely identifies themselves as the applicant.

However, as the meeting is not conducted face-to-face, the mediator cannot be certain that the telephone participant who purports to be the applicant is in fact the applicant. Further, the preference of telephone mediation processes over a face-to-face conciliation meeting prevents the mediator from assessing the demeanour and body language of the applicant.

The FWC and FWO telephone conciliation processes, while expedient, are unfair to respondents and these are resulting in many matters being settled by the respondent paying the applicant 'go away money' even where there is little or no merit to the application.

As the FWO schedules the matter for conciliation without the respondent first being afforded the opportunity to respond to the claim, there is a perception that the FWO acts as a representative of the applicant. The FWO's approach can also appear to the respondent to be heavy-handed and prejudicial against them.

Prior to the introduction of mediated wage complaints, the FWO actually investigated complaints in consultation with the employer and made a determination based on the merits of the case. Claims that lacked merit were quickly dismissed.

What, if any, changes should they make to their processes and roles in this area?

The current time frames for an applicant to lodge an unfair dismissal claim (21 days) and for the respondent to respond (7 days) are inequitable and grossly unfair to the respondent. For example, a respondent in the hotel and hospitality industry who receives an unfair dismissal complaint during the peak Christmas or Easter period has insufficient time to prepare the response.

It is recommended the Fair Work Act should be amended to reduce the time available in which an applicant has to lodge an unfair dismissal application from 21 days to 14 days. The time period available for the respondent to file its response should be increased from 7 days to 14 days to ensure that the process is equitable.

Since the 2013 amendments to the FWA to increase the time limit for filing an unfair dismissal application from 14 days to 21 days, there has been a considerable increase in the number of applications filed. Many of these applications appear to have been nothing more than speculative and filed as a result of the existing FWC mediation procedures, and the prevalence of 'go away money' being paid irrespective of the validity of the claim.

In assessing whether an employee was unfairly dismissed, the FWC is required to consider the factors prescribed in s 387 (h) of the FWA. The last criteria require the FWC to consider "*any other matters that the FWC considers relevant.*" This criterion is vague and makes it very difficult for an employer to comply when the determination is made after the dismissal. Given the ambit of this provision the FWC decision in this area can be quite diverse.

It is recommended these particular criteria should be removed.

It is difficult that during the mediation conference, a technical expert is on occasions requested to join the conference to assist in proceedings by providing advice on technical issues. The mediator should possess the adequate skills and knowledge not to have to require additional assistance. This process is also unproductive as the suspension in proceedings while the technical expert is summoned delays the resolution of the matter and can frustrate a party or parties.

It is recommended that the FWO mediation process should be changed to require the respondent to submit its response prior to the mediation conference. This will enable the mediator to assess the material prior to mediation as to whether at the very least, the applicant has a 'prima facie' case. The existence of a 'prima facie' case should be a prerequisite for the FWO listing the matter for mediation.

It is impossible for the FWO to currently assess whether a 'prima facie' case exists when it only has the applicant's side of the story only. Further, the current process has the potential to consciously or subconsciously prejudice the FWO mediator against the respondent, contributing to 'go away

money' being paid to applicant who does not have a valid claim, as the mediator is only aware of the applicant's case going into the proceedings.

It is recommended that:

- Section 387 (h) of the Fair Work Act "*any other matters that the FWC considers relevant.*" Should be removed from the unfair dismissal criteria
- Additionally, the FWC should be empowered to award costs against a party who lodges a frivolous or vexatious claim.

3.15 Independent contractors and labour hire

Independent Contractors and Labour Hire are widely used in the hospitality industry, particularly in performing functions such as cleaning and security. Whilst this is fairly common in accommodation venues, pub style venues are also moving towards engaging an Independent Contractor to fulfil their cleaning and security requirements.

Determining whether or not the relationship is one of independent contractor/principal or employee/employer is not an easy task. Historically the contractual arrangement was important (ie contract for services v contract of services) in determining the relationship, there are now an extensive number of indicators that need to be used to assess the type of relationship between the parties. The degree of control over how work is performed is important in establishing the relationship.

The definition of independent contractor currently in the FWA (s 12 definition of 'independent contractor') does not assist in establishing what exactly is meant by independent contractor. A more specific, but not too specific, definition could be included to assist business owners, in particular small business owners, in determining whether or not they are engaging an independent contractor or an employee. However, the information produced by the FWO does provide clear and useful advice on determining the relationship type.

Labour Hire workers are covered by the applicable Modern Award for the type of work being performed, FWA and NES provisions. A concern however is that the host employer may be seen as accountable for the non-compliance of the agency who supplies the worker.

Note: whilst a number of members do utilise the services of independent contractors, disputes over the type of arrangement entered into have been rare. In addition the use of labour hire workers has not been an issue.

It is recommended that the Fair Work Act be amended so as to provide a clearer definition of Independent Contractor

Sham contracting

The sham contracting provisions in the FWA in our view are sufficient. It is up to the FWO to investigate and enforce these provisions, especially in industries with a high prevalence of sham arrangements. We are not in a position to comment on what industries these are. The compliance provisions of the Fair Work Act are sufficient to restrict Sham Contracting, i.e. Section 357 to 359.

3.16 Transfer of business

The Productivity Commission's issue paper questions the current workplace relations transfer of business provisions and the appropriate changes needed.

The current transfer of business provisions in the FW Act have created a more complex set of rules where a transfer of business occurs where traditionally a transfer would not have occurred. By way of example, part 2-8 of the *Fair Work Act* imputes a transfer of business when the following criteria are met:

- The employment with the old employer has terminated
- Within three months of the termination, the employee becomes employed by the new employer
- The work the employee performs in the new role is substantially the same as the work performed in their old role
- There is at least one connection between the new and old employer

There are concerns in relation to the tenuous nature of the 'connection' required between the old employer and the new employer. These include circumstances where there has been:

- A transfer of assets between the old and new employer (or associated entities of those employers
- Outsourcing
- Insourcing
- The two entities are associated entities

If any of the above connections are made out, the prior enterprise agreement will apply to the transferred employee and to potentially later workers engaged to perform the transferred employee's role. Complex rules about accrued 'service' for the purposes of annual leave and redundancy also apply. Importantly, unless Fair Work Commission orders otherwise, the transfer of business rules apply automatically. Employers are put to an expensive process where they seek a Tribunal order that a prior industrial agreement not apply to the transferred employee.

The types of connection described under s311 of the *Fair Work Act* deny the reality of industries, such as the hotel and hospitality industry, which are subject to transfers of materials and employees as a matter of course.

Large parts of the hotel and hospitality industry are characterised by intermittent work and a transient workforce. As a result many employees are engaged on a daily hire basis. Daily hire employees regularly move from one employer to another, depending on which employer has work available.

In this circumstance, all necessary elements of the 'transfer of business' rules are met, other than having the requisite connection. The fact that a connection can be made out simply based on a transfer of assets or association between entities leads to poor outcomes for both employers and employees and should be changed.

In relation to a transfer of assets connection under s311 of the *Fair Work Act*, it is common practice for a contractor who has excess materials following the completion of a project to sell those materials to other contractors. There is no guidance in the *Fair Work Act* as to what constitutes

'assets' for the purpose of the section, but a plain reading of the word asset would include materials, as stock and inventory are considered assets at least in an accounting sense.

This creates an absurd situation where competing hotels with no real connection could be exposed to a transfer of business situation simply by employing a person from their competitor only to find that they are obliged to pay the employee based on the previous industrial instrument.

It is recommended that part 2-8 of the *Fair Work Act* be removed and the transfer provisions that were in place at the time the *Workplace Relations Act 1996* was repealed be reinstated into the *Fair Work Act*.

3.17 Long service leave

The Productivity Commission's issue paper highlights the current provisions relating to long service leave and queries whether a uniform national long service leave scheme is required.

A uniform scheme is not supported given the differences in accrual and payment entitlements that apply across the different states and territories. For example, in Queensland and Victoria, the accrual and payment entitlements are similar (8 and 2/3 weeks paid long service leave after 10 years of continuous service with pro rata payments after 7 years in limited circumstances).

However in South Australia, the accrual and payment entitlement is considerably more favourable to employees, and more costly to employers (13 weeks paid long service leave after 10 years of continuous service). Moving to a uniform scheme would potentially increase employer costs considerably in the long term, and also during any transition period.

In the main, employers were faced with increasing costs as a result of the award modernisation process which resulted in the current modern awards system. In addition to this, compulsory superannuation contributions increased from 1 July 2013 and 1 July 2014. Business has also faced other increases to the cost of doing business. The creation of a national long service leave scheme that would increase costs to employers is not supported.

It is recommended that Division 9 of the FW Act be:

- simplified to recognise state and territory long service leave schemes as providing the entitlements to long service leave
- amended to allow Enterprise Agreements to include flexibility terms for the accrual and payment of long service leave

4 Conclusion

The AHA/AAOA appreciates the opportunity to have contributed to a review of the workplace relations system.

5 Appendix A – Public Holidays

List of Public Holidays 2016

No.	NSW	Victoria	Queensland	Tasmania	SA	WA	ACT	NT
National								
1. 2. 3. 4. 5. 6. 7. 8.	New Year's Day Australia Day Good Friday Easter Monday Anzac Day Queen's Birthday Christmas Day Boxing Day	New Year's Day Australia Day Good Friday Easter Monday Anzac Day Queen's Birthday Christmas Day Boxing Day	New Year's Day Australia Day Good Friday Easter Monday Anzac Day Queen's Birthday Christmas Day Boxing Day	New Year's Day Australia Day Good Friday Easter Monday Anzac Day Queen's Birthday Christmas Day Boxing Day	New Year's Day Australia Day Good Friday Easter Monday Anzac Day Queen's Birthday Christmas Day Proclamation Day	New Year's Day Australia Day Good Friday Easter Monday Anzac Day Queen's Birthday Christmas Day Boxing Day	New Year's Day Australia Day Good Friday Easter Monday Anzac Day Queen's Birthday Christmas Day Boxing Day	New Year's Day Australia Day Good Friday Easter Monday Anzac Day Queen's Birthday Christmas Day Boxing Day
State (Substitute, Additional, Other)								
9. 10. 11. 12. 13. 14. 15.	Easter Saturday Easter Sunday Bank Holiday Labour Day Xmas Day (Add.) Cup Days ½ day	Labour day Easter Saturday Melb cup day Xmas Day (Sub.) AFL GF Eve Easter Sunday	Easter Saturday Show Holiday Labour day Xmas Day (Add.)	Hob. Reg/Rec Day Eight Hours Day Easter Tuesday Xmas Day Sub) Local Cup/Shows	March Public Holiday Easter Saturday Labour day Xmas Eve 7pm-12pm NYE 7pm-12pm Xmas Day (add.) Procl. Day (add.)	Labour Day WA Day Xmas Day (Add.) Boxing Day (Add.) NJYD Sunday 1 January **2017** (add) Monday 2 January **2017**	Canberra Day Easter Saturday Family&Community Labour Day Xmas Day (Sub.)	Easter Saturday May Day Picnic Day Xmas Day (Sub.) Show Days (5 local)

6 Appendix B - Economic Considerations

"Productivity isn't everything, but in the long run it is almost everything. A country's ability to improve its standard of living over time depends almost entirely on its ability to raise its output per worker."[14]

Introduction

Productivity has become a much debated concept in recent years and is of particular focus in the context of the Australian workplace relations system. The Australian workplace relations system has undergone a number of legislative changes over the years. Unfortunately, in a number of cases these changes have focused on political interests and ideological belief rather than on sound economic principles.

Groups tend to propose policy change with the expectation of being made better off by the change.[15] However, this does not necessarily mean that society as a whole will be better off.[16] Productivity is important as growth in productivity can generate higher incomes and government revenues that can be used to raise living standards and address disadvantage.[17]

The field of economics can be of great benefit to this debate as it concerns the study of how people and society decide to utilise limited productive resources to produce goods and services and distribute these amongst various persons and groups in society.[18]

Given that resources are limited and peoples' wants are unlimited, choices needs to be made about how to use these limited resources and organise production to satisfy unlimited wants to the greatest possible extent.[19] The answer to this quandary is that available resources must be used as efficiently as possible in order to achieve maximum output.[20] This is particularly important in competitive markets both within Australia and internationally.

While on the topic of economic efficiency, it is important to be wary of two major problems that prevent a society from achieving economic efficiency.[21] These are unemployment/underemployment and resource misallocation.[22] Governments must ensure our limited resources are not allocated to uncompetitive industries, particularly where resources could otherwise be allocated to developing competitive industries.

What is Productivity and How is it Influenced?

Productivity is a fairly simple concept that means production efficiency, especially in relation to industrial production.[23] The International Labour Office (ILO) has defined 'productivity' as "*the value of output produced by the factors of production (inputs)*."[24]

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[14] Krugman, P., *The Age of Diminished Expectations*, Third Edition, USA, MIT Press, 1997: 11
[15] Borland, J., Industrial relations reform: Chasing a pot of gold at then of the rainbow?, Lecture given at University of Melbourne on March 19 2012 as returning Visiting Professor of Australian Studies at Harvard University
[16] Ibid:
[17] Banks, G., Productivity policies: the 'to do' list, Economic and Social Outlook Conference, 'Securing the Future', Melbourne, 2 November 2012.
[18] Waud, R.N. et all., *Economics*, Australian Edition, Sydney, Harper & Row Publishers, 1989: 4
[19] Ibid: 28
[20] Ibid: 28
[21] Ibid: 28
[22] Ibid: 28
[23] The Australian Pocket Oxford Dictionary, Melbourne, Oxford University Press, 1980: 629
[24] Janankar, P. N., *Is there a trade-off between employment and productivity?*, Employment Working Paper No. 167, Geneva, ILO, 2014: 2

At the firm or workplace level, productivity can be measured as the output per unit of a single factor of production or labour input such as hours worked.[25] At more aggregated or economy wide levels, productivity can be measured as the value added such as gross product either per unit of labour input (labour productivity) or per unit of labour and capital services inputs (multifactor productivity).[26]

While the focus of this submission is productivity in the context of the Australian workplace relations system, it must be noted there are other factors that directly impact on productivity. At the firm level, these include managerial practice/talent, labour quality such as education and training, capital inputs, information technology/research and development, learning by doing, product innovation and firm structure decisions.[27]

Governments have the ability to influence the productivity of businesses via three policy channels being:

- incentives that foster competition such as opening industries to domestic and foreign competition;

- capabilities that, promote human resources and knowledge systems, institutions and infrastructure, required to plan productivity improvement changes and provide effective support; and

- flexibilities that allow businesses to make necessary changes to realise productive potential.[28]

A key policy issue under flexibilities policy is the degree of regulation.[29] The degree of regulation influences what a business can and cannot do, define how a business operates and increase the cost of making changes.[30] The regulation of workplace relations falls within the flexibilities policy channel.[31]

Despite most regulations having worthwhile objectives, many are developed without sufficient regard to productivity and consideration about how objectives could be achieved in more cost effective ways.[32] Businesses that require a large proportion of labour to operate will be heavily influenced by the degree of workplace relations regulation.

David Peetz conducted a recent study of the link between productivity, fairness and industrial relations policy at the workplace, national and international levels using economic data.[33] This study revealed that only industrial relations at the workplace level made a difference to productivity.[34] The decisions of management and the relationships with employees and unions affect what happens at the workplace and can have a noticeable effect on productivity.[35] His study also revealed some

[25] Eslake, S., *Productivity: The Lost Decade*, The Australian Economy in the 2000s, Conference Paper, Reserve Bank of Australia, 2011: 223
[26] Ibid: 223
[27] Syverson, C., *What Determines Productivity?*, Working Paper 15712, Cambridge, National Bureau of Economic Research, January 2010: 13-30
[28] Banks, G., Op cit: 7-8
[29] Banks, G., Op cit: 7-8
[30] Banks, G., Op cit: 15
[31] Banks, G., Op cit: 15
[32] Banks, G., Op cit: 15
[33] Peetz, D., *Does Industrial Relations Policy Affect Productivity?*' ABL Vol 38 No 4 2012: 286
[34] Ibid: 286
[35] Ibid: 286

evidence that industrial relations policies that enhance fairness also enhance economic performance.[36]

Saul Eslake came to a similar conclusion as David Peetz by proposing that productivity improvements occur as a result of decisions made at the enterprise and workplace level rather than as a direct result of public policy initiatives.[37]

What can be learnt from these studies is that productivity and economic performance can be achieved by allowing flexibility at the workplace level while ensuring fairness through industrial relations policy.

Economic Indicators

Prior to making submissions about the Australian workplace relations system from a productivity perspective, it is appropriate to look at a number of economic indicators with a focus on the hospitality industry.

Australia's Labour Productivity

Table 1 and Graph 1 show the change in labour productivity from June 1996 to June 2014 in terms of the yearly percentage change in labour productivity hours worked and multi-factor productivity hours worked. The data, particularly Graph 1, indicates that labour productivity despite some fluctuations is experiencing a downward trend over the period.

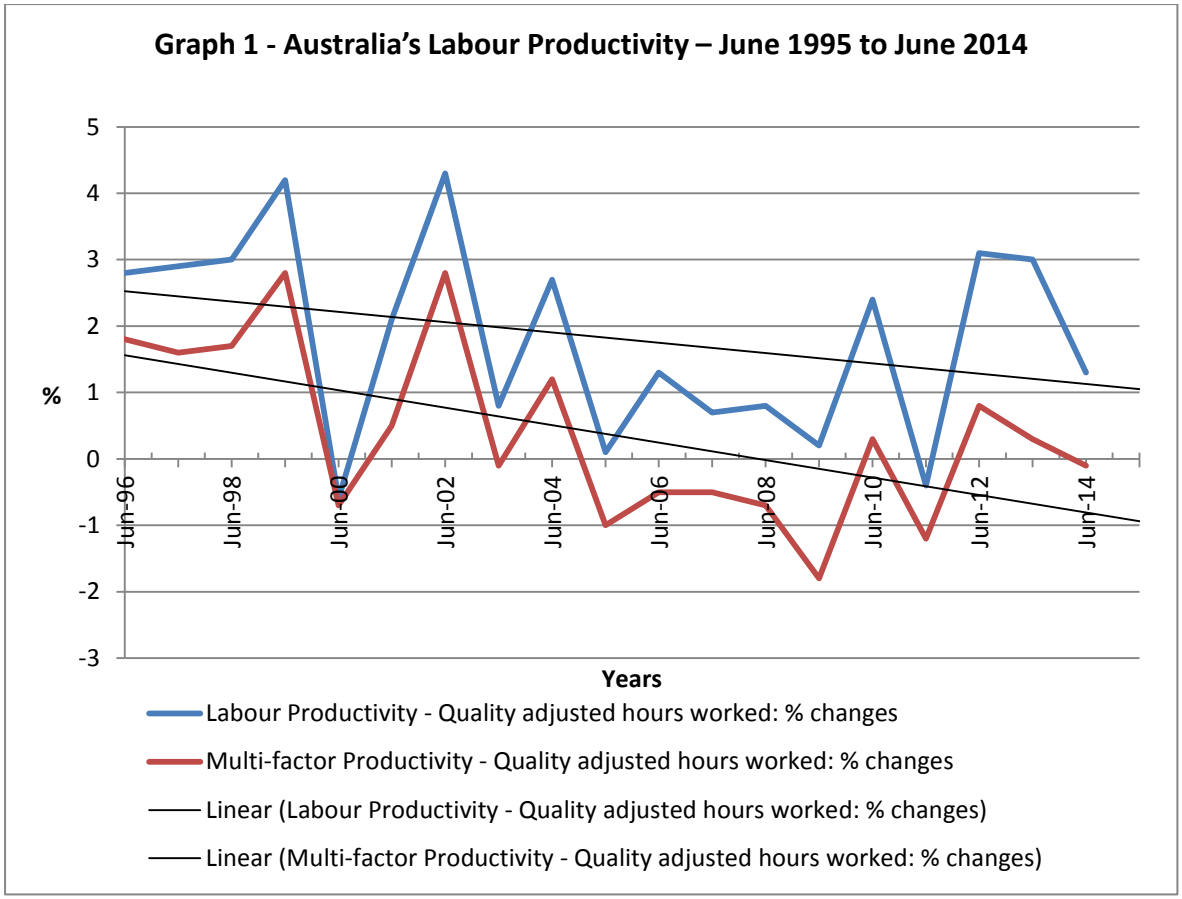
Labour productivity – Quality adjusted hours worked: % changes has declined by a linear perspective from about 2.5% in June 1996 to about 1.1% in June 2014. Multi-factor productivity - Quality Adjusted hours worked: Percentage changes has declined by a linear perspective from about 1.5% in June 1996 to about -0.8% in June 2014.

[36] Peetz, D., Op cit: 286
[37] Eslake, S., Op cit: 247

Table 1 - Australia's Labour Productivity – June 1995 to June 2014		
Year	Labour productivity – Quality adjusted hours worked: Percentage changes	Multifactor productivity - Quality adjusted hours worked: Percentage changes
Jun-1996	2.8	1.8
Jun-1997	2.9	1.6
Jun-1998	3.0	1.7
Jun-1999	4.2	2.8
Jun-2000	-0.6	-0.7
Jun-2001	2.1	0.5
Jun-2002	4.3	2.8
Jun-2003	0.8	-0.1
Jun-2004	2.7	1.2
Jun-2005	0.1	-1.0
Jun-2006	1.3	-0.5
Jun-2007	0.7	-0.5
Jun-2008	0.8	-0.7
Jun-2009	0.2	-1.8
Jun-2010	2.4	0.3
Jun-2011	-0.4	-1.2
Jun-2012	3.1	0.8
Jun-2013	3.0	0.3
Jun-2014	1.3	-0.1
Average %	1.83 (rounded)	0.38 (rounded)

ABS 5204.0 Australian System of National Accounts, 2013-2014 - Time Serious Spreadsheets - Table 13 Productivity in the Market Sector – Labour Productivity Quality Adjusted hours worked: Percentage changes;

and Multi-factor Productivity Quality Adjusted hours worked: Percentage changes



Note: Linear lines have been added.

Table 2 and Graph 2 show the GDP (Gross Domestic Product) per hour worked (index) from June 1976 to June 2014 in terms of yearly percentage change. The data for Table 2 and Graph 2, particularly Graph 2, indicates that GDP per hour worked despite some fluctuations is experiencing a slight downward trend over the long run. From a linear perspective, GDP per hour worked: Index – Percentage changes declined from about 2.1% in June 1976 to about 1.4%.

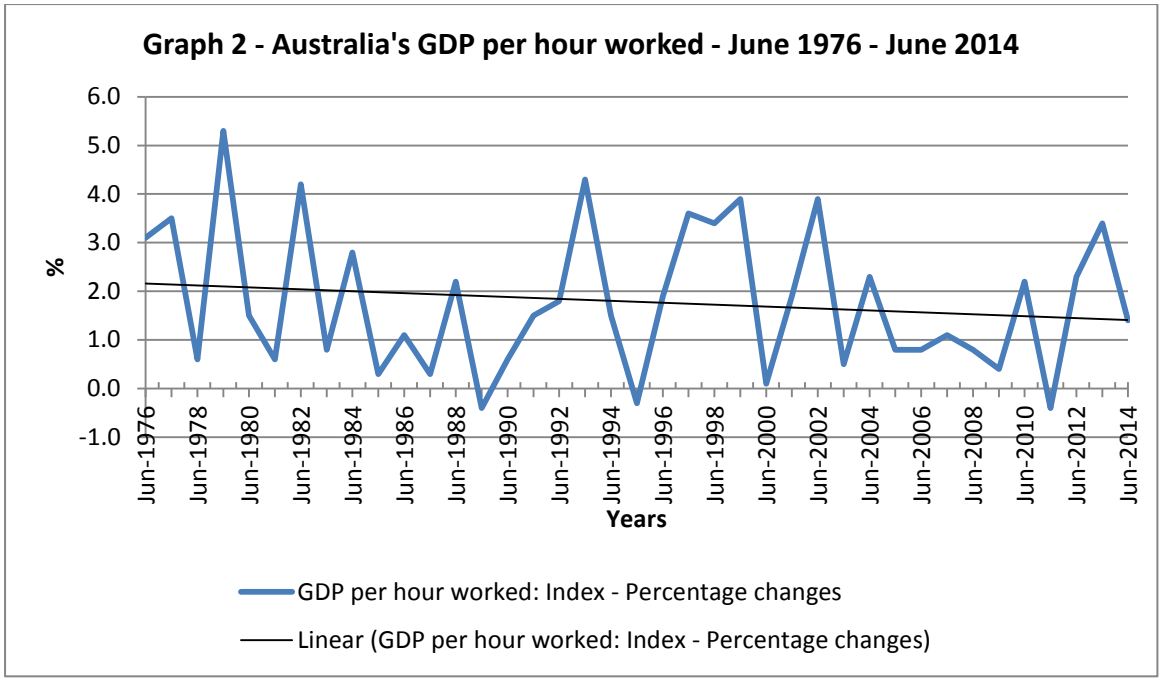
Table 2 - Australia's GDP per hour worked

June 1976 to June 2014

Year	GDP per hour worked: index – percentage change
Jun-1976	3.1
Jun-1977	3.5
Jun-1978	0.6
Jun-1979	5.3
Jun-1980	1.5
Jun-1981	0.6
Jun-1982	4.2
Jun-1983	0.8
Jun-1984	2.8
Jun-1985	0.3
Jun-1986	1.1
Jun-1987	0.3
Jun-1988	2.2
Jun-1989	-0.4
Jun-1990	0.6
Jun-1991	1.5
Jun-1992	1.8
Jun-1993	4.3
Jun-1994	1.5
Jun-1995	-0.3
Jun-1996	1.9
Jun-1997	3.6
Jun-1998	3.4

Jun-1999	3.9
Jun-2000	0.1
Jun-2001	1.9
Jun-2002	3.9
Jun-2003	0.5
Jun-2004	2.3
Jun-2005	0.8
Jun-2006	0.8
Jun-2007	1.1
Jun-2008	0.8
Jun-2009	0.4
Jun-2010	2.2
Jun-2011	-0.4
Jun-2012	2.3
Jun-2013	3.4
Jun-2014	1.4
Average %	1.8

ABS 5204.0 Australian System of National Accounts, 2013-2014 – Time Series Spreadsheets – Table 1 Key National Accounts Aggregates, GDP per hour worked: index – percentage changes



Note: Linear line has been added.

Commentary – Australia's Labour Productivity

There has been plenty of commentary about the state of Australia's productivity including labour productivity.[38] [39] [40] The Productivity Commission has predicted average labour productivity growth to be about 1.5% per year from 2013-2014 to 2059-60 whereas from 1988-1989 to 2003-2004 average peak to peak labour productivity growth always exceeded 1.8 per cent.[41] However, it must be noted that many commentators have considered the reforms of the later part of the 1980s and 1990s (for example, privatisation of government monopolies and some aspects of competition policy) to be the most likely cause of surges in productivity during the 1990s.[42]

Nevertheless, over the long run labour productivity growth can have a significant effect on Australia's GDP per capita and therefore the wealth of the nation. The Productivity Commission has predicted that even a modest sustained increase in labour productivity growth rates of 0.3 percentage points a year from 2013-2014 to 2059-60 will result in an additional $20,000 of GDP per capita by 2059-60 and raise the cumulative sum of GDP by $13 trillion over the projection period.[43]

[38] Karunaratne, N.D., *The mining boom, productivity conundrum and monetary policy design to combat resource curse effects in Australia*, Journal of Economics and International Finance, Vol 6(1) January 2014: 1-2
[39] Productivity Commission 2010, *Annual Report 2009-10,* Annual Report Series, Productivity Commission, Canberra, Appendix A, Recent Developments in Australia's productivity: 55-74
[40] Eslake, S., Op cit: 229
[41] Productivity Commission 2013, *An Ageing Australia: Preparing for the Future*, Commission Research Paper Overview, Canberra: 103
[42] Eslake, S., Op cit: 238
[43] Productivity Commission 2013, Op cit: 103

Industrial Disputes

Table 3 and Graph 3 show the number of days lost per year due to industrial disputes from 1985 to 2013. The data shows quite a high number of days lost due to industrial disputes during the mid-1980s to very early 1990s with a substantial reduction to date since this time. In 2013, the number of days lost due to industrial disputation was 131 000. Between January 2014 to September 2014, the number of days lost due to industrial disputation was 54 500.[44]

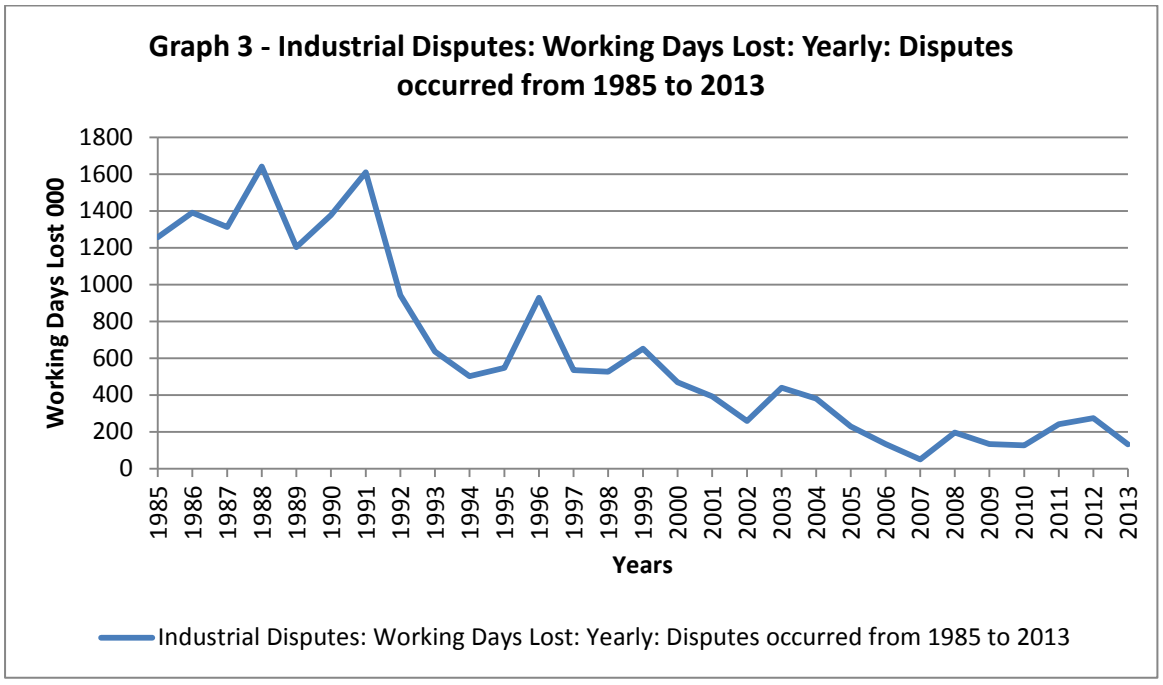
Table 3 – Working Days Lost: Yearly: Disputes occurred from 1985 to 2013

Year	Working Days Lost: Yearly: Disputes occurred - 000
1985	1256.2
1986	1390.7
1987	1311.9
1988	1641.4
1989	1202.3
1990	1376.5
1991	1610.5
1992	941.1
1993	635.7
1994	501.6
1995	547.6
1996	928.7
1997	534.2
1998	526.4
1999	650.7
2000	469.1
2001	393.1
2002	259.1
2003	439.5
2004	379.8
2005	228.2

[44] ABS 6321.0.55.001 - Industrial Disputes, Australia, Sep 2014 – Time Series Spreadsheets – Table 1: Industrial Disputes that Occurred During the Period - Working Days Lost: Quarter – Dispute Occurred

2006	132.7
2007	49.7
2008	196.6
2009	132.7
2010	126.6
2011	241.5
2012	273.2
2013	131.0
Average	638.2 (rounded)

ABS 6321.0.55.001 - Industrial Disputes, Australia, Sep 2014 – Time Series Spreadsheets – Table 1: Industrial Disputes that Occurred During the Period – Working Days Lost: Quarter – Dispute Occurred; (Note: Data has been adjusted to Yearly data)



Commentary – Industrial Disputes

While the number of days lost due to industrial disputation has improved since the 1980s, the recent figures for days lost would certainly have a negative impact on firm profitability, competitiveness and ultimately Australia's GDP. From an economic perspective, it is clearly not efficient to allow strike activity as a form of dispute resolution that causes economic harm to a business or sector of the economy. The 2011 Qantas dispute is a prime example of the negative impact industrial disputation can have on a particular business as well as other sectors of the economy such as the hospitality industry.

Unemployed, Employed and Underemployed

There has been a tendency for groups to focus specifically on employed persons when examining the operation of the Australian workplace relations system. However, it is also important to look at it from the perspective of unemployed and underemployed persons.

The ABS defines 'unemployed' as:

"*Persons aged 15 years and over who were not employed during the reference week, and*

(a) had actively looked for full-time or part-time work at any time in the four weeks up to the end of the reference week, or

(b) were waiting to start a new job within four weeks from the end of the reference week and could have started in the reference week if the job had been available then."[45]

The ABS defines 'underemployed workers' as:

"*Employed persons who want, and are available for, more hours of work than they currently have. They comprise:*

(a) persons employed part-time who want to work more hours and are available to start work with more hours, either in the reference week or in the four weeks subsequent to the survey

(b) persons employed full-time who worked part-time hours in the reference week for economic reasons (such as being stood down or insufficient work being available). It is assumed that these people wanted to work full-time in the reference week and would have been available to do so."[46]

Analysis by Age Group

Unemployed Persons

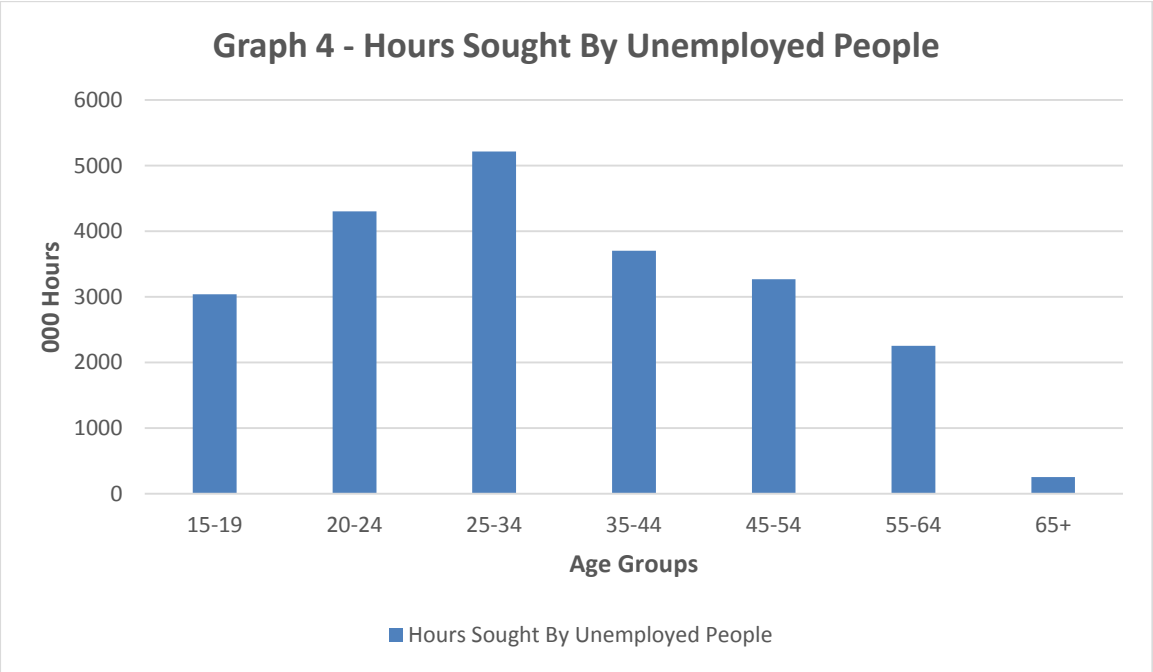
Table 4 and Graph 4 show the number of hours of work sought by unemployed people by age group in a reference week in August 2013. The data indicates there was a significant number of work hours sought by unemployed people that are not able to be satisfied by employers in the existing employment market. People in the 25–34 age group sought the maximum number of hours (5,213,500) followed by age groups 20-24 (4,305,400 hours) and 35-44 (3,702,600 hours).

Table 4 – Number of hours of work sought by unemployed people by age group in August 2013	
Age Group	'000 hours
15 – 19	3038.5
20-24	**4305.4**
25-34	**5213.5**
35-44	**3702.6**

[45] ABS 6105.0 Australian Labour Market Statistics Released at 11.30am (Canberra Time) 08 July 2014 - Glossary
[46] Ibid

45-54	3268.0
55-64	2254.7
65+	253.2
15-64	21789.6
Total hours	22133.7

ABS 6105.0 Australian Labour Market Statistics July 2014 – Table 4. Volume Measures of Underutilised Labour: Populations by Age – August 2003 – August 2013 (All data are original series) – Hours sought by unemployed people – Persons (August 2013)



Underemployed Persons

Table 5 and Graph 5 show the additional hours preferred by underemployed workers. The ABS defines 'Additional hours preferred by underemployed workers' as:

"*For full-time employed people who worked less than 35 hours in the reference week for economic reasons: the difference between the number of hours usually worked and actually worked in the reference week. For underemployed part-time workers: the additional hours they would prefer to work.*"[47]

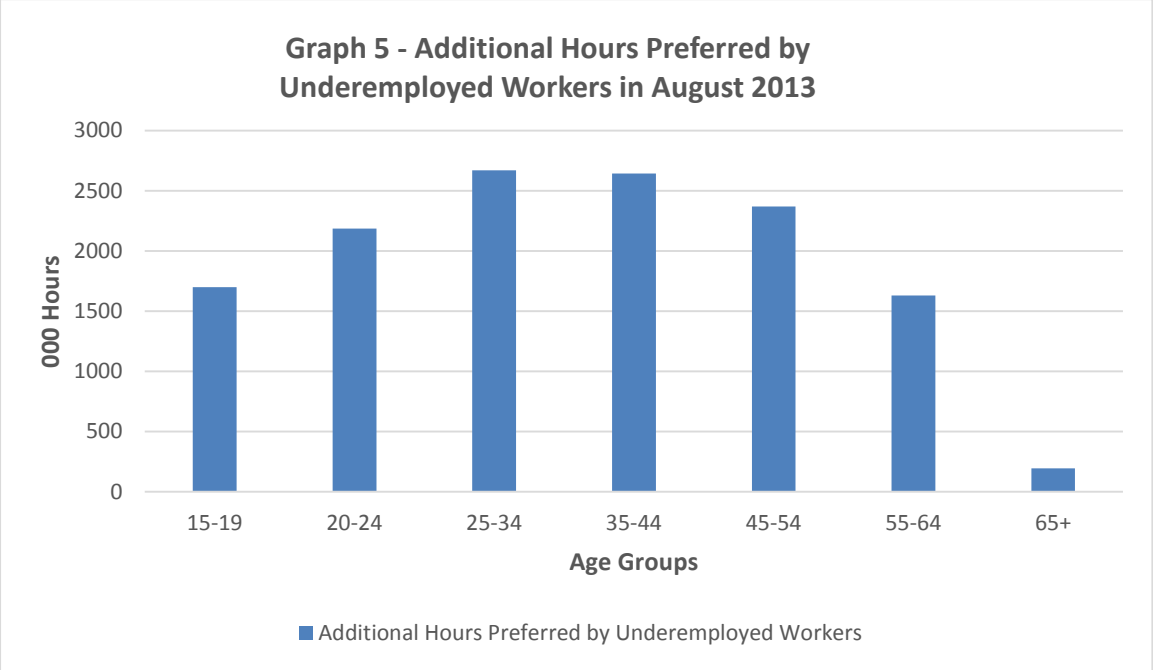
Table 5 and Graph 5 indicate there is a significant number of work hours sought by employed workers that are not able to be satisfied by employers in the existing employment market. People in the 25–34 age group (2,668,900 hours) sought the maximum number of hours followed closely by age groups 35-44 (2,642,800 hours) and 45-54 (2,370,300 hours).

Table 5 – Number of additional hours preferred by underemployed workers in August 2013	
Age Group	000 hours

[47] Ibid

15 – 19	1699.9
20-24	2185.2
25-34	**2668.9**
35-44	**2642.8**
45-54	**2370.3**
55-64	1631.4
65+	194.0
15-64	13204.8
Total hours	13400.5

ABS 6105.0 Australian Labour Market Statistics July 2014 – Table 4. Volume Measures of Underutilised Labour: Populations by Age (All data are original series) – additional hours preferred by underemployed workers (August 2013)



Commentary – Unemployment and Underemployment

From an economic perspective, the prevailing wage in a labour market is heavily influenced by the forces of demand and supply. [48] At the equilibrium wage, the demand for labour by employers equals the supply of labour by employees leaving no surplus or shortage. [49] However, labour market institutions (such as unions) tend to alter the operation of the market by increasing the wage above the equilibrium resulting in the supply of labour by employees exceeding the demand for labour by employers. [50] The degree of unemployment and underemployment in hours exhibited by Tables and Graphs 4 and 5 indicates that wages are above the equilibrium wage.

[48] Ehrenberg, R.G and Smith, R.S., *Modern Labor Economics Theory and Public Policy*, Fourth Edition, HarperCollins Publishers, USA, 1991: 40
[49] Ibid: 42
[50] Ibid: 48-49

Analysis by Industry

Relevant ABS Industry Classification

The ABS classifies Australian industries into the following 19 industry groups: agriculture, forestry and fishing; mining; manufacturing; electricity, gas, water and waste services; construction; wholesale trade, retail trade; accommodation and food services; transport, postal and warehousing; information media and telecommunications; financial and insurance services; rental, hiring and real estate services; professional, scientific and technical services; administrative and support services; public administration and safety; education and training; health care and social assistance; arts and recreation services; and other services.[51]

The accommodation and food services industry comprises accommodation for visitors such as hotels, motels and similar units; and food and beverage services such as cafes, restaurants and takeaway food services, pubs, taverns and bars and clubs (hospitality).[52] However, excluded from this classification are gambling institutions (casinos), amusement and recreation parks, long-term (residential) caravan parks, theatre restaurants, sporting clubs, and other recreation and entertainment facilities providing food, beverage and accommodation services.[53]

The arts and recreational services industry includes activities such as heritage, creative and performing arts, sports and recreation activities and gambling activities (which includes casino operation, lottery operation and other gambling activities but excludes units mainly engaged in selling alcoholic beverages both for consumption on and off premises and hospitality clubs).[54]

The retail trade industry includes motor vehicle and motor vehicle parts retailing, fuel retailing, food retailing, other store-based retailing and non-store retailing and retail commission based buying and/or selling.[55]

The hospitality industry would fall under the accommodation and food services industry classification with casino operation falling under a segment of the arts and recreation services industry classification.

Employed Persons

Table 6 and Graph 6 show the number of employed persons by industry for the quarter of November 2014. The data shows that the Health Care and Social Assistance industry employs the highest number of persons (1,388,000), followed by the Retail trade industry (1,258,600) and Construction industry (1,056,800). The Accommodation and Food Services industry ranks as 7th (823,7000) in terms of the number of persons employed out of 19 industry classifications.

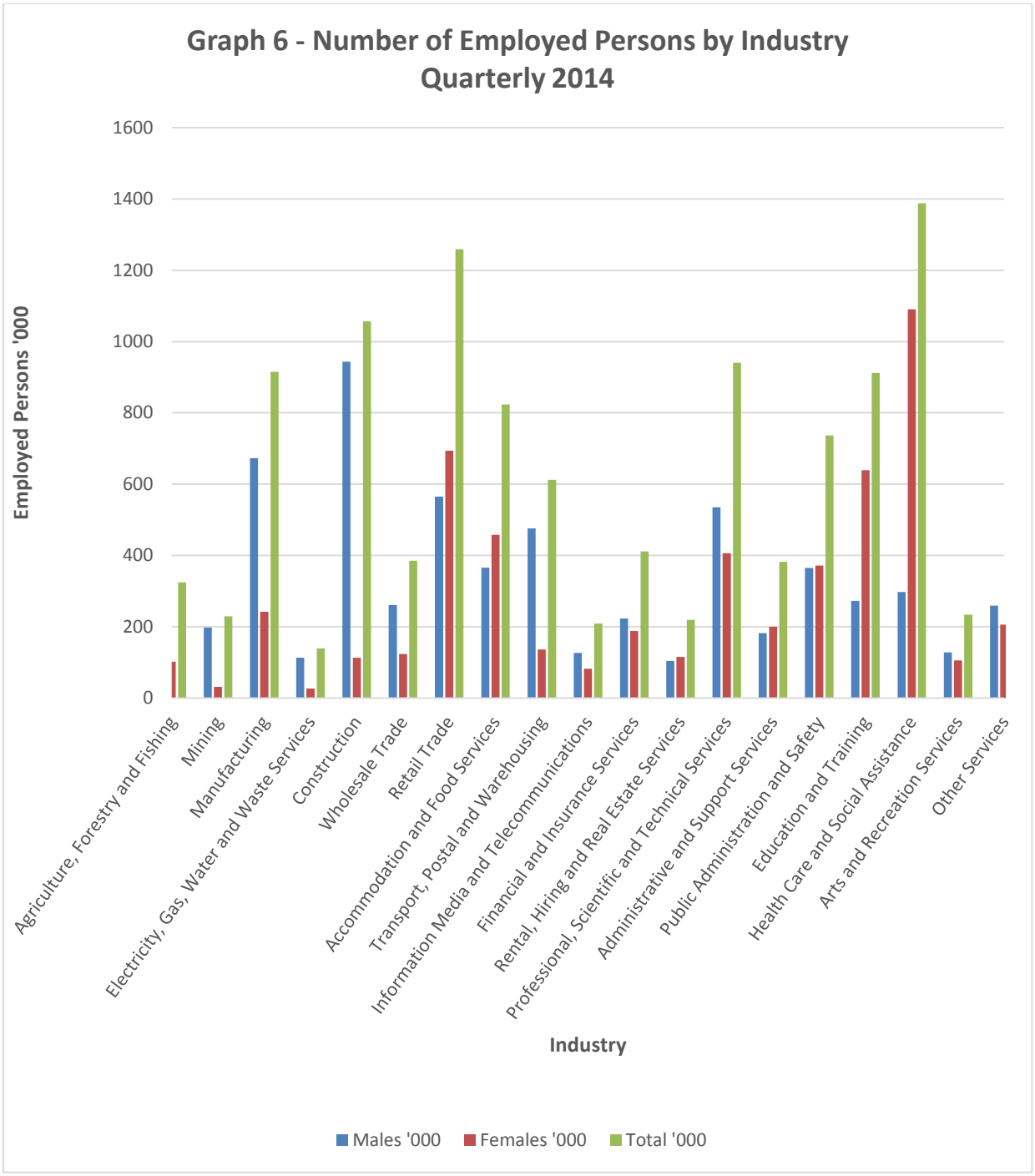
Table 6 – Number of Employed Persons by Industry Quarterly 2014

Industry	Males '000	Females '000	Total '000
Agriculture, Forestry and Fishing	222.5	101.8	324.3
Mining	197.6	31.3	228.9
Manufacturing	673.0	242.0	915.0

[51] ABS 1292.0 – Australian and New Zealand Standard Industrial Classification (ANZSIC), 2006 (Revision 2.0): 12
[52] Ibid: 262
[53] Ibid: 262
[54] Ibid: 351
[55] Ibid: 244

Electricity, Gas, Water and Waste Services	112.8	26.6	139.4
Construction	943.6	113.2	1056.8
Wholesale Trade	261.0	123.8	384.8
Retail Trade	564.8	693.8	1258.6
Accommodation and Food Services	**366.0**	**457.6**	**823.7**
Transport, Postal and Warehousing	476.0	136.3	612.3
Information Media and Telecommunications	126.5	82.2	208.7
Financial and Insurance Services	223.5	188.0	411.5
Rental, Hiring and Real Estate Services	104.0	115.7	219.6
Professional, Scientific and Technical Services	535.0	405.8	940.7
Administrative and Support Services	182.3	199.8	382.1
Public Administration and Safety	364.8	371.8	736.7
Education and Training	272.8	639.4	912.1
Health Care and Social Assistance	297.4	1090.6	1388.0
Arts and Recreation Services	128.3	105.9	234.1
Other Services	259.6	205.8	465.4

ABS 6291.0.55.003 Labour Force, Australia, Detailed, Quarterly - Table 19 Underemployed, Industry and Occupation, Original - November 2014 (includes data only collected in February, May, August and November)


Graph 6 - Number of Employed Persons by Industry Quarterly 2014
Employed Persons '000
1600
1400
1200
1000
800
600
400
200
0
Agriculture, Forestry and Fishing
Mining
Manufacturing
Electricity, Gas, Water and Waste Services
Construction
Wholesale Trade
Retail Trade
Accommodation and Food Services
Transport, Postal and Warehousing
Information Media and Telecommunications
Financial and Insurance Services
Rental, Hiring and Real Estate Services
Professional, Scientific and Technical Services
Administrative and Support Services
Public Administration and Safety
Education and Training
Health Care and Social Assistance
Arts and Recreation Services
Other Services
Industry
Males '000
Females '000
Total '000

Underemployed Persons

Table 7 and Graph 7 show the number of underemployed persons by industry for the quarter of November 2014. These show that the Retail Trade industry had the highest number of underemployed persons (207,300), followed closely behind by the Accommodation and Food Services (189,000) and then Health Care and Social Assistance Industry (141,200).

Table 7 – Number of Underemployed Persons by Industry Quarterly 2014			
Industry	**Males '000**	**Females '000**	**Total '000**
Agriculture, Forestry and Fishing	12.0	7.4	19.4
Mining	1.1	0.3	1.4
Manufacturing	25.2	21.6	46.9
Electricity, Gas, Water and Waste Services	3.2	0.7	3.9
Construction	53.2	8.7	61.9
Wholesale Trade	9.2	6.1	15.3
Retail Trade	68.9	138.4	207.3
Accommodation and Food Services	**76.5**	**112.5**	**189.0**
Transport, Postal and Warehousing	30.6	10.0	40.6
Information Media and Telecommunications	6.8	8.3	15.1
Financial and Insurance Services	1.2	9.3	10.5
Rental, Hiring and Real Estate Services	4.6	6.8	11.4
Professional, Scientific and Technical Services	24.2	27.6	51.7
Administrative and Support Services	27.6	34.2	61.8
Public Administration and Safety	13.2	17.2	30.4
Education and Training	27.9	68.0	95.9
Health Care and Social Assistance	26.7	114.4	141.2
Arts and Recreation	25.0	18.4	43.4

Services			
Other Services	14.6	21.6	36.2

ABS 6291.0.55.003 Labour Force, Australia, Detailed, Quarterly - Table 19 Underemployed, Industry and Occupation, Original - November 2014 (includes data only collected in February, May, August and November)

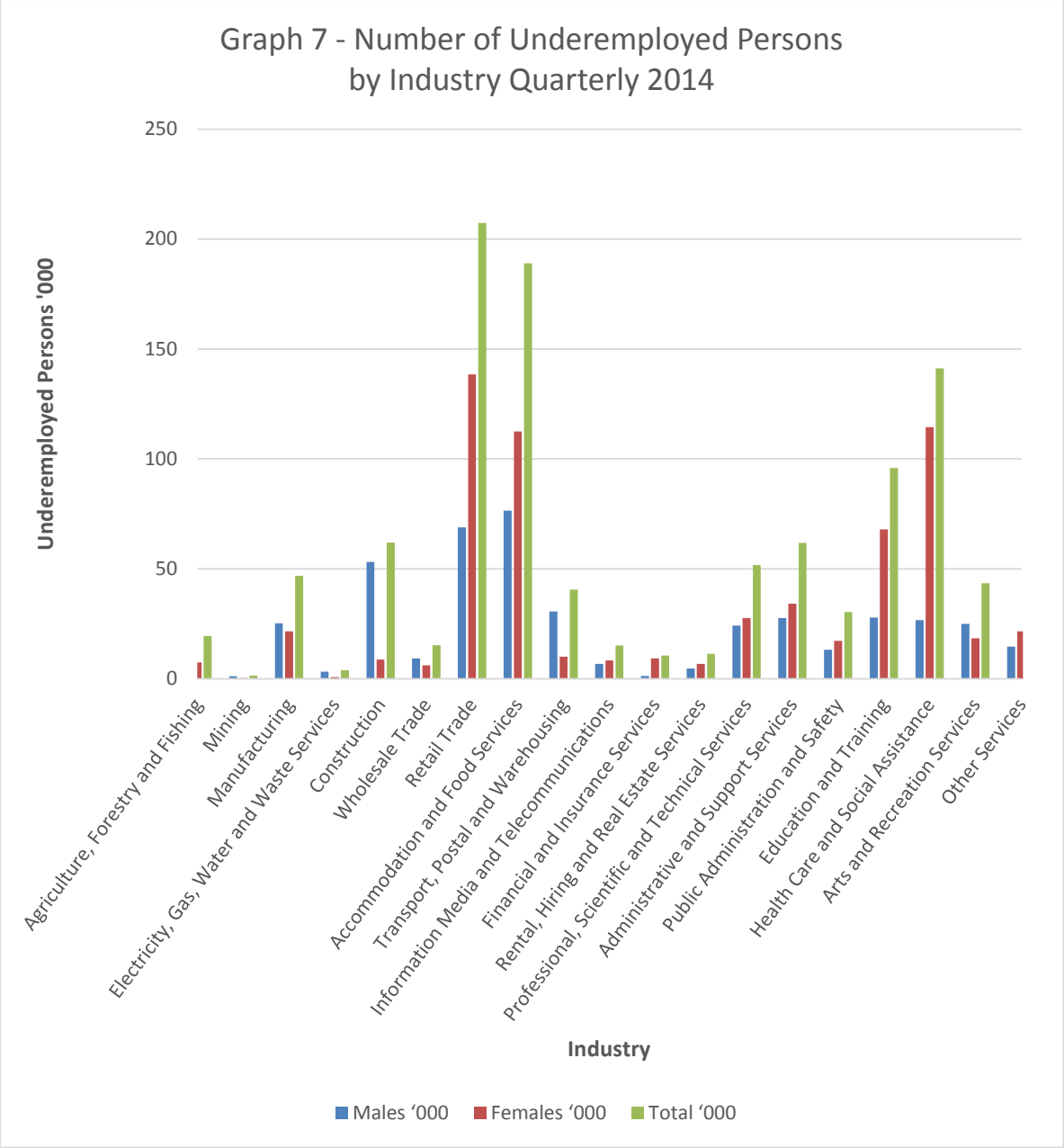


Table 8 and Graph 8 show the proportion of underemployed persons expressed as a percentage of the number of underemployed persons by the number of employed persons in terms of total persons, male and female. (Note: This is why many of the results reveal lower percentage proportions for total persons than male and female persons)

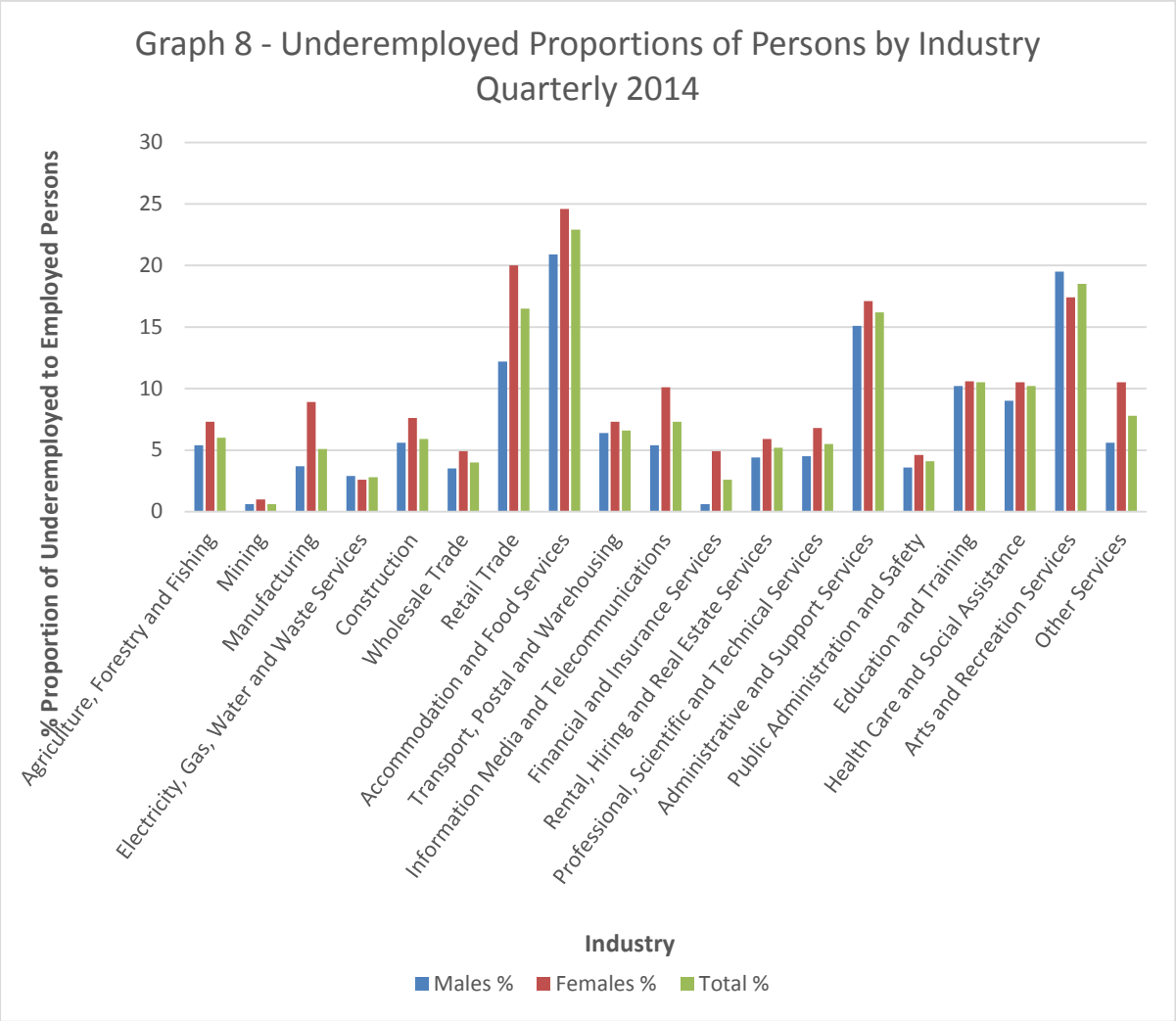
The data shows that as a percentage proportion of underemployed to employed persons by industry in terms of total persons, male and female, the Accommodation and Food Service industry had the higher proportion of underemployment (22.9% Total Persons, 20.9% Males and 24.6% Females),

followed by Arts and Recreation Services (18.5% Total Persons, 19.5% Males and 17.4% Females), the Retail Trade industry (16.5% Total Persons, 12.2% Males and 20.0% Females) and followed closely behind by the Administrative and Support Services industry (16.2% Total Persons, 15.1% Males and 17.1% Females).

Table 8 – Underemployed Proportions of Persons by Industry Quarterly 2014			
Industry	**Males %**	**Females %**	**Total %**
Agriculture, Forestry and Fishing	5.4	7.3	6.0
Mining	0.6	1.0	0.6
Manufacturing	3.7	8.9	5.1
Electricity, Gas, Water and Waste Services	2.9	2.6	2.8
Construction	5.6	7.6	5.9
Wholesale Trade	3.5	4.9	4.0
Retail Trade	12.2	20.0	16.5
Accommodation and Food Services	**20.9**	**24.6**	**22.9**
Transport, Postal and Warehousing	6.4	7.3	6.6
Information Media and Telecommunications	5.4	10.1	7.3
Financial and Insurance Services	0.6	4.9	2.6
Rental, Hiring and Real Estate Services	4.4	5.9	5.2
Professional, Scientific and Technical Services	4.5	6.8	5.5
Administrative and Support Services	15.1	17.1	16.2
Public Administration and Safety	3.6	4.6	4.1
Education and Training	10.2	10.6	10.5

Health Care and Social Assistance	9.0	10.5	10.2
Arts and Recreation Services	19.5	17.4	18.5
Other Services	5.6	10.5	7.8

ABS 6291.0.55.003 Labour Force, Australia, Detailed, Quarterly - Table 19 Underemployed, Industry and Occupation, Original - November 2014 (includes data only collected in February, May, August and November)



Commentary – Analysis by Industry

Despite the Accommodation and Food Service industry only ranked as 7th highest in terms of the number of persons employed out of the 19 industry classifications in table/graph 6, it features remarkably in terms of underemployment with graphs/tables 7 and 8 in terms of the number of underemployed and underemployed proportions.

The Retail industry ranked as 2nd highest in terms of the number of persons employed out of the 19 industry classifications in table/graph 6 and also features quite prominently in terms of underemployment and underemployed proportions with tables/graphs 7 and 8. The industry would involve the working of non-standard working hours and therefore penalty rates.

Interestingly, while the Administrative and Support Services industry and Arts and Recreation Services industry did not feature prominently in tables/graphs 6 and 7 due to the lower ranking in terms of number of employed and underemployed persons, both feature fairly prominently in terms of underemployment proportions with table/graph 8.

As previously mentioned, the Arts and Recreational Services industry comprises activities such heritage, creative and performing arts, sports and recreation and gambling which includes casinos. The industry would involve the working of non-standard working hours and therefore penalty rates.

The Administrative and Support Services industry comprises administrative services and building cleaning, pest control and other support services. A good proportion of the work in this industry would involve standard work hours and therefore limited penalty rates. The fairly prominent underemployment proportion for this industry may best be explained by the relatively broad and non-high skilled positions with standard hours thereby making it more attractive to a wider group of people.

Trade Union Membership

Tables 9/9A and Graphs 9/9A show trade union membership in Australia from August 2010 to August 2013. Trade union membership has been declining since August 2011, particularly since August 2012. As at August 2013, trade union membership was 17.0% nationally and only 12.0% nationally for the private sector.

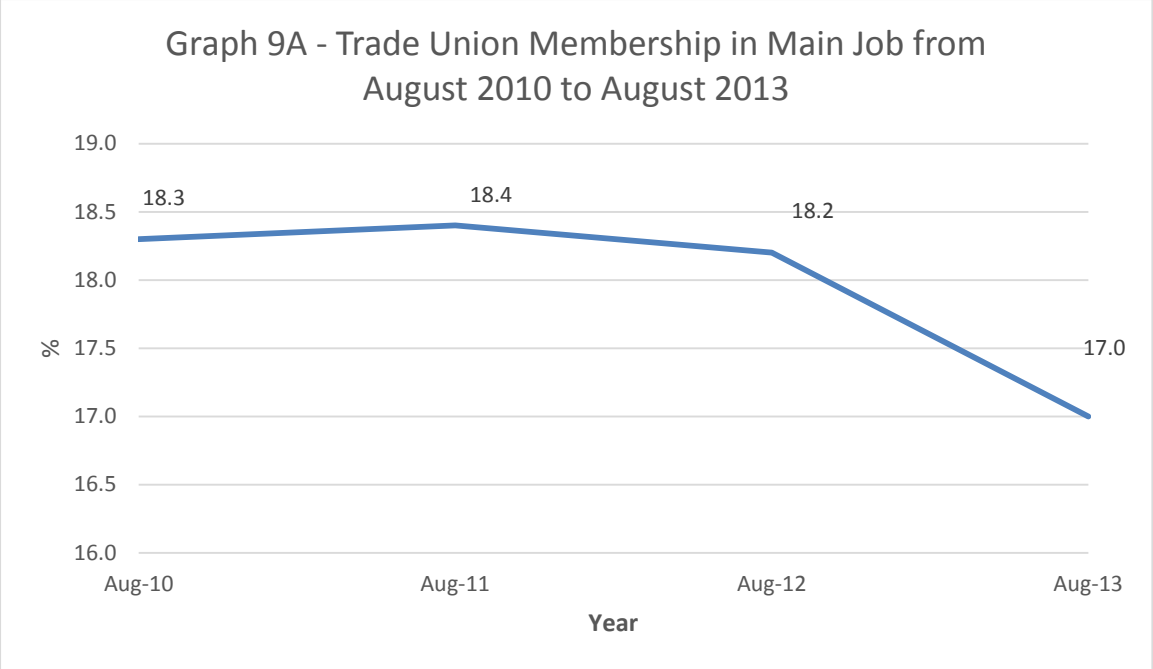
Table 9A – Trade Union Membership in Main Job from August 2010 to August 2013

August 2010		August 2011		August 2012		August 2013	
'000	%	'000	%	'000	%	'000	%
1787.8	18.3	1834.7	18.4	1840.4	18.2	1747.6	17.0

Table 9B – Trade Union Membership by Sector of Main Job from August 2010 to August 2013

	August 2010		August 2011		August 2012		August 2013	
Sector	'000	%	'000	%	'000	%	'000	%
Public	663.6	41.5	737.4	43.4	755.8	43.4	719.3	41.7
Private	1124.2	13.8	1097.3	13.2	1084.7	13.0	1028.3	12.0

ABS 6310.0 Employee Earnings, Benefits and Trade Union Membership, Australia Table 11 – Employees in Main Job, Selected personal and employment characteristics – By trade union membership in main job – August 2010 to August 2013 (Note: Percentages represent trade union members in main job as a proportion of all employees within that population group. The total used to calculate the proportion also includes persons for whom trade union membership in main job was not known)



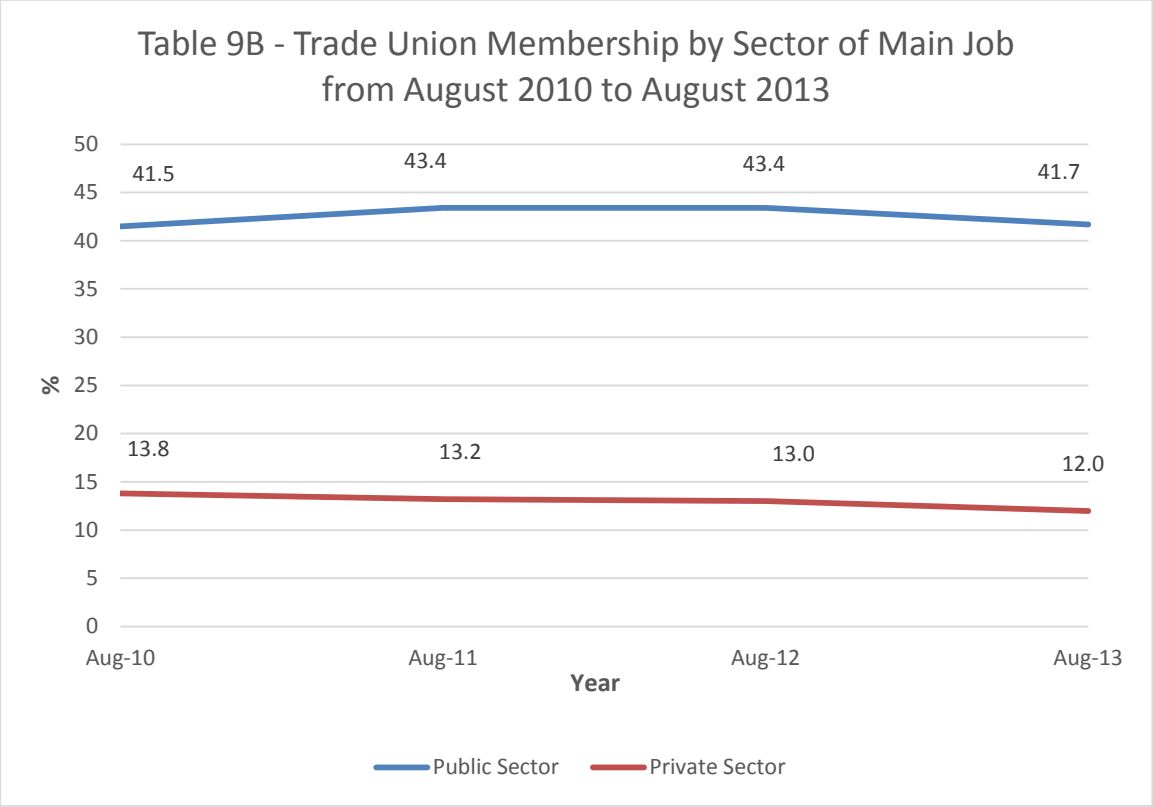


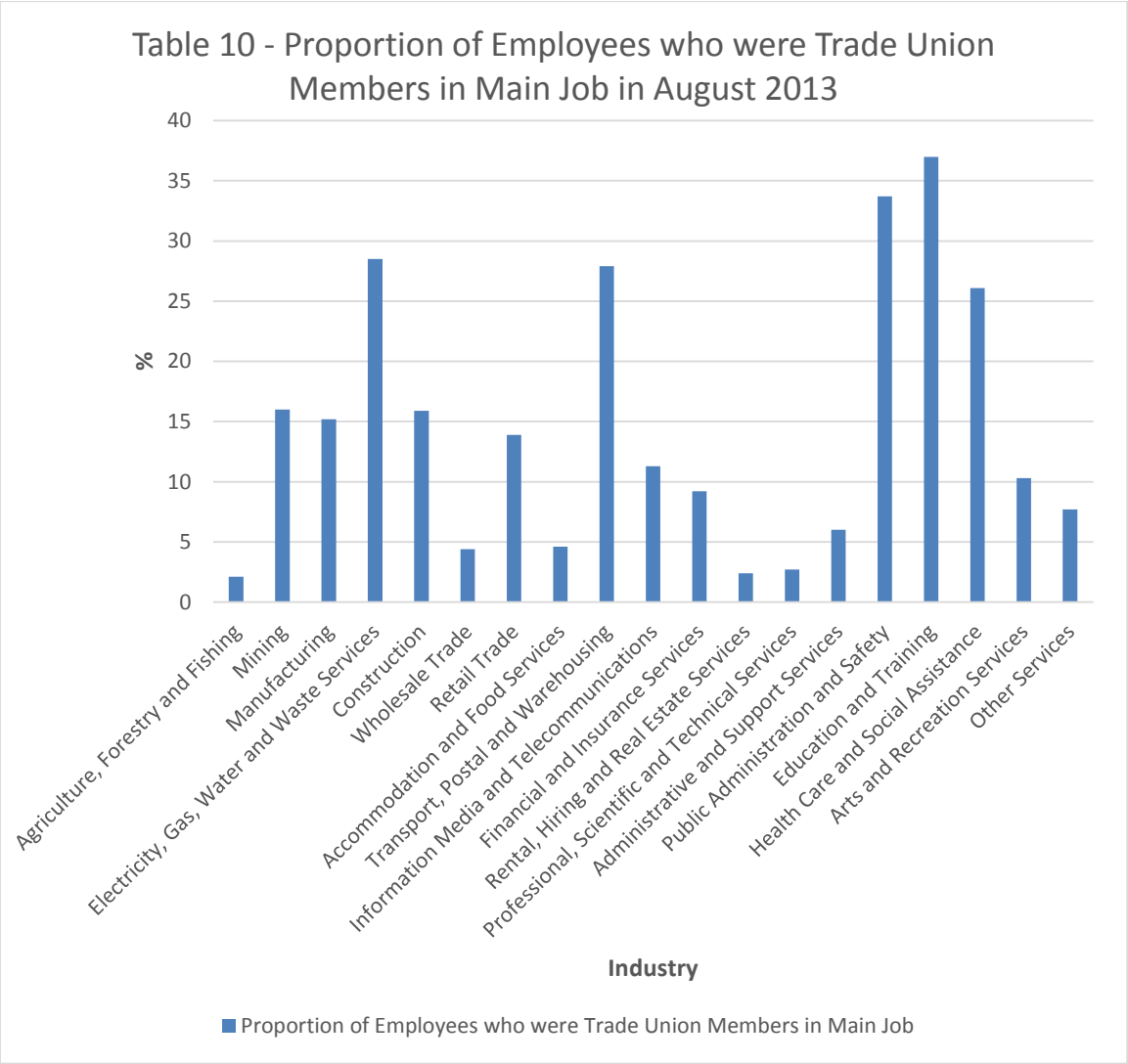
Table 10 and Graph 10 show the proportion of employees who were trade union members in their main job by industry for August 2013. The data shows that the proportion of employees who were trade union members in their main job for the Accommodation and Food Services industry in August 2013 was only 4.6%.

Table 10 – Proportion of Employees who were Trade Union Members in their Main Job by Industry for August 2013

Industry	Trade Union Member in Main Job '000	Total(a) '000	Proportion of employees who were trade union members in main job %
Agriculture, Forestry and Fishing	*3.7	174.6	*2.1
Mining	42.6	266.1	16.0
Manufacturing	129.6	854.6	15.2
Electricity, Gas, Water and Waste Services	42.5	148.9	28.5
Construction	125.9	790.9	15.9
Wholesale Trade	17.2	389.3	4.4
Retail Trade	156.7	1124.3	13.9
Accommodation and Food Services	**33.0**	**716.6**	**4.6**
Transport, Postal and Warehousing	142.3	510.9	27.9
Information Media and Telecommunications	20.3	178.6	11.3
Financial and Insurance Services	38.6	419.4	9.2
Rental, Hiring and Real Estate Services	*4.0	165.7	*2.4
Professional, Scientific and Technical Services	21.2	789.2	2.7
Administrative and Support Services	17.7	292.3	6.0
Public Administration and Safety	261.7	776.5	33.7
Education and Training	309.5	837.1	37.0
Health Care and Social Assistance	335.1	1285.6	26.1
Arts and Recreation Services	17.9	172.6	10.3
Other Services	28.2	365.4	7.7

ABS 6310.0 Employee Earnings, Benefits and Trade Union Membership, Australia, Table 13 – Employees in Main Job, Selected main job characteristics – By full-time of part-time status and

duration of trade union membership in main job – By Sex (Persons) - August 2013 - (a) Includes an estimated 399,800 persons for whom trade union membership in their main job was not known (250,800 males and 149,000 females) - *estimate has a relative standard error of 25% to 50% and should be used with caution



Employee Composition and Benefits

The ABS reported that in August 2013 the accommodation and food services industry had a relatively large proportion of younger workers with 25% of employees being 15-19 years of age.[56] The Retail industry had 18% of employees who were 15-19 years of age.[57] As a comparison with all industries, only 6% of employees were 15-19 years of age.[58]

Table 11 and Graph 11 show industry data of employees in August 2013 with and without paid leave entitlements in their main job excluding Owner Managers of Incorporated Enterprises (OMIEs). This data is essentially an indicator of the degree of workforce casualization.

[56] ABS 6310.0 Employee Earnings, Benefits and Trade Union Membership, Australia, August 2013: 5
[57] Ibid: 5
[58] Ibid: 5

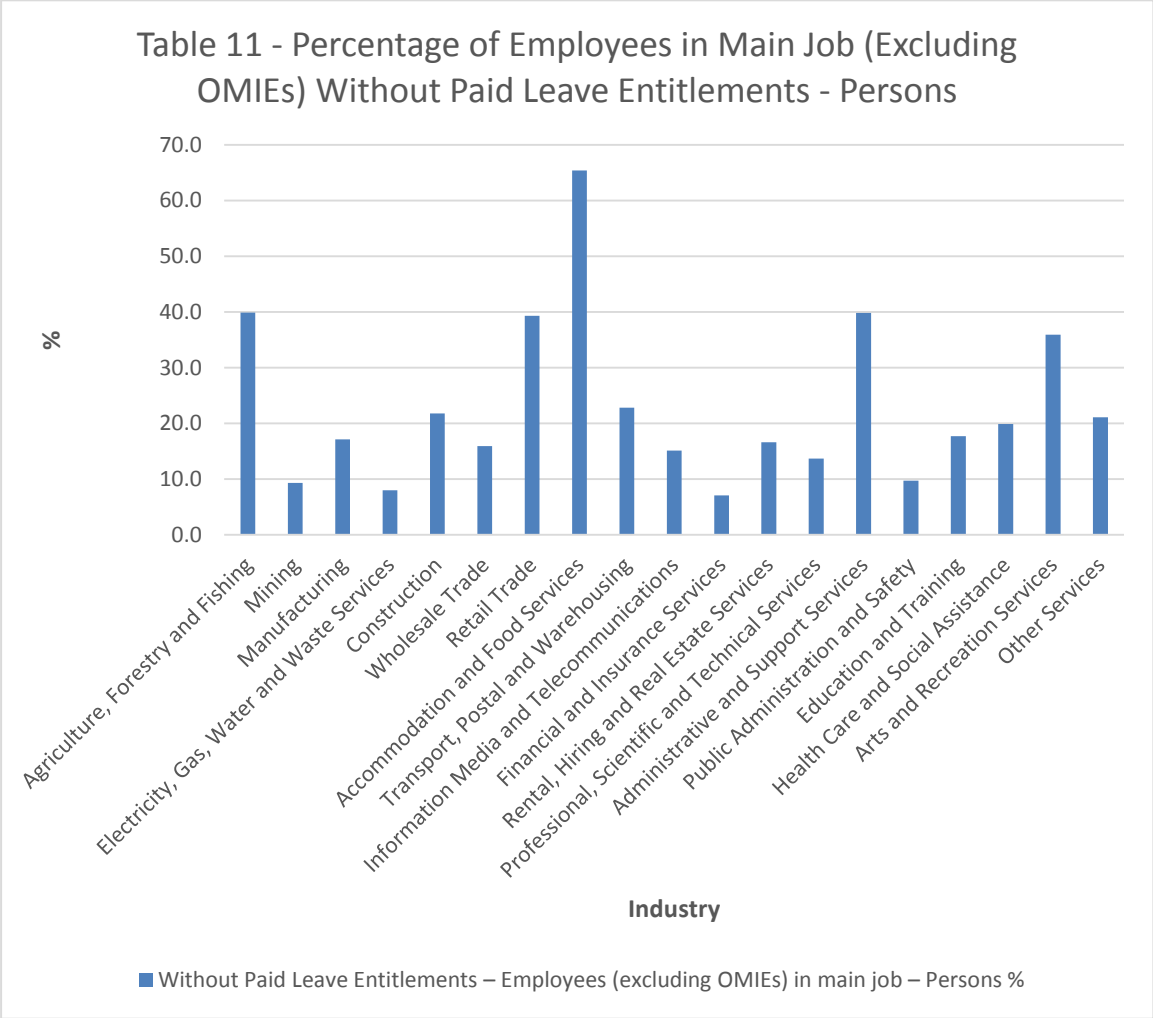
Table 11 and Graph 11 show that the Accommodation and Food Services industry has an extremely high percentage of employees (excluding OMIEs) who do not have paid leave entitlements (65.4%). The next highest percentage was agriculture, forestry and fishing (39.9), followed by administrative and support services (39.8%), retail trade (39.3%) and arts and recreational services (35.9%).

Table 11 – Employees with and without Paid Leave Entitlements in their Main Job excluding Owner Managers of Incorporated Enterprises (OMIEs) in August 2013

Industry	Without Paid Leave Entitlements (Employees) - Persons '000	With Paid Leave Entitlements Employees (excluding OMIEs) in main job – Persons '000	Total – Employees (excluding OMIEs) in main Job – Persons '000	Without Paid Leave Entitlements – Employees (excluding OMIEs) in main job – Persons %
Agriculture, Forestry and Fishing	52.5	79.2	131.6	39.9
Mining	24.5	238.6	263.0	9.3
Manufacturing	136.3	658.5	794.8	17.1
Electricity, Gas, Water and Waste Services	11.7	134.3	146.0	8.0
Construction	144.8	518.1	662.9	21.8
Wholesale Trade	54.6	289.2	343.8	15.9
Retail Trade	419.0	646.4	1065.4	39.3
Accommodation and Food Services	**441.3**	**233.7**	**675.0**	**65.4**
Transport, Postal and Warehousing	108.1	367.0	475.1	22.8
Information Media and Telecommunications	25.2	141.4	166.6	15.1
Financial and Insurance Services	28.0	365.4	393.5	7.1
Rental, Hiring and Real Estate Services	22.6	113.8	136.4	16.6
Professional, Scientific and Technical Services	90.4	570.0	660.4	13.7
Administrative and Support Services	105.6	159.6	265.2	39.8
Public Administration and Safety	74.5	694.8	769.3	9.7

Education and Training	146.2	677.7	823.9	17.7
Health Care and Social Assistance	246.2	992.8	1239.0	19.9
Arts and Recreation Services	58.8	104.9	163.7	35.9
Other Services	68.6	257.1	325.7	21.1

ABS 6310.0 Employee Earnings, Benefits and Trade Union Membership, Australia, August 2013 - Table 22 – Employees (Excluding OMIEs) in Main Job, Selected characteristics-By whether had paid leave entitlements in main job)-By full-time or part-time status in main job-By sex



Concluding Commentary – Productivity and Economic Indicators

The economic data indicates that Australia's labour productivity requires improvement. While a range of factors can influence labour productivity, the degree of workplace relations regulation can be influential at the workplace level.

The use of strike activity may appear appropriate from an industrial relations perspective, but from an economic perspective it is entirely inappropriate as it results in economic harm to business and

the economy. There should be a greater role for conciliation and arbitration to resolve disputes as quickly as soon as possible rather than having disputes continue on an ongoing basis.

A greater focus needs to be made of the plight of unemployed and underemployed workers. It is noted that the hospitality industry (ie. ABS – principally in the Accommodation and Food Services industry) has the highest proportion of underemployed workers across all industries. Given that the industry involves the working of non-standard hours such as on weekends and public holidays, this can be attributable to high penalty rates and inflexible work provisions. The extremely high proportion of casual workers in the industry as opposed to the employment of permanent part-time workers is evidence of this inflexibility.

Tribunals must be mindful when setting penalty rates and prescribing work arrangements of not only the immediate interests of employed workers generally, but the propensity of businesses to pay these penalty rates and operate within prescribed work constraints as well as the resultant plight of unemployed and underemployed workers.

The trade union membership data in the private sector shows membership at low levels, particularly in the hospitality industry which in August 2013 was only 4.6% of employees in the industry classification. It is questionable whether trade unions are really representative of the views of the workforce, particularly those that are unemployed and underemployed.

The industrial relations/economic research indicates that productivity and economic performance are achieved by allowing workplace flexibility and ensuring fairness. A renewed focus on flexibility and fairness in the Australian workplace relations system will very likely have a positive effect on labour productivity and the Australian economy.

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