

The voice of Australia's leading retailers



Submission to the Productivity Commission Inquiry into the Workplace Relations Framework

**Australian National
Retailers Association**

The voice of Australia's leading retailers

Suite 901, 3 Spring Street

Sydney NSW 2000

P (02) 8249 4520 | www.anra.com.au

About ANRA

The Australian National Retailers' Association (ANRA) represents Members that lead the retail industry delivering to customers across all types of retail goods and services. They are leading employers who contribute to local communities and regional development and strongly interrelate with other Australian industries.

The current members of ANRA are:

Best & Less	Harvey Norman Homewares Electrical
Bunnings	Just Group Fashion Stationery
The Co-op	Luxottica Optometry Fashion Budget Eyewear
Coles Group Supermarkets Convenience Liquor	Petbarn
Costco	Super Retail Group Auto Sports Recreation
David Jones	Woolworths Supermarkets Liquor General Merchandise Home Improvement
Dymocks	
Forty Winks	7-Eleven

Retail is Australia's largest private sector employer, accounting for around 1.25 million jobs. The members of ANRA employ more than 500,000 people or 41 per cent of the retail workforce and 4.4 per cent of the Australian workforce, with approximately 100,000 of these employees located in regional and rural Australia. The sector supports a further 500,000 jobs in associated industries including agriculture, manufacturing, transport & logistics and construction & property maintenance.

In terms of industry value added, the retail trade industry contributed around 4.44 per cent to the national economy in 2013 to 2014. Combined turnover reached more than \$270 billion across the retail industry in 2013 to 2014, which is equivalent to 17.2 per cent of Australia's nominal Gross Domestic Product (GDP).

ANRA established in 2006 following a desire by the founding member companies to contribute, at an industry level, to the development and support of public policy that would boost productivity, support employment growth, foster a competitive environment and ultimately, make the sector stronger.

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Abbreviations

ABS	Australian Bureau of Statistics
AFL	Australian Football League
ANRA	Australian National Retailers Association
BOOT	Better Off Overall Test
CCA	Competition and Consumer Act 2010
EBA	Enterprise Bargaining Agreement
FWC	Fair Work Commission
FWO	Fair Work Ombudsman
FW Act	Fair Work Act 2009
GRIA 2010	General Retail Industry Award 2010
NDT	No Disadvantage Test
NES	National Employment Standards
OECD	Organisation for Economic Cooperation and Development
WR	Workplace Relations

Executive Summary

At a time of sluggish productivity growth and rising unemployment, particularly youth unemployment, the timing of the Productivity Commission in making recommendations to Government for a workplace relations framework – beyond the Fair Work Act 2009 and supporting institutions – that meets the current and future needs of Australian workers and their employers is welcomed by Australia's top retailers.

Retail's role as the largest private sector employer in the country means the sector is acutely aware of trends and changes in labour productivity. Estimates of labour productivity growth (on a quality adjusted basis) across retail and a 12 industry sector indicator show productivity recovered slightly from 2010-11 onwards, but on balance these indicators suggest that labour productivity has been much weaker over the past decade in comparison to the 1990s when labour productivity grew strongly as the Australian economy came out of recession and the benefits of major labour market reforms flowed throughout the economy.

Labour market reform is again needed.

Australia's future workplace relations framework should:

- reinvigorate Australia's productivity growth performance;
- maintain the living standards of low income households;
- protect the workplace conditions and appropriate treatment of Australian workers;
- encourage employers to grow their businesses and create jobs; and
- remain flexible enough to continue to adapt to demographic and economic change.

As Australia's largest private sector employer of 1.25 million workers and a contributor of around 4.5 per cent of the national economy, retailers would welcome the development of a workplace relations framework that enables its sizeable workforce to grow further and play an even greater role in the lives of all Australians.

More than ever we are working in a global 24/7 economy but our industrial relations framework is based on a working week set over sixty years ago¹. The growth of online retailing and its impact on jobs is already being felt and online shopping is most popular when bricks and mortar stores are closed.

Our workplace relations framework must deliver greater flexibility in what is a 24/7 global economy; what constitutes unsociable hours needs to be revisited; and the level of penalty rates needs to strike the right balance between meeting rightful reward for the employee and providing appropriate flexibility to meet consumer demand.

¹ The Commonwealth Arbitration Court gave approval of the 40-hour five-day working week nationally beginning on 1 January 1948.

The Productivity Commission's five issues paper set out a structure for its consideration. This submission attempts to respond to the issues regarding safety nets; the bargaining framework; and employee protections.

The interplay between Australia's minimum pay and workplace condition settings needs to be considered alongside the impact of the tax and benefit system when assessing the appropriate policy settings for maintaining the living standards of Australia's low income households. These 'safety nets' should be designed with due consideration for expected changes in particular sectors or the broader economy – particularly the likely impact on youth employment and/or total employment more generally.

There is also a strong rationale for the simplification and standardisation of both public holiday and long service leave provisions, which should be embodied in the National Employment Standards – rather than the currently inconsistent approach taken by the states and territories.

Literal application of the Better Off Overall Test (BOOT) is by far the biggest impediment to developing agreements that are more suited to the needs of employees, their employers and that reflect the requirements of employers' customers – which must be addressed if a business expects to survive. Award penalty rate structures make application of the BOOT to enterprise agreements in the retail sector particularly troublesome.

The unfair dismissal and general protections provisions of the Fair Work Act 2009 go well beyond protecting the basic rights of employees and are overly complex – generating unnecessary cost and uncertainty for business.

There will likely always be a natural tension between safeguarding the legitimate interests of employees and employee representatives against allowing employers to pursue their commercial interests in a way they deem appropriate. Balance must be restored to the obligations placed on business to facilitate employee representatives' participation in bargaining and the terms that can be included in agreements outside matters directly relevant to the pay and conditions of employees.

Tables 1-4 list ANRA recommendations for this review.

Table 1: List of Recommendations on Safety Nets (Issues Paper 2)

No.	Recommendation	Page
1	Annual minimum wage decisions should have greater scope to consider specific sector conditions.	12
2	Subsection 61(1) of the FW Act should be amended to allow bargaining over terms within the NES.	15
3	<p>ANRA believes that a single consistent national public holiday regime should, as far as possible, be achieved by the FW Act itself clearly specifying the days which are to be observed as public holidays without reference to inconsistent and ambiguous State and Territory provisions. This should be done by the FW Act:</p> <p>(1) stating there are 11 days to be observed as public holidays in the NES;</p> <p>(2) clearly stating the circumstances in which the designated public holidays are to be substituted when they fall on a weekend without reference to State or Territory laws (either generally or by reference to substitution for employees who work, or who are rostered to work, on the following Monday or Tuesday but not the actual day);</p> <p>(3) providing that "additional holidays" designated under a State or Territory law are not recognised under the FW Act when they are designated in respect of an occasion already designated under the FW Act (or when they are designated on either an actual or substitute holiday already designated under the FW Act); and</p> <p>(4) specifically permitting industrial agreements to substitute public holidays otherwise designated under the FW Act provided the same total number of public holidays are maintained and allow for the operation of arrangements relating to public holidays agreed to by the respective parties to a federal Enterprise Agreement.</p>	16

Table 2: List of Recommendations on Bargaining Processes (Issues Paper 3)

No.	Recommendation	Page
4	The FW Act should specify that a party must nominate to be part of the negotiation process within 21 days after the last notice is issued under subsection 173(1).	23
5	The BOOT is revised to make it clear that the test is to be applied on an overall or collective basis, having regard to whether the agreement benefits the majority of employees, rather than being applied on an individual basis.	24
6	The BOOT should accommodate consideration of non-monetary benefit.	26

Table 3: List of Recommendations on Employee Protections (Issues Paper 4)

No.	Recommendation	Page
7	Parties to conciliation hearings should have the option to request a face-to-face meeting.	27
8	The Small Business Fair Dismissal Code should apply to all businesses with fewer than 100 employees.	29
9	Remove the reverse Onus of the Proof in Subsection 361(1) of the FW Act.	29
10	The FW Act should not provide privileges over and above protections against adverse action granted to all employees.	29

Table 4: List of Recommendations on Other Workplace Relations Issues (Issues Paper 5)

No.	Recommendation	Page
11	The Federal Government amends the Competition and Consumer Act to reflect Draft Recommendation 37 of the Competition Policy Review Final Report.	30
12	The Fair Work Amendment Bill 2014 is passed.	31
13	The FW Act should be amended to re-insert provisions similar to sections 585-587 of the WR Act (as in force immediately prior to the introduction of the FW Act) whereby a transferring instrument ceases to have effect on the earlier of: (a) the expiry of 12 months following transmission; or (b) the nominal expiry date of the transferring instrument (provided that an existing industrial agreement within its nominal; expiry date would then operate to cover the transferring employees); or (c) the introduction of a new enterprise agreement, following the transfer date, covering the transferring employees and meeting the BOOT (whether or not the transferring instrument has yet reached its nominal expiry date).	32
14	The FW Act should provide guidance on the nature of work that is 'the same, or substantially the same' for transferring work provisions contained in Paragraph 311(1)(c).	33
15	The FW Act should define the term 'outsource' for the purposes of defining connection between old and new employers in Subsections 311(4) and 311(5).	33
16	The Federal Government consults on the structure of minimum long service leave provisions to be provided for in the NES. This could include (but is not an exhaustive list): • Qualification after 10 years of continuous service; • For a total of two months (8.67 weeks) leave, increasing by 0.87 weeks for each additional year of service (so that a person qualifies for 13 weeks of long service leave after 15 years continuous service); and • A pro-rata entitlement period commences after 7 years of continuous service whenever: - The employee retires or is forced to terminate employment due to illness or any other pressing necessity; or - The employer terminates for any reason apart from serious and wilful misconduct.	34

1. Retail in Context

Retail is a pillar for employment and a major channel through which activity spreads across the economy. This section outlines the importance of retail to the economy and the business community in particular.

1.1 Retail contribution to Growth and Jobs

The retail sector directly accounted for more than \$70 billion of activity or 4.5 per cent of the national economy – in value added terms – in 2013/14, a share of total industry value-added twice that of agriculture, forestry and fishing.

The most positive contribution retail makes to Australia, however, is not necessarily measured in terms of dollars – it's in how many jobs retail creates and supports. Retail is currently responsible for directly employing 1.25 million Australians; providing career opportunities for customer service professionals, butchers, bakers, pharmacists, hairdressers, mechanics, financial analysts, information technology and communications specialists, human resources managers and more. Indeed, the retail sector is Australia's largest private sector employer, accounting for 11 per cent of Australia's workforce.² In addition, retail supports approximately 500,000 jobs in other sectors across the economy, including food manufacturing, agriculture, transport and construction.³

Around half of retail jobs (605,000) are part-time roles which allow flexibility for a modern workforce; particularly primary care givers and young people wanting to combine family and/or study commitments with employment.⁴ Retail is also the second largest employer of women – over 690,000 women work in the sector, with around 420,000 working part-time.⁵

Retail also has one of the youngest age profiles of any workforce, with around one third of retail staff aged 24 years or younger.⁶

ANRA members' commitment to their customers extends to the diversity of the workforce, ensuring that the retail team reflects the customer. Our members have a range of initiatives to increase diversity in the workplace, particularly mature age workers, indigenous people and people with a disability.

Retail employees earned almost \$40 billion in pre-tax wages in 2012/13 (latest available), much of which is then re-spent through the Australian economy, supporting other sectors and jobs.⁷

² ABS (2014), 6291.0.55.003 Table 5 – Employed persons by State and Industry.

³ ANRA (2011) *Retail is jobs*

⁴ 6291.0.55.003 - *Labour Force, Australia, Detailed, Quarterly*,

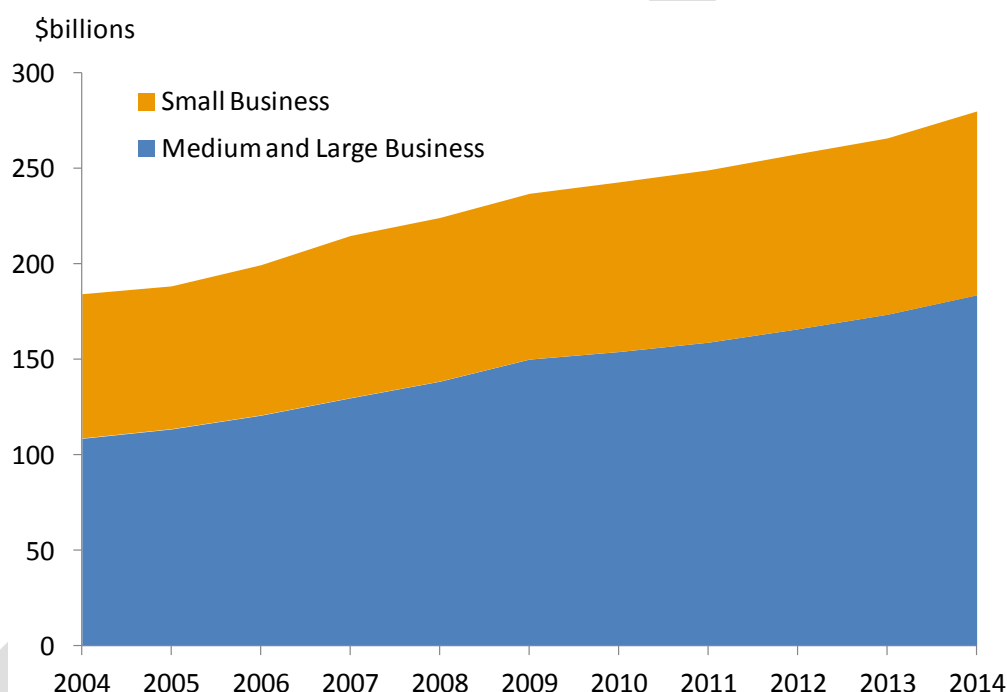
⁵ 6291.0.55.003 - *Labour Force, Australia, Detailed, Quarterly*,

⁶ 6291.0.55.003 - *Labour Force, Australia, Detailed, Quarterly*,

1.2 Retail is over 125,000 businesses

ANRA represents Australia's top retailers including listed companies, private companies, and franchises. Figure 1 below shows that approximately two-thirds of all sales annually are transacted across 5,000 medium to large retail enterprises, including franchise operations. The remaining one-third of retail sales occurs across a further 122,000 small businesses. These 127,000 retail operators combined represent about six per cent of all businesses across Australia.⁸

Figure 1: Retail turnover by business size (2004 to 2014)



Source: ABS (March 2015), 8501.0 Table 14 – Retail Turnover, Completely Enumerated (Large) and Sample (Small), By Industry Group.

1.3 Labour productivity in Retail

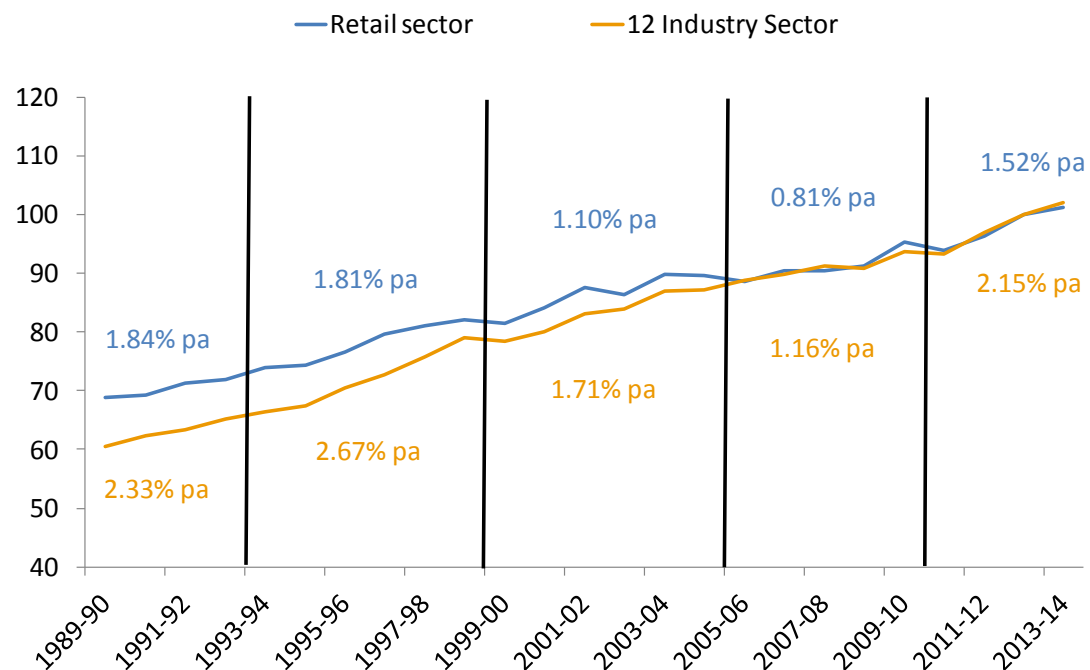
Retail's role as the largest private sector employer in the country means the sector is acutely aware of trends and changes in labour productivity. Figure 2 below shows that estimates of labour productivity growth (on a quality adjusted basis) across retail and a 12 industry sector indicator recovered slightly from 2010-11 onwards, but on balance these indicators suggest that labour productivity has been much weaker over the past decade in comparison to the 1990s

⁷ 8155.0 Australian Industry, 2012/13

⁸ as at June 30, 2013 in ABS (2014), 81650 – Counts of Australian Businesses.

when labour productivity grew strongly as the Australian economy came out of recession and the benefits of major labour market reforms flowed throughout the economy.

Figure 2: Labour Productivity Indexes and Labour Productivity Growth (1989-90 to 2013-14)



Source: ABS (December 2014), *Estimates of Multifactor Productivity, Australia – Table 6*.
Average rates of productivity growth are displayed during those periods.

2. Safety Nets (Issues Paper 2)

Pay and employment conditions are central to the contract that employers and employees make. A review of the safety net provided by annual wage decisions and minimum standards of employment is important to ensure these particular aspects of Australia's workplace relations framework are improved to promote workplace productivity and economic activity, without compromising the work and collective living standards of the people covered by them.

2.1 Minimum Wages and the Tax System

Role of Minimum Wages

ANRA has supported the use of minimum wage settings as one of several policy tools that can be used for maintaining the living standards of award dependent workers and their families. There are approximately 370,000 (or 30% of the retail workforce) award dependent workers – mostly covered by the General Retail Industry Award 2010 (GRIA 2010) – across the retail sector alone.⁹

However, ANRA believes the tax and transfer system (tax system) is better suited to acting as a safeguard for household – which might include both workers and non-workers – living standards. ANRA agrees with the OECD (2007) view in this respect:¹⁰

'raising minimum wages might lift labour costs, but not necessarily boost net incomes as much as they should. Policymakers may achieve more impact by improving disposable earnings via changes in the tax and benefit system.'

By assessing total household resources (income and assets) policymakers can expect to have a significant influence over the ultimate living standards of Australian households.

The role and effect of changes in the minimum wage during economic and/or demographic developments are largely outweighed by the impacts of the tax system on households. That is, while minimum wages might be set to encourage greater employment during times of weaker economic activity, the tax system should remain the fundamental mechanism by which Australian households' living standards are largely determined.

⁹ ANRA calculations based on ABS (May 2014), *Employee Earnings and Hours, Table 4* and ABS (November 2014), *6291.0.55.003 Labour Force, Australia, Detailed, Quarterly, Table 5*.

¹⁰ Martin & Immervoll (2007), *The minimum wage: making it pay*.

'In work' benefits

ANRA regards in-work benefits (such as the federal childcare subsidy, employer subsidies for hiring the long-term unemployed etc.) as positive features of the tax system. Providing incentives for workers to join and/or stay in the workforce (whether a benefit is directly paid to the worker or an employment subsidy paid to an employer) should:

- act to reduce total social welfare costs for the tax system;
- support the ongoing mental health and wellbeing of employees¹¹; and
- avoid opportunity costs associated with retraining and replacing staff that might be forced to leave because non-working welfare payments offer higher net incomes.

2.2 Fair Work Commission Annual Wage Decisions

Sectoral considerations

FWC annual wage decisions should give greater consideration to sector specific conditions. ANRA understands the FW Act requires annual minimum wage setting decisions to be based on the overall performance of the economy, rather than for a specific sector. However, subsection 287(2) of the FW Act permits the setting of different wages or loadings in exceptional circumstances.

Meeting the FWC's interpretation of 'exceptional circumstances' appears to be a major hurdle to pass. ANRA repeatedly argued for the FWC to give special consideration to the retail sector in annual wage decisions from 2011 through to 2013 because of the historically poor conditions facing retailers following the global financial crisis; but this was ignored on each occasion.¹²

ANRA members do not support regional variances in annual wage decisions in the absence of 'exceptional circumstances' that justify doing so – for example, in response to a natural disaster. Some enterprises develop state-specific agreements because of a combination of factors, such as the employee association covering their employees or the structure of the business within that state, etc. However, ANRA believes it is only appropriate to distinguish between two sets of employees on the basis of a geographic boundary if that boundary is relevant to any 'exceptional circumstances' that may have arisen. For example, the state boundary may define an area that has been impacted by flooding and is therefore a relevant consideration.

Recommendation 1: Annual minimum wage decisions should have greater scope to consider sector specific conditions.

¹¹ See, for example Goldsmith & Diette (2012), *Exploring the link between unemployment and mental health outcomes*.

¹² For example, retail turnover grew at 2.6% over the year to December 2011, or less than half the historical average of 6.1%.

Special wage rates

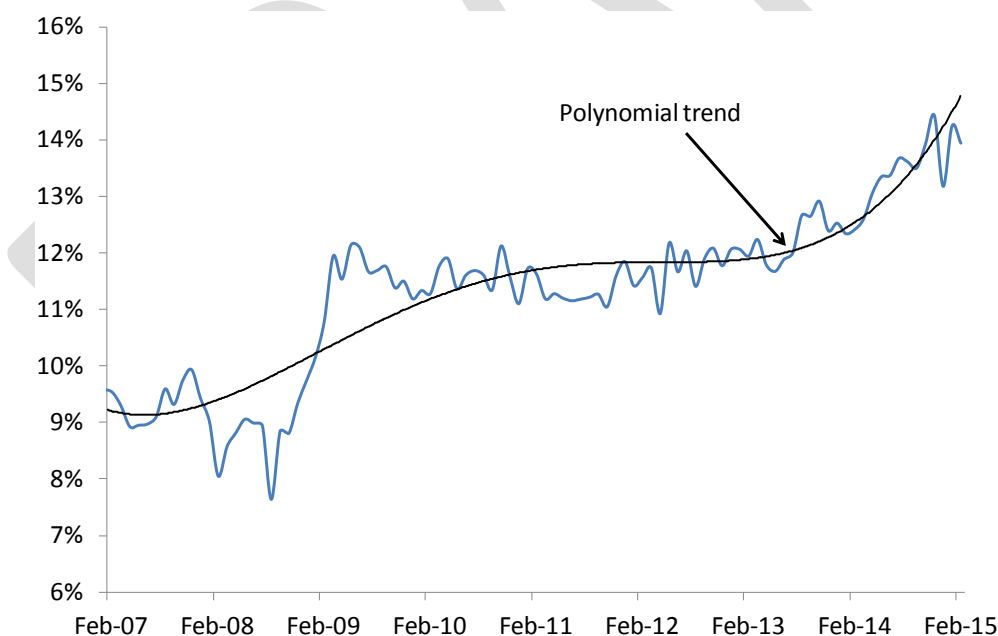
The special wage rates that apply to juniors, trainees and apprentices are features of industrial instruments that have developed over many years, with valid reason – to offset the likely lower productivity (and therefore employability) of a younger employee in comparison to one with more experience, skills and training etc.¹³

ANRA sees no reason to dispute the view of the OECD:¹⁴

On balance, the evidence shows that an appropriately-set minimum wage need not have large negative effects on job prospects, especially if wage floors are properly differentiated (e.g. lower rates for young workers) and non-wage labour costs are kept in check.

The recent experience of Australia suggests the 'wage floors' for younger workers might be an area policymakers investigate more closely in addressing the stubbornly high youth unemployment rate (for 15 to 24 year olds); Figure 3 below shows that youth unemployment has drifted upwards to around the 14% level over the past six months – its highest in a decade. There are currently just under 300,000 unemployed young workers across Australia.

Figure 3: Youth (15 to 24 year old) unemployment rates (Feb 2006 to Feb 2015)



Source: ABS (March 2015), *Labour Force Status by Sex – Persons aged 15 to 24 years*.

¹³ Productivity Commission (2015), *Workplace Relations Framework: Safety Nets - Issues Paper 2*, p.3

¹⁴ Martin & Immervoll (2007), *The minimum wage: Making it pay*.

Annual wage decision transmission effects

The FWC annual wage decision plays a pivotal role in determining ongoing labour costs for many industries, including retail. Retail has a large number of award dependent employees (approximately 370,000, or 30% of the retail workforce) and employees that are engaged through collective agreements (approximately 540,000, or 43% of the retail workforce), mostly negotiated directly with reference to the GRIA 2010.¹⁵

Retailers' EBAs are typically negotiated to cover a period of between three to four years in recognition of the time and resources it takes to negotiate and approve enterprise agreements. The cumulative effect of award decisions in the years prior to negotiation of an EBA are likely to have a direct influence on the expectations of both employee representatives and employers when agreeing on future annual changes in the rates of remuneration.

From an industry perspective, the negotiation of EBAs appears to have fallen into a relatively staggered pattern, so there is somewhat of a smoothing effect with respect to the transmission of changes in the award to the rates of remuneration for those employees engaged through EBAs. That is, the 2012/13 and 2013/14 annual wage decisions are likely to have played a central role in setting expectations for enterprise agreement negotiations during the financial years of 2013/14 and now 2014/15 respectively.

2.3 National Employment Standards

NES and Bargaining

ANRA recognises the need for a minimum safety net provided by minimum wage decisions and the National Employment Standards (NES), including:

- limits on maximum weekly hours;
- requests for flexible working arrangements;
- Parental, carer's and compassionate leave provisions;
- Annual (and potentially long service) leave provisions; and
- Notice of termination and redundancy pay requirements, amongst others.

ANRA believes agreement making could be improved by allowing for negotiation of terms within the NES. Subsection 61(1) of the FW Act effectively prevents negotiation of terms within the NES, even if employees (or their representatives) are willing to trade-off some of the aforementioned standards for additional benefits, such as higher base rates of pay or additional leave provisions.

¹⁵ ANRA calculations based on ABS (May 2014), *Employee Earnings and Hours, Table 4* and ABS (November 2014), *6291.0.55.003 Labour Force, Australia, Detailed, Quarterly, Table 5*.

By not allowing for negotiation of these terms, the NES is in effect limiting the ability of employees and employers to bargain.

For example, a group of employees may wish to reduce the number of paid leave days for jury service from 10 (in the NES) to five, in exchange for an additional unpaid parental leave allowance. Removing the non-negotiable restriction on terms within the NES would allow for bargaining outcomes to better reflect the needs of employers and wishes of employees.

Recommendation 2: Subsection 61(1) of the FW Act should be amended to allow bargaining over terms within the NES.

Public Holidays

Table 5 below shows the number of public holidays for the states and territories over 2015 and 2016. The range of days varies from 10 to 13 in 2015, to between 11 and 12 in 2016. The change in range is due to the inconsistency in approaches of the respective states and territories towards the designation of public holidays and also additional or substitute public holidays when the actual day falls on a weekend. For example, WA is currently the only state or territory that awards an additional public holiday on the following Monday whenever ANZAC Day falls on a weekend.

Table 5: Public Holidays across Australian States and Territories (2015 and 2016)

	ACT	NSW	VIC	TAS	NT	QLD	SA	WA
2015	12	12	13	10	11	11	12*	12
2016	12	12	12#	11	11	11	12*	11

#Assumes VIC Government makes Easter Sunday a public holiday on a permanent basis, but not the proposed AFL Grand Final Eve public holiday.

*Equates two part-day public holidays as the equivalent of one full public holiday.

Certain arrangements to ensure a higher level of consistency were endorsed by the Australian Federation Meeting of Premiers held on 12 September 2008; but decisions in SA (the creation of two part-day public holidays on Christmas Eve and New Year's Eve) and potentially VIC (joining NSW as the only other state to designate Easter Sunday as a Public Holiday and by considering making the Friday before an AFL Grand Final Day a Public Holiday) are examples of states continuing to diverge on this matter.

ANRA has raised three specific difficulties within the context of previous reviews over the application of the public holiday provisions in Division 11 of Chapter 2 of the FW Act – see Appendix 1 for full details. These difficulties have arisen for a variety of reasons:

- inconsistent approaches taken by the states and territories for the designation of public holidays, additional or substitute public holidays where an actual holiday falls on a weekend (as highlighted above);
- ambiguity over whether the FW Act actually "picks up" additional public holidays designated under a State or Territory law in respect of an occasion already designated as a public holiday under paragraph 115(1)(a) of the FW Act; and
- claims for "double dipping" in respect of the same holiday given the alternative approach to public holidays traditionally taken under most major industrial agreements in the retail industry.

Such was the veracity of these difficulties that the independent expert Fair Work Act review panel recommended in 2012 that:¹⁶

'the Government consider limiting the number of public holidays under the NES on which penalty rates are payable to a nationally consistent number of 11.'

Recommendation 3: ANRA believes that a single consistent national public holiday regime should, as far as possible, be achieved by the FW Act itself clearly specifying the days which are to be observed as public holidays without reference to inconsistent and ambiguous State and Territory provisions. This should be done by the FW Act:

- (1) stating there are 11 days to be observed as public holidays in the NES;
- (2) clearly stating the circumstances in which the designated public holidays are to be substituted when they fall on a weekend without reference to State or Territory laws (either generally or by reference to substitution for employees who work, or who are rostered to work, on the following Monday or Tuesday but not the actual day);
- (3) providing that "additional holidays" designated under a State or Territory law are not recognised under the FW Act when they are designated in respect of an occasion already designated under the FW Act (or when they are designated on either an actual or substitute holiday already designated under the FW Act); and
- (4) specifically permitting industrial agreements to substitute public holidays otherwise designated under the FW Act provided the same total number of public holidays are maintained and allow for the operation of arrangements relating to public holidays agreed to by the respective parties to a federal Enterprise Agreement.

¹⁶ McCallum et al. (2012), *Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation*, Recommendation 8.

2.4 Award System and Flexibility

Simplification

The modern award most relevant to ANRA and its members, the GRIA 2010, does not appear to be overly complicated considering the terms and conditions it covers. Unnecessary duplication is typically avoided within the GRIA 2010 by direct reference to the applicable instrument rather than restating relevant terms. For example, clause 32.1 of the GRIA 2010 states:

‘Annual leave is provided for in the NES.’

ANRA supports the simplification of awards in principle, because streamlining modern awards would likely:

- make complying with modern awards more easily understood and less costly for business;
- improve the bargaining process by lowering the number of terms and conditions that must be considered and agreed to; and
- make the negotiation of EBA terms outside of the award on their individual merits, with reference only to the suitability for the workplace, rather than because of a benchmark established by the GRIA 2010 for the entire retail industry.

Consolidation

In terms of reducing the number of awards, there may be opportunities for award consolidation across other industries; but given retail is responsible for approximately one in six award dependent employees, there does not appear to be a strong rationale for attempting to combine the GRIA 2010 with another award.¹⁷

Adaptation and review

It is important for industrial instruments to stay relevant and adapt to modern expectations and needs. However, it is more important that annual wage decisions consider sector specific conditions first than it would be to ask the FWC to amend the structure of awards to accommodate changing economic circumstances.

From ANRA's perspective, the inaugural four yearly review of modern awards has so far been an unnecessarily lengthy and drawn out process. Consolidating the number of awards would likely have the benefit of reducing the amount of time taken (and cost) to conduct these types of reviews.

¹⁷ ABS (May 2014), *Employee Earnings and Hours*, Table 4.

2.5 Penalty Rates

Determination

The FWC is the most appropriate body for establishing the conditions of awards, including penalty rates.

ANRA is satisfied this will remain the case so long as each panel appointed to reviewing the conditions of an award is relatively balanced in terms of its representation by members with backgrounds from, or with clear views that:

- support the interests of employee stakeholder groups;
- support the interests of employer stakeholder groups; and
- provide an independent expert understanding of the economic impact of potential decisions.

It is ANRA's hope that the current review of modern awards by the FWC pays due regard to modern attitudes of employees, the demands of customers and the potential long term impacts (each are discussed in turn for the remainder of this subsection) of not structuring the GRIA 2010's penalty rate provisions to reflect the modern Australian economy.

Employees Willingness to Work

There is valid debate over the merits of providing additional incentives for people to work beyond the standard base rate of pay during purported 'anti-social' or unpredictable hours – particularly when the employee has a preference for doing so.

The payment of additional incentives to employees that prefer to work during evenings or on weekends around other commitments throughout the week – such as tertiary study, family care commitments etc. – is analogous to paying an 'in-work' benefit to someone that is willing and able to work for the initially offered base rate of pay. That is, an in-work benefit might be paid to a person that is happy to work for the initial non-subsidised wage, and so the additional or 'overpaid' benefit represents a 'deadweight cost'. Just as the Commission expressed concern over the deadweight costs of providing in-work benefits for those employees that are happy to work for the base rate of pay¹⁸, ANRA believes there could be an element of this with respect to the payment of penalty rates to people for working during purported 'anti-social' or unpredictable hours.

The retail sector has a significant number of employees (particularly within the group of 605,000 part-time employees across the sector) with a greater willingness and capacity to work during the purported anti-social hours of evenings, weekends and on public holidays.

¹⁸ Productivity Commission (2015), *Workplace Relations Framework: Safety Nets - Issues Paper 2*, p.8

It therefore stands to reason that some employees are likely to have offered to work for the base rates of pay offered to staff that work on weekdays during 'ordinary' hours – or indeed some staff may prefer to shift their work patterns towards weekends as household circumstances change over time.

Consumer preferences are bias towards evenings and weekends

It is a reasonable expectation for businesses to require employees to work during times when their customers require. Modern consumers are typically time-poor and this tends to result in evenings and weekends being heavier trading times for retailers than during more traditional white-collar working hours throughout Monday to Friday. In Victoria, where Sunday trading has been deregulated for some time, Sunday is now the second most valuable day of the week for supermarkets.¹⁹ Any other allocation of staff engagement is unlikely to be in the interests of customers and therefore not in the long term interests of the business or its employees.

This is a widely acknowledged fact; often recognised as a primary motivator for the deregulation of retail trading hours in major reviews, including:

- The Productivity Commission's (2011) inquiry into the Economic Structure and Performance of the Australian Retail Industry :²⁰
'consumers actually shift their shopping patterns towards the deregulated trading hours.'
- The Productivity Commission's (2014) research into the Relative Costs of Doing Business in Australia: Retail Trade:²¹
'Recent experience shows that relaxing retail trading restrictions has capitalised on latent consumer demand and allowed consumers to shop according to their preferences as determined by their work, leisure and family commitments.'
- The Competition Policy Review Final Report (2015):²²
'State and territory governments have deregulated retail trading hours to varying degrees over recent years. This has generally widened choices for consumers. Yet consumers continue to seek greater diversity in how and when they shop...'

If penalty rates were deregulated

The Commission has raised its interest about the potential impacts of deregulating the mechanisms for setting penalty rates.²³

¹⁹ *Response to Competition Review Issues Paper*, Woolworths June 2014, p.60

²⁰ Productivity Commission (2015), *Workplace Relations Framework: Safety Nets - Issues Paper 2*, p. 295

²¹ Productivity Commission (2015), *Workplace Relations Framework: Safety Nets - Issues Paper 2*, p. 103

²² Harper et al. (2015), p. 46

²³ Productivity Commission (2015), *Workplace Relations Framework: Safety Nets - Issues Paper 2*, p.16

ANRA is not in a position to accurately predict the likely changes in penalty rate structures if these were deregulated. However, feedback from members and our own surveying suggests a significant proportion of retail employees are willing to work in the evening, over weekends and on public holidays. This suggests the balance between retailers' demand for workers and employees' collective willingness to work could warrant penalty rates adjusting away from where they are currently set.

The extent of profitability and intensity of sales during certain times of the week would then become even more relevant to retailers' demand for labour; and therefore the relative scarcity of labour would play a greater role in determining penalty rate arrangements at the enterprise level.

Long term impacts

The regulation of penalty rates through modern awards effectively imposes a floor or minimum level on business labour costs, which are ultimately reflected in the final prices of goods and services. If this floor on labour costs is higher than it otherwise would have been under a pure market setting mechanism then consumers are likely to ultimately pay more over the long term.

As consumers demand more and more the availability of services in what is currently terms 'unsociable hours' for the means of determining wages, retailers will feel pressured to open doors to keep the customer in the long term but with high wages this will be born through to the customer.

3. The Bargaining Framework (Issues Paper 3)

Providing an appropriate framework for employers and employees (or their representatives) to bargain over the terms and conditions of employment should act to deliver patterns of employee engagement that are better suited to the workplace and should therefore drive greater productivity growth. It is critical this is achieved through ongoing reasonable behaviour on the part of employers, employees and their representatives.

3.1 Bargaining Processes

Pattern Bargaining

The co-ordinated commitment to specific terms and non-negotiable approach reflected by an industry-wide pattern agreement is likely to produce detrimental outcomes:

- Generic terms and conditions that are not negotiated to suit the individual circumstances of the enterprise, its employees and the enterprise's customers;
- No scope for competition between enterprises through the terms and conditions of their EBAs to become employers of choice; and
- Maintenance of terms that force the acquisition of services from specific providers and therefore reduce competition amongst service providers to the enterprise.

ANRA recognises that considerable time and effort can be saved by using established agreements as the template or basis for bargaining. This provides some guidance to both sides of the negotiation process of the likely conditions that might be considered and possibly agreed to. However, in no way should co-ordinated and widespread adherence to specific terms and conditions be permitted in attempts to hinder or prevent genuine negotiations.

Negotiations when employer has no direct control over workplace

The proposal for joint enterprise bargaining between employees and/or their representative(s), an employer (contracting supplier) and a third party (contracting customer,) would appear to unnecessarily complicate the agreement negotiation process. ANRA maintains the most appropriate negotiation over conditions of employment takes place between employees and/or their representatives and the employer.

Non-employee representatives may be tempted to use a tripartite negotiation process as a means for pseudo-commercial negotiations that should take place directly between the third-party (contracting customer) and employer (contracting supplier). For example, negotiations may become entrenched in liability for costs associated with worker meals, cleaning and toilet facilities etc.

With reference to the specific case of a labour hire firm supplying workers into a customer's worksite, it is also reasonable to expect that accepting the offer of employment with a labour hire

firm comes with a degree of acceptance that working conditions and location will likely vary over time and there is some allowance on behalf of the employee for minor differences between workplace conditions at the labour hire firm's customer worksites.

Importance of Good Faith Provisions

Historically ANRA members have typically negotiated applicable industrial agreements with a single association (that may have exclusive representation rights). For the most part, this process was conducted in good faith, in line with the objectives of fairness and flexibility and after a period of negotiation agreements were ultimately reached.

Under the current FW Act and with the decision in *SDA vs. NUW*²⁴, ANRA members have observed a greater number of representatives wishing to be part of negotiations – undermining some of the longstanding principles of demarcation.

Having a greater number of employee representatives 'at the bargaining table' with employers creates a significantly more complex negotiating environment.

In *SDA vs. NUW*, a Full Bench of FWA noted that competition between two unions at a workplace for membership, and efforts by those unions to recruit members, may result in the enterprise bargaining processes becoming more difficult with multiple bargaining representatives – but ultimately did not make a representation order.

ANRA members do not object to employees selecting a representative of their choosing; and remain mindful of the FWA decision in *SDA vs. NUW*. Ideally the employee representatives would reach a single position and agree on a lead negotiator before engaging in negotiations, but this does not occur in practice.

The good faith provisions in the FW Act have been critical in continuing the enterprise bargaining negotiation process once it becomes clear that some representatives are no longer willing to negotiate.

Time limit on entry into negotiations

The FW Act also currently permits employee representatives to nominate as a party to negotiations at any stage of negotiations. In ANRA's opinion the negotiation process would benefit from a time limit being imposed on parties wishing to nominate as part of the negotiation process. That is, the FW Act should specify that a party must nominate to be part of the negotiation process within 21 days after the last notice under subsection 173(1) (that deals with giving notice to employees of their representational rights during bargaining), which is the minimum window required by subsection 181(2) before an employer can request employees to approve a proposed enterprise agreement.

Such a measure would avoid negotiations progressing a good deal towards a final outcome, only to stall to accommodate the entry of an additional employee representative that may have quite different views to those already involved in negotiations.

²⁴ (2012) FWAFB 461

Recommendation 4: the FW Act should specify that a party must nominate to be part of the negotiation process within 21 days after the last notice is issued under subsection 173(1).

Restrictions on Agreement Content

Permitted matters should be largely confined to the nature of employees' engagement by the employer. ANRA sees no reason why an enterprise agreement (or any other industrial agreement for that manner) should be permitted to restrict employer engagement of services from another party (such as labour hire) or impose training obligations on an employer that do not reflect the requirements of the workplace. A specific matter pertaining to trading restrictions in industrial agreements is discussed under subsection 5.2 of this submission.

3.2 Better Off Overall Test

Application

ANRA believes that the application of the BOOT on an individual and not collective basis creates substantial inflexibility and uncertainty.

The Commission correctly points out that under section 193 of the FW Act an enterprise agreement will only pass the Better Off Overall Test (BOOT) if the FWC is satisfied, at the time of application, that each award covered employee, and each prospective award covered employee, would be better off overall if the agreement applied to the employee rather than the relevant modern award.

This is a significantly higher threshold than the former No-Disadvantage Test (NDT) as initially introduced by the *Industrial Relations Reform Act 1993*. The *Workplace Relations Forward with Fairness Act* subsequently inserted a new Division 5A of Part 8 into the *Workplace Relations Act*. Subsection 346D(2) then dealt with the application of the NDT to collective agreements. It was in broadly similar terms to the NDT under previous section 170XA, and provided that a collective agreement passed the NDT if the Workplace Authority Director was satisfied that the agreement would not result, on balance, in a reduction in the terms and conditions of employment of the employees whose employment was subject to the agreement under any applicable reference instrument.

The application of the BOOT to agreement making in the retail industry is even more constrained by the evening, weekend and public holiday penalty rate provisions of the GRIA 2010 – such as the 200% penalty rate for full-time and part-time employees working ordinary hours on a Sunday. Such is the complexity of interaction between the penalty rate structures of the GRIA 2010 and potential enterprise agreements that the FWC saw the need to request further information, or has imposed formal undertakings on recent retail agreements (that were endorsed by employees, their representatives and employers), including:

- The Masters Agreement 2014;
- The Priceline Retail Employees Enterprise Agreement 2014; and
- The Noni-B Enterprise Agreement 2014.

Furthermore, ANRA members report that significant welfare-enhancing terms (such as further increases in the base rate of pay in compensation for a reduction in weekend penalty rates) have been prevented by such a literal application of the BOOT. Retailers have particular difficulty in application of the BOOT if the business employs a small number of people wishing to work more over the weekend than on weekdays – see the simplified scenario in Breakout Box 1 below.

Retailers are subsequently forced into the position of making careful rostering arrangements under which full-time and part-time employees are required to work a roster which includes both weekday work and a certain amount of ordinary hours on weekends. This is to ensure that there are no employees working only, or primarily, on weekends who might be individually worse off relative to the GRIA 2010.

These kinds of arrangements can inhibit flexibility and employee choice:

- full-time and part-time employees who have traditionally worked a large number of hours during the week are now required to also work a greater number of ordinary hours on weekends, even if they might prefer not to do so;
- employees, including casual employees, who might have previously worked a substantial proportion of their ordinary hours on a weekend can no longer be offered such work, and must, instead, work a greater number of ordinary hours on weekdays (meaning, for instance, that an employee who is a student must work at times which might be more inconvenient for that employee, and cannot be offered additional weekend hours even if that might be the preference of the employee).

Recommendation 5: the BOOT is revised to make it clear that the test is to be applied on an overall or collective basis, having regard to whether the agreement benefits the majority of employees, rather than being applied on an individual basis.

Breakout Box 1: Simplified Scenario

A retailer only operates during 'ordinary hours' (for the purposes of the GRIA 2010) during weekdays and weekends (so the only penalty rate provisions apply for working on Saturdays and Sundays). The retailer has agreed with employee representatives to raise the hourly rate by 10% above the GRIA 2010 in exchange for a reduction in the Sunday penalty rate loading for full-time and part-time employees from 100% to 50%. All employees are level 3 retail employees; so they would be paid an hourly base rate of \$19.26 under the GRIA 2010 and \$21.19 under the proposed EBA.

The retailer would like to do this as a retention tool for weekday workers in particular. However, the retailer also has an employee ('Mike') that has historically worked two eight hour shifts on weekdays and one eight hour shift on a Sunday. All remaining (estimated 71.5 full-time equivalent) staff share rostering equally so that the hours and penalty rate payments are distributed proportionately over the course of a month.

Day	Approx Staff	Employee Hours	Labour Costs under GRIA (\$)	Labour Costs under Proposed EBA (\$)
Monday	20	360	6933.79	7627.17
Tuesday	20	360	6933.79	7627.17
Wednesday	20	360	6933.79	7627.17
Thursday	22	396	7627.17	8389.89
Friday	22	396	7627.17	8389.89
Saturday	26	468	11267.41	12394.15
Sunday	22	396	7627.17	12584.83
Total		2736	\$62,577.45	\$64,640.25

Mike is paid \$616.34 per week under the GRIA; and the rest of the team are paid \$866.59 on average per week. Under the proposal, Mike would now only receive \$593.22; while the rest of the team members would be paid \$902.07 on average per week.

Despite the business paying an additional \$2,062.80 (not including provisions for statutory rights like annual leave or employer superannuation contributions) in pay to the pool of employees; and with an almost absolute majority benefiting from the proposal, such an agreement would not pass the BOOT and so the total welfare of all employees suffers.

Non-monetary Benefits

In practice, the BOOT also ignores consideration of non-monetary benefits. For example, an employee may place a value on extra time off that is higher than their hourly rate of pay and so may be willing to forgo a higher wage to access more paid leave. Such a situation cannot be taken into account using the current BOOT.

ANRA supports section 13 of the Government's proposed Fair Work Amendment Bill 2014 that would specifically permit the FWC to consider non-monetary items (such as more flexibility for an employee about when they work) when applying the BOOT to an individual flexibility agreement.²⁵

Recommendation 6: The BOOT should accommodate consideration of non-monetary benefit.

Requirement to consider productivity improvements

There are clear commercial incentives to improve workforce productivity; but the experience of members is that these goals are typically reflected indirectly in the structure of enterprise agreements and do not result in specific or general productivity clauses and/or trade-offs.

Individual Flexibility Agreements

ANRA members typically do not make use of individual flexibility agreements (IFAs) within the workplace. It is more often the case that employee requests can be accommodated through appropriate dialogue and action between rostering managers and the employee(s) concerned.

3.3 Dispute Resolution

Conciliation procedures

ANRA members have reported mixed experiences in their dealings with the Fair Work Ombudsman (FWO).

Some members have expressed concern over the professionalism of some conciliators in Unfair Dismissal matters. There is a concern that some conciliators are more focused on following tightly prescribed processes and more focused on "ticking boxes", rather than achieving a fair and appropriate outcome.

Of greater concern is that in the past members have reported instances of paperwork being incorrectly completed or misdirected – which has left employers with little time to prepare for matters once these problems are corrected. Furthermore, some members have reported that conciliators were unwilling to reschedule hearings despite being at fault for misdirecting formal correspondence.

²⁵ Productivity Commission (2015), *Workplace Relations Framework: The Bargaining Framework - Issues Paper 3*, p.5

Right to face-to-face meetings

ANRA understands that telephone conferences for unfair dismissal claims were introduced to avoid the costs associated with unnecessary representation and to reduce the time taken to settle matters. However, members believe that in some instances this has come at the cost of getting an accurate account of whatever events have transpired and ultimately a fair and appropriate outcome.

ANRA members believe dispute resolution would benefit from the option of having face-to-face meetings at the request of either party, rather than purely phone-based hearings.

Recommendation 7: Parties to conciliation hearings should have the option to request a face-to-face meeting.

4. Employee Protections (Issues Paper 4)

All employees should be given the opportunity to perform the tasks they were hired to do free of discrimination, harassment or harsh treatment and to organise collectively to discuss matters concerning their engagement and conditions in the workplace.

4.1 Unfair Dismissal

Costly framework for Business

In ANRA members' experience the existing body of specific unfair dismissal and general protections provisions is sufficiently large such that employees that wish to lodge a claim are more likely to be in the position of choosing whichever avenue (unfair dismissal or a general protections claim) is likely to result in the highest financial compensation, rather than the law not having sufficient scope to address an aggrieved party's claim.

In ANRA members' experience, Australia's unfair dismissal arrangements:

1. Increase firm costs and lower workforce productivity directly by:
 - a. Prolonging the recruitment process because additional employee screening is required at the hiring stage;
 - b. Generating ongoing human resources compliance costs associated with adhering to prolonged requirements to make a 'fair' dismissal;
 - c. Effectively forcing the ongoing employment of a non-performing staff member (which also can have a demoralising effect on attitudes of other employees);
2. Could provide a perverse incentive to employ generally and also to not hire permanent employees but rather casual workers instead.

Compensation Cap

The compensation cap described in subsections 392(5) and 392(6) of the FW Act is high enough that it is typically not binding in unfair dismissal cases across the retail sector.

Small Business Fair Dismissal Code

There is a wide variety of approaches to defining 'small business' across state and territory and federal legislature; and efforts should be made to provide some consistency across the different jurisdictions whenever this is feasible and practical.

Subsection 5(1) of the exposure draft *Australian Small Business and Family Enterprise Ombudsman Bill 2015* defines small business as having fewer than 100 employees or a turnover of less than five million dollars.²⁶

The practical effect of aligning the definition of small business in the Fair Dismissal Code with that proposed in the exposure draft *Australian Small Business and Family Enterprise Ombudsman Bill 2015* would be to relieve many smaller businesses of the heavy compliance burden generated by Australia's Unfair Dismissal and General Protections provisions.

Recommendation 8: The Small Business Fair Dismissal Code should apply to all businesses with fewer than 100 employees.

4.2 General Protections and 'adverse action'

Reverse onus of Proof

Employers must prove they have not discriminated against an employee under a general protection claim, rather than the employee needing to prove they have been discriminated against. This reverse onus of proof is not in line with standard legal practice of assuming defendants innocent until proven guilty. It also provides disgruntled employees an opportunity to launch action for the sole purposes of causing the employer inconvenience/disruption.

Recommendation 9: Remove the reverse Onus of the Proof in Subsection 361(1) of the FW Act.

Equal general protections for all employees (union membership not to invoke privilege)

The reverse onus of proof requirement in subsection 361(1) and elements of the FW Act's adverse action provisions were tested in the landmark case of *Barclay vs. The Board of Bendigo Regional Institute of Technical and Further Education* [2011] FCAFC 14, with the Full Federal Court's decision exposing two significant flaws within the FW Act.

Firstly, despite believing the employer had acted for the reasons given (and not consciously because of the employee's role as a union representative), this did not amount to sufficient proof that the employer had not taken disciplinary action for reasons prohibited by the FW Act (against industrial action in this instance). This raises serious questions over what evidence will in fact be sufficient to prove the employer was not taking action in contravention of the FW Act.

Secondly, the decision also highlights that union membership may invoke certain privileges over and above the general protections against adverse action granted to all employees by the FW Act. It is relevant to note that if a non-unionised employee had engaged in similar conduct the actions of the employee could not be construed as protected industrial activity.

Recommendation 10: The FW Act should not provide privileges over and above protections against adverse action granted to all employees.

²⁶ Turnover estimate is relevant to the previous financial year or the current financial year if it is the first year of business.

5. Other workplace relations issues (Issues Paper 5)

There are other important elements of the workplace relations framework that affect workplace productivity and that sit outside of minimum pay and conditions, bargaining processes and protections afforded to employees against unjust treatment. This includes attempts to restrict employer choice within enterprise agreements, conditions on the transfer of industrial agreements and long service leave provisions that currently sit outside of the NES.

5.1 Competition Law

Trading Restrictions in Industrial Agreements

ANRA is supportive of Recommendation 37 of the Competition Policy Review Final Report:²⁷

'Sections 45E and 45EA of the CCA should be amended so that they apply to awards and industrial agreements, except to the extent they relate to the remuneration, conditions of employment, hours of work or working conditions of employees.'

The present limitation in sections 45E and 45EA, such that the prohibitions only apply to restrictions affecting persons with whom an employer 'has been accustomed, or is under an obligation' to deal with, should be removed.'

Any conflict between the CCA and the Fair Work Act should be resolved by amending sections 45E and 45EA so that they expressly include awards and enterprise agreements. ANRA understands the purpose of these sections is to prevent an employer or head contractor from entering into an arrangement with an employee association or their representative that hinders or stops the supply or acquisition of goods or services from a second party. The proposed change would extend these sections to awards and enterprise bargaining agreements – which are typically negotiated by an employee association but are not agreements with an employee association.

ANRA sees no reason for industrial instruments that are negotiated by employee associations to be excluded from the CCA. The coverage of sections 45E and 45EA should not be excluded from awards and enterprise bargaining agreements negotiated under the Fair Work Act. Having restrictive clauses of this nature enshrined within an enterprise bargaining agreement is anticompetitive; because it creates an artificial constraint on firms' ability to consider engaging alternative labour sources and potentially other suppliers of goods or services.

Recommendation 11: The Federal Government amends the Competition and Consumer Act to reflect Draft Recommendation 37 of the Competition Policy Review Final Report.

²⁷ Harper et al. (2015), p 69

5.3 Other elements of the WR framework

Right of entry

ANRA is supportive of the *Fair Work Amendment Bill 2014*, which would have the practical effects of:

1. Removing the non-negotiable ability of union officials to conduct union meetings in lunchrooms (which may or may not be desirable from the employees' perspective);
2. Restore employers' rights to make reasonable requests that union meetings are held in a specific part of the workplace; and
3. Replace unfettered entry into the workplace with limits on the right of entry to:
 - a. employee representatives covered by an enterprise agreement; or
 - b. an employee representative invited to the premises by a union member or potential member.

Recommendation 12: The Fair Work Amendment Bill 2014 is passed.

Transfer of Business (Time limit on instruments)

Subsection 580(4) of the repealed Workplace Relations Act 1996 effectively provided a 12 month limitation on transferring industrial instruments. This period provided both the employer and employee with the ability to see through a period of transition and thereafter agree to an appropriate set of employment conditions more suited to that particular workplace.

Under the FW Act, however, transferring instruments now continue until they are terminated or replaced, thereby imposing a set of conditions agreed to by the 'old employer' on another workplace (of the 'new' employer). These conditions may be significantly different to the terms and conditions which generally apply to that workplace, especially where parts of a particular (old employer) business is acquired and integrated into another (new employer's) business.

Continuance of the industrial instrument reached with an 'old employer' acts as a deterrent to business transfers – notably for companies that are seeking to acquire parts of a business. Permitting unlimited exposure to agreements reached by an old employer add greater complexity and significant restriction in meeting any prospective new employer's commercial needs.

In some cases, an industrial agreement applying to the old employer may have reached its nominal expiry date, or is shortly about to do so. At the same time, the new employer may also have a comprehensive agreement, suited to its business (and having passed BOOT) which may also have been recently negotiated and have some years to run before it reaches its nominal expiry date. In such circumstances, the new employer should not be put to the time and cost of making an application to the FWC for an order restricting the transfer of the industrial instrument applying to the old employer.

Transferring employees should also have the benefit of future pay rises likely to be incorporated in the ongoing industrial agreement covering the remainder of the new employer's staff.

For these reasons, ANRA believes that the transfer of business provisions of the FW Act should be amended to re-insert provisions similar to sections 585-587 of the WR Act (as in force

immediately prior to the introduction of the FW Act) whereby a transferring instrument ceases to have effect on the earlier of:

- (a) the expiry of 12 months following transmission; or
- (b) the nominal expiry date of the transferring instrument (provided that an existing industrial agreement within its nominal; expiry date would then operate to cover the transferring employees); or
- (c) the introduction of a new enterprise agreement, following the transfer date, covering the transferring employees and meeting the BOOT (whether or not the transferring instrument has yet reached its nominal expiry date).

ANRA members suggest that re-introducing a 12 month transmission period would allow a company to assess whether it should continue to apply the transferring instrument or come to an agreement with the employees and their representative to an alternative set of conditions relevant to both parties, as provided by the enterprise bargaining provisions.

Recommendation 13: The FW Act should be amended to re-insert provisions similar to sections 585-587 of the WR Act (as in force immediately prior to the introduction of the FW Act) whereby a transferring instrument ceases to have effect on the earlier of:

- (a) the expiry of 12 months following transmission; or**
- (b) the nominal expiry date of the transferring instrument (provided that an existing industrial agreement within its nominal; expiry date would then operate to cover the transferring employees); or**
- (c) the introduction of a new enterprise agreement, following the transfer date, covering the transferring employees and meeting the BOOT (whether or not the transferring instrument has yet reached its nominal expiry date).**

Transfer of Business (Transferring Work)

Paragraph 311(1)(c) of the FW Act is one of four conditions to satisfy for a transfer of business to occur:

‘the work the employee performs for the new employer is the same, or substantially the same, as the work the employee performed for the old employer’.

The broadness of this term generates significant risk of expanding coverage of the legislation pertaining to transferring work, so that unrelated activities in a business could also be deemed to have transferred. In ANRA's view it would be more appropriate for a transfer of business to be constrained to circumstances where:

- a. The work and functions performed for the new employer are the same as the nature of work for the old employer; and
- b. This situation has arisen solely at the direction of the new employer (that is, an employee has not voluntarily transferred from the old employer to the new employer).

A detailed examination of this matter is available in Appendix 2. However, the Commission is likely aware that the *Fair Work Amendment Bill 2014* currently before the Senate is likely to satisfy ANRA's concerns with respect to (b.) immediately above.

The Bill states there will not be a transfer of business under Part 2-8 of the FW Act when an employee seeks employment with an associated entity on his/her own initiative before the termination of the employee's employment with an old employer.

Further, the transfer of business coverage should apply only in circumstances where ownership of assets are transferred, and not merely in the use of assets, as this could lead to negative and unintended consequences.

For example, such provisions operate as a major disincentive to transfer employees between associated entities (but within the same group). This can result in employers giving greater consideration towards making employees redundant as part of a transfer of business, rather than transferring the employees to a new employer – which should be the primary consideration in any transfer.

There is a risk the cost of restrictions imposed outweigh any benefits which might be attained from the transaction and therefore the issue could (and has in some members' experience) prevent a transaction between parties that would otherwise prove beneficial to employers and employees alike.

Recommendation 14: The FW Act should provide guidance on the nature of work that is 'the same, or substantially the same' for transferring work provisions contained in Paragraph 311(1)(c).

Transfer of Business (Connection between old and new employers)

Subsections 311(4) and 311(5) of the FW Act refer to a connection between an old and new employer in circumstances of the 'outsourcing' of work from an old employer to a new employer.

The term 'outsource' remains undefined and should be clarified to avoid any negative consequences in application.

Recommendation 15: The FW Act should define the term 'outsource' for the purposes of defining connection between old and new employers in Subsections 311(4) and 311(5).

Payment of Loading on Accrued Annual Leave

The *Fair Work Amendment Bill 2014* responds to recommendation 6 of the Fair Work Act Review by clarifying the payment of untaken annual leave is paid out as provided by the applicable industrial instrument. ANRA's Recommendation 12 supports the passing of the *Fair Work Amendment Bill 2014*.

Long Service Leave

Table 6 below demonstrates that long service leave entitlements are another clear example where there is no consistency amongst the provisions made by the states and territories. The interaction between state and territory long service leave laws and enterprise agreements is consequently very complex and can be a potential cause of confusion for business.

Table 6: Long Service Leave across Australian States and Territories

	ACT	NSW	VIC	TAS	NT	QLD	SA	WA
Minimum service period	7 years	10 years	10 years	10 years	10 years	10 years	10 years	10 years
Amount	6.06 weeks	2 months	8.67 weeks	8.66 weeks	13 Weeks	8.67 weeks	13 weeks	8.67 weeks
Pro-rata period [^]	5 years	5 years	7 years	7 years	7 years	7 years	7 years	7 years

[^]Typically granted if an employer terminates (apart from serious misconduct) or the employee retires or is forced to terminate employment due to illness.

Long service leave provisions should be harmonised across the states and territories and then fully transitioned into the NES, alongside other important leave provisions. This transition should include the full repeal of all applicable state and territory long service leave laws.

Recommendation 16: the Federal Government consults on the structure of minimum long service leave provisions to be provided for in the NES. This could include (but is not an exhaustive list):

- **Qualification after 10 years of continuous service;**
- **For a total of two months (8.67 weeks) leave, increasing by 0.87 weeks for each additional year of service (so that a person qualifies for 13 weeks of long service leave after 15 years continuous service); and**
- **A pro-rata entitlement period commences after 7 years of continuous service whenever:**
 - **The employee retires or is forced to terminate employment due to illness or any other pressing necessity; or**
 - **The employer terminates for any reason apart from serious and wilful misconduct**

6. Appendices

Appendix 1 - Public Holidays

ANRA members have reported significant difficulties with the application of the public holiday provisions in Division 11 of Chapter 2 of the FW Act. These difficulties have arisen for a variety of reasons:

- (a) inconsistent approaches taken by the different States and Territories as to the designation of additional or substitute public holidays where an actual holiday falls on a Saturday or Sunday;
- (b) ambiguity over whether the FW Act actually "picks up" additional public holidays designated under a State or Territory law in respect of an occasion already designated as a public holiday under paragraph 115(1)(a) of the FW Act; and
- (c) claims for "double dipping" in respect of the same holiday given the alternative approach to public holidays traditionally taken under most major industrial agreements in the retail industry.

Inconsistent Approach

Different States and Territories have, in the past, adopted different practices where a public holiday falls on a weekend.

Over the early to mid 2000s, various efforts were made to seek to harmonise public holiday arrangements. Certain arrangements to ensure a higher level of consistency were also endorsed by the Australian Federation Meeting of Premiers held on 12 September 2008. However, since that time, a substantial level of divergence has once again become apparent, on occasions where:

- (a) 26 January fell on a Saturday or a Sunday, the following Monday was previously substituted as a public holiday in NSW, Victoria, Queensland, Tasmania, Western Australia, the ACT and the NT. The Saturday or Sunday was not observed as a public holiday. In South Australia, a similar approach was taken where 26 January fell on a Saturday, but an additional holiday was declared on the following Monday when 26 January fell on a Sunday. In contrast, the long standing practice of the Australian Industrial Relations Commission was to include model clauses in federal awards providing that, where 26 January fell on a Saturday or a Sunday, then that day would be regarded as the public holiday in determining an employee's entitlements to have the day off, or be paid penalty rates for work, without any additional or substitute day being designated: 1994 Public Holidays Test Case (Full Bench, 4 August 1994, Print L4534).

(b) 25 April fell on a Saturday, the Australian Federation Meeting of Premiers held on 12 September 2008 endorsed a proposal that the Saturday to be designated as the public holiday, without any additional or substitute public holiday being designated. This was consistent with the practice of the Commission in federal awards: 1994 Public Holidays Test Case (Full Bench, 4 August 1994, Print L4534). However, this approach was not adopted by Western Australia when 25 April fell on a Saturday on 2009 (with WA designating 25 April 2009 as the actual holiday and the following Monday as an additional holiday) and will not be the case in 2015 too;

(c) 25 April fell on a Sunday, the past practice in Victoria and Tasmania was for the Sunday to be designated as the public holiday without any additional or substitute public holiday on the following Monday. The long standing practice of the Australian Industrial Relations Commission was also to include model clauses in federal awards providing that the Sunday would be the public holiday in determining an employee's entitlements to have the day off, or be paid penalty rates for work, without any additional or substitute day being designated. However, the past practice in NSW, Queensland, the ACT and the NT was to designate the following Monday as a substitute public holiday without the Sunday being not designated as a public holiday. In South Australia and Western Australia, the Sunday is designated as a public holiday and an additional public holiday was also previously recognised on the following Monday.

(d) 25 December, 26 December or 1 January fall on a Saturday or Sunday, quite different arrangements have been made in the different states and Territories over recent years. For instance, in Victoria, where 25 December falls on a Saturday or Sunday, a substitute holiday has generally been observed and the actual day is not regarded as a holiday. In other States and Territories, additional or substitute days have often been set but with no real consistency in approach nationally.

The difficulties arising from inconsistent State and Territory practices was, in the past, ameliorated in the retail industry, at least to some degree, as a result of the Australian Industrial Relations Commission inserting model public holiday provisions in federal awards.

Many national retail businesses also sought to move towards common arrangements across all States and Territories through the inclusion of specific public holiday substitution arrangements in certified agreements and workplace agreements made under Commonwealth industrial relations laws. Commonly, these provisions provided for substitution of particular public holidays in the event that an employee was rostered to work on the following Monday but not the actual weekend public holiday. In addition, provision was generally made for full-time employees, and certain part-time employees, to receive additional benefits if they were not rostered to work on either the actual day or any substitute day.

This meant, in effect, that all full-time employees, and many part-time employees, were guaranteed of receiving benefits equivalent to either 10 or 11 public holidays in any particular year no matter their roster pattern.

However, the public holiday provisions of the FW Act substantially affect long standing arrangements set out in federal industrial agreements, particularly in relation to the substitution of public holidays falling on a weekend. These effects are exacerbated by the different States and Territories continuing to take inconsistent approaches to the designation of substitute and additional public holidays.

The end result is great confusion and uncertainty for businesses operating on a national basis, and unnecessary and wasteful compliance costs being incurred by businesses needing to ensure that appropriate arrangements are implemented in each State and Territory.

This is a particular issue for the retail industry. The retail sector is the largest private sector employer in Australia. Retail employers also engage many staff on weekends, and are likely to be most affected by arrangements designating substitute or additional public holidays when the celebrated (or "actual") day falls on a weekend.

Legal Ambiguity

Even greater ambiguity arises out of questions as to whether paragraph 115(1)(b) actually operates to "pick up" additional days designated by a State or Territory in relation to an occasion already designated under paragraph 115(1)(a).

Double Dipping of Public Holiday Benefits

ANRA members report various attempts by employees who have already received the benefit of either an "actual" or substitute/additional particular public holiday to seek to "double dip" by claiming further benefits for the other day, even though they were not rostered to work, and did not work, on the second day.

This is the result of existing industrial agreements taking a different approach to public holidays by providing "replacement days" where a public holiday falls on a non rostered day for a full time employee, or a part time employee who works an average of four or five days per week: see *Shop, Distributive and Allied Employees' Association v Woolworths Limited* [2000] FCA 206; *Shop, Distributive and Allied Employees' Association v Woolworths SA Pty Ltd* [2011] FCA 25; *Shop, Distributive and Allied Employees' Association v Woolworths SA Pty Ltd* [2011] FCFC 67; and *Shop, Distributive and Allied Employees' Association v Woolworths Limited WA* [2013] FCAFC 151.

Appendix 2 - Transfer of Business (voluntary employee transfer)

Many major retailers operate through a number of different companies (usually being subsidiaries of a main parent company). For instance, some major retailers conduct different businesses or trading units through different companies. Some retailers also have separate state-based subsidiary operating companies.

Where a retailer operates different businesses or trading units, it is common to have different industrial agreements applying to employees in the different businesses. This is because it is important to have an industrial agreement adapted to the specific needs of the individual businesses, which may have different store formats, different staffing requirements and, in some cases, different trading hours. While the agreements will have many similar conditions, there will usually be some differences given the specific needs of different business units.

Major retailers who operate through different companies also generally seek to permit and promote employee mobility through different roles and business units. Employees engaged in one business unit will commonly apply for, and be appointed to, roles in other business units. This may occur, for instance, where an employee wishes to seek broader retail experiences, wishes to work in a different environment, seeks to move to a store closer to home, or wishes to relocate from one residential area to another. In such cases, employees may commonly apply for a new role with the same retail group, but in a different business unit.

In such cases, there is no "transmission of business" in the classic sense recognised under former provisions of the Industrial Relations Act 1988 or the Workplace Relations Act 1996. This is because no functions, property, business or undertaking is being transferred from one business to another; instead, each business is continuing to conduct the same separate operations both before and after the move by the employee.

In such a situation, however, questions may arise as to whether this would, nevertheless, be a "transfer of business" under section 311 of the FW Act. Paragraphs 311(1)(a) and (b) would undoubtedly be satisfied, as would paragraph 311(1)(d) (given that the potential new employer is an associated entity of the old employer under subsection 311(6)). However, the drafting of paragraph 311(1)(c) gives rise to some lack of clarity. This is because it is not entirely clear whether the work the employee might perform in the new store is the "same, or substantially the same" as that performed for the old employer.

In ANRA's view, no transfer of business would occur as the work which might be performed in a different business unit and at a different store is of a substantially different nature. For instance, the employee would be dealing with different products and customers at a different location, need different product knowledge, and require different knowledge of point of sale and other systems and procedures applicable to the new employer's business. However, ANRA believes that the FW Act should be clarified to remove any residual doubt about such an outcome.

ANRA notes that any contrary outcome may have the effect of inhibiting policies and procedures designed to confer benefits on staff by promoting and assisting staff mobility where such transfers are sought by staff. In such cases, retailers should not be placed in a situation where they might be put to the time and cost of seeking an order from the FWC under Division 3 of Chapter 2 in order to manage small-scale individual transfers made on an offer and acceptance basis, generally at the request or instigation of the employee. The incongruity of the situation is

highlighted by the fact that no transfer of business could possibly occur if an employee simply sought to move between two different business units operated by the same employing company. There is no reason why such issues should arise where an employer group seeks to promote employee flexibility and satisfaction by also offering potential transfers between different business units operated through different companies.

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