

Victorian Government Reply Submission to the Draft Report of the Productivity Commission Inquiry into the Workplace Relations Framework

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Victorian Government Reply Submission to the Draft Report of the Productivity Commission

1. Introduction - Maintaining the Safety Net

- 1.1. In its preliminary submission, the Victorian Government stated its concern that the Commonwealth Government intends to use the Productivity Commission's (Commission) inquiry to erode employee protections to the detriment of the most vulnerable and low paid Victorian workers.
- 1.2. A significant number of the Commission's key recommendations, if implemented, would directly or indirectly reduce essential safety net features of the *Fair Work Act 2009* (the FW Act). In particular: reduction of penalty rates for workers in certain industries; slowing increases to the minimum wage; decreasing protections for unfair dismissal; and replacing the 'Better off Overall Test' (BOOT) with a different 'No Disadvantage Test' in conjunction with the creation of a new 'enterprise contract'.
- 1.3. Conversely, the Victorian Government welcomes some recommendations of the Commission that might increase protections for particularly vulnerable classes of workers such as: providing additional resources for the Fair Work Ombudsman (FWO) to investigate employers suspected of underpaying migrant workers (although noting that payment of those workers' entitlements, rather than punishing employers, should be the key objective of such prosecutions); and reducing the threshold test for an employer to be prosecuted for sham contracting.
- 1.4. Other significant recommendations would if implemented, fundamentally alter the tribunal and arbitral nature of the Fair Work Commission (FWC). The Victorian Government considers that the FWC is the body which is best placed to make determinations on future increases in the minimum wage, and on penalty rates, in accordance with the objectives and processes set out in the FW Act. The Victorian Government submits that the FWC, and its predecessors, made determinations using the best available evidence presented by relevant parties at the time, supported by precedent, and that these processes should continue.

2. The Economy - Evidence, Findings and Recommendations

- 2.1. The Victorian Government welcomes the findings of the Commission that:
*Contrary to perceptions, Australia's labour market performance and flexibility is relatively good by global standards, and many of the concerns that pervaded historical arrangements have now abated. Strike activity is low, wages are responsive to economic downturns and there are multiple forms of employment arrangements that offer employees and employers flexible options for working.*¹

¹ Draft Report of the Productivity Commission, page 3

- 2.2. These findings are consistent with the Victorian Government's preliminary submission and support the view that the FW Act is broadly meeting its objectives and does not require wholesale change.
- 2.3. However, despite the Commission's positive assessment of Australia's economy supported by its workplace relations framework, there is an apparent disconnect between that assessment and many of the recommendations.

3. Penalty rates

- 3.1. The Victorian Government supports the findings of the Commission that penalty rates have a legitimate role in compensating employees for working long hours or at unsociable times and that they should be maintained.
- 3.2. The Victorian Government strongly rejects the concept that some workers should receive lower penalty rates than others, based solely on the industry in which they work - seriously disadvantaging vulnerable, low paid workers who have little bargaining power. The Victorian Government submits that the fact that some members of the public expect shops and restaurants to be open should have no impact on the working conditions of those employed in those businesses.
- 3.3. The suggestion that targeted workers suffer a significant income loss, without any compensation, is also inconsistent with the Commission's reasoning that the BOOT be replaced by a 'no disadvantage' test. The Commission argues that workers offered an 'enterprise contract' should be no worse off than they are under the relevant award, yet recommends that workers lose penalty rates without such a test applying.
- 3.4. The Commission's recommendation that Sunday penalty rates be reduced to the Saturday rate in some sectors, is not backed by evidence or any submissions that this will increase employment or productivity.
- 3.5. Cutting penalty rates will reduce the amount of disposable income within the economy. The Retail Council point out that 30 per cent of retail jobs are located in regional and remote areas and that the wages earned by retail staff in those communities is spent in those communities.² Cutting wages will only hurt local businesses, which rely on the custom of local workers.
- 3.6. The Victorian Government also rejects the Commission's apparent profile of a 'typical' retail and hospitality worker. There is an assumption that the majority of retail and hospitality workers are low skilled, young, and working merely to earn some extra cash. In fact, according to the Retail Council,³ retail is the fourth largest employer of

² *State of the Sector Report 2015*

³ *State of the Sector Report 2015*

people aged 55 and over, and the number of mature aged workers in retail has increased 50 per cent in the last 10 years.

- 3.7. The Commission's typical profile ignores the thousands of retail and hospitality workers who have developed considerable skills after having worked for many years in their industry, who see their work as a career, and who work Sundays not just occasionally but as part of their core hours. These workers will be severely disadvantaged by the Commission's proposal.
- 3.8. The Victorian Government provided information on the potential impact of cuts to penalty rates in its initial submission to the Commission (as outlined in **Table 3** of that submission).⁴
- 3.9. The consequences of reducing Sunday penalty rates to Saturday rates for individual employees, and their families, will be significant. As an example, a Level 1 retail employee would have an effective pay cut of nearly 11 per cent or \$105.64 per week (see **Table 2** in **Appendix**).
- 3.10. The Commission also argues that reducing Sunday penalty rates will lead to an increase in employment levels, through savings to the employer. There is insufficient evidence to support this conclusion.
- 3.11. It also assumes that an employer will not use any money saved for other purposes, for example: increased profits, equipment purchase or marketing. Extrapolating from this type of scenario, it is difficult to see support for any 'jobs boom'.
- 3.12. The Commission's conclusions are also based on the notion that a business employs as many people as it can afford, rather than as many people as it needs. A business that is fully staffed will not employ additional staff, even if wages costs are reduced. To do so would not make any sense.
- 3.13. Contrary to the Commission's recommendation to reduce penalty rates, the Victorian Government maintains that the FW Act provides adequate mechanisms for employers and employees to negotiate alternatives to award penalty rate arrangements where desired.⁵ Further, as the Victorian Government's initial submission also noted,⁶ the Commission's own analysis of retail sector enterprise agreements found that employers had failed to take full advantage of existing enterprise bargaining to adopt flexibility and productivity-enhancing arrangements.⁷

⁴ See in particular paragraphs 2.55-2.71 of the Victorian Government submission April 2015.

⁵ See paragraphs 2.72-2.79 Victorian Government submission April 2015

⁶ See paragraph 2.79 Victorian Government submission April 2015

⁷ Productivity Commission, *Economic Structure and Performance of the Australian Retail Industry* (Inquiry Report, no. 56, 4 November 2011) p.360.

4. Enterprise contracts

- 4.1. The Victorian Government rejects the introduction of 'enterprise contracts' as a proposed response to the low take-up rate of enterprise bargaining by small business (Chapter 17). These contracts, which could be offered on a 'take-it-or-leave-it' basis, appear to be nothing other than Australian Workplace Agreements (AWAs) by another name.
- 4.2. The Commission states that employees will be protected by the new 'no-disadvantage' test, which will benchmark the proposed agreement against the extant award or enterprise agreement. This premise is contradicted by the terminology – the current test, where an employee must be 'better off overall' is to be replaced with a test whereby the employee is to be 'no worse off overall'. It is a subtle difference but nevertheless potentially significant in practice.
- 4.3. The Commission has offered no explanation why a change from the BOOT is warranted and has offered no evidence suggesting that the current test is flawed. The Victorian Government submits that the current test is fair and balanced and should be retained. The Victorian Government is also alarmed at the proposal that employees would be denied an automatic right to representation in negotiations (this would be at the employer's discretion).
- 4.4. The Commission stated that the proposed enterprise contract is different to an AWA because one is a collective arrangement, whilst an AWA is an individual one. Yet the Commission recommends that an employee may opt out of an enterprise contract after 12 months (presumably to return to award coverage). This seems to undermine the collective nature of the enterprise contract. It is also hard to see how this can operate in practice. For example, there may be a workplace where 10 employees who form a team, sign an enterprise contract, which changes their working day from 9:00am-5:00pm, to 8:30am-4:30pm. If after 12 months one employee decides that they don't like these arrangements, they may seek to exercise their right to return to their previous hours of work. Such a situation would be unworkable in practice for the business.
- 4.5. On its face, the enterprise contract seems to be aimed more at changing the power balance between employers and employees, than making it easier for small business operators to bargain with their staff.

5. Industrial action

- 5.1. The Victorian Government supports the right of employees to take industrial action in support of enterprise bargaining claims. As such, the Victorian Government supports the current framework governing the taking of industrial action, including the good faith bargaining arrangements.
- 5.2. The Victorian Government agrees with the statement of the Commission that:
*The credible threat of industrial action by both employees and employers is an important negotiating tool for parties `engaging in enterprise bargaining, helping to reduce asymmetries in information and bargaining power.*⁸
- 5.3. We also note that the Commission recognises that industrial dispute levels are historically low. The Victorian Government also agrees with the Commission's observation that:
*In the debates about regulation of industrial disputes, there is often a mantra that disputes are harmful to productivity and efficiency, and that there should therefore be more binding constraints on their use. Disputes may have such effects, although in aggregate there is little evidence that the effects are material. Many disputes are about who gets what portion of a cake, not the quantum of the cake. In fact, a missing story is that the toxic relationships that can surface between employers and employees are sometimes the result of poor relationship management (emphasis added) — a key skill for both employers and employee representatives — not a fault of the WR system.*⁹
- 5.4. It is difficult, therefore, to reconcile these statements with the Commission's recommendations, and difficult to avoid drawing the conclusion that these recommendations are aimed more at restricting the right of employees to take legitimate, protected industrial action, than at the resolution of disputes.
- 5.5. The Commission also discusses employer initiated industrial action (lockouts). The Victorian Government agrees that lockouts should only be used as a last resort.¹⁰ In its initial submission to the Commission, the Victorian Government also referred to the fact that the process for taking employer industrial action is less regulated than that for employee industrial action.¹¹
- 5.6. In respect to lockouts, the Commission sought further information on whether there should be other options available to employers to allow a more graduated response to worker industrial action.¹² Notwithstanding this, the Commission proceeds to make

⁸ Page 39 Draft report

⁹ Ibid page 41

¹⁰ Victorian Government submission paragraphs 5.64-5.67

¹¹ Ibid paragraph 5.66

¹² Page 59 Draft report

recommendations, both of which would make it easier for employers to take punitive action against employees (recommendations 19.3 and 19.4).

- 5.7. At the same time, the Commission makes recommendations that if implemented will make it harder for employees to take lawful industrial action (recommendations 19.1, 19.2 and 19.4), as well as increasing the penalties where the industrial action is found to be unlawful (recommendation 19.6).

6. Unfair dismissal

- 6.1. The Victorian Government supports the existing unfair dismissal laws in the FW Work Act, and believes that they do effectively provide a “fair go all-round”.

- 6.2. The Victorian Government welcomes the comments of the Commission (at page 27) that:

Perceptions aside, there is little evidence that unfair dismissal laws are a major obstacle to hiring, especially given the relatively long probationary periods that exempt an employer from any claims (six months for an employer with 15 or more employees and one year for smaller businesses).

- 6.3. Given this conclusion, the Victorian Government does not support the recommendations of the Commission, which seek to place further limits on the FWC’s unfair dismissal jurisdiction. It is of particular concern that recommendations are made that seek to restrict compensation (recommendation 5.2) and remove reinstatement as the primary remedy (recommendation 5.3).

- 6.4. As regards the statement that in some cases employees who have been found to have engaged in serious misconduct have nevertheless received compensation, the Commission cites one case,¹³ stating that the employer failed to follow “certain procedures”. What is not mentioned is that the FWC found that not only were “certain procedures” not followed, but that the investigation of the incident that led to the dismissal of the two employees in question was seriously flawed. In other words, this was not simply a case of an employer forgetting to sign a form; this was a case of accused employees being denied natural justice. The compensation awarded to the employees was two weeks’ pay.

- 6.5. The Victorian Government is particularly concerned at the Commission’s observation at page 12 that:

As an illustration, there is good statistical evidence that the findings in unfair dismissal cases have allowed some inconsistencies to creep into judgments. Given their different perspectives, it is not surprising that members with an employer association background are more likely to find in favour of an employer

¹³ *Sheng He v Peacock Brothers & Wilson Lac v Peacock Brothers* (2013) FWC 7541, page 698.

compared with other members, while on average those with a union background produce outcomes in the opposite direction.

- 6.6. There are two issues here: one is that similar fact cases are treated differently or inconsistently; the other issue is a suggestion that the reason for different outcomes, is one of bias.
- 6.7. In response to the first issue, the Victorian Government submits that a similar conclusion could be made of any tribunal. A decision must turn upon its own facts and rarely will any two cases have exactly the same fact scenarios.
- 6.8. Secondly, the Victorian Government submits that the strength of the FWC, as with its predecessors, is in the diversity of the backgrounds of its constituent members. It also notes that the evidence in the report about decisions made by members of particular background is at odds with the Commission's conclusions.

7. Labour hire, insecure work and sham contracting

- 7.1. The Victorian Government's initial submission to the Commission noted our concern that labour hire arrangements can make labour hire workers vulnerable to exploitation, can create uncertainty for workers around continuity in employment and income, and can allow unscrupulous operators to evade taxation and other obligations.¹⁴
- 7.2. The Victorian Government welcomes the findings of the Commission, which endorse this position.¹⁵
- 7.3. The Victorian Government also welcomes the Commission's recommendation that the FWO be better resourced to help it address the exploitation of labour hire workers (recommendation 21.1). This is consistent with the Victorian Government's initial submission.¹⁶
- 7.4. However, in light of these findings, the Victorian Government cannot support the Commission's recommendation that workplace agreement terms that restrict the engagement of independent contractors, labour hire and casual workers, or regulate the terms of their engagement, should constitute unlawful terms under the FW Act (recommendation 20.1). The Victorian Government believes that such arrangements are best left to the parties and it should not be the role of the legislature to unduly interfere with such workplace content and arrangements.

¹⁴ Paragraph 6.25 Victorian Government submission April 2015

¹⁵ Page 720 draft report

¹⁶ Paragraph 6.27 Victorian Government submission April 2015

- 7.5. The Victorian Government will hold an inquiry into labour hire, insecure work and sham contracting, commencing in the second half of 2015. Professor Anthony Forsyth of the RMIT University Graduate School of Business and Law will chair the inquiry. The inquiry has been established in response to evidence that labour hire arrangements are being used to circumvent normal workplace relations safeguards and other legislative obligations.
- 7.6. The Victorian Government does not support one of the few remaining safeguards against labour hire worker exploitation being made unlawful as content for an enterprise agreement.

8. Exploitation of migrant workers

- 8.1. The Victorian Government agrees with the Commission's statement at page 4 of its report that:
- Migrant workers are more vulnerable to exploitation than are other employees, and this is especially true for illegally working migrants. This may require more proportional penalties to deter exploitation and further resourcing of the Fair Work Ombudsman to detect it.*
- 8.2. The Victorian Government agrees that higher penalties should be considered as a way of deterring exploitative behaviour by some employers. The Victorian Government's inquiry into labour hire will include an examination of the working visa program and other conduits for overseas workers. The Victorian Government believes that measures other than increasing fines may also be needed to help address unconscionable behaviour, for example, a formal registration scheme for labour hire operators.
- 8.3. Whilst supporting extra enforcement resourcing, the Victorian Government rejects the suggestion that 'fines' recovered from employers or labour hire operators found to have exploited migrant workers should be returned to the Federal Government. The primary aim should also be to address the wrong done to the person found to have been denied their rights, and the law should ensure that the first priority is that any unpaid employment entitlements are paid.
- 8.4. As noted above the Victorian Government does not support recommendation 20.1 that it be unlawful for workplace agreements to seek to restrict the use of labour hire workers. Workplace agreements, which are agreed to by employers and employees, can be useful in providing oversight to ensure that vulnerable workers are not exploited.

9. The minimum wage

- 9.1. The Victorian Government is concerned that recommendations 8.1 and 9.1 of the report, along with the Commission's recommendation that a new Minimum Standards Division be created within the FWC, will see future minimum wage increases slowed, regardless of existing economic circumstances. This would further exacerbate the growing disparity in wages outcomes between award and enterprise bargaining. It would also exacerbate wages inequality, as commented on by the OECD.¹⁷
- 9.2. In its initial submission, the Victorian Government argued that modest increases in minimum wages have a negligible effect on employment, and that businesses are able to absorb modest increases. The submission argued that there was insufficient evidence to support the view that low paid jobs are necessarily a 'stepping-stone' to better paid employment, and pointed out that many workers get trapped in low paid jobs, or are caught in what is known as the 'no-pay, then low-pay' cycle.¹⁸
- 9.3. Consistent with this, the Victorian Government supported an increase in minimum wage rates in this year's Annual Wage Review to protect vulnerable and low paid workers.
- 9.4. In response to recommendation 3.1, the Victorian Government believes the FWC is best qualified to assess future increases in the minimum wage. There is no evidence to support the contention that increases in the minimum wage should be slowed overall. Changes in the minimum wage are assessed annually, on the evidence and economic data available at the time. This process is fair and rational and should continue.
- 9.5. Recommendations 8.1 and 9.1 appear to allow for varied pay increases for some workers, something that some employer associations have long argued for, but which has been consistently rejected by the FWC and its predecessors. The Victorian Government notes that the FWC is currently restrained by the objects of the FW Act, and the FW Act provision that minimum wages be reviewed annually. Legislative change would be needed to facilitate these recommendations, something that the Victorian Government could not support. Granting minimum wage increases to some award-reliant employees, but not other vulnerable workers is unfair, and no evidence has been presented that would justify such a move.

¹⁷ OECD (2014) 'Income inequality' *OECD Factbook 2014: Economic, Environmental and Social Statistics*, OECD Publishing. Accessed from: <http://dx.doi.org/10.1787/factbook-2014-24-en>.

¹⁸ See paragraphs 2.19-2.40 Victorian Government submission April 2015

10. Enterprise bargaining and productivity

10.1. The Victorian Government agrees with the Commission's comments that:

Surmise aside, there is little robust evidence that the different variants of WR systems over the last 20 years have had detectable effects on measured economy wide productivity. This does not mean there are no effects, but simply that they apply at the enterprise and industry level and are hard to identify in the aggregate economy given the myriad of other factors shaping productivity.¹⁹

10.2. The Victorian Government also agrees with the Commission's Draft Finding 15.1 that:

The case for imposing statutory requirements for employers and employees to discuss productivity improvements as part of the bargaining process, or for the mandatory inclusion of productivity clauses in agreements, is not strong. Voluntary agreements that promote productivity are highly desirable, but such agreements, and the gains they deliver, should arise from better management, not from a regulated requirement, which is likely to have perverse effects.

10.3. The Victorian Government reiterates the arguments made in its initial submission at paragraphs 4.3 to 4.6.

10.4. The Victorian Government does not support recommendation 15.7, which would allow employers to make a unilateral greenfields agreement should they be unable to reach agreement with the union after three months. The Commission recommends that such agreements have a 12 month nominal expiry date, but in practice such an agreement would continue until replaced with a new agreement or terminated by the parties or the FWC. This could leave employees disadvantaged, particularly given the Commission's recommendation that the BOOT test be replaced with an inferior test.

11. The future of the Fair Work Commission

11.1. The Commission makes a number of recommendations on the structure of the FWC.

11.2. Whilst the Victorian Government agrees that the FWC should be better resourced, allowing it to conduct more of its own research, it rejects the other recommendations made by the Commission on the composition of the FWC.

11.3. The Victorian Government does not support splitting the FWC into two streams (recommendations 3.1 and 3.4). The Commission has not demonstrated that recruiting Commission members who have experience and expertise in the field of workplace relations adversely affects the quality or justice of the tribunal's determinations. The Victorian Government also believes it is important for the FWC to continue to place significant weight on the submissions of the parties, not less weight, as recommended by the Commission.

¹⁹ Page 9 Draft report

12. Gender equity

- 12.1. The Victorian Government wishes to express its disappointment that the Commission did not address any gender-related issues in its report, despite the fact that it is over 900 pages long. The gender pay gap, and gender equity at the workplace more broadly, which show no signs of improvement, are serious matters that should be considered. The Commission cannot ignore the economic benefits that gender equality provides to individual businesses and industries. It is the Victorian Government's submission that the Commission should properly turn its mind to this issue in its final report.
- 12.2. The Victorian Government notes that many of the Commission's recommendations will impact disproportionately on female workers, for example, the reduction in Sunday penalty rates and slowing increases to the minimum wage.

13. Conclusion

- 13.1. In summary, the Victorian Government does not support the Commission's recommendations to:
- reduce Sunday penalty rates to Saturday rates in some sectors;
 - 'water down' the current 'BOOT';
 - introduce 'enterprise contracts';
 - place further limitations on unfair dismissal remedies;
 - place further limitations on the content of workplace agreements, namely, the proposed prohibition of clauses relating to labour hire;
 - increase limits on the ability of workers to take protected industrial action;
 - increase the power of employers to take punitive action against workers, particularly in situations where those employees are not actually engaged in industrial action;
 - alter the governance and membership of the FWC by splitting it into two streams; and
 - quarantine some workers from minimum wage increases.
- 13.2. The Victorian Government submits that the Commission has not made out a convincing case for the far-reaching recommendations it has made. In fact, the Commission's findings support the maintenance of the status-quo in many areas.
- 13.3. The Victorian Government believes in the value and dignity of work, and acknowledges the efforts of Victorians working in both the public and private sectors. The Victorian Government stands for fairness in the workplace: employers, employees and their unions should work together in the interests of economic prosperity for all Victorians and a fair, comprehensive safety net of wages and conditions is essential to that aim.

Appendix: Impact of proposed penalty rate changes on retail and food & beverage employees

Table 1: Retail and hospitality employees' earnings: ordinary hours, overtime/evening work, Saturday penalty, Sunday as Saturday rate (2014)

Day	Retail employee (Level 1)		Food and beverage employee (Level 1)	
	Roster/rate	Earnings	Roster/rate	Earnings
Wednesday	7.6 hours x \$18.52	\$140.75	7.6 hours x \$17.35	\$131.86
Thursday	(7.6 hours x \$18.52) + (3 hours x \$27.79)	\$224.12	(7.6 hours x \$17.35) + (3 x \$19.32)	\$189.82
Friday	7.6 hours x \$18.52	\$140.75	7.6 hours x \$17.35	\$131.86
Saturday	7.6 hours x \$23.15	\$175.94	7.6 hours x \$21.69	\$164.84
Sunday	7.6 hours x \$23.15 (Saturday rate)	\$175.94	7.6 hours x \$21.69 (Saturday rate)	\$164.84
Total gross weekly earnings:		\$857.50		\$783.22
Dollar difference		\$105.64		\$32.99
Percentage difference		10.97%		4.05%

Table 2: Retail and hospitality employees' earnings: ordinary hours, overtime/evening work, Saturday and Sunday penalty rates (2014)

Day	Retail employee (Level 1)		Food and beverage employee (Level 1)	
	Roster/rate	Earnings	Roster/rate	Earnings
Wednesday	7.6 hours x \$18.52	\$140.75	7.6 hours x \$17.35	\$131.86
Thursday	(7.6 hours x \$18.52) + (3 hours x \$27.79)	\$224.12	(7.6 hours x \$17.35) + (3 hours x \$19.32)	\$189.82
Friday	7.6 hours x \$18.52	\$140.75	7.6 hours x \$17.35	\$131.86
Saturday	7.6 hours x \$23.15	\$175.94	7.6 hours x \$21.69	\$164.84
Sunday	7.6 hours x \$37.05	\$281.58	7.6 hours x \$26.03	\$197.83
Total gross weekly earnings:		\$963.14		\$816.21

Source: FWO (2014) *Pay Guide for the General Retail Industry Award 2010*, July 2014; FWO (2014) *Pay Guide for the Restaurant Industry Award 2010*, July 2014.