Submission to the Productivity Commission regarding the Draft Report into the *Economic Structure and Performance of the Australian Retail Industry*

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Introduction

This submission is focussed on the matters set out in the chapter of the draft report on 'workplace regulation'. The ACTU believes that the inclusion of this material in the draft report, citing no or insufficient evidence, without appropriate balance and (in some cases) without even reference to alternative views, is deeply inappropriate.

In this respect, the commentary in relation to workplace regulation contrasts unfavourably with the other parts of the draft report, which much more thoroughly considers the relevant issues and deals with alternative perspectives.

For the reasons set out below the ACTU believes that the 'workplace regulation' sections of the draft report should be removed or significantly amended.

The Terms of Reference and employer submissions

The Terms of Reference asked the Commission to produce a report on the 'implications of globalisation for the Australian retail industry', with a particular focus on the GST-free threshold for imports. While the Commission was asked to look at the 'employment structure' of the industry, it certainly was not asked to undertake a review of wages and workplace regulation in the sector.

In this respect we note that the Fair Work system is only 20 months old and that the determination of questions relating to wages, loadings and penalty rates are reserved by operation of the Fair Work Act for determination by Fair Work Australia. The terms of reference are clearly not an invitation to the Commission by the government to usurp the statutory functions of Fair Work Australia.

Despite the absence of any mandate under its Terms of Reference, the Commission's discussion paper contained a section on 'labour market issues', and asked a range of inappropriate leading questions about whether wages were too high in the retail sector, and whether the Fair Work system impeded 'flexibility' or 'productivity.

Despite the material in the discussion paper, it is telling that almost no employer criticism was forthcoming. The ACTU has examined the 43 submissions made by industry associations or large employers to this inquiry. Only eleven submissions even *discussed* labour market issues; of these, only seven expressed any substantive criticism of existing wage levels or labour laws[1] (and one expressed concerned that wages were too *low* to attract staff in mining regions[2]).

In particular, we note that:

- The two peak employer groups in Australia, the Ai Group and the Australian Chamber of Commerce and Industry, did not see any need to make a submission to the inquiry;
- There was no little or no discussion of labour market issues in the submissions of the two peak retail industry bodies. The Australian National Retail Association made no comment. The National Retailers' Association only devoted two paragraphs to labour market issues in its 177 page submission;

[1] Australian National Retail Association; Australian Newsagents' Federation; Myer Holdings; National Retailers' Association (submission 102); Retail Traders' Association of Western Australia; Westfield; Woolworths
[2] Post Office Agents' Association of Australia.

- Of the seven submissions that were critical of labour market issues, most discussions were limited to a few paragraphs making generalised complaints about wage costs or the alleged impact of award modernisation. The majority of such issues raised were an attempt to re-agitate matters specifically dealt with by Fair Work Australia (the independent tribunal specifically vested with the power to consider such matters) as part of the award modernisation process.

- The only large employer submissions that went into any detail were Woolworths' (which raised penalty rates, the 'transfer of business' rules, and overtime for part-time employees) and Myer's (which raised penalty rates and commission-based wages);

- Of the seven critical employer submissions, only Woolworths' called for specific action, namely a review of retail penalty rates;

- Even the Institute of Public Affairs' submission – a well-known critic of labour market regulation – made no comment on labour market issues.

This lack of employer discussion about labour market issues suggests that the employers considered (appropriately, and consistent with our view) that these matters were outside the Commission's terms of reference. In the alternative, they did not consider labour market issues to be significant problems for the retail sector.

Given lack of any substantive concerns and complete absence of evidence present to the Commission in relation to labour market issues the inclusion of the chapter on the issues in the draft report is inappropriate, and its contents deeply flawed. In essence, the draft does no more than repeat the very limited number of critical comments by employers and presents them without evidence or analysis. Indeed, Box 10.4 on page 300 does not really contain 'selected' participant comments; it contains effectively all the critical comments made by employers.

Compounding this error, the Commission then proceeds to examine issues that were not identified as problems by *any* of the employer submissions. It devotes two pages to 'Individual Flexibility Arrangements'. Since it cannot quote any of the submissions to it on this issue, the draft report merely quotes Ai Group, including unsubstantiated claims that unions are 'routinely' blocking meaningful flexibility in enterprise agreements. [3]

This pattern in repeated in relation to unfair dismissal laws. Again, as these were not identified as problems by any major employer submissions, reliance in placed on external references (Ai Group, again, and Professor Judith Sloan) for the claim that these laws are 'making it more difficult' for employers.[4] The only direct employer submission on this point is a complaint from a single micro business, Eltham Valley Pantry. This is not evidence of employer 'difficulties' and certainly an unsafe basis on which to ground an sort of general finding in relation to a key aspect of workplace relations regulation. Despite this, the draft report devotes two pages to the issue, all of which are critical of unfair dismissal laws. No countervailing considerations are raised, including fairness to employees, or the role of unfair dismissal laws in boosting productivity by enhancing employee commitment to the business.

[3] Page 313.
[4] Page 320.

The draft conclusions and recommendation

We turn to the conclusions of the draft report. We are pleased that the Commission acknowledged that it was not 'appropriate in the context of this review for the Commission to recommend specific changes' to the Fair Work laws.[5] Indeed, as we have argued, this would be wholly outside the Commission's Terms of Reference, and would usurp the role of Fair Work Australia.

The draft report appears to have been disproportionately, and inappropriately, influenced by the submissions of Myer and Woolworths, as well as by the views expressed in other contexts of organisations (such as Ai Group) who chose not to make a submission to the inquiry.

In particular, it is concerning that the Commission has made almost no reference, and given almost no weight, to the interests of the one million workers in the retail sector and their families. All of the emphasis in the draft report is on the interests of business, particularly big business. Such an unbalanced approach is inconsistent with the Commissions obligations under section 8(1)(e) of the *Productivity Commission Act*, which requires the Commission to 'recognise the interests of … employees, consumers and the community, likely to be affected by measures proposed by the Commission'.

On the question of the draft recommendation tabled by the Commission, we make two comments. First of all, the call for the government to consider 'retail industry concerns' as part of the planned post-implementation review of the *Fair Work Act* is unnecessary and inappropriate for a number of reasons. First, there is no evidence before the Commission that concerns are either widespread or valid. Second, such a recommendation is unbalanced without giving similar support to the views of workers and unions. Third, relevant stakeholders will have the opportunity to express views as part of any review process, without needing encouragement from the Commission.

Similarly, the Commission's suggestion that the 2012 review of modern awards to be conducted by Fair Work Australia could be a 'further opportunity' to address alleged employer concerns is also both unnecessary and inappropriate. The 2012 review will proceed according to the statutory framework, and employers will have a right to be heard and make applications concerning the content of awards in this process – a process which is within the exclusive province of Fair Work Australia.

Accordingly, we recommend deleting the draft recommendation. Indeed, in light of the unbalanced nature of the chapter, the factual flaws and omissions (discussed in detail in the rest of this report), as well as the fact that the chapter discussed matters which are clearly outside the Commission's Terms of Reference, the appropriate course is the deletion of the chapter entirely.

The rest of this submission will outline errors and omissions in the draft report relating to labour costs in the retail sector; 'productivity'; and 'flexibility'.

[5] Page 325.

Wages and labour costs

Wages in Australia

Australian retail workers are some of the lowest paid workers in Australia.

As noted by the Commission, about 22% of retail workers earn the legal minimum rate of pay – the award rate of pay. Under the *General Retail Industry Award 2010* (the modern retail award) the relevant award rate, for shop assistants, is only $17.03 per hour (about $33,650 per annum) for permanent adult employees, and as little as $7.67 per hour for juniors. Although these wages are periodically increased by Fair Work Australia, these increases are generally in line with inflation, and so do not tend to increase the real wage. Indeed, the real value of a shop assistant's award wage has only increased by 1% since 2005.[6]

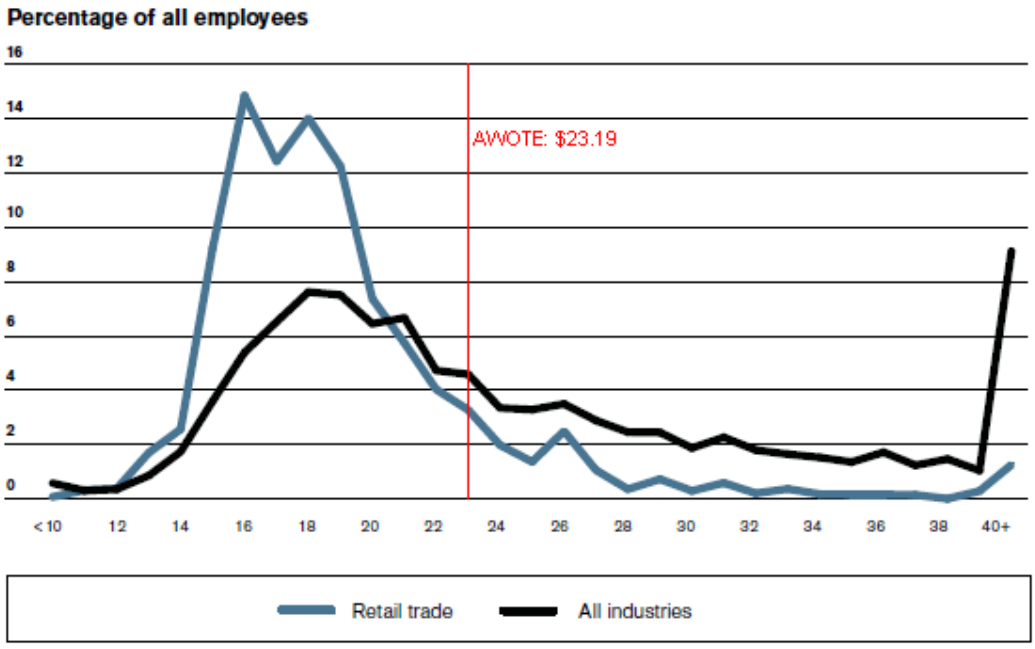
We note that these references are to wages payable under the national modern award. With the achievement of a national industrial relations system, transitional wage rates of pay are payable by some employers who formerly operated in State industrial relations systems. Many of these transitional rates of pay are even *lower* than the modern award rate (see below).

A further 41% of retail workers are covered by registered collective agreements.[7] These workers tend not to earn significantly more than they would under the modern award. The most recent data, from 2006 in Victoria, shows that retail workers covered by agreements earned only 2.5% more than comparable workers whose pay was set by awards.[8]

Looking at all full-time workers in the retail sector, in May 2011 average adult full-time ordinary-time earnings (AWOTE) was just $939.50[9] or $24.72 per hour.[10] These figures include a significant number of full-time workers (10% of the total[11]) who are casual and receive a casual loading; it therefore is likely to overestimate the wage earned by a typical retail worker, who is a permanent employee.[12]

These average figures also include the earnings of managers and other high-paid retail employees. Although small in number, the earnings of these employees significantly inflate the industry average. This can be seen in the distribution of hourly earnings for adults in the retail sector, based on the most recent available figures (from 2006):[13]

[6] ACTU submission to Fair Work Australia Annual Wage Review (2011) <www.fwa.gov.au/sites/wagereview2011/submissions/ACTU_sub_awr1011.pdf> 137.
[7] ABS cat 6306.0 (May 2010) Table 5.
[8] Average non-managerial average total hourly cash earnings. D Peetz & A Preston, 'AWAs, collective agreements and earnings: beneath the aggregate data' (2007) Table A.3 <www.business.vic.gov.au/busvicwr/_assets/main/lib60013/awa-ca-earnings-paper.pdf>.
[9] ABS cat 6302.0 (May 2011) Table 10G.
[10] Assuming a 38 hour week.
[11] ABS cat 6359.0 (Nov 2010) Table 7.
[12] Ibid.
[13] Modified version of Figure 9 from J Pech, L Nelms, K Yuen and T Bolton, *Retail Trade Industry Profile* (2009) Australian Fair Pay Commission, Research report 7/09.



Note: Based on ANZSIC 1993 classification system. Earnings are segmented using dollar intervals – e.g. $15 includes amounts over $14 per hour and equal to or less than $15 per hour.
Source: ABS, *Employee Earnings and Hours*, May 2006, Catalogue No. 6306.0, Canberra, ABS, unpublished data.

We suggest that the spikes at around $16 and $18 are due to the influence of the award-derived legal minimum rates of pay for permanent and casual workers respectively. Assuming this pattern still exists, it seems likely that prevailing (2011) *median* earnings for permanent workers would not be much more than $17, and median earnings for casual workers would not much more than $21.

These average wages for the sector also mask significant variation by region and subsector. For example, in fuel retailing, average hourly earnings for non-managerial adult employees was only $21.20 per hour in May 2010.[14] In Tasmanian store-based retailing, it was $18.40 per hour.

No other industry, apart from 'accommodation and food services', has lower wages than retail. The average ordinary-time wage for full-time workers in all industries is 39% higher than the retail figure, at $1,304.70 per week, or $34.33 per hour.[15]

Finally, these ordinary-time earnings figures do not take into account the amount of unpaid overtime performed by retail workers. According to the most recent figures, from 2003, 27% of retail workers regularly worked overtime. Of these, less than half (44%) were paid for the overtime work.[16]

Labour costs by international comparison

Australia's retail labour costs are also low by international comparison. However, this is not apparent from the Commission's draft report. In the draft, the Commission asserts that 'total labour rates were on average 27 per cent lower in the US and 29 per cent lower in the UK than in Australia'.[17] The only source for this claim is a research note by investment analysts Morgan Stanley.

However, the Morgan Stanley note is based on rough estimates of labour costs (based on a range of questionable assumptions) for a small number of very large retailers. Even if their figures are correct

[14] ABS cat 6306.0 (May 2010) Table 1a.
[15] ABS cat 6302.0 (May 2011) Table 10G.
[16] ABS cat 6342.0 (Nov 2003) Table 10.
[17] Page 376.

for the retailers concerned, this is not necessarily reflective of costs across the entire industry. Indeed, the figures from European countries (shown below) show a significant difference in the labour costs of large firms compared to the all-industry average.

The Commission could easily have obtained the industry-wide figures directly from the relevant national statistical agencies. We have done this for both the United States and Europe.

In the United States, the average labour cost for a retail worker in 2009 was US$17.12 per hour,[18] or A$21.61 at prevailing exchange rates.[19] The Commission has estimated Australian retail labour costs to be A$21.71 per hour in 2009-2010, which was equivalent to US$14.95 based on purchasing power parity (PPP).[20] In other words, Australia's retail labour costs were 4.6% *lower* than the United States in 2009, based on PPP.

European countries collect figures for the retail sector combined with wholesale trade and vehicle repair. In 2009, labour costs in those sectors in the developed European countries for which we have data were as follows:[21]

	All firms			**Firms with >10 employees**		
	€	***$A***	**$US (PPP)**	**€**	***$A***	**$US (PPP)**
Austria	-	-	-	22.99	*40.83*	*21.36*
Belgium	-	-	-	31.65	*56.21*	*27.92*
Denmark	-	-	-	32.90	*58.43*	*22.70*
France	-	-	-	27.16	*48.23*	*23.79*
Germany	-	-	-	23.80	*42.27*	*22.49*
Greece	-	-	-	15.00	*26.64*	*15.54*
Iceland	-	-	-	16.46	*29.23*	*16.70*
Ireland	21.34	*37.90*	*16.93*	21.69	*38.52*	*17.21*
Luxembourg	-	-	-	21.62	*38.39*	*17.85*
Portugal	9.93	*17.63*	*11.20*	11.05	*19.62*	*12.46*
Spain	15.92	*28.27*	*16.28*	17.27	*30.67*	*17.66*
United Kingdom	15.09	*26.80*	*15.85*	15.55	*27.61*	*16.33*
Average	15.57	*27.65*	*15.07*	21.43	*38.05*	*19.33*

The figures above suggest that it is cheaper to employ labour in a retail business in Australia than in any developed country in Europe, except Portugal. On average, Australia's labour costs are 27% cheaper based on nominal exchange rates, and 1% cheaper based on PPP. Medium and large-sized European firms face labour costs that are 76% higher than our average retail sector labour costs in nominal terms, or 29% in PPP adjusted terms.

[18] US Department of Labor, *Employer Costs for Employee Compensation: Historical Listing* (2011) Table 18, December 2009 quarter.
[19] Using the 2009 average US/AUD exchange rate from OZForex <www.chartflow.com/fx/averageRate.asp?>
[20] Using 2009 OECD PPP figures: <http://stats.oecd.org/Index.aspx?datasetcode=SNA_TABLE4>.
[21] Eurostat, Hourly Labour Costs (NACE rev 2). Available from: <http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=lc_an_costh_r2&lang=en>

Penalty rates

In its draft report, there was much criticism of Australia's 'penalty rate' regime. Penalty rates have a long history in Australia. They are designed to provide compensation to employees for working unsociable hours. In doing so, they attempt to redress some of the private and social costs of working these hours, including loss of time with family, and loss of participation in community activities.

Under the modern retail award, the following penalty rates apply, expressed here as a percentage of the regular rate of pay which would otherwise apply to that worker:

	Weekday days	**Weekdays after 6pm**		**Saturday day**		**Sunday day**		**Public holidays**	
	$/hr	**$/hr**	**%***	**$/hr**	**%**	**$/hr**	**%**	**$/hr**	**%**
Permanent employee									
Adult	17.03	21.29	125	21.29	125	34.07	200	42.59	250 (or a day in lieu)
Junior	7.66	9.51		9.51		15.33		19.16	
Casual employee									
Adult	21.29	21.29	100	23.00	108	34.07	160	42.59	200 (or a day in lieu)
Junior	9.58	9.58		10.35		15.33		19.16	

* Expressed as a percentage of the relevant weekday day rate

As can be seen, the penalty rates for casual workers are particularly low. Moreover, employers may avoid the cost of penalty rates by substituting junior workers for adults at those times when penalty rates apply. There is widespread evidence of this occurring in retail.

Furthermore, the penalty rates that apply in the retail sector are heavily discounted from those which apply in regular '9-to-5' workplaces. For example, in the manufacturing industry (traditionally the template for award regulation), the penalty rates for non-continuous production are as follows:[22]

	Weekday days	**Weekdays after 6pm**		**Saturday day**		**Sunday day**		**Public holidays**	
	$/hr	**$/hr**	**%**	**$/hr**	**%**	**$/hr**	**%**	**$/hr**	**%**
Permanent employee									
Adult	16.78	25.17	150[23]	25.17	150	33.56	200	41.95	250
Junior	6.17	9.26		9.26		12.35		15.44	
Casual employee									
Adult	20.97	31.46	150[24]	31.46	150	41.95	200	52.43	250
Junior	7.71	11.58		11.58		15.44		19.30	

[22] Based on *Manufacturing and Associated Industries and Occupations Award 2010*.
[23] Until 9pm, 200% thereafter.
[24] Until 9pm, 200% thereafter.

Australia's system of penalty rates is also not unusual when considered in an international context. The ACTU has reviewed the laws relating to weekend work in all 34 OECD countries. (See Appendix 1).

Work during the designated weekly rest period[25] is restricted in 18 of the 27 countries (excluding Australia) for which information is available, in relation to the retail sector. Specifically,

- Work is prohibited outright during the weekly rest period, or restricted to cases or emergency or necessity, in 13 countries (Austria, Belgium26, Denmark, Germany, Hungary, Iceland, Israel, Japan, Luxembourg27, Netherlands, Norway, Slovakia, Slovenia, Sweden and Switzerland);
- Work is prohibited unless authorised by a collective agreement, in two countries (France and Italy); and
- Work is prohibited, unless the employee agrees, in three countries (Estonia, Finland and the United Kingdom)

Where work *is* permitted during the weekly rest period, most OECD countries require it to be paid for at penalty rates. These rates are:

- Less than 150% of the ordinary rate in three countries (Czech republic, Japan, Mexico);
- 150% of the ordinary rate in three countries (Hungary, Israel, South Korea) as well as in three states of the United States;
- 180% of the ordinary rate in one country (Iceland);
- 200% of the ordinary rate in three countries (Finland, France and Luxembourg);
- A rate to be negotiated with the union, in two countries (Slovakia or South Korea); and
- A 'reasonable' rate in one country (Ireland).

The statistics above relate to adult workers. In addition, most OECD countries restrict the work of children (people aged under 18) on weekends. Specifically:

- There is a longer weekly rest period (usually two days) for children in sixteen countries (Austria, Belgium, Czech republic, Denmark, Finland, France, Germany, Iceland, Italy, Luxembourg, Netherlands, Norway, Portugal, Slovenia, Spain and the United Kingdom).
- Children are prohibited outright from working during the weekly rest period in five countries (Austria, Iceland, Ireland, Luxembourg and Switzerland); and
- Children are permitted to work during the weekly rest period, but with more restrictions than adults, in three countries (Belgium, Germany and Mexico).

[25] Usually Sunday only, but sometimes 1.5 or 2 days per week.
[26] Sunday morning trade is permitted, though.
[27] Family businesses may trade, though.

Australian and international practice is, of course, shaped by the conventions and recommendations of the International Labour Organisation (ILO), an agency of the United Nations. The relevant ILO rules are as follows:

- There should be one day's rest each week, observed simultaneously by all workers in each enterprise, and across all industries, to be taken where possible on the day established by custom in the country concerned;
- In enterprises where this 'cannot' be observed because of 'the nature of the work, the nature of the service performed by the establishment, the size of the population to be served, or the number of persons employed', the government may prescribe a different weekly rest scheme, after consultation with unions and employers;
- The law may authorise employers to require employees to work during weekly rest breaks, but only in cases of (a) emergency or business crisis; (b) abnormal and unforeseeable work demands, where there is no practical alternative; and (c) in order to prevent the loss of perishable goods.[28]

Furthermore, the ILO recommends that children under 18 be prohibited from working on the customary rest day, and that they receive an additional rest days (except in industrial employment).[29]

Australia has not ratified the two relevant ILO conventions, but 126 countries (including 21 members of the OCED) have ratified at least one of them. Countries that ratify a convention are obliged under international law to implement them.

In summary, then, it can be seen that most OECD countries ban or restrict the work of adults and (especially) children on at least one day of the weekend. In those few countries where work *can* be required on the weekly day off, penalty rates of pay are usually payable.

This demonstrates that Australia's penalty rate regime is not at all unusual. Indeed, Australia *is* unusual in not providing guaranteed days of rest for adults, and in not providing any restrictions on children's work on weekends. Both of these omissions are contrary to ILO principles.

In any event, we note that the default penalty rate regime set by the modern award can be modified through enterprise bargaining, provided this leaves workers better off overall. This is a good example of the flexibility of the current industrial relations system.

Impact of award modernisation

The Commission's draft report airs employer criticisms of the outcomes of the award modernisation process. However, at the time, the retail employers said they 'strongly support[ed] the AIRC's determination to modernise Australia's award system'[30] and to consolidate more than 113 retail awards into a single document.

As part of this process of harmonisation, it was inevitable that there would be increases in award entitlements in some parts of Australia, and decreases in others. For any given entitlement, the AIRC

[28] *Weekly Rest (Industry) Convention 1921; Weekly Rest (Commerce and Offices) Convention 1957*.
[29] Weekly Rest (Commerce and Offices) Recommendation 1957; Minimum Age Recommendation 1973.
[30] Submission of the Australian Retailers' Association to the AIRC (5 June 2008) <www.airc.gov.au/awardmod/databases/general/submissions/area_sub.doc>

generally adopted the sensible approach of preferring the standard which already applied to the greatest number of workers; this was usually the standard that prevailed in the more populous States. This minimised the degree of change caused by award modernisation.

Despite this approach, it is clear that some things did change. The employers imply that most changes were to their detriment. This is false. Take, for example, some of the most important wage rates: those that apply for Monday to Friday work during the day. The wage rates at these times for permanent adult workers in the retail sector went *down* by 0.86%, from $15.93 per hour (based on a weighted average) to $15.79 per hour;[31] the rates for casuals went down by 2.12%, on average, from $20.17 to $19.74 per hour.

The actual changes in the three big States (accounting for more than 80% of retail employment) are set out below.

	Modern award rate (from 1 Jan 2010)	**Former award rate ($/hr)**	**% change**
NSW			
Permanent	$15.79	$15.85 (corporations)[32] $16.40 (others)[33]	-0.32% -3.72%
Casual	$19.74	$19.74 (corporations) $20.43 (others)	No change - 3.38%
Vic[34]			
Permanent	$15.79	$15.86	-0.44%
Casual	$19.74	$21.15	-6.67%
Qld			
Permanent	$15.79	$15.86 (corporations)[35] $16.51 (others)[36]	-0.44% -4.36%
Casual	$19.74	$19.51 (corporations) $20.30 (others)	+1.18% -2.76%

Harmonisation also meant significant changes for wage rates that were 'outliers' in a national context. This often delivered windfall gains for employers. For example, the Sunday casual rate in the Northern territory will decrease from $34.90 to $31.58 by 2015, ignoring the effects of annual minimum wage adjustments.[37] This is a reduction of 10%. Many similar examples can be given.

As well as changes to wage rates, award modernisation has led to some changes in penalty rates. The Commission asserts that'[b]usinesses previously covered by state awards … face significant

[31] Weighted average based on retail employment by State (cat 6291.0.55.003 (Nov 2009)), assuming that 25% of retail employees work for non-constitutional corporations, and assuming that every retail worker was covered by one of the following major retail awards (or NAPSAs): *Retail and Wholesale Industry - Shop Employees - Australian Capital Territory - Award 2000*; *Retail, Wholesale and Distributive Employees (NT) Award 2000*; *Shop, Distributive and Allied Employees Association - Victorian Shops Interim Award 2000*; *Shop Employees State Award* (NSW); *Retail Industry Award - State 2004* (Qld); *Retail Industry Award* (SA); *Retail Trades Award* (Tas); *The Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977* (WA).
[32] The NAPSA derived from the *Shop Employees State Award (NSW)*.
[33] The Div 2B State award derived from the *Shop Employees State Award (NSW)* .
[34] *Shop, Distributive and Allied Employees Association - Victorian Shops Interim Award 2000*.
[35] The NAPSA derived from the *Retail Industry Award - State 2004 (Qld)*.
[36] The Div 2B State award derived from the *Retail Industry Award - State 2004 (Qld)*.
[37] ACTU calculation based on the *Retail, Wholesale and Distributive Employees (NT) Award 2000*.

increases in penalty rates'.[38] The implication is that most penalty rates will increase, and that the increases are always 'significant'. However, this cannot be categorically stated. The picture is extremely mixed. Some rates have gone up, while others have gone down or stayed the same.

The Commission gives a number of selective examples in order to support its claim. First, it repeats the NRA example relating to corporations formed during the *Work Choices* period.[39] Although it is true that these businesses were formerly award-free, this was a Coalition policy designed to undercut the award system, and undercut existing businesses that were obliged to pay award rates. In any event, this exemption only affected a comparatively small number of businesses, many of whom would no longer be operating, given that one in five new employing businesses fail within a year.[40]

Second, the Commission asserts that the Queensland state retail award 'did not provide for casuals to receive week-end penalty rates'. This is incorrect: casuals received a loading of 150% for Sunday work (in small businesses[41]) or 200% (in large businesses) rather than the 23% casual loading normally paid.[42] This represents a 22% penalty for a small business employer, and a 63% penalty for a large business employer.

The Commission then gives (in Box 10.6) the example of changes to Myer's penalty rates. However, these changes have nothing to do with the creation of the modern retail award. Myer is not even covered by that award; it is covered by an enterprise award, the *Myer/Grace Bros Stores Award 2002*. The inclusion of this Box is misleading, as it implies that the specific changes agreed to by Myer are compulsory, and will be faced by other retailers. That is not the case. Accordingly, the Commission should delete Box 10.6.

Finally, it is inappropriate to include unsubstantiated employer claims about the overall costs of award modernisation. The Commission quotes the figure the NRA put to Fair Work Australia: 1.6%.[43] However, the NRA never explained to Fair Work Australia how it obtained this figure. It did not even put this allegation directly to the Commission. The assertion is unsafe and should not be repeated.

Similarly, the Commission includes a case study by the Australian Retailers Association purporting to show wage increases of 3-5% due to award modernisation.[44] However, even these (relatively small) claimed increases should not be accepted uncritically. This is because:

- The specific awards, as well as the roster patterns, used as the basis for the case study are not disclosed, making it impossible to verify the figures;
- There is no evidence that the roster used for the case study is representative of actual practice;
- The case studies compare the NAPSA rates 'prior to 1 July 2010' with the modern award rates payable from '1 July this year [2011]'. The latter rates incorporate the $26-per-week

[38] Page 304.
[39] Page 304.
[40] ABS cat 8165.0 (Jun 07 to Jun 09) Table 16.
[41] Technically, exempt shops and independent retail shops, as defined by the *Trading (Allowable Hours) Act 1990* (Qld).
[42] *Retail Industry Award - State 2004* (Qld) cl 6.1.6-7.
[43] Page 302.
[44] Box 10.5 on page 302.

increase awarded by Fair Work Australia in July 2010. Accordingly, the comparison does not appear valid; and

- The case study conveniently omits the other large State, Victoria, where (as the table above suggests) labour costs have fallen significantly because of award modernisation.

We note, in any event, that this case study contradicts the ARA's prediction (from 2008) that award modernisation would increase retail labour costs by '14% or $22,000' on average, and by '$30,094 or 22%' in NSW.[45] This figure was revised down in late 2009, with the estimated cost increase in NSW given as $28,473 or 16.5%.[46]

Given the flaws in the ARA analysis, we recommend that the Commission remove all reference to the case study in the final report.

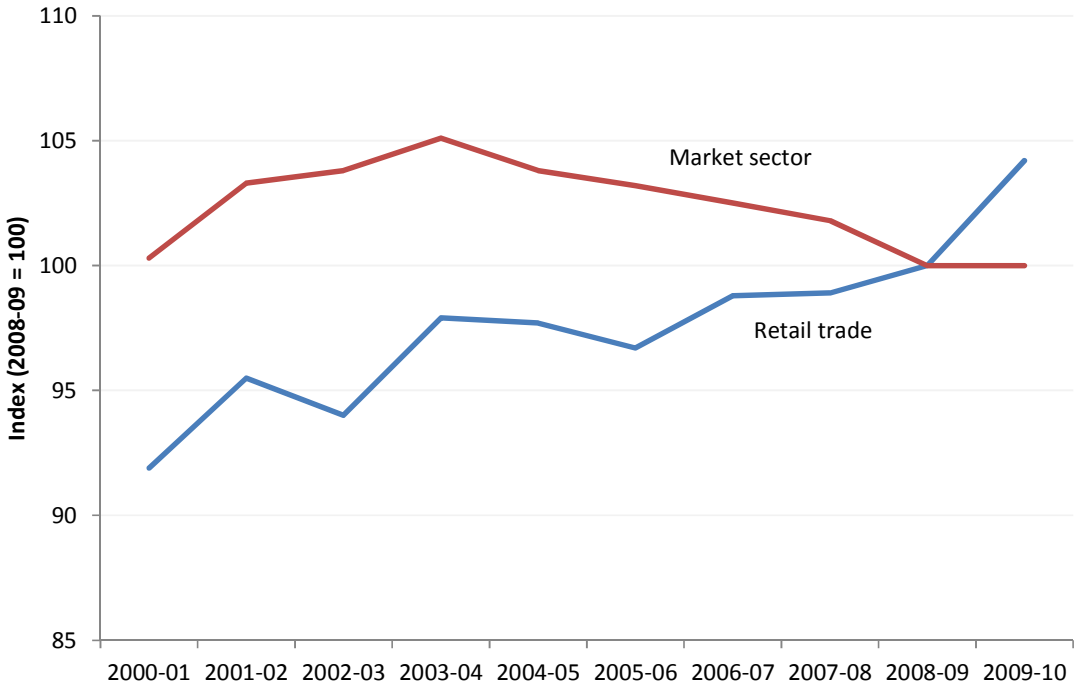
Further unsubstantiated employer claims about the costs of award modernisation are aired in Box 10.4 on page 300. These comments should be removed, for the reasons set out in the Introduction.

Productivity

The Commission's draft report suggests that productivity growth is low in the retail sector, and implies that the Fair Work Act is to blame.

First of all, as we demonstrated in our original submission, labour productivity growth in the retail sector has in fact *exceeded* the all-industries figure, with particularly strong growth in the last few years (see original submission, 5). The same result applies to measures of multifactor productivity (MFP) growth. The graph below shows that MFP in the market sector has fallen by 0.3% in the past decade, but rose 13.4% in the retail sector, including a 4.2% increase since the Fair Work Act was introduced.[47]

[45] 'Retailers face 14% wage bill increase under new award' (6 November 2008) Smart Company <www.smartcompany.com.au/retail/retailers-face-14-wage-bill-increase-under-new-award.html>.
[46] 'New retail award will drive costs up' <www.retail.org.au/index.php/employment_relations/award_modernisation>
[47] From ABS cat 5260.0.55.002 (2009-10), Table 1.



Second, despite the temptation to ascribe the secular increase in the rate of productivity growth to the *Fair Work Act*, we think it is unsafe to make any strong connection between productivity and particular industrial relations arrangements. Indeed, as Figure 3.18 of the draft report demonstrates, retail labour productivity declined significantly during the period of the Howard government, compared to the United States. Rather, we think that intellectual rigour demands an acknowledgement of the complexity of the many factors which contribute to productivity growth, as well as recognition that ultimately it is technological advances which determine the long-run rate of productivity growth, not changes in labour laws.

Thirdly, to the extent that industrial relations laws and practices do affect productivity, undue emphasis has been given by part of the business community and others to the unfounded proposition that minimum wages, unions, collective bargaining, unfair dismissal (indeed all labour law per se) are all barriers to the productivity growth. Productivity is a function of greater efficiency, and it is wrong to conflate productivity with cost reductions that might be obtained for employers by lowering wages and conditions.

Fourthly, the Commission's international comparisons for labour productivity uses data collected before the Fair Work Act came into effect. For example, figures 3.15 to 3.18 use 2007 data. Obviously, Australia's productivity performance in 2007 cannot be ascribed to an Act that came into full effect three years later.

'Flexibility'

The Commission's draft report uncritically airs employer complaints 'that workplace regulation is impacting on their ability to flexibly adapt to a changing retail market in Australia' (p 311). It suggests that minimum shift length rules (p 316), unfair dismissal protection (p 322), the 'better off overall test' (p 322) and the business transfer rules (p 323) are all constraints on 'flexibility'. It is also suggests there is 'further scope' for employers to use Individual Flexibility Arrangements (p 313) and enterprise agreements (p 319) to achieve 'flexibilities', particularly commission-based pay.

First, let us examine the difference between the 'flexibilities' demanded by employers, and those sought by workers. The 'flexibility' that employers desire is the power to hire, deploy and fire workers, without legal constraint. It is essentially a demand for an exemption from the law, or at least a capacity to opt-out of the law (for instance, by making a statutory individual agreement). This is equivalent to business demanding 'flexibility' in the application of the tax or environmental laws; these demands would be seen as transparently self-serving, injurious to others and to the public good.

Employer calls for a 'flexible workforce' is also cover for a desire to shift costs and market risk to workers, by converting them from regular employment to more precarious forms of work, such as a casual worker, fixed-term employee or contractor. For example, with regular employees, it is the employer who bears the risk of short-term market downturns (in which case wages must still be paid to the employee, or else the worker must be dismissed with severance pay); worker mistakes (since the employer is vicariously liable at law); worker illness (since sick leave is payable) and so forth. In contrast, non-standard employees bear some or all of these risks themselves, even though they are often least able to control the risk, or bear the loss if it materialises. As a result, large costs are often passed on to the taxpayer: for instance, when Medicare covers the medical costs of an uninsured contractor; when Centrelink provides Newstart to fixed-term workers between jobs; or when contractors without superannuation need to rely on the age pension in retirement. In other words, employer demands for flexibility have nothing to do with productivity or wealth-creation; it is all about shifting risk to workers and the taxpayer, and increasing profits for business.

The demand by Australian employers for greater 'flexibility' (ie reduced employment regulation) is particularly curious given that Australia has some of the weakest employment protection laws in the OECD.[48] In any event, the OECD has concluded on the basis of empirical studies that there is 'no clear link' between more 'flexible' (ie weaker) labour market regulation and higher levels of employment, or any other favourable labour market outcomes in the aggregate.[49]

Now lets us consider the 'flexibilities' that employees sometimes seek from their employers. This usually takes the form of some exemption – not to the law, but rather to internal firm rules. For example, workers might ask to work from home, or to come in late one morning per week, or to take unpaid leave. These requests for flexibility are usually driven by the employee's need to care for children and family. In these cases, there is a strong public interest in the employer accommodating the request, particularly in cases where there is little or no cost to the business.

With this distinction in mind, the flexibility debate can now be seen for what it is. Employers charge that unions, awards, Fair Work Australia – and indeed, the law itself – obstructs 'flexibility'. What they mean is that these institutions constrain the exercise of their power, in the interests of protecting workers. That is precisely so, and deliberately so.

On the other hand, unions support *employee-driven* flexibility, provided it does not undercut important collective standards at the workplace (such as wages). We know, for example, that 25% of people working less than 35 hours per week want more shifts, or else full-time work.[50] Conversely, 25% of full-time retail workers would like to reduce their hours of work, for family reasons (20%) or

[48] OCED, *Economic Surveys: Australia* (2010) 136. Available from <http://resources.news.com.au/files/2010/11/15/1225953/995883-101116-aes.pdf>.
[49] OCED, *Employment Outlook* (2007).
[50] ABS cat 6265.0 (Sep 2010) Table 3.

to have more free time (60%).[51] Less than half (45%) of retail workers say their work and family/social lives are always balanced, with 12% reporting that they are rarely or never balanced.

However, the law provides limited support for employees seeking flexibility from their employer in terms of the working arrangements:

- Under the common law, employees are contractually bound to obey employer rules about working time and duties. If they seek 'flexibility', the employer can simply refuse – although there is an emerging principle that the employer cannot do so capriciously or in 'bad faith';
- Under the retail modern award, the employer's power to determine rosters is made explicit.[52] Employers are empowered to alter rosters at any time and for any reason. If the employee objects to the change, the parties must have 'discussions', and conciliation by Fair Work Australia is available. However, since arbitration is not available, the employer will have the final say;
- Under the *Fair Work Act*, employees do not have rights to flexible work generally. There is a more limited 'right to request' flexible working conditions for workers who provide care to young children or people with a disability. However, employer refusals of employee requests cannot be challenged.

[51] ABS cat 6210.2 (Dec 2010) Table 3a. These are Victorian figures, but are replicated in Queensland and Western Australia. See note 57 below.
[52] Clause 28.14.

As a result, many retail workers are denied the opportunity to obtain more flexible working conditions. For example, ABS data shows that:

- only 34.5% of retail workers say have a say in their start and finishing times (compared to more than 50% in finance, IT, professional services and public administration); [53] and
- only 33.5% of retail workers say they are able to choose to work extra hours and take time off in lieu at a convenient time (compared to more than 50% in professional services, public administration and real estate).[54]

We note that the modern retail award does permit alterations to start/finish times (within a very broad span of hours),[55] and explicitly provides for TOIL,[56] with no additional costs to employers. As such, the lack of flexibility for two-thirds of retail workers must be due to employer decisions about what times of the week to trade, and how to structure employment and rosters. Not all of these decisions will be rational or fair.

Many retail workers do try to achieve some working time flexibility. The ABS has recently undertaken surveys on work flexibility in Victoria, Queensland and Western Australia. The findings are consistent, and we present the Victorian results here.[57] Twenty-nine percent of retail workers have asked for changes in work arrangements, generally for financial, family or childcare reasons. However, across all industries, these requests were denied (in whole or part) in 25% of cases. Within each industry, a further 17% of workers would like to make a request to change working arrangements but have not done so because they believe the job (or the employer) does not permit flexible working.[58]

As a result of these inflexibilities, many workers (particularly women) need to access paid and unpaid leave, especially in order to provide care for families. According to the ABS, 34% of retail workers provide care to young children or the elderly.[59] And across all industries, 36% of working mothers (and 23% of working fathers) take unpaid paid leave to care for children; 23% of mothers (and 24% of fathers) take paid annual leave; 18% of mothers (and 24% of fathers) take paid carer's leave.[60]

Further costs of the unavailability of decent yet flexible work are that parents (again, mostly women) cannot easily return to the workforce after the birth of a child; that parents in work are forced to rely on informal or formal childcare (which can be very expensive); and that parents suffer stress due to the inability to balance work and family responsibilities. According to the ABS, most working men (76%) and women (85%) feel rushed or pressed for time, principally due to the pressures of balancing work and family.[61]

One final point needs to be made. As much as some retail workers desire 'flexibility', many desire the opposite – stability and certainty. (Typically, workers seek both: stability in some things, and

[53] ABS cat 6342.0 (Nov 09) Table 5.
[54] Ibid, Table 6.
[55] For example, from 7am to 9pm during the week: clause 27.2.
[56] Clause 29.3.
[57] ABS cat 6210.5 (Oct 2010) [WA]; ABS cat 6342.0.80.002 (Oct 2010) [Qld]; ABS cat 6210.2 (Dec 2010) [Vic].
[58] ABS cat 6210.2 (Dec 2010) Table 22a.
[59] ABS cat 6361.0 (Apr to Jun 2007) Table 8.
[60] Ibid, Table 11.
[61] Ibid, Table 6.

flexibility in others.) For example, most workers desire a stable job, predictable hours of work, and a regular amount in their pay-check. Unfortunately, many workers in the retail sector do not have this. For example:

- 40% of retail employees are casual (compared to the all-industries average of 24%).[62] These workers have no guaranteed minimum number of hours of work per week, and face loss of shifts at short notice;
- 14% of retail employees have been with their employer for less than 6 months, and so have no unfair dismissal protection. A further 5% are employed in small business and have been with their employer for between 6 and 12 months, and so also lack unfair dismissal protection;[63] and
- 33% of retail employees have pay that varies from week to week (compared to the all-industries average of 25%).[64]

It is well known that job insecurity is a major source of stress, which can lead to mental illness, family break-ups, and other undesirable consequences.[65] Accordingly, the Commission should be very careful before it advocates further 'flexibility' of the type that exacerbates job insecurity.

We now turn to specifically address some of the supposed 'inflexibilities' of the *Fair Work Act* nominated by the Commission.

Performance pay

The Commission's draft report suggests that performance-based pay could be used to enhance productivity, but that 'minimum award wages that are high in Australia, by international comparison, are constraining the ability of employers' to implement performance-based pay (at p 325). We make a number of responses.

Firstly, as we made clear to the Commission in consultations, the *Fair Work Act* does not preclude an employer and employee from entering into a common law contract placing some or all of an employee's earnings 'at risk' – provided that over the course of an agreed period the employee is not disadvantaged in a financial sense compared to the award. These 'set-off' arrangements are quite common in a number of industries, such as real estate.

Secondly, it is not the case that 'high' minimum wages preclude these arrangements. Indeed, seven percent of collective agreements in the retail sector explicitly provide for performance-based pay.[66] The main reason why these arrangements are not embraced is that the rewards offered by employers are not commensurate with the risks that employees are asked to bear. This is a market problem: if employers offered sufficient rewards, employees would no doubt be more interested in performance-based pay.

Thirdly, as we have noted earlier, if performance-based pay is used simply to reduce wages, without improving sales, this does not increase productivity but instead simply transfers income from labour

[62] ABS cat 6359.0 (Nov 2010) Table 7.
[63] ABS cat 6209.0 (Feb 2010) Table 4; ABS cat 1321.0 (2001) Table 3.3.
[64] ABS cat 6359.0 (Nov 2010) Table 7.
[65] B Pocock, R Prosser and K Bridge, '"Only a Casual…": How Casual Work Affects Employees, Households and Communities in Australia', Labour Studies, University of Adelaide, August 2004.
[66] Productivity Commission draft report, 381.

to capital. The Commission should be careful about claiming that performance-based pay enhances productivity. It depends on how the risks and incentives are balanced.

Individual Flexibility Arrangements

The Commission airs the employers' complaints about the 'inflexibility' of Individual Flexibility Arrangements (IFAs). No balancing views or critique is provided, leading a reader to assume that the Commission endorses the employers' views.

The features of IFAs that the employers complain about are precisely those protections which Fair Work Australia decided were necessary in order to prevent exploitation of employees, based on Australia's experience with Australian Workplace Agreements (AWAs) under *Work Choices*. These protections were ultimately incorporated into the *Fair Work Act*.

Under *Work Choices*, AWAs could be offered as a condition of employment, and (for a period) they could derogate from the award without the need to provide compensation. As a result, thousands of vulnerable employees were forced (by economic necessity) to accept jobs on below-award conditions. Studies showed that 76% cut at least one important award condition; 68% cut penalty rates (perhaps the most valuable award condition); while 16% of AWAs removed *all* award conditions.[67] Little or no compensation was provided for these cuts: the average AWA paid just 3% more than the minimum wage. In the Victorian retail sector, 24% of AWAs paid *only* the minimum wage, and at least 6% paid *less* the minimum wage (despite it being illegal to do so).[68] AWAs did not only cut award conditions: twenty-eight percent of AWAs (unlawfully) derogated from the five statutory minimum conditions of employment.[69]

Although AWAs were touted as providing for 'flexibility' that would drive 'productivity', there was little evidence of them being used to implement innovative and genuinely productive human resources management practices, let alone provide tailored or 'individualised' conditions of employment to meet workers' needs.[70] Indeed, they tended to be template agreements (often drafted by employer associations) designed to be rolled out across entire workplaces and industries, with the main objective of minimising labour costs, or avoiding collective bargaining with unions.[71]

As a direct response to this debacle, in designing the rules governing IFAs, Fair Work Australia (and the *Fair Work Act*) adopted three key protections for workers:

- a requirement of genuine employee consent (in that IFAs cannot be made a condition of employment, and employees may resign from the arrangement);
- a requirement that they leave workers genuinely better off than the award;
- the principle that collective agreements prevail over IFAs.

[67] Victorian Workplace Rights Advocate, *Report of the Inquiry into the Impact of the Federal Government's Work Choices Legislation on Workers and Employers in the Victorian Retail and Hospitality Industries* (2007) 62. Available at: <www.business.vic.gov.au/busvicwr/_assets/main/lib60148/retail%20&%20hospitality-artfinal.pdf>
[68] Ibid, 59.
[69] Ibid, 62.
[70] R Mitchell & J Fetter, 'Human resource management and individualisation in Australian labour law' (2003) 45 *Journal of Industrial Relations* 292.
[71] J Fetter, 'The Strategic Use of Individual Employment Agreements: Three Case Studies' (2002) University of Melbourne Centre for Employment and Labour Relations Law, Working Paper 26.

Despite these clear rules, there is anecdotal evidence that employers – including those in the retail sector – are continuing to treat IFAs as if they were AWAs. In particular, we have several reports of employers either informing job applicants that they 'must' sign an IFA, or else simply providing a copy of the IFA with the contract of employment and Tax File Number declaration at the start of employment, without explaining that employees are not obliged to sign the IFA.

Secondly, we have reports (including from the pharmacy sector) of employers offering IFAs that remove penalty rates, but which state that in return the employee will be given the 'flexibility to work the hours that suit the employee'. Clearly, this arrangement cannot leave the employee 'better off', since they will have incurred a financial disadvantage.

The draft report notes that the General Manager of Fair Work Australia is currently investigating the use of IFAs. We await his report. However, our suspicion is that the evidence will show that IFAs are being used by employers to implement their idea of 'flexibility' – namely, wage cuts – with little use of IFAs to promote employee-oriented flexibility. If that is the case, then any attempt by employers to expand the circumstances in which IFAs can be used should be strongly resisted, lest Australia ends up with AWAs again. As the *Fair Work Act* itself states, statutory individual agreements that undermine awards and collective agreements 'can never be part of a fair workplace relations system'.[72]

Unfair dismissal laws

The draft report also airs employer dissatisfaction with unfair dismissal laws, and endorses the OECD view that unfair dismissal laws should 'ensure reasonable flexibility for employers to hire and fire', with the implication that Australia's laws do not do so.

This is simply false. Australia has some of the weakest unfair dismissal laws of all the countries that have ratified (or otherwise observe) the ILO's *Convention on Termination of Employment*, including most European countries.[73] In any event, the Convention does *not* prevent employers from dismissing workers, where the dismissal is warranted.

First of all, Australia sets a 6 or 12 month qualifying period before unfair dismissal protection commences. This is inconsistent with the Convention, which only permits exclusions for workers serving a 'reasonable' probationary period agreed in advance with their employer. As set out above, this rule probably excludes 19% of retail workers from the unfair dismissal jurisdiction. Australia also excludes high-income award-free employees from the jurisdiction, contrary to the Convention.

Second, under the Convention, a worker can only be fairly dismissed for misconduct, underperformance or redundancy. In contrast, in Australia, workers can be fairly dismissed on a broader range of grounds, provided the dismissal was not 'harsh, unjust or unreasonable'. Under the Convention, a dismissal is automatically unfair if workers are not given the opportunity to defend themselves against charges of misconduct or underperformance, but this is not the case in Australia.

Third, if a dismissal is found to be unfair, the Convention requires reinstatement or else 'adequate' compensation. Under the Fair Work Act, compensation is capped at 6 months' wages, and damages are not available for distress. Given the average full-time wage in retail is $939.50 per week, this

[72] Section 3(c).

[73] The key principles from the ILO convention are incorporated in art 24 of the *European Social Charter*, which has been ratified by 32 out of 48 European countries. Seventeen European countries have also directed ratified the ILO convention.

implies a limit of less than $25,000. Query whether this is 'adequate' for the most serious unfair dismissal cases – say where an employee is, say, publicly (but falsely) accused of theft by their employer, and is never able to work again because of their tarnished reputation

These rules can hardly be viewed as onerous.

Moreover, very few dismissals result in claims against employers. Hopefully this is due to employers acting fairly, rather than employees being unfairly dismissed but unable or unwilling to bring claims forward.

In a typical year, about a million employees cease work involuntarily, due to dismissal, redundancy, ill health or expiry of a fixed-term contract.[74] However, only 11,116 unfair dismissal claims were made in the federal system last financial year (plus a trivial number in State systems).[75] This represents a complaint rate of about one percent.

It is true that the number of claims has increased from the *Work Choices* period. However, the coverage of the *Work Choices* unfair dismissal laws was much smaller: the laws excluded non-corporate employers (outside of Victoria and the Territories), small businesses, short-term casual workers, and others. We calculate that *Work Choices* only gave unfair dismissal protection to 22% of employees in Australia, whereas the *Fair Work Act* covers 71% of employees. In other words, the coverage of the federal system has more than tripled; as such, it is no surprise that the number of claims has increased.

Of the 9,369 unfair dismissal claims disposed of by Fair Work Australia during last financial year:[76]

- The vast majority (9,292, or 99%) were settled before hearing. Of those settled in official conciliation, 25% were settled without money payment from the employer, 21% were settled for less than $2,000; and 23% were settled for less than $4,000. There is no way to tell if moneys paid were in respect of unpaid entitlements, compensation for acknowledged wrongdoing, or 'ex gratia' payments without admission of liability.

- A very small proportion of claims (109) were dismissed at a preliminary jurisdictional hearing for not being within the scope of the Fair Work Act. Only four were dismissed on the ground they were 'vexatious';

- Only 87 claims were arbitrated. Of these, the employer won in 35 cases and lost in the remaining 52 cases. Where the employee won, reinstatement was ordered in 15 cases, and compensation awarded in the others. Where monetary awards were made, less than $4,000 was ordered in 29% of cases; $4,000-$8,000 was awarded in 23% of cases; and $8,000-$13,000 was ordered in 13% of cases.[77] Once again, it is not possible to tell if these amounts represent unpaid entitlements, or compensation, or both. The maximum amount of compensation (6 months' wages) was awarded in fewer than 2% of cases.

Given these statistics, it can be seen that employers who act fairly have nothing to fear from unfair dismissal laws … and, unfortunately, even those who act unfairly do not face significant liability for their actions. To be specific, there is a 52-in-a-million chance of a dismissed worker pursuing a claim

[74] ABS cat 6209.0 (Feb 2010) Table 10.
[75] FWA, *Annual Report 2009-10* (2010) 12-14, 76.
[76] Ibid.
[77] Senate Standing Committee on Education Employment and Workplace Relations, Additional Estimates (February 2011), FWA Answer to Question on Notice EW0749_11.

which ends in judgment against the employer – and even then, the employer would only face liability of $4,000 or $8,000. In terms of the risks of employing people, employers have much more to fear from irregularities such as: failure to keep employment records (maximum penalty $16,500 for a body corporate); wage underpayment (maximum penalty $33,000) or sexual harassment (a maximum penalty of $33,000 plus damages, where the highest amount ever awarded is $466,000[78]).

These levels of compensation for unfair dismissal are very low by international standards. We have conducted an analysis of the unfair dismissal laws (as they apply to retail workers) in the 28 OECD countries apart from Australia for which information was available (Appendix 2). The analysis shows that:

- Compensation is unlimited in 15 countries (Austria, Belgium, Canada, Czech republic, Estonia, France, Israel, Italy, Luxembourg, Mexico, Netherlands, New Zealand, Poland, United Kingdom, United States);

- Ten countries impose a minimum compensation payment, with an average amount of 6 months' wages (Estonia, Finland, France, Greece, Hungary, Italy , Luxembourg, Mexico, Spain, Sweden), not counting any higher minimums imposed in some countries when long-serving employees are dismissed; and

- Of the 14 countries that impose a cap on compensation, the average level of the cap is 15 months' wages (Chile, Denmark, France, Finland, Germany, Greece, Hungary, Italy, Ireland, Luxembourg, Slovenia, Spain, Sweden, Switzerland), not including any higher cap which applies to long-serving employees.

Accordingly, it is hard to believe that Australia's moderate unfair dismissal laws could impose any real constraint on the decision of an employer to hire or fire.

Transfer of business rules

The Commission's draft report ventilates employer dissatisfaction with the transfer of business rules, and implies that the Fair Work Act does not give sufficient emphasis to the 'interests of employers in running their enterprises efficiently'.

Employer criticisms of these rules are curious, and hypocritical, given that the business community normally supports the fundamental principle of contract law, namely *pacta sunt servanda* (contracts should be honoured). Without transfer of business rules, there would be nothing to stop an employer entering into a collective agreement with its workforce, and the next day selling the business to another firm (or even a subsidiary), with the loss of agreement conditions. Indeed, in the absence of transfer of business rules, workers would have little incentive to make collective agreements, knowing that they did not survive a business transfer. The result would be a serious erosion of trust and co-operation between the parties, leading to a withdrawal of employee effort and greater levels of industrial disputation.

Accordingly, it is in the public interest that there be strong transfer of business rules. These were first inserted in the predecessor to the *Fair Work Act* in 1914.[79] They were absolute in nature, requiring any 'successor' business to observe an award (and, later, a collective agreement) binding on its predecessor, in respect of *all* of its employees.

[78] *Poniatowska v Hickinbotham* [2009] FCA 680 (23 June 2009); *McKenna v State of Victoria* [1997] VADT 38.
[79] *Commonwealth Conciliation and Arbitration Act (No 2) 1914* (Cth).

These provisions were watered down under *Work Choices*, which provided that: a collective agreement only bound a successor firm if it operated the same "business" as its predecessor (and so excluding most in-sourcing/out-sourcing cases); the agreement only bound employees who had transferred from the old employer; the agreement ceased to operate after 12 months; and the new employer was not liable to recognise entitlements that had accrued under the agreement but which had not been paid by the old employer (which in many cases was insolvent).

These rules encouraged rogue employers to 'phoenix' their businesses, by transferring control to a new corporate entity. In some cases, the objective was to remove employee entitlements from balance sheets: workers would be transferred to a new company, which had no liability for their accrued entitlements. The old company (which did have liability for these entitlements) would then be placed into liquidation. In other cases, the objective was to avoid existing wage deals: workers were falsely told their employer's business was failing, but that it could be 'saved' if they agreed to transfer to a new corporate entity, at lower wages.

These *Work Choices* rules also encouraged large companies to engage in outsourcing in order to avoid collective agreements. They would outsource parts of their business (such as cleaning and catering) to contractors and then 'in-source' these same services from the contractors, at bargain rates. Workers found themselves performing the same jobs, with the same equipment, at the same premises, just on lower wages and conditions.

Obviously, these rules were wholly (and deliberately) ineffective in promoting the principle of *pacta sunt servanda*. The *Fair Work Act* attempts to close some of the worst loopholes, by ensuring that a collective agreement does transfer in cases of in-sourcing, out-sourcing, and transfers between related companies. However, the legislation is still weaker than the 1914 legislation in that a collective agreement only binds the successor in respect of the transferring employees (rather than all employees doing the same type of work), and that Fair Work Australia may relieve the successor of the obligation to observe the transferring agreement, or modify the way in which it applies.[80]

These new rules mean that it is harder for employers to avoid their obligations under collective agreements. They also mean that firms looking to acquire other firms must honour collective agreements (at least until they reach their nominal expiry date, at which point they can be renegotiated) in the same way that they must honour existing leases and mortgages entered into by the old business. We think this is entirely appropriate.

Minimum shift length

The Commission's draft report identifies 'prescriptive' minimum shift length rules as a 'constraint on employer flexibility', and implicitly recommends a levelling down of standards, so that all casual workers will be treated as schoolchildren are now treated in retail, namely that there is only a 90 minute guaranteed minimum shift.

The Commission should be mindful of the history and purpose of minimum shift length provisions. These provisions have been included in awards for many decades. In most retail awards (including the major ones in New South Wales and Queensland) the standard minimum shift length was three hours (although it was four hours in the Tasmanian retail award). In 1991, the retail employers convinced the Victorian industrial relations tribunal to reduce the minimum shift length to two hours in Victoria, 'in circumstances where employers had communicated a policy to decasualise the retail

[80] See, eg, *Queensland Nickel Pty Ltd* [2009] FWA 335.

industry'.[81] Clearly, this policy was never implemented. However, for the next 20 years, there were no serious employer complaints about minimum shift length rules, and certainly no employer attempts to vary the relevant award provisions.

During award modernisation, Fair Work Australia selected the standard which applied to the greatest number of retail workers – three hours – as the basis for the national standard under the modern award. As a result, on 1 January 2010, the minimum shift length for the retail industry increased in Victoria and decreased in Tasmania. There was no change in the other States.[82]

Soon after, one employer in Victoria, the Terang hardware store, complained that the rule change meant that it would be forced to dismiss young casuals who it had been used to employing for 1.5 hours in the afternoon (despite the Victorian award stipulating a 2 hour minimum).[83] The national retail employer associations then applied to Fair Work Australia to reduce the minimum shift length in the retail modern award for all employees. This application was rejected in July 2010, for lack of evidence. In the middle of a federal election campaign, the employers appealed. The appeal was dismissed in October 2010, on the basis that it was 'hard to imagine a weaker evidentiary case'.[84]

On the same day, the retailers lodged a fresh case, this time limited to schoolchildren. The newly-elected Victorian Liberal government intervened in favour of the employers. Fair Work Australia handed down its decision in June 2011. It said:

> *[45] The employer evidence did not establish how the change would impact on retail operations and why the change would benefit businesses in the industry. The employer evidentiary case was very brief and indirect. It did not deal with the issues relevant to employer flexibility in any meaningful manner. Nor did it attempt to address the impact of the proposed change on school students and other existing employees. I do not therefore consider that a case has been made out based on employers' desire for more flexible engagement practices that the change sought in the application is necessary to achieve the relevant parts of the modern awards objective.*[85]

Nevertheless, the tribunal decided that it was appropriate to reduce the minimum shift length for schoolchildren in very limited circumstances where a longer engagement was 'not possible'. As the Commission notes, this decision is being appealed by the SDA; the ACTU supports the appeal (but we are not an appellant, as suggested at page 316).

Having set out the history of the minimum shift length provisions, we turn to why these protections are important. Without minimum shift rules, employees could spend $10 travelling to work, only to be told when they arrived that trade is slow and they are not wanted. In this case, their net wage, after transport costs, is negative. They could also be asked to 'wait around' and see if trade picks up; during this time they are in limbo, neither at work nor able to relax with friends or family. In both cases, this represents a shift of market risk (the risk of slow trade) from employers to workers – with no compensation or risk premium for the workers. Moreover, abolishing minimum shift provisions

[81] *Re General Retail Industry Award; ex p National Retail Association Ltd* [2010] FWA 5068 (Watson SDP).
[82] With one or two minor exceptions, unnecessary to discuss here.
[83] The employer later agreed to pay $3,000 in back-pay after a Fair Work Ombudsman investigation: Ewin Hannan, 'IR's teen losers take their jobs plea to the PM' (3 April 2010) *The Australian* <www.theaustralian.com.au/politics/irs-teen-losers-take-their-jobs-plea-to-the-pm/story-e6frgczf-1225849083894>
[84] *Appeal by National Retail Association Ltd* [2010] FWAFB 7838.
[85] *Re National Retail Association* [2011] FWA 3777.

would discriminate against workers who could not afford to take short shifts (for example, those with significant travel times or costs to/from work).

In particular, there is a risk that employers would reduce the hours of day workers, and replace them with lower-wage workers. For example, imagine a shop which employs adults from 9:30am to 5:30pm (with an unpaid 30 minute lunch break) at $20 per hour, plus 9% superannuation. Now imagine the employer finds a University student who is happy to cover two hours over lunch (for award rates, without superannuation[86]), and a 15 year old schoolchild who wants to work from 3:30-5:30pm at award rates (without superannuation[87]). As a result, the employer changes the day worker's roster, so that they now work from 9:30am-12:00pm, and again from 2:00-3:30pm. The net result is that the adult worker's wage (and superannuation entitlement) has been reduced by 47%, while the employer has reduced its labour costs by 16%. Conversely, the two students have earned income that they didn't have before – but, unlike the day worker, they are unlikely to rely on the money to support themselves and their families.

Given that most permanent day workers in the retail sector are women,[88] often with caring responsibilities, whereas those who might present themselves for short shifts are likely to be men and women (in more equal measure) without caring responsibilities, it is likely that the reduction or abolition of minimum shifts would have a disproportionate impact on female workers, and a particularly damaging impact on those women who provide care. The unions therefore see their removal as discriminatory, and contrary to the public interest.

Moreover, we note that reduced shift lengths reduce the incentive to work; this is likely to have a significant labour supply effect, particularly for workers with a high opportunity cost for attending work (for example, because of long travel times or high travel costs, or else because there are more attractive job offers available). Because of this, we doubt whether reduced minimum shift lengths in the retail sector would be attractive to most workers, save those who have no other option but to accept work on any terms.

Conclusion

The Productivity Commission has marred an otherwise thorough report into the retail sector by including a chapter on workplace regulation that is beyond its Terms of Reference, that is based on unsubstantiated assertions by a small number of employers, and which contains numerous errors and unsupported conclusions. Fair Work Australia is the body that has expertise in this area, and the ACTU believes that these matters are properly within its domain.

In this submission, we have produced evidence showing that:

- Australia's retail workers are low paid, by Australian and international standards;
- Retail penalty rates are moderate, by Australian and international standards;
- Employer claims of significant cost increases due to award modernisation cannot be substantiated;
- Productivity growth in the retail sector is high, compared to the *Work Choices* period;

[86] Workers who earn less than $450 per month are not entitled to superannuation: *Superannuation Guarantee (Administration) Act 1992* (Cth) s 27(2).
[87] Workers under 18 are not entitled to superannuation: *Superannuation Guarantee (Administration) Act 1992* (Cth) s 28.
[88] 53% of permanent workers in the retail sector are women. Of permanent part-time workers, women constitute 74%: ABS cat 6359.0 (Nov 2010) Table 7.

- The Fair Work Act rules relating to performance pay, Individual Flexibility Arrangements, unfair dismissal, transfer of business and minimum shift lengths are already very 'flexible' and there is no case for further weakening of protections for workers.

We recommend that the Commission delete the entire chapter on workplace regulation, or at least significantly amend it to remove errors and unsubstantiated views, and provide a more balanced analysis based on real evidence.

APPENDIX 1

Compensation amounts for unfair dismissal in OECD countries[89]

Australia	Maximum 6 months' wages
Austria	Unlimited
Belgium	Blue collar: maximum 6 months' wages; White collar: unlimited
Canada	Unlimited
Chile	14 months' wages in regular cases; 28 months' wages in serious cases
Czech republic	Unlimited
Denmark	Maximum 3-6 months' wages, depending on age and length of service
Estonia	Minimum 3 months' wages; no maximum
Finland	Minimum 3 months' wages; maximum 24 months' wages
France	Minimum 6 months' wages; additional 1 month's wage if employer did not follow a fair dismissal procedure
Germany	Maximum 12 months' wages (but up to 18 months for workers with long service)
Greece	Severance pay
Hungary	Minimum 3 months' wages; maximum 12 months' wages plus compensation for any losses
Iceland	No information
Israel	Compensation for breach of contract[90]
Italy	Small business (<15 employees): 2-6 months' wages (but up to 14 months' wages for employees with long service; Other businesses: reinstatement plus 5 months' wages, or else a minimum payment of 15 months' wages
Ireland	Maximum 104 weeks' wages[91]
Japan	No compensation payable (apart from back-pay)
Korea, South	Wages that would have been earned but for the dismissal
Luxembourg	Minimum compensation of 1 month's wages where employer did not comply with fair dismissal process. Maximum: unlimited.
Mexico	(Workers with indefinite employment contracts): minimum 9 months' wages plus an additional 20 days' wages for each year of service
Netherlands	Unlimited
New Zealand	Compensation lost wages plus compensation for humiliation, loss of dignity, injury to feelings and loss of expected employment benefits
Norway	No information
Poland	Unlimited[92]
Slovakia	No information
Slovenia	Maximum 18 months' wages

[89] Source: ILO Employment protection legislation database (EPLex), unless otherwise noted. See: <www.ilo.org/dyn/eplex/termmain.home>.

[90] ILO, National Labour Law Profile: The State of Israel <www.ilo.org/public/english/dialogue/ifpdial/info/national/is.htm#_Toc14149943>.

[91] ILO, National Labour Law Profile: Ireland <www.ilo.org/public/english/dialogue/ifpdial/info/national/ire.htm#5>.

[92] ILO Termination of Employment Digest <www.ilo.org/public/english/dialogue/ifpdial/downloads/term/digest.pdf>.

Spain	Mandatory compensation of 45 days' wages per year of service (capped at 42 months' pay)
Sweden	Mandatory compensation of 6 months' wages (for employees with less than 6 years' service); up to 32 months' wages for employees with long service.
Switzerland	Maximum 6 months' wages
Turkey	No information
United Kingdom	Unlimited
United States	Common law damages if plaintiff proves wrongful dismissal, including breach of implied term that employment will only be terminated for 'good cause' [93]

[93] Ibid.

APPENDIX 2

Weekly rest provisions in OECD countries, in the retail sector[94]

Glossary

Children = People aged under 18

Loading = A wage supplement. A 100% loading implies a doubling of the normal rate of pay.

Time off in lieu = An additional rest day to be taken at a later time

	Weekly rest day(s)	Work permitted?	Compensation for work performed?
Australia[95]			
Adults	2 days	Yes	Standard workers: 25% loading on Saturday; 100% loading on Sunday. Casual employees: 35% loading on Saturday; 100% loading on Sunday.
Children	2 days	Yes	As above
Austria			
Adults	Saturday afternoon and Sunday	Only if 'necessary' or in tourism	Time off in lieu
Children	Saturday and Sunday	Only on Saturday. Not on Sunday.	Time off in lieu
Belgium			
Adults	Sunday	Only 8am-12pm Sunday	Time off in lieu
Children	Sunday plus either Saturday or Monday	Only if necessary	Time off in lieu
Canada			
Adults	Sunday		
Children			

[94] Source: ILO Travail database, unless otherwise noted. See <www.ilo.org/dyn/travail/travmain.home>. A blank entry indicates that no information was available.

[95] ACTU summary of *Fair Work Act 2009* (Cth) and *General Retail Industry Modern Award*.

APPENDIX 2

Chile			
Adults	Sunday plus Saturday night	Yes, in shops	Time off in lieu
Children			
Czech Rep.			
Adults	Sunday	Yes	10% loading paid
Children	Sunday plus one day	Yes	10% loading paid
Denmark			
Adults	Sunday	Only in exceptional circumstances (continuous production; unexpected workloads)	
Children	Sunday plus one day		
Estonia			
Adults	2 days	Yes, if employee consents (unless urgent)	
Children			
Finland			
Adults	Sunday	Only if agreed to by employee	100% loading paid
Children	Sunday plus half day	Only if agreed to by employee	100% loading paid

France			
Adults	Sunday	Only if permitted by collective agreement, and based on rotation	100% loading paid plus time off in lieu
Children	Sunday plus one day	Only if permitted by collective agreement, and based on rotation	100% loading paid plus time off in lieu
Germany			
Adults	Sunday	Only if necessary	Time off in lieu
Children	Sunday plus Saturday or Monday	Can only work on Saturday or Sunday in certain industries, and number of weekends restricted	Time off in lieu
Greece			
Adults	Sunday		
Children			
Hungary			
Adults	Sunday plus one day	Can only work Sunday if nature of business requires it. Must enjoy one Sunday off each month.	Part-time workers and workers in businesses that regularly operate on Sundays: ordinary wage rate. Other workers: 50% loading paid.
Children			

APPENDIX 2

Iceland[96]			
Adults	One day (but usually Saturday and Sunday under collective agreements)	Only if necessary	80% loading paid
Children	Sunday plus one day	No	-
Ireland			
Adults	Sunday	Yes	'Reasonable' additional pay, or 'reasonable' additional time off in lieu
Children	Sunday plus 1 day	No	
Israel[97]			
Adults	One religious day (Saturday for Jews, Sunday for Christians and Friday for Muslims) plus one half day (generally Friday afternoon)	Only if 'impossible' for them not to work	50% loading paid for Saturday
Children			
Italy			
Adults	Sunday	Only if permitted by a collective agreement	
Children	Sunday plus one day	Only if permitted by a collective agreement	

[96] Icelandic Confederation of Labour (ASI), *Icelandic Labour Law* (2007) < www.asi.is/Portaldata/1/Resources/upplysingarit/Icelandic_labour_law_-_okt_2007.pdf>.
[97] ILO, *National Labour Law Profile: The State of Israel* <www.ilo.org/public/english/dialogue/ifpdial/info/national/is.htm#_Toc14149953>.

Japan			
Adults	1 day	Only if 'unavoidable' and if employee agrees	Government order sets loading of 25-50%
Children			
Korea, South			
Adults	1 day	Yes	50% loading paid, or else time off in lieu negotiated with union
Children			
Luxembourg			
Adults	44 hours per week, including Sunday	Only in family businesses. Single parents of children under 16 may refuse.	100% loading paid
Children	Sunday plus 1 day	Not in retail	-
Mexico			
Adults	Sunday	Yes	25% loading paid
Children	Sunday	Yes	200% loading paid
Netherlands			
Adults	Sunday (or a substitute day determined by a collective agreement)	Only if 'necessary' and employee or works council agrees	Time off in lieu
Children	1.5 days	Only if 'necessary' and employee or works council agrees	Time off in lieu
New Zealand			
Adults	As agreed	Yes. However, shop workers employed since 1990 have a right to refuse Sunday work.	
Children			

Norway			
Adults	Sunday	Only if 'necessary'	Time off in lieu
Children	Sunday plus 1 day	Only if 'necessary'	Time off in lieu
Poland			
Adults			
Children			
Portugal			
Adults	Sunday	Only if necessary	Time off in lieu according to contract or collective agreement
Children	Sunday plus 1 day		
Slovakia			
Adults	Sunday plus Saturday or Monday	Only in exceptional cases	To be negotiated with the union
Children			
Slovenia			
Adults	0.5 days (except managers)	Only for objective, technical and organisational reasons	Time off in lieu
Children	2 days		
Spain			
Adults	Sunday plus 0.5 day on Saturday or Monday		
Children	Sunday plus 1 day		
Sweden			
Adults	Saturday or Sunday	Only in special unforeseen circumstances	Time off in lieu
Children			

Switzerland			
Adults	Sunday	Airports and train stations: yes, if employee agrees. Elsewhere: no, unless emergency.	50% loading paid
Children	Sunday	Not permitted	
Turkey			
Adults	1 day		Ordinary wage paid
Children			
UK (England)[98]			
Adults	1 day. Small shops can trade on Sundays; most large shops can only trade for 6 hours on Sunday	Yes. However, no Sunday work for shop workers (a) who were employed before 1994; (b) whose contracts prohibit Sunday work; or (c) who elect not to work Sundays, by giving 3 months' notice (but excluding workers who are employed only to work on Sundays).	Ordinary wage paid
Children	2 days.	As above	As above

[98] UK government, *BusinessLink* <www.businesslink.gov.uk>. See pages on 'Seasonal and Sunday trading' and 'Working time'.

APPENDIX 2

United States			
Adults	As per State law (usually 1 day, but 2 days in some States like New York and California)	Yes	50% loading paid on Sunday in Kentucky, Massachusetts and Rhode Island[99]
Children			

[99] Barbara Kate Repa, *Your Rights in the Workplace* (9th ed, 2010).