Submission to the

Productivity Commission

concerning the

The Economic Structure and Performance of The Australian Retail Industry *Draft Report*

September 2011

A. Introduction

The Shop, Distributive and Allied Employees' Association (SDA) welcomes the opportunity to provide comment on the draft report that the Commission released in July.

The SDA is commenting directly on areas which are of most concern to the welfare of our members who work in the Retail industry.

B. Appropriateness of current indirect tax arrangements (Chapter 6)

This inquiry arose from the public comments of certain retailers, highlighting the competitive disadvantage they faced with online overseas retailers not being charged the GST and any applicable import duty. This was the key concern which retailers themselves could not address in their operations but requires Government action instead. It is disappointing that after consultation and a review of literature and submissions, this key issue will not be remedied unless there is a cost neutral basis to implement any change. According to the draft report, nothing should be done that improves the situation in a timely manner. This will be a failure of the Commission for employers operating in Australia and Australian workers in the retail industry. They will be continued to be exposed to unfair competition indefinitely. Without a remedy or any improvement in this area, some retail workers may lose their jobs. This is unfair given retail is a key employer in Australia.

Faceless internet operations such as e-Bay and other overseas operators in retail should not be given preferential treatment at the expense of Australian workers and employers. Overseas operators are taking advantage of the unfair competitive environment to grow their business. It is not uncommon for these overseas operators to ensure GST and import duties are avoided. For example, if an order is over $1000, it is automatically split into two orders to fall below the $1000 threshold. A system that actively and willingly condones such approaches is wrong.

The retail industry is bearing the real cost in competitive disadvantage brought about by inefficiencies in custom, postal and government bureaucracies. This should not be allowed to continue.

There are real issues that have been identified. It cannot be deemed too hard to implement change, nor that a 'cost neutral' approach is warranted. Such a response jeopardises employment of many Australians in retail. It also appears to contradict the driving force of this Commission in that it is about productivity, yet it appears that if is too hard then it can be left alone. Retail workers and their employers are vulnerable to the consumer whims and their current tendency to save and not spend.

Having inefficiencies that give overseas competitors an advantage in that they can avoid GST and import duties is something that they should not have to contend with. It is something that can be addressed by proactive measures and review of the various practices. It is not expected that the problems can be resolved immediately but a proper and fully itemised plan should be implemented so that progress can be made to reduce and hopefully eliminate this disadvantage. Such action should be done to promote and protect the workers and employers in retail. Other industries are given grants to ensure their survival against international competition. If this can happen, then implementing changes as sought by the retail industry should not be restricted on the basis of a narrow interpretation of 'cost-effective'.

This is one area where all the retail players agree. It is the outsiders of the retail industry who have protested against change. A level playing field on taxes that our government charges all businesses should be achieved. If not, then it is a blatant 'free kick' to non-Australian companies – something an Australian Government should not be supporting.

C. Workplace regulation (Chapter 10)

The draft report contains two recommendations on workplace regulation.

The first recommendation which recommends the Fair Work Ombudsman addressing the issue of calculating award wage rates by promoting its service and refining its systems is supported by the SDA. The SDA would note that this is not just a problem for the Retail industry but throughout any industry where transition arrangements apply.

The second recommendation is:

> *Draft recommendation 10.2*
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> "*The Australian Government should, within the context of the current system and consistent with the maintenance of minimum safety net provisions for all employees, examine retail industry concerns about the operation of the Fair Work Act. This should include consideration of options to address any significant obstacles to the efficient negotiation of enterprise-based arrangements, that have the potential to improve overall productivity. The post-implementation review of the Fair Work Act, which is to commence before 1 January 2012, should provide the appropriate review mechanism. The first review of modern awards, scheduled for 2012, is a further opportunity to address concerns that relate specifically to the operation of relevant retail awards."*

This recommendation in part does not cause the SDA concern, as it reflects the process that has been established i.e. a review of Modern Awards. However, the basis and material in the report which the Commission relies upon does cause concern for the SDA. The concern the SDA has is that the examination of the industrial issues as they pertain to the retail industry is flawed, in that a full and proper set of facts and knowledge has not been placed before the Commission. Statements which are made by some retailers should not be accepted as accurate without first having a look behind them.

The Commission has been influenced to believe that the retail award is based on a 9 am to 5 pm Monday to Friday working week. This we feel, is due to such a statement being repeated by many employers. One can also trace this back to the Deloitte consultative report. It is made as a "finding". However, in examining the report, the source of this statement comes directly from the instigating party of the report – Woolworths. It is a statement about perception, which Deloitte does not question, but accepts as a fact.

The retail awards in Australia have <u>never</u> been based on a 9 am to 5 pm, Monday to Friday working week. The retail industry always had industrial awards that allowed (or required) work to be performed on Saturdays. Fully sixty years ago, a working week for a full time retail worker was from Monday to Saturday lunchtime. Thus, the working week was five

and a half days for full timers during a period when all other workers enjoyed a five day working week. The standard week for other industries, including manufacturing, metals etc., over that period was five days, Monday to Friday. This anomaly continued until the 1970's. It was a "requirement" that employers wanted and needed to ensure that stores opened on Saturday mornings.

In 1972, in Victoria and New South Wales, and in later years in other states, a late night of trading was legislated, accompanied by a five day working week in the relevant retail State awards. Employers were still able to roster workers across Monday to Saturday but only as a five day week. This was the first time retail workers were entitled to two full days off a week. The retail awards were amended to reflect the longer time of shop opening hours, with ordinary time and low penalty rates applying in place of overtime during the extended hours of trading. Exactly the same things happened when Saturday afternoon trading was legislated in the 1980's and Sunday trading started in the 1990's. The idea that retail awards reflect 9 am to 5 pm, Monday to Friday is simply nonsense, and always has been nonsense.

The modern General Retail Award provides for ordinary hours on all days of the week. Clearly a spread of seven days a week shows that a claim of a Monday to Friday restriction is incorrect. The Retail Award has a span of Monday to Friday, 7am to 9pm (11pm for those employers who open beyond 9pm Monday to Friday, or 6pm on Saturday or Sunday), Saturday 7am to 6pm and Sunday 9am to 6pm. Further the modern Retail award has a night shiftwork provision.

A simple look through the awards in other industries shows that retail ordinary hours are far in excess of hours that are standard.

	Ordinary / Span of Hours
Metals	Monday to Friday
Manufacturing (Food, Beverage & Tobacco)	Monday to Friday 6am to 6pm
Vehicle Industry (Auto Parts Sales)	Monday to Friday
Nursery	6am-6pm on 5 days in week Plus till 9pm on one day M-F

Furthermore, penalties that apply in other industries for various hours are in excess of those that apply in retail.

	Saturday %	**Sunday %**
Metals	50 *(If employee agrees to work)*	100 *(If employee agrees to work)*
Nursery	25	100
Vehicle *Auto parts sales*	50	100
Manufacturing(Food, Beverage & Tobacco)	50 *(If employee agrees to work)*	100 *(If employee agrees to work)*

Evening work in other industries also attracts greater penalties.

	6pm to 9pm	**9pm to 11pm**
Metals*	Overtime	Overtime
Nursery	Overtime (except 1 evening)	Overtime
Vehicle*	Overtime	Overtime

**Evening work may be worked as part of shift work system*.

Given the span of hours under retail and the penalties applied, there is no possibility of concluding retail is restrictive and has high penalties. In comparison with other industries, retail offers no limitations on when hours can be worked, nor are its penalties as high as many other industries that operate 24/7. In fact, in comparison to some of the modern awards where non-general retailers fall, the general retail award has lower penalties, a broader span of ordinary hours and a simple shift work provision.

As the Productivity Commission noted for the retail industry, several awards apply, not just the General Retail Industry Award.

The automotive spare parts retailers are one type of retailer that fall under the Vehicle Manufacturing, Repair, Services and Retail Award. As such, these retailers have a 50%

penalty for Saturday work and either shift penalties (between 18% - 30%) for work between 6pm and 9pm Monday to Friday or overtime. This Award is also multifaceted, complex and not developed for retailers. It is an award that has come out of the vehicle industry.

Many submissions raised no issues or issued no complaints over industrial relations regulation. This includes both small and large retailers.

Of those that raised an issue on industrial relations, most have made a broad statement with no real evidence or repeated the same statement (presumably from a common template) e.g. Diva, BNT. The number of times a statement is repeated does not increase the accuracy of the statement. In the case of BNT, the penalty rates and the casual loading it is required to pay are those it proposed to the SDA in the enterprise agreement that now applies to its business.

The Modern Retail Award arose from the process of modernising the award system, as part of the Federal Government's move to a fairer and simpler system. The retail industry was identified as a priority area in the award modernisation process. The modernisation process in retail was long and complicated, given the fact there was no National Retail Award. Awards applied on a State or Territory basis. Various occupations in each State or Territory other than the shop assistant such as bakers or butchers also had awards applying in State or Territories. This meant that in the past a large supermarket in Western Australia would have applied the following awards:

- *Meat Industry (State) NAPSA - 2003 (WA)* [AN160350]
- *Bakers (Country) NAPSA (WA)* [AN160022] *or*
  Bakers (Metropolitan) NAPSA (WA) [AN160023]
- *Pastrycooks NAPSA (WA)* [AN160242]
- *Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977*
- *Clerks' (Wholesale and Retail Establishments) Award No.38 of 1947* (AN160080)

In Victoria a large supermarket would have applied the following awards:

- *SDA - Victorian Shops Interim Award 2000* [AT796250]
- *Bread Trade (Victoria) Award 1999* [AT769688]

- *Pastrycooks (Victoria) Award 1999* [AT792620]
- *Clerical and Administrative Employees (Victoria) Award 1999* [AP773032CRV]
- *Federal Meat Industry (Retail and Wholesale) Award 2000* [AP805114]

And a similar story was true for the rest of the States and Territories.

Each of the awards was different in terms of language, style etc. but also in conditions that applied and what was allowed eg rest breaks, start times, penalties etc.

In developing the Modern Retail Award, a full consultation process was undertaken by the Australian Industrial Relations Commission (AIRC). The Award was not developed in a void, isolated from the industry employers. A simple look at the number of submissions made in the retail industry modernisation process shows the sheer volume of submissions and the range of interested parties. Small retailers, large retailers, big and small employer organisations and unions all made repeated submissions arguing various points. Furthermore, the AIRC issued a draft award for consultation as part of the process. Arguments were submitted and considered by the AIRC on many issues, covering all items of contention (the name of the award was about the only issue not debated).

Many employer submissions were made seeking lower penalties and lower casual loadings than those that were eventually placed in the award. The AIRC was required to examine submissions, examine the then current awards that operated and determine, based on this, what conditions would apply. In most cases of penalty rates and loadings, the AIRC simply adopted the middle position or the most common position contained in the various pre-existing State retail awards. It would appear that employers were not satisfied with the considerations and findings of the AIRC and have attempted to rehash their former prima-facie claims in a different forum.

However, the SDA believes that those who are experts in industrial relations have done the work and understand the various positions. An independent expert umpire namely, the AIRC, has made a decision. The Productivity Commission should not venture into the territory which other regulatory bodies are responsible for.

The retail industry during the modernisation process received the most submissions. The retail industry also had the longest hearings. In fact the retail industry always required extra time and extra submissions over the modernisation process. Even when the Award was made in December 2008, a further round of applications was made by parties seeking changes. Multiple applications were made by various employer organisations to reduce penalties.

A Full Bench of Fair Work Australia determined this application. An extract of the decision is as follows:

> ***Sunday penalties***
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> *The NRA, CCIWA, RTAWA and the Australian Retailers Association (ARA) seek to reduce the Sunday penalty rates for full time employees from 100% to 50% and for casual employees from 125% to 50%. The rates sought are reflected in NAPSAs applying in New South Wales and to Queensland exempt shops but are not generally reflected in other pre-reform awards and NAPSAs. The modern award rate of 100% for full time employees is in line with the existing rate in Victoria, the Australian Capital Territory, Queensland non-exempt shops, Western Australia and Tasmania. In our view the critical mass supports the retention of this provision.*
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> *(FWA: [2010]FWAFB 305, 29th January 2010)*

The modern retail award that is now in place radically overhauled the structures that previously applied through the multitude of awards. The retail industry, unlike many other industries, never had a national award. Having one single award apply nationally is a productivity gain that needs to be recognised. The retailers, of course, in their submissions did not mention this.

The modern retail award provides for 24 hours, 7 days a week operation without overtime. This is the first time such a provision has applied. Under the numerous previous awards there were limitations on when and how ordinary hours could be worked, i.e. nightfill could only occur when the store was closed, "fill" ended at midnight, only one late night (evening) of work in a week could be rostered. A 24-hour trading store would have needed to use overtime rates to staff the store for substantial periods of the night and early morning.

The modern retail award now allows and caters for 24 hour operations. This is a major productivity gain for employers that the modern award has provided. The retailers, of course, did not mention this either!

The retail award also encompasses all classifications and categories of workers into the one award. This means that at a department store or a supermarket, all workers are governed by one award, not separate awards based on occupation, e.g. bakers, butchers, payroll clerks, visual merchandisers and even a candlestick maker! Anyone that a retailer would employ in a store, in any part of the country is now covered by the one award. Again, another productivity benefit and, again, something not mentioned by the retailers.

This not only reduces the number of awards at a store, but reduces the differing conditions that had previously applied, e.g. there is only one set of roster conditions applying, one set of rest break conditions, etc. This is also a significant productivity benefit for the industry, providing uniformity across Australia, easier application of conditions, a simpler understanding, no state differentials to deal with, and a simpler payroll system.

Much has been made of employers complaining about increased penalties. Any penalty increase will take five years to fully implement. However, many retail employees lost in an instant a substantial component of their regular wage due to the fact overtime was not a "penalty" and therefore was not phased in or out. It was simply removed. To illustrate this, in many states work between 6 pm – 9 pm Monday – Thursday was overtime. Retail workers regularly worked this time, e.g. supermarkets open to 8 pm. Employees working between 6 pm – 8 pm were paid a 50% overtime penalty. With the new award span of hours allowing work after 6 pm with a penalty of 25%, a "transition" is to occur. This transition however is from 0% to 25% over five years as the overtime penalty was not saved. FWA and FWO have both agreed this is correct, so employers could freely trade to 8 pm, no longer pay the overtime penalty, do not have to pay the full 25% penalty, but enjoy a five year phase-in of the transition from 0 to 25%. Currently, a transition penalty of 10% applies. This is substantially less than what workers previously received.

This is an enormous cost saving to these employers, but they failed to mention it in their submissions.

This mechanism means any hours that were outside the previous span of hours are now on a phase-in from 0% to new penalties. This is a substantial benefit to employers, which employees have had to accept.

The modern retail award also:

- Has no limits of casual employment;
- No conversion of casual to permanent;
- Allows part-time employees to agree to work additional hours up to full-time, without overtime;
- Has no ratio or proportion of part-time or full-time employees;
- Allows employers to chose shiftwork or a penalty hour system or a combination of both, depending on their trading pattern, business structure or preference;
- Allows work to be performed at any time on any day.
- Has an all encompassing classification structure.

It is clear that the General Retail Award is an extremely flexible award in relation to the employment terms it contains.

"Restriction" is a term bandied about in many submissions from retailers. The term is deliberately used to convey the notion that there are many rules and limitations applying that prevent employees working. These submissions are clearly misleading and incorrect.

The modern award does not contain "restrictions" that prevent labour being employed. It does provide a balance between the employer's and employee's needs. For example, there are maximum shift lengths of 11 hours, but someone could work 12 hours. Paying appropriate penalties or observing minimum standards are not a "restriction" prohibiting employment at certain times. If the employers' argument was correct that the award was "restrictive" then awards should not exist, as any provision or condition is a restriction. Industrial relations is about the balance to protect employees from employers' absolute

power. Any look at the minimalist Work Choices contracts demonstrates clearly the power employers can exercise, when there are no or very few minimums in place.

The examination of industrial relations in the draft report seems to have paid scant attention to the reign of Work Choices. Many employers in the retail industry, especially in small operations, took up the option under Work Choices of removing employee entitlements. Any look at individual contracts made clearly show that retail employers made bare minimum agreements. They did not include what the Commission has identified as "Productivity" provisions, e.g.:

- Commitment to raising productivity
- KPI's
- Productivity related bonuses

Given that the option of individual contracts was available, it may surprise the Productivity Commission that employers simply reduced entitlements – removed penalty rates, took away tea breaks, reduced overtime rates to ordinary rates and increased the working week, to name a few. Furthermore, the payment made to workers was the award rate or a little more – but clearly insufficient to compensate for lost entitlements and insufficient to pass a 'no disadvantage' test.

Not all employers chose this path. Many the SDA dealt with maintained collective agreements with various conditions, but they were disadvantaged by paying their employees more and maintaining better conditions, e.g. giving rest breaks. There have been studies conducted regarding the effects of Work Choices.

One such study which specifically examined the Retail and Hospitality Industry was conducted by the Workplace Research Centre of the University of Sydney. The study's findings were reported in "'Lowering the standards': From Awards to *Work Choices* in Retail and Hospitality Collective Agreements." This report is attached as Appendix 1. The report contained the following overview:

"The findings of this study can be simply stated:

In the first round of bargaining, under the best macro-economic conditions in a generation, agreements rarely raised employee's work standards and usually lowered them. As such, it reveals that the shift from award to statutory based enforceable rights has profound implications in sectors where workers have limited choices.

- *The changes achieved through agreements were often derived from template contracts. They usually had nothing to do with customising employment arrangements to the unique needs of the enterprise.*

- *A quarter (24 percent) of the agreements studied had been based around a template devised by one consultant working both the retail and hospitality industries.*

- *Where agreements differed, it was due to union influence and the fact that employers were larger and had bargaining experience.*

- *90 percent of union agreements preserved nearly all protected Award matters, whereas 50 percent of non-union ones abolished five or more*

- *The scope of issues covered in agreements was extremely narrow. They generally dealt with working time rights and rarely anything else*

- *Less than a third dealt with skills issues and less than one in six addressed childcare and work and family balance issues.*

- *Most left out the majority of 'non-protected' award matters like redundancy and severance pay (which where lost or reduced in 77 percent of agreements)*

- *The interaction of the new entitlements with common rostering arrangements will generally lead to falls in earnings. In retail these falls are in the range of 12 percent to 1 percent and in hospitality in the range 6 to 10 percent (although for union agreements increases of 3 percent are possible).*

- *In particular sectors, workers on particular rosters will be up to 30 percent worse off. Cafés and Restaurants offer consistently poor prospects for casual and part-time workers.*

- *The best that the 'Fairness Test' can deliver is partial compensation for a limited range of award losses.*

- *Employees have lost up to 10 – 30 percent in earnings, more when allowances, paid breaks and annual leave loading and overtime are factored in.*

- *No modeling has been done for losses concerning redundancy and severance pay.*

- *No amount of money can compensate for losses like the right to notice, rights to recovery time and basic protection for part-timers which are now purely optional for employers."*[1]

Clearly, most retailers using individual contracts and others using agreements under the Work Choices legislation took away basic entitlements to pay and conditions as the Howard Government intended they could.

Casual shift

The SDA is surprised that the Productivity Commission has a key point for 'Casual Shift Engagements'. This is an issue some employers have decided to make a case about, blaming the modern award for restrictions.

It may also surprise the Productivity Commission that prior to the modern award, the overwhelming minimum shift length for casuals in State retail awards was three hours This had been an uncontested standard for decades. Again, it is a case of needing to check behind the claims of retailers to establish the key facts about this provision.

[1] 'Lowering the standards': From Awards to *Work Choices* in Retail and Hospitality Collective Agreements Evesson et al Pg vii

During the proceedings before FWA, an expert witness from the SDA made the following point:

> "*None of the employers or employer association representatives we interviewed for the youth project expressed any problems with the current Queensland limit on three hour minimum shifts, but all of them mentioned that children were unreliable and frequently did not turn up to work when rostered. Shorter shifts create less of an incentive for young people to turn up for work* [2]

The Productivity Commission pointing out that having two standards for different casuals could leave non-students exposed to a disadvantage is an argument that the SDA raised with Fair Work Australia. However, the approach should not be to disadvantage other casuals with a shorter shift, (which was the case lost by employers last year) on the basis that there is now a difference in shift arrangements, subject to appeal.

Further wrong perception

Woolworths is quoted on page 306 of the draft report regarding concerns over 'flexing-up' part timers. Any brief examination of the award would bring to light the decision and variation made by FWA to clarify that a part timer can work additional hours by agreement without overtime. In other words, Woolworths has no valid complaint at all!

The Full Bench decision states:

> ***[10]*** *We have generally agreed to amend part-time provisions regarding overtime, in the light of the change to the consolidated request, to make it clear that when variations to part-time hours are agreed in writing overtime is not payable for such agreed additional hours unless the total hours exceed 38 per week or the other limits on ordinary hours. Such changes assist in making additional hours available to part-time employees subject to their genuine agreement. We will vary the modern award to replace the second sentence of cl.2.7 to read as follows:*

[2] FWA matter AM2010/226, SDA written submission April 2011, Dr Price's written statement(sworn) Para 37

"All time worked in excess of the hours as agreed under clause 12.2 or varied under clause 12.3 will be overtime and paid for at the rates prescribed in clause 28.2—Overtime(excluding shiftwork)" (FWA: [2010]FWAFB 305, 29th January 2010)

Clearly part timers can be flexed up at any time on a temporary basis. Again, the SDA states that a proper and full examination of claims by retailers is required before the Productivity Commission makes any conclusion about supposed restrictions in the retail award.

Views on productivity

A staff research paper on the productivity in the retail and wholesale industry was produced by the Productivity Commission in October 2000. It is interesting that there were no great concerns or impediments raised about productivity in the retail industry.

Given the timing of that paper, the retail industry was then governed by numerous and disparate State and Federal Awards, yet this was not raised as an impediment to productivity in the industry.

The draft report has tried to examine the 'productivity' measures in retail agreements, using various means including information from the Department of Education, Employment and Workplace Relations ('DEEWR').

The SDA, in reviewing the DEEWR tables, found that many of the productivity measures in retail agreements are not recorded. We believe this is because DEWR information misses specific industry only measures. Retail does have productivity measures which are generally found only in retail agreements. Furthermore, an understanding of the retail environment is required as some recorded productivity measures of DEEWR e.g. that the employer directs/controls when a break is taken are normal standard practice in retail and as such are generally not reflected in agreements. Some agreement provisions are there to ensure that entitlements or operational needs are balanced. In the breaks example, most agreements contain a provision to not have a break immediately at the start or end of a shift, as this is not the purpose of the breaks. This actually ensures the employee will be more productive!

Another item noted as 'productivity' is the buy out of allowances. In retail there are some allowances that are applied on an ad hoc basis. They include meal, travel and first aid. Companies do not 'buy out' these allowances as they may only apply to 10% of the workplace. Buying them out would be inefficient and reduce productivity.

The agreements in retail have many productivity measures which include items such as casuals working up to full time hours without penalty, no proportions between full time, part time or casuals, roster changes by management, emergency roster changes, rosters changing with mutual agreement, part time hours being able to be reduced in difficult trading times, time of in lieu ('TOIL') (although some companies do not have this as they find it to hard to administer appropriately).

Agreements and bargaining

Both Myer and Woolworths have indicated issues over penalty structures, penalty increase and inflexibilities. Both Myer and Woolworths have had enterprise agreements with the SDA for up to seventeen years.

Both have provided the penalties agreed to be paid under their current agreements to the Commission (Box 10.6). Both have complained about penalties. However, the enterprise agreements were agreed upon following negotiations. Both companies have paid over the base award rates and conditions for many years (agreements had to be higher than the awards to pass the various no disadvantage tests).

It seems strange that companies who have actively negotiated conditions and arrangements for their specific workplaces with the Union are now complaining about those arrangements to the Productivity Commission! They agreed to the terms of the enterprise agreement with the Union, they promoted those terms to their employees for approval, they told the Australian Industrial Relations Commission or Fair Work Australia they agreed to those terms, yet now they complain about them to the Productivity Commission ! Their submissions in this respect cannot be taken seriously.

Conclusion

Given the further information the SDA has provided in this submission, the SDA would caution the Productivity Commission from making a recommendation or drawing conclusions that have been influenced by the views being placed by some retailers before the Commission.

D. Trading hours

It is generally accepted in the retail industry that longer retail trading hours leads to the following consequences: -

1. There is a reduction in full-time employment and an increase in part-time and casual employment in order to staff the stores across the new span of opening each week.
2. There is an increase in costs to retailers in staffing their stores over the expanded hours but no increase in retail sales. This means the profit margins enjoyed by retailers are reduced or prices are increased (or both).
3. If one retailer manages to increase sales as a result of longer opening hours, it is at the expense of other retailers who previously had this business. As a result, some retailers, usually small businesses, are driven out of the industry.
4. As a result of the above, retailers attack penalty rates to reduce their costs even if they originally agreed to keep these penalty rates as a means of securing Government agreement to legislate longer shop opening hours. To the extent that retailers are successful in reducing penalty rates, shop assistants lose income as a result.
5. Retailers will require shop assistants to work at the newly de-regulated times of opening, even if they originally agreed to voluntary work at these times to secure the Government's acceptance of the longer trading hours. Shop assistants are than again the losers, being forced to work at unsocial times.

In the light of the above, no case for longer retail trading can be substantiated, particularly because we already have seven days per week trading in most of the country.

The Productivity Commission looked at various trading hour issues and proposes the following draft recommendation:

> *Draft recommendation 9.1*
>
> *Retail trading hours should be fully deregulated in all States (including on public holidays)*.

Apart from ignoring the above five considerations, the SDA is concerned that the Commission appears to cite and rely upon fairly old studies, (i.e. pre 2000 and pre 1990's) to support the claim that trading hours should be deregulated. For example: Bennett 1981, p 257, Jebb Holland Dimasi 2000, p 257, Brooker and King, 1997, p 273, Pilat, 1997 , p 275, Tum and Weichenreider 1997, p 258

The SDA believes that the draft recommendation is not supported by the draft report for a number of reasons:

1. There was a recent referendum in WA (2005) where a substantial majority of the population voted against longer trading hours. This result appears to have been dismissed as unimportant as there was a campaign by independent grocers. Such a dismissal trivialises the voice expressed by the WA population. The WA population had a direct vote on when they wanted shops to open. There can be no more accurate reflection on community views than a referendum. If people have elected not to have longer trading hours, then this is the pertinent view of the people/consumers. At page 256 the Commission itself states consumer preference cannot be ignored or downplayed, yet it then ignores the people of WA in its draft recommendation!

2. The draft report shows that there is a negative 1.4% effect on productivity when trading hours are extended. From a simple logical view, if it is detrimental to productivity by 1.4% (which is substantial), then it is a bad move (see table 9.7 Brooker & King).

3. In states where broad deregulation has occurred, retailers have often not taken up such opportunities. Very few retailers open at 2 am on a Tuesday or midnight on a Saturday. In fact, for much of the extended hours seen in, say, the Australian Capital Territory, retailers stoically remain shut!

4. The ACT has no restrictions on trading hours. However, it has one of the worst performing retail figures. Again the link between deregulated hours and increasing productivity in terms of sales cannot be made or supported.

5. Trading hours restrictions have not facilitated or influenced the growth in online retailing, which is the claim on page 258. Online retailing is a growing phenomenon that all retailers in developed countries are facing. There is no link shown (in any research), with trading hours. If such a link did exist, then retailers in the Northern Territory, Australian Capital Territory and Victoria should not be feeling threatened by online retailers. Retailers are threatened nationwide, as it is the uneven playing field that is the problem.

6. Comments from retailers and the Productivity Commission's general view in this draft report that penalties are a restriction do not address the issue that this position would be a detrimental cost to employees. If penalties are removed or reduced, then employees are less likely to want to work in the industry. Furthermore, an employee cannot refuse any hours of work during the span of ordinary hours. Given the retail span is seven days a week and can be up to 11pm, there is no 'choice' as to when an employee can be required to work.

7. The report highlights that there are "employees in retail who prefer to work outside of the regulated hours" (Page 257). The first point is that the use of 'regulated hours' is nonsensical. Any hour on any day can be worked under the Modern Retail Award. Secondly, the draft report does not cite any evidence of this fact. The SDA understands there may be retail employees who would prefer to work at evenings, nights or every weekend. However, it is the SDA's experience that retail employees with such a view would form a minority of the retail workforce. The majority of retail

employees believe there would be a significant cost to their personal, family and community time and lifestyle if full deregulation occurred.

8. Unrestricted trading hours, especially on Public Holidays, will create substantial personal costs for employees. On Boxing Day, major retailers (where they can open) over recent years have started their sales earlier and earlier. Some retailers now open at 6am or 5am on Boxing Day and trade until midnight. For a store to open, employees have to work before and after the sale start time. This is a detriment to employees enjoying Christmas. It is busy for them right up to Christmas Eve, they then have to work after close on Christmas Eve to set up ready for the Boxing Day sale. In the relentless competitive push of retailers, the social, family and religious aspects the employee may enjoy on public holidays are sacrificed. Any change to legislation on trading hours should make work voluntary for retail employees.

9. Overseas retailers do not impinge on their employees' Christmas or New Year celebrations as they have their post-Christmas sales in January, not the day after Christmas. This is a far more rational and economic position.

10. Given that there is only weak or inconclusive evidence in studies on Australian retailing and the effect of extended trading hours, this should indicate that the "economic" argument that deregulation is beneficial is not supported or proven.

The report focuses almost entirely on the welfare of consumers ('consumer welfare') and almost completely ignores the welfare of employees, families of employees, or society generally. This focus is not in line with the terms of reference.

A more recent and specific examination of Trading Hours was conducted in South Australia. It had a broad reference and examined many matters including the welfare issues. The findings of this can be found in the 'Report of the 2006/07 Review of the Shop Trading Hours Act 1977' by Alan Moss.

In contrast to the Productivity Commission draft Report, the Review of the South Australian Shop Trading Hours Act, concluded that "[t]here is no clear evidence of public demand for further extension of shopping hours."[3]

The Productivity draft report cites many submissions that argue retail sales, spending and employment will increase with deregulation (Pages 272-279). However, the findings of an independent report from the South Australian Centre for Economic Studies concludes:-

> "Based on the experience of the previous extension of shopping hours, there is no evidence to suggest that further liberalisation would increase either state income or employment levels.[4]"
>
> Furthermore, the SA Centre for Economic Studies concludes any potential net benefit for the state [SA] of increased retail expenditure will come at the expense of household savings. And, "ABS data on retail turnover provides no evidence of a benefit, in that there has been no apparent increase in rate of growth of retail employment in South Australia [since further liberalisation of trading hours]."[5]

The draft report cites an inquiry undertaken by ER Kelly in Western Australia nearly 25 years ago to dismiss the argument that deregulation may cause harm to society (Page 283). Again the draft report does not examine in detail this topic, nor provide counter evidence. In a submission to the Moss review of South Australia's Shop Trading Act in 2006/2007, the South Australian Police stated, "that Sunday trading has increased crime in shopping centre areas and that extended hours will increase this trend and place further demands on already stretched police resources".[6]

It is negligent of the draft report not to examine in a more detailed manner the effect of deregulation on the community and society.

[3] Moss, Alan Report of the 2006/07 Review of the Shop Trading Hours Act 1977, p 51
[4] The Potential Economic Impact of Liberalisation of Shop Trading Hours, The SA Centre for Economic Studies, September 2006
[5] The Potential Economic Impact of Liberalisation of Shop Trading Hours, The SA Centre for Economic Studies, September 2006

[6] Moss, Alan Report of the 2006/07 Review of the Shop Trading Hours Act 1977, p 25

The Productivity Commission draft report devotes pages to the 'cost of regulation' to retailers and consumers, but does not explore the benefits to retail owners and employees of concurrent family and leisure time. The Moss Review in his review concluded that [f]urther deregulation of shopping hours would further erode the leisure time and quality of life of operators of small retail businesses.[7]

The 2006/07 review of the South Australian Shop Trading Hours Act did examine in some detail the likely effect of deregulation on the community and society:

> *"While it is a primary duty of governments to grow their communities' economies it is not their only duty. Governments also have a duty to nurture and preserve their social and community fabric and institutions. It does not serve us well if, in the end, we become materially wealthy and spiritually impoverished. I have noticed that those arguing in favour of deregulation, or extension, of shopping hours, very often describe their proposals as "reforms", in the sense that adoption of their proposals would be a change for the better. Of course changes are only reforms in that sense if they benefit the community as a whole. If the changes have the potential to benefit some members of the community at the expense of others, then they are unlikely to be reforms.*
>
> *Governments should only pass laws which have this potential if it is clearly in the interests of the vast majority of the community. At the end of the day there are more important human activities than shopping.*[8]

Conclusion

The SDA strongly opposes the recommendation proposed by the Productivity Commission. The SDA has through the above analysis shown that the recommendation cannot be supported. The SDA is concerned that despite a wide range of research and studies being quoted, that the most recent and specific examination of Retail Trading hours in Australia has been missed or ignored.

[7] Moss, Alan Report of the 2006/07 Review of the Shop Trading Hours Act 1977, p 51
[8] Moss, Alan Report of the 2006/07 Review of the Shop Trading Hours Act 1977, p 51

To borrow from the Moss report "*Governments should only pass laws which have this potential if it is clearly in the interests of the vast majority of the community."* We believe that the Commission has not applied this principle. The view it has taken has been too narrow.

"*At the end of the day there are more important human activities than shopping".* Unfortunately in economic analysis, living and participating in society are not matters that sit comfortably in a free market based analysis. The Productivity Commission should acknowledge the concerns and impacts that all participants in the industry have, not give preference to economic consumers or industry employers. In doing this, it cannot make the recommendation as proposed as it is flawed. Trading hours should be left to state governments to determine, as this is where the responsibility properly lies.

E. Summary

The key issue for the Productivity Commission in this inquiry is the present unfair competitive position between overseas on-line retailers and Australian retailers including those who operate an on-line business.

Australian retailers all have to pay the G.S.T. on all merchandise they handle, and to pay any import duty on this merchandise.

Overseas-based on-line retailers do not pay the G.S.T. on merchandise priced under $1,000. They do not pay import duty. This gives them a price advantage of up to 20% over Australian-based retailers who must pay both the G.S.T. and any import duty.

Therefore, we have an uneven playing field. This is unfair competition. The magnitude of the disadvantage suffered by Australian retailers is substantial for an industry where profit margins are generally quite small. It is not a sustainable situation.

Many countries deliberately protect domestic companies from overseas competition. Here, we are doing the opposite. Government policy actually penalises Australian retailers against their overseas on-line competitors.

To say that this situation should only be fixed once it is cost-effective to do so is nonsense.

The Australian Retail Industry is already a modern and competitive industry with an extremely flexible workforce and an efficient mode of operation. It is as advanced as any retail industry in North American or Western Europe.

The Government legislates to impose various taxes and duties. In doing so, it has an obligation to the retail industry and its employees to ensure that this taxation regime does not disadvantage any companies, whether domestic or foreign. It has a duty to ensure there is a level playing field.

To legislate a taxation regime that imposes unfair competition on Australian retailers, and then to say it should not be fixed until the collection of those taxes is "cost-effective", is imposing an unfair and unwarranted burden on domestic retailers in the allegedly greater interest of collecting revenue.

It cannot be substantiated on any grounds.

The Productivity Commission should recommend to the Government that in any collection of taxes and duties, a fair competitive environment between companies must be preserved.

If there is an unfair advantage to overseas companies, it should be remedied without delay.

Overseas on-line retailers should pay the same taxes and duties as their Australian-based competitors.
