AUSTRALIAN CHAMBER OF COMMERCE AND INDUSTRY

ACCI SUBMISSION

Economic Structure and Performance of the Australian Retail Industry

Productivity Commission Draft Report

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1. ABOUT ACCI

1.1 Who We Are

The Australian Chamber of Commerce and Industry (ACCI) speaks on behalf of Australian business at a national and international level.

Australia's largest and most representative business advocate, ACCI develops and advocates policies that are in the best interests of Australian business, economy and community.

We achieve this through the collaborative action of our national member network which comprises:

- All state and territory chambers of commerce
- 28 national industry associations
- Bilateral and multilateral business organisations

In this way, ACCI provides leadership for more than 350,000 businesses which:

- Operate in all industry sectors
- Includes small, medium and large businesses
- Are located throughout metropolitan and regional Australia

1.2 What We Do

ACCI takes a leading role in advocating the views of Australian business to public policy decision makers and influencers including:

- Federal Government Ministers & Shadow Ministers
- Federal Parliamentarians
- Policy Advisors
- Commonwealth Public Servants
- Regulatory Authorities
- Federal Government Agencies

Our objective is to ensure that the voice of Australian businesses is heard, whether they are one of the top 100 Australian companies or a small sole trader.

Our specific activities include:

- Representation and advocacy to Governments, parliaments, tribunals and policy makers both domestically and internationally;
- Business representation on a range of statutory and business boards and committees;
- Representing business in national forums including Fair Work Australia, Safe Work Australia and many other bodies associated with economics, taxation, sustainability, small business, superannuation, employment, education and training, migration, trade, workplace relations and occupational health and safety;
- Representing business in international and global forums including the International Labour Organisation, International Organisation of Employers, International Chamber of Commerce, Business and Industry Advisory Committee to the Organisation for Economic Co-operation and Development, Confederation of Asia-Pacific Chambers of Commerce and Industry and Confederation of Asia-Pacific Employers;
- Research and policy development on issues concerning Australian business;
- The publication of leading business surveys and other information products; and
- Providing forums for collective discussion amongst businesses on matters of law and policy.

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2. INTRODUCTION

1. The Australian Chamber of Commerce and Industry (ACCI) welcomes the opportunity to provide a submission to the Productivity Commission's (PC) inquiry and draft report, "Economic Structure and Performance of the Australian Retail Industry".

2. This submission is made without prejudice to ACCI or its members' views who are involved in the inquiry.

2.1 Services Sector – Undervalued and Underrepresented

3. The main purpose of this submission is not to address all of the terms of reference, rather it is to provide a response to Chapter 10 "Workplace regulation" and reiterate a number of issues raised by employers and Industry Associations.

4. ACCI has attached to this submission is most recent and extensive ACCI policy Blueprint which is dedicated to the services sector, entitled "*Services: The New Economic Paradigm*"[1] (**Attachment A**). This publication represents the most comprehensive services sector reform Blueprint yet developed by industry, and was launched on 1 April 2011 by ACCI President David Michaelis in Sydney.

5. The 159-page Blueprint includes 83 recommendations directed at industry, governments and regulators aimed at driving growth in jobs-rich and entrepreneurial service industries, including across tax, regulatory compliance, government support, workplace regulation, human capital and international trade policy. It also includes case studies of six sectors: construction services, business services, tourism and events, hospitality, wholesale and retail and higher education.[2]

6. Speaking at the launch of the ACCI Services Blueprint, ACCI's Chief Executive, Peter Anderson, said:

> Coming out of the global financial crisis we considered it vital to challenge ourselves and governments to get serious about making the regulatory system work for service industries, rather than return to business as usual.

[1] A copy can also be accessed here: http://www.acci.asn.au/Files/Services-The-New-Economic-Paradigm-ACCI-s-Service-

[2] Chapter 6 is dedicated to the Tourism and Events Industries, Chapter 7 is dedicated to the Accommodation, Restaurant and Catering Industries, and Chapter 8 is dedicated to the Distributive Trades (Wholesale And Retail Trade) Industry.

> Until only recently, the old economic paradigm of the 5-day week was the template used for most industry policy in Australia. Little attention was given to the reality of businesses that work and employ around the clock, across seven days, affected by random factors such as changes in family circumstance, the opening of a competitor or business opportunity on the other side of the world, or the seasonality and whim of consumer sentiment.
>
> Service industries are agile, but with agility comes vulnerability. For these businesses, two days are rarely the same. For them, regulation – from the tax system to the way people work – needs a heavy dose of flexibility and reality. Whilst much has changed, these industries still need public policy champions. That is where the ACCI Service Industries Blueprint comes in.

7. ACCI commends the publication to the PC inquiry for its consideration, not only to this inquiry, but to future inquiries which relate to the services sector.

2.2 The ACCI Network

8. ACCI is Australia's peak council of employer organisations and business associations (employer organisations), representing 37 separate member-based organisations including both principal State and Territory Chamber of Commerce, and national and sectoral Industry Associations. Our Chambers and Industry Associations provide broad based services to the business community and their corporate / employer members. ACCI represents Australian business in all major facets and operations.

9. ACCI is recognised as a "peak council" under the *Fair Work Act 2009* and represents business on a number of other statutory committees and consultative bodies, including the *National Workplace Relations Consultative Council Act 2002* (Cth).[3] ACCI Chambers and Industry Associations provide advice to employers and business with respect to their employment obligations and assist with the development of policy at various levels of government.

10. ACCI, as the organisation most representative of employers in Australia, is also recognised internationally as an elected member of the International Labour Organisation (ILO).

[3] Other bodies and forums include: Safe Work Australia, the ATO's Superannuation Consultative Committee, and the Minimum Wage Research Group (Fair Work Australia).

11. ACCI has been extensively involved in policy debates at the federal level, with member involved at the State/Territory level. As a network we are well placed to respond to the matters raised in the draft report from a workplace relations policy perspective.

3. WORKPLACE RELATIONS

12. Chapter 10 of the ACCI Services Blueprint is dedicated to workplace relations issues. The issues and the recommendations are apposite to the existing inquiry into the retail industry.

13. It is essential that labour market regulation is flexible and adaptable to changes in the domestic and global economy.

14. In today's modern economy, these changes take place much more quickly and dramatically than previously was the case.

15. Firms operating within the services sector must be able to react with respect to their workforce in a more dynamic way than other industries. Firms in the services sector tend to generally be lowly unionised and exposed to sudden changes in demand which require agility in matching labour supply and working arrangements to business conditions.

16. It is vital that the range of necessary forms of workplace arrangements is recognised by policy makers and regulators.

17. Policy decisions should enhance rather than diminish workplace flexibility and the choices available to employers and employees. Furthermore, consideration should be given by policy makers to increase productivity of the services sector, which should be pursued through "smarter regulation" efforts. That is, regulation must be targeted, efficient and not exceed what is necessary to achieve policy goals.

18. ACCI supports the recent views expressed by the International Employers Organisation (IOE) and the Business and Industry Advisory Committee to the OECD (BIAC) in the wake of the Global Financial Crisis (GFC) that:[4]

> [s]tructural reform of labour market rigidities must continue even in this challenging economic environment. Flexibility in labour markets is essential not only for the survival and sustainability of firms, but also for their ability to be able to retain employees through economic downturn. The strictness and scope of employment regulation or social safety nets can impact on capacities for recovery, and can risk

[4] IOE and BIAC 2010, *Jobs Preservation And Jobs Growth - G20 Meeting*, International Organisation of Employers , Final Report, March 2010, p. 3, http://www.ioe emp.org/ fileadmin/user_upload/documents_pdf/papers/position_papers/english/pos2010_jobspreservation.pdf

> perpetuating joblessness and risk worsening the impacts of future economic downturns. This does not mean eliminating regulation – it means smarter, more effective regulation.

19. Australia has a long history of a highly centralised and regulated labour system. Over the last two decades, federal governments have introduced and developed workplace reforms that were designed to make the Australian economy more efficient and competitive, and to improve employment opportunities. This largely began with the Keating Government's *Industrial Relations Reform Act 1993* and the Howard Government's *Workplace Relations Act 1996* (WR Act)[5]. Each of these reforms played a positive role in improving firm productivity, efficiencies and overall levels of employment across the Australian economy, particularly for key segments of the services sector.

20. The major reform direction in each of these years was towards shifting from a centralised system of setting wages and working conditions towards a more enterprise and workplace based system. These reforms increasingly equipped Australia to transform the economy away from traditional industries and towards services. Notwithstanding these inroads, the system remains too complex and not rooted in the realities of modern workplaces, which is typified by the services sector. For example, many of these flexibilities are said to be grounded in a collective bargaining system, yet service industries are largely non-unionised and apart from a handful of larger business chains, do not organise employee relations around a collective bargaining paradigm.

21. More recently, significant legislative changes were made to the national workplace relations laws by the then Rudd Government's *Fair Work Act 2009*, as detailed in its 2007 pre-election policies, "*Forward with Fairness*" and the "*Implementation Plan*". Whilst the Fair Work laws took further important steps towards meeting a longstanding ACCI policy priority of creating a national industrial relations system for the private sector, aspects of the Fair Work system bring back a level of centralisation and workplace inflexibility at the enterprise level (characterised, for example, by "one-size-fits all" awards and national regulation) which the Australian system was successfully moving away from.

[5] Econtech 1993, The Economic Effects Of Industrial Relations Reforms Since *(prepared for the Australian Chamber of Commerce and Industry*; Econtech 2007, http://www.econtech.com.au/information/Industry/EcontechAugust2007_ACCI.pdf. (p. 3-8 of the report provides a broad summary of key changes from 1993).

22. This is already beginning to negatively impact employers who operate in the burgeoning services sector, and there remain considerable areas of risk and exposure inherent in the Fair Work reforms which may threaten the viability and growth of the sector once the outer limits are tested by trade unions and regulators. Employer experience and emerging evidence suggests that key aspects of the Fair Work system will need a period of review, and if required, legislative amendment if Australia is to maintain workplace flexibility, increase productivity and jobs, and harness the opportunities the service sector offers.

23. Some key elements of the former reforms have been retained in the Fair Work system, including a national system for the private sector predominantly based on the corporations power of the Australian Constitution, prohibitions on unlawful industrial action during the life of an enterprise agreement, secret ballots authorising industrial action, prohibitions on industrial action when pattern bargaining occurs, secondary boycotts, and strike pay. However, there are aspects of the Fair Work laws which are negatively impacting business in the services sector. These include one size-fits-all regulation and additional costs from "modern" awards, a failure to tailor industrial regulation to the seven day nature of service industries, and a failure of "individual flexibility arrangements" clauses in modern awards to markedly allow for individual employer-employee agreements. Other issues concern new rules around bargaining and agreement making, inflexible transmission of business rules, removal of exemptions which make it easier for employees to make unfair dismissal claims, increased capacities for unions to enter workplaces, the general re-regulation of industrial awards and removal of the capacity for an employer and employee to make individual agreements which suits the needs of both parties.[6]

24. The OECD's 2008 Economic Survey of Australia noted:[7]

> The simplification and gradual decentralisation of industrial relations since the early 1990s has made the economy more resilient. But the pursuit of reforms towards a greater individualisation of labour relations, following the WorkChoices Act in March 2006, did stir much controversy, because of equity concerns. […] While equity concerns need to be addressed, care should be taken not to undermine labour market flexibility. To maintain a close link between productivity gains and wages, the future organisation of

[6] These matters were identified in detail by the ACCI employer network during various Senate Committee inquiries into the Fair Work Bill 2008 and associated legislation during 2008 and 2009. A copy of all ACCI submissions on the fair work legislation can be found here: http://www.acci.asn.au

[7] OECD, 'Economic Survey of Australia', *Policy Brief,* 2008, p.8 http://www.oecd.org/dataoecd/40/39/41411272.pdf

> collective bargaining must remain within the company framework, as recognised by the government. Harmonising the system of industrial relations across the states is an important goal, but the result must not be alignment on the most restrictive standards.

25. The OECD's recent comments about the impact of the Fair Work reforms on youth employment, by reference to the repeal of individual contracts are also noteworthy. The OECD was specifically critical of the repeal of the scope for the making of individual employment agreements and recommended that *"policymakers should be prepared to take steps to amend the new rules if sizeable negative effects are detected."*[8]

26. ACCI made a number of recommendations in the ACCI Services Blueprint. The following recommendations are consistent with domestic and international evidence on the importance of ensuring that workplace regulations have a positive effect on productivity, investment, and jobs in the services sector. Whilst they do not attempt to address every aspect of workplace regulation, they should be considered as short to medium term microeconomic reform measures that will preserve or improve the vital services sector.

27. Emerging evidence indicates that there are aspects of the Fair Work reforms that suggest a reversion to structural inflexibility which will undoubtedly impact productivity and employment in the services sector. ACCI echoes the sentiments of the Chairman of the Productivity Commission that the *"regulation of labour markets cannot remain a no-go area for evidence-based policy making"*.[9]

28. As noted by the PC at p.326 of the draft report, the then Prime Minister, Kevin Rudd, granted an exceptional circumstances regulation impact statement exemption at the decision making stage. Despite the merit of doing so, current indications are that an impending review by the Government of the laws from 1 January 2012 is not expected to be conducted by an independent statutory body, such as the Productivity Commission, and to date, there is little to indicate how extensive the inquiry will be and whether substantive concerns of industry will be addressed beyond technical matters.

[8] Uren, D., 'Labor risk to youth jobs says OECD as PM Kevin Rudd calls recession 'inevitable', The Australian, 21 April 2009.
[9] Banks, G., Successful reform: past lessons, future challenges, Keynote address to the Annual Forecasting Conference of the Australian Business Economists, Sydney,
8 December 2010. p.16. http://www.pc.gov.au/__data/assets/pdf_file/0018/104229/successful-reform.pdf

29. One current issue which has yet to be resolved through discussions with the relevant Minister, the Fair Work Ombudsman and the Department of Education, Employment and Workplace Relations, is an issue concerning the interpretation of the National Employment Standards and modern awards. Despite some modern awards clearly stating that annual leave loading is not payable on termination of employment, the Fair Work Ombudsman has essentially changed its mind after 12 months of the modern awards commencing, and has now indicated that annual leave loading on termination is payable and that employers are to disregard the award term which says otherwise.[10] Each breach of the Fair Work Act, including a modern award term, renders an employer liable to penalties of up to $33,000 per contravention, on top of any back pay. The only real resolution to this confusion is an amendment to the legislation which will make it abundantly clear for both employers and employees.

30. Whilst we await the scope and potential outcome of the Government's own review, we do remain concerned that real and pressing problems, such as the one outlined above, are not being dealt with by sensible legislative amendments in the interim of a more wider review of the laws.

31. The ACCI member network has commenced a system wide review of the Fair Work laws, but there are a number of interim recommendations that ACCI has made in relation to the Fair Work system as a matter of priority. The following recommendations are contained at pp. 63-64 of the ACCI Services Blueprint and are commended to the current inquiry into the retail industry.

Recommendation 28: (Fair Work System and Industrial awards)

The Government should direct the Productivity Commission to examine the effects of the Fair Work laws, particularly the operation of modern awards on firms in priority services sectors. Provisions that are too prescriptive, inflexible or do not assist in achieving productivity should be reviewed and changed following extensive consultation with industry. Awards should be a genuine minimum safety net only and not impede bargaining. The process of creating or varying industrial awards should not increase costs or introduce new inflexibilities on employers.

Recommendation 29: (Enterprise Agreements)

[10] See for example, clause 29.8 of the **Vehicle Manufacturing, Repair, Services and Retail Award 2010:** "Payment of either leave loading or the higher shift loading payment instead of leave loading prescribed in clause 29.7(a) will not apply to the pay out of untaken leave". http://www.fwa.gov.au/documents/modern_awards/award/ma000089/default.htm

Agreement making between employers and employees facilitated by bargaining agents should be truly voluntary. There should not be any capacity to frustrate formal agreement making where a majority of employees and the employer wish to bargain and make an agreement. Agreement making should be flexible to reflect both collectivist and non-collectivist workplaces in Australia. The content of agreements should be limited to employment matters only. Statutory agreements should have limited procedural requirements for approval. Agreements should pass a No-Disadvantage Test against a clear safety net of terms and conditions. Individual Flexibility Arrangements (IFAs) need to be able to flexibly deal with modifying the application of terms as originally intended.

Recommendation 30: (Bargaining/Arbitration)

There should be limited scope for an industrial tribunal to arbitrate and impose a workplace determination or order on an employer. There should be no powers to coerce an employer into bargaining or prescriptive rules about bargaining which could lead to orders made against a business. Access to protected industrial action should only occur once bargaining commences and should be accessed only as a last resort.

Recommendation 31: (Statutory Minima)

Statutory minimum standards are warranted but must be flexible and adaptable to suit a variety of workplace circumstances. They should be monitored to ensure sufficient flexibility and to identify any negative effects in a workplace. Modern awards and agreements should facilitate flexibility of the NES (for example, cashing out of annual leave).

Recommendation 32: (Minimum wages)

Minimum wages should operate in conjunction with the tax transfer system and the primary focus should be on improving social inclusion through increased workforce participation. Minimum wages for juniors, apprentices and trainees need to be retained and assist in maximising employment and training opportunities for the most vulnerable in our labour market. Decisions by industrial tribunals should not price these workers out of the labour market. A primary consideration for an industrial tribunal should be how non-productivity based minimum wage decisions will impact individual businesses, including factors such as additional labour on-costs and its capacity to pay.

Recommendation 33: (Transfer of business)

Rules on transmission of agreements should be flexible. Inflexible agreements should not apply indefinitely to an in-coming employer.

Recommendation 34: (Employment Protection)

Unfair dismissal laws should not penalise an employer where they have terminated an employee based on a valid reason. Similarly, procedural deficiencies in termination or carrying out redundancies should not render an otherwise justified termination, unlawful. Appropriate exemptions should be considered after extensive consultation with industry. There should be low cost and fast track processes to exclude inappropriate or non-qualifying claims.

Recommendation 35: (General Protections)

The general protection regime under Part 3-1 of the Fair Work Act 2009 should be reviewed to ensure that the majority of laws are aimed at governing "freedom of association" as was historically the case under previous laws. Anti-discrimination provisions should be aligned with federal and state anti-discrimination legislation by removing "reverse onus" provisions which deem an employer liable unless they can demonstrate that their conduct was not for unlawful reasons. Laws should generally apply a "dominant purpose" test.

Recommendation 36: (Independent Contractors)

Employment laws should not apply to genuine independent contractors who operate on a commercial basis (apart from special cases, such as the TCF industry).

Recommendation 37: (Superannuation)

The overall regulatory burdens on firms should be decreased. Dual regulation of superannuation should be removed and only dealt with in the federal Superannuation Guarantee legislation (i.e. not in modern awards). There should be no additional costs to employers through higher Superannuation Guarantee levies without commensurate off-sets in other business costs.

Recommendation 38: (Red Tape)

Red tape on business should be minimised. The existing 'employee records' exemption and 'small business' exemption in national privacy laws must be retained. The small business exemption threshold should be indexed and immediately extended from $3 million to $5 million (which is based on a firm's annual turnover). There should be no obligation on an employer to administer Government schemes and programs unless there is a real and equal benefit. Therefore, the

> Government's Paid Parental Leave scheme, whereby employers are forced to act as the "paymaster" (i.e. pass public monies to individuals on behalf of the Government) without any benefit to the employer or employee, should be modified.

32. ACCI wishes to address a number of issues raised by the PC in its draft report in more detail.

3.1 Minimum Duration Shifts

33. ACCI supported Industry Association members in their bid to vary the minimum engagement shifts in the *General Retail Industry Award 2010* (modern award) by intervening in all proceedings, including the recent appeal by the SDA. We continue to support the underpinning principle of the common sense variation to the modern award by allowing young secondary students the limited opportunity to work hours less than three hours after school. The fact that up until today students are being denied employment opportunities as a result of the opposition by trade unions, highlights how difficult it is to obtain a variation to the modern award within the four yearly statutory review period.[11] This has proven to be a significant hurdle, which was not present during the Part 10A award modernisation proceedings, conducted by the Australian Industrial Relations Commission (AIRC). There is a real question mark as to how modern, flexible and productivity enhancing, modern awards are for employers and employees.

34. It is important for the Commission to understand that the Part 10A process was a highly constrained process for the AIRC and all participants involved. The process did not involve a detailed consideration of the merits of whether historical employment standards (which are artefacts of a bygone era of 'paper' disputes initiated by trade unions in the most part) should be retained or modified to better suit the contemporary world of work. Whilst ACCI supports a sustainable and effective safety net of minimum wages and conditions, in many ways the so-called "modern awards" preserve existing award terms. These are inherently inflexible as they operate on a "one-size fits all" approach and were arbitrated following long forgotten disputes of decades past. The services sector is extremely diverse and dynamic and such inflexible labour rules do not reflect the evolution of the sector of the specific needs of firms.

[11] Apart from a successful application under s. 160 (removal of ambiguity or uncertainty), a modern award can only be varied within the four yearly statutory review process, if it is *"necessary to achieve the modern awards objective"*. See s.157(1) and (2).

35. The Full Bench of the AIRC during the Part 10A award modernisation proceedings assured industry that there would be an opportunity to review modern awards, presumably as an response to ACCI's recommendations for more robust hearings and for some issues to be referred to an independent authority such as the PC to consider *"the productivity effect of the modern award and where terms and conditions may have a positive or negative productivity outcome"*.

36. A lengthy extract from the Full Bench decision which rejects both sets of ACCI recommendations are set out below: [12]

> **[56]** We referred earlier to a proposal by ACCI that the Commission, in discharging its statutory functions in relation to award modernisation should conduct external research. To elaborate a little, it was submitted that we should commission research on *"key economic indicators as a consequence of a modern award applying in a particular industry or sector."* This proposal was accompanied by a proposal that where appropriate the Commission should conduct an arbitration where an employer's costs have increased. We think these proposals have some significant limitations.
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> **[57]** The proposal in relation to research is contained in the following paragraph from ACCI's May 2009 submission:
>
> > *"72. Employer: Where a modern award results in an increase in costs or inflexibilities to employers, and where an employer is affected by a modern award, the following should occur:*
> > - *The draft or finalised modern award is referred to an appropriate and independent organisation (such as the Productivity Commission or an economic modelling advisory firm) to conduct research and report on issues relevant to the AIRC's statutory considerations (under s.103, Part 10A and the request), including but not limited to:*
> > - *The impact of a proposed modern award to employers in that relevant industry or sector with reference to key macro and microeconomic indicators, such as its affect on the national economy, employment, inflation, and international competitiveness.*
> > - *Consider the productivity effect of the modern award and where terms and conditions may have a positive or negative productivity outcome.*
> > - *Suggested amendments to the modern award to address the above concerns."*
>
> **[58]** The initial and perhaps insurmountable difficulty is in deciding the circumstances in which research assistance should be sought. At one extreme every modern award which results in an increase in cost or inflexibility for one employer would be caught by the proposal.

[12] [2009] AIRCFB 800. The decision can be found here:
http://www.airc.gov.au/awardmod/databases/general/decisions/2009aircfb800.htm

Secondly, the potential for the proposal to delay the completion of modernisation is apparently unlimited. The proposal also fails to acknowledge that modern awards impact differently upon employers depending upon the terms of pre-modern award coverage. Delay in implementation of increases in costs for some employers would equally result in delay in decreases in costs for other employers.

[59] We turn now to the question of possible arbitrations in relation to particular matters. It is said that some employers want a more robust process of hearings and arbitration, including oral and written evidence.

[60] The process of award modernisation is dealt with in the relevant statutory provisions and in the consolidated request. It is the Commission's responsibility to establish the way in which the process will be conducted, to publish exposure drafts and then awards, with provision for consultation at each step along the way. The process does not include arbitration in the traditional sense. While the Commission makes every endeavour to ensure that all material submitted is taken into account, it is impossible to deal with all of it in written reasons for decision. Where employers (or any parties) are dissatisfied with the outcome there are statutory provisions for variation. There are also opportunities to raise matters in the context of a review of the operation of the modern award. For the purposes of any application to vary employers may seek to rely upon any relevant material including independently commissioned research. The grounds for such an application might include incapacity to pay and any other relevant ground. In relation to transitional provisions, with which this decision is directly concerned, the phasing arrangements we have included in the model schedule should provide an effective buffer against increases in costs in most cases. Nevertheless the model provisions also provide for a review. ACCI's suggestion that we graft onto this process an additional procedure permitting formal arbitration does not take into account the nature of the process which the legislature has developed, the temporal constraints imposed by the 31 December 2009 deadline or the opportunities provided by the legislation for variation and review. There is an additional relevant matter. If modern awards are to apply nationally, as they must, it is inevitable that there will be changes in conditions of employment, in some case increases, in other decreases. No amount of economic analysis can alter that fact. While economic analysis can be very important, it must be seen in the context of the requirement that we develop national standard conditions in the modern award concerned.

[61] Parties other than ACCI have advanced similar proposals. Some of those proposals would require the Commission to review modern awards already made either on an economic or some other basis. As we indicated in our statement of 26 June 2009, referred to above, review or variation of the substantive terms of awards should be dealt with by an application to vary.

37. Whilst the AIRC Full Bench did provide an indication that matters could be reviewed, it appears that the process of review is inherently difficult with mixed results for both employees and employers.

38. The practical effect of the modern award was displacing existing young workers from employment opportunities and possibly denying future employment opportunities. Prior to the commencement of the modern award, the minimum engagement shift for a casual was two hours in Victoria. This changed to three hours as a result of the Part 10A award modernisation process. As a result of the negative impact the minimum shift clause was causing, applications were made in 2010 to amend the clause to reflect the pre-existing clause contained in the Victorian pre-reform federal award of two hours, and to include a provision to allow secondary school students to work less than the minimum. The SDA and ACTU vigorously opposed the application and the application was ultimately not successful.[13] A subsequent appeal against this decision by the retail Industry Associations was also not successful.[14] This is despite evidence from actual employees who had lost their shifts and small businesses who gave evidence of their inability to provide additional work because of the strict requirements of the modern award.

39. Part of the evidence led by employers in the first case is set out below:[15]

> **[17]** The NRA led evidence from two secondary school students from Terang Secondary College in Terang in South Western Victoria. Both had been employed by the Terang and District Co-op during weekday afternoons until January 2010. They gave evidence that they lost their jobs because the award required a minimum engagement of three hours and they were only available after school from approximately 4.00pm until the store closed at 5.30pm. In the case of one of the students he was unable to work at the associated supermarket which remained open later because of sporting commitments. The NRA also led evidence from the owner of a newsagency in suburban Adelaide who said that in 2010 he had ceased to offer afternoon shifts to school students as they were not able to work the three hour minimum engagement after school before his shop closed at 5.30pm.
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> **[18]** The MGA led evidence from three employers that operate small supermarket businesses in country Victoria. They each employ local juniors in their businesses. They explained the difficulties in moving

[13] [2010] FWA 5068. The decision can be found here:
http://www.fwa.gov.au/decisionssigned/html/2010fwa5068.htm

[14] [2010] FWAFB 7838. The decision can be found here:
http://www.fwa.gov.au/fullbench/2010fwafb7838.htm

[15] [2010] FWA 5068.

> from a two to a three hour minimum engagement period for school students. In some cases the change has led to less employment of juniors after school during the week. The witnesses explained why the ability to employ such juniors on two hour engagements after school is beneficial to the business, beneficial to other employees and often preferred by the students themselves because they are looking to fit some casual work into their school, sport and other commitments.
>
> **[19] ...** The ARA did however tender the results of a survey of retail outlets. This survey revealed that over 50% of respondents employ students on short shifts before close of business and that the majority of students are not available until 4.00pm or later. Most businesses close at or before 5.30pm, and most students are available for work for two hours or less. A majority of respondents asserted that they will stop employing school students after school or stop employing students at all. About 60% of respondents dedicated that they do not employ school students because of the minimum shift requirements in the award.

40. Vice President Watson in a further decision ,[16] which is the subject of an appeal, accepted the evidence tendered by the employer parties, ACCI and the Victorian Government who supported of the application. This included the House of Representatives Standing Committee on Education and Training report, "*Adolescent overload? Report of the inquiry into combining school and work: supporting successful youth transitions*", October 2009 and an ACCI "*Issues Paper Youth Employment*", May 2010.[17]

41. In order to clarify the current status of the proceedings, as a result of the SDA successfully applying for a stay order of the Watson VP decision until the appeal was heard and concluded, the modern award clause has not been varied to allow students to work less than the 3 hour minimum shift. At p.316 of the PC report, it appears that the Commission is under the impression that the award variation to allow a shorter shift actually commenced. To reiterate, ACCI remains concerned that secondary school children are not able to utilise the benefit of the limited clause pending the outcome of the union's appeal.

3.2 Minimum Wages

42. Australia currently has the most regulated and highest minimum wages in the OECD. This is only sustainable if it reflects our economic

[16] 2011 FWA [3777]. The decision can be accessed here: http://www.fwa.gov.au/decisionssigned/html/2011fwa3777.htm#P129_11428

[17] The ACCI *"Issues Paper Youth Employment"* can be accessed here: http://www.acci.asn.au/getattachment/234ff3be-f1b4-4779-9e5a-bf6826fda42e/Youth-Employment-May-2010.aspx

circumstances and is matched by comparable levels of productivity. Australia is the only country to have a cascade of multiple minimum wage rates which apply to unskilled, trade, managerial and professional employees. On top of these base wage costs are related on-costs, penalty rates, allowances, loadings, workers compensation premiums, payroll tax, superannuation and associated administrative costs. Policymakers need to closely re-examine Australia's minimum wage classification system and its effect on productivity in the services sector.

43. The new Minimum Wage Panel of Fair Work Australia published its inaugural decision on 3 June 2010 and awarded an increase of $26 per week to all minimum wage rates from low skilled to high skilled professionals and managers.[18] The result was $1 short of what the Australian Council of Trade Unions (ACTU) requested.

44. This result led labour economists, such as Professor Mark Wooden of the Melbourne Institute of Applied Economic and Social Research, to question the role of our current minimum wage system in achieving an important objective of protecting the needs of the low paid, commenting:[19]

> Australia is, however, relatively unique among industrial nations in having not one single minimum wage, but a whole raft of different minima that vary both across awards and within awards. While the number of such minima has been greatly streamlined over the years, the question still remains as to why we need to set a multitude of minimum wage floors for jobs scattered across almost the entire wage distribution.
>
> If the rationale behind minimum wage adjustments is to protect the living standards of the lowest paid, I can see little reason why we need more than one global minimum wage. Varying award rates above the global minimum has little to do with protecting the needs of the lowest paid.

45. Commenting on the impact of the new Fair Work minimum wage laws on the unemployed following the inaugural minimum wage decision Professor Wooden stated:[20]

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[18] Annual Wage Review 2009-10, [2010] FWAFB 4000 (June 2010).

[19] Wooden, M. "A hole in the safety net", The Australian Financial Review. 9 June 2010.

[20] Wooden, M., " An Unfair Safety Net?", Australian Bulletin of Labour, Volume 36, No 3, 2010, p.325.

> Minimum wage rises benefit low-paid workers at the expense of the unemployed. Any action that increases the cost of hiring low-wage labour reduces the likelihood of those without jobs finding one in the future. Moreover, it is the long-term unemployed who's employment chances are most damaged. This seems very unfair. And it certainly doesn't promote social inclusion through greater workforce participation […] The decision looks even more unfair once you realise that many low paid workers do not live in poor households, and that a low-paid worker has a much better chance of getting a better paid job than someone who doesn't have a job at all.

46. On 3 June 2011, the Minimum Wage Panel published its second decision awarding a 3.4 % increase to all wage classification levels to all awards. This was despite the uneven economic conditions, the results of an ACCI National Survey on the impact of the first decision, and the extreme weather events in parts of metropolitan and regional Australia.

47. The setting and adjustment of minimum wages in Australia remains an important exercise because of the influence and impact of that process upon employers, employees and those seeking employment. This is particularly so for the retail industry. Small and medium sized retailers are overwhelming directly affected by the minimum wage arbitration given the low level of wage determinations through above award collective bargaining in this part of the industry.

48. The focus of minimum wage determinations should be directed to the impact on the employers and employees (including those that are seeking employment) who are most affected by non-productivity based minimum wage increases. Particularly those employers that pay exactly or slightly more than the minimum wages required by a relevant modern award.

49. Minimum wage decisions continue to disproportionately impact particular employers and sectors of the economy.

50. It appears that the Minimum Wage Panel continues to focus on the broad domestic economy, and in doing so, does not consider to a sufficient degree, the impact on vulnerable small to medium sized employers at the industry level.

51. It remains the position that service industries including retail, hospitality and restaurants have a comparatively higher level of direct employment on minimum wages (without over award or enterprise agreement based pay) than both all industries averages and other

industries with a higher incidence of agreement making (manufacturing, construction, mining, communications, transport etc).

52. This means that the impact of wage increases in minimum wage reviews is disproportionately (and more comprehensively) experienced in these industries than other industries, including those sectors with a higher incidence of agreement making (who generally pay above award rates and are therefore not required to adjust their actual pay following an increase in minimum wages).

53. Regulatory burdens are an important consideration, particularly for smaller firms that must implement increases to minimum wages and who may not have the HR resources that larger firms may have. Many employers will incur additional red-tape costs as a result of an increase in minimum wages. Pay-roll software, contracts of employment/policies/manuals may need to be updated, and in some cases, specific industrial or legal advice obtained. Whilst is it difficult to quantify these administrative costs, it is a burden which should be required to be taken into account by Fair Work Australia. Just because employers are on notice that an increase is to take effect from the first pay period on or after 1 July each year, does not mean that they know what the increase will be and can adjust payrolls accordingly.

54. Labour on-costs have been considered by the previous national industrial tribunal in its 2004 decision [PR002004], the AIRC noted (at [308]):

> On-costs mean that for every dollar awarded by the Commission, employers must spend more than $1, whereas the impact of tax and tax transfer arrangements means that, in many cases, the employee receives substantially less than $1 as additional disposable income …

55. In attempting to provide empirical research to the Panel on the impact of last year's decision on national system employers, particularly small to medium sized employers, who are sensitive to minimum wage decisions, ACCI undertook a national online survey of employers across Australia who were directly affected by the Panel's 2010 AWR decision (**Attachment B**).

56. The survey was carried out in conjunction with ACCI's network of Chambers and Industry based members and reflects the views of a representative cross section of Australian employers. ACCI's National Employer Survey was designed to provide information about the impact of AWR decisions on those required to bear the cost of those increases – the employer and business owners in Australian SMEs.

57. The survey gathered both quantitative and qualitative data from national system employers who were directly affected by national minimum wage decision.

58. In summary, a significant number of employers indicated that as a direct result of last year's increase, employers responded by offering less hours to staff, increased the costs of products/services to customers, and experienced a decrease in cash flow and overall level of profitability. It also had a direct negative effect on employers' hiring intentions to put on new staff and required an increase in the hours owners worked in their own business. Whilst the majority of employers did not report a change in the number of employees, a significant number of employers did report that the decision resulted in a decrease in full time and part time staff.

59. Employers were also given an opportunity to provide comments in relation to the 2010 AWR decision or this year's AWR decision.

60. This qualitative research is also useful to understand, first hand, how many businesses view the AWR process and the impact these and other pressures are having on many firms.

3.2.1 Summary of Findings

61. Where employers passed on all or part of the 2010 AWR decision to at least one modern award regulated employee, the majority of employers indicated that as a direct result of the increase they reported a decrease in the level of overall profitability (65.9%) and a decrease in the level of cash flow (54.6%).

62. Whilst a majority of employers reported no change to the number of employees, the second most reported effect was a decrease in the number of full-time employees (18.6%), part-time employees (12.9%), and casual employees (24.2%) as well as an increase in the number of juniors (10.6%).

63. Similarly, whilst the majority of employers reported that the total number of employment hours offered to employees did not change (53.4%), the second most reported impact was a decrease in total number of employment hours offered (39.1%).

64. The majority of employers reported no change to the selling price of products and services offered (54.4%), the second most reported

effect was an increase in the selling price of products and services offered (32.2%).

65. Responding to a question about what employers thought the Tribunal should award in the forthcoming 2011 AWR, the majority of employers indicated that there should be no increase to modern award rates of pay (30.5%).

66. This was followed by: don't know/not sure (18.7%), an increase of between $10-$14 per week (10.6%), an increase of between $1-4 per week (10.3%) and an increase of between $5-9 per week (9.8%).

67. The results from the ACCI National Employer Survey on the impact of last year's minimum wage decision is consistent with a similar survey conducted by ACCI member, the Victorian Automobile Chamber of Commerce (VACC) on automotive employers in particular states.[21] The results are also consistent with the general findings reported by a Fair Work Australia commissioned report by the Workplace Research Centre (7/2010 – Enterprise Case Studies: Effects of minimum wage setting at an enterprise level).[22]

68. The results are important in the context of the retail industry sector, as this accounted for the second largest group of respondents (16.6%) using the broadest ANZIC Industry Divisions, with the most respondents being small to medium sized firms (52.8%).

3.2.2 Recommendations

69. In addition to the recommendations contained in the ACCI Services Blueprint, ACCI recommends that dedicated resources be provided to the ABS to conduct more regular labour on-costs surveys.

70. The minimum wage research branch of FWA should undertake a similar research survey to that conducted by ACCI for retail sector employers.

71. The PC should conduct an in-house research project into the productivity and employment aspects of the minimum wage adjustment system for the retail industry and/or minimum wage reliant industry sectors, including quantifying all on-costs related to the minimum wage system.

[21] http://www.fwa.gov.au/sites/wagereview2011/submissions/VACC_sub_awr1011.pdf
[22] http://www.fwa.gov.au/sites/wagereview2011/research/Enterprise_Case_Studies7_2010.pdf

3.3 Individual Flexibility Arrangements

72. The Government and Parliament (through the Explanatory Memorandum) indicated that Individual Flexibility Arrangements (IFAs) were to deliver a level of individual flexibility and could accommodate employees with tailored conditions. IFAs have added safeguards, can be terminated at short notice and an employer cannot force an employee to sign one or make it a condition of employment. They are not "AWAs by another name" as some unions would misrepresent them.

73. The *Fair Work Act 2009* provides:

> **Division 5—Mandatory terms of enterprise agreements**
>
> *202 Enterprise agreements to include a flexibility term etc. Flexibility term must be included in an enterprise agreement*
>
> (1) An enterprise agreement must include a term (a flexibility term)
>
> that:
>
> (a) enables an employee and his or her employer to agree to an arrangement (an individual flexibility arrangement) varying the effect of the agreement in relation to the employee and the employer, in order to meet the genuine needs of the employee and employer; and
>
> (b) complies with section 203.
>
> *Effect of an individual flexibility arrangement*
>
> (2) If an employee and employer agree to an individual flexibility arrangement under a flexibility term in an enterprise agreement:
>
> (a) the agreement has effect in relation to the employee and the employer as if it were varied by the arrangement; and
>
> (b) the arrangement is taken to be a term of the agreement.
>
> (3) To avoid doubt, the individual flexibility arrangement:
>
> (a) does not change the effect the agreement has in relation to the employer and any other employee; and
>
> (b) does not have any effect other than as a term of the agreement.
>
> *Model flexibility term*

(4) If an enterprise agreement does not include a flexibility term, the model flexibility term is taken to be a term of the agreement.

(5) The regulations must prescribe the model flexibility term for enterprise agreements.

74. The model (default) IFA term for agreements can be found in Schedule 2.2 of the *Fair Work Regulations 2009:*

Schedule 2.2 Model flexibility term

(regulation 2.08)

Model flexibility term

(1) An employer and employee covered by this enterprise agreement may agree to make an individual flexibility arrangement to vary the effect of terms of the agreement if:

(a) the agreement deals with 1 or more of the following matters:

(i) arrangements about when work is performed;

(ii) overtime rates;

(iii) penalty rates;

(iv) allowances;

(v) leave loading; and

(b) the arrangement meets the genuine needs of the employer and employee in relation to 1 or more of the matters mentioned in paragraph (a); and

(c) the arrangement is genuinely agreed to by the employer and employee.

(2) The employer must ensure that the terms of the individual flexibility arrangement:

(a) are about permitted matters under section 172 of the Fair Work Act 2009; and

(b) are not unlawful terms under section 194 of the Fair Work Act 2009; and

(c) result in the employee being better off overall than the employee would be if no arrangement was made.

> (3) The employer must ensure that the individual flexibility arrangement:
>
> > (a) is in writing; and
> >
> > (b) includes the name of the employer and employee; and
> >
> > (c) is signed by the employer and employee and if the employee is under 18 years of age, signed by a parent or guardian of the employee; and
> >
> > (d) includes details of:
> >
> > > (i) the terms of the enterprise agreement that will be varied by the arrangement; and
> > >
> > > (ii) how the arrangement will vary the effect of the terms; and
> > >
> > > (iii) how the employee will be better off overall in relation to the terms and conditions of his or her employment as a result of the arrangement; and
> >
> > (e) states the day on which the arrangement commences.
>
> (4) The employer must give the employee a copy of the individual flexibility arrangement within 14 days after it is agreed to.
>
> (5) The employer or employee may terminate the individual flexibility arrangement:
>
> > (a) by giving no more than 28 days written notice to the other party to the arrangement; or
> >
> > (b) if the employer and employee agree in writing — at any time.

75. ACCI is concerned that IFAs are not delivering sufficient individual flexibility as promised. Employers are discouraged to utilise an IFA in the manner purported in the EM or FWO examples (reproduced at Box 10.8 of the PC report), as there is an element of risk and they may be breaching the award terms should a court conclude that the IFA does not meet the "better off overall test" as against all award conditions. A Full Bench decision of the Tribunal (considering multiple fast food employer agreements) has cast doubt that the example in Box 10.8 can actually be used, when it ruled that a "preferred hours" clause (which allows an employee to nominate which hours it prefers to work, without paid penalty rates being applicable), was less beneficial than the award. These clauses were a feature in many approved pre Fair

Work Act agreements (both collective and individual agreements), with the Tribunal ruling that it generally offended the "no disadvantage test" and was not permitted:[23]

> **[69]** The reference instruments provide for work on public holidays, Saturday or Sunday or for late work or additional hours to be paid for at a rate in excess of the basic hourly rate of pay regardless of whether an employee nominates such work as their preferred hours or not. Under the Retail Agreements some or all of such work is paid for at a rate in excess of the basic hourly rate of pay if the employee has not nominated the work as their preferred hours and at the basic hourly rate of pay if the employee has nominated the work as their preferred hours. Accordingly, the Retail Agreements contain at least one term or condition of employment that is less beneficial than the terms and conditions in the relevant reference instruments, that is the payment for some or all of such work at the basic hourly rate of pay rather than at a rate in excess of the basic hourly rate of pay if the employee has nominated the work as their preferred hours.

76. Moreover, a number of trade unions have engaged in an industrial strategy of limiting the use of Individual Flexibility Arrangements (IFA) in enterprise agreements and opposing agreements where they contain an IFA that is as flexible as the default regulation model clause or the model clause in modern awards. A union has no power to reduce the flexibility in a modern award (absent a successful application to vary it before Fair Work Australia). There are also union IFA clauses that require a majority of the workforce to agree to changing the application of certain conditions in an agreement. This is equally offensive to the principle that IFAs were supposed to be available to individual employees and their employer. It reaffirms why ACCI continues to support both collective and individual enterprise agreements in the workplace, supported by a statutory minimum safety net of terms and conditions.

77. Unions are limiting the number of matters an IFA can deal with in bargaining and rendering it fundamentally ineffective as a vehicle for promised flexibility. One trade union leader indicated publicly that he "*would be seeking to have the capacity for individual bargaining prohibited at other companies*" following a large manufacturer agreeing to water down the Government's own default IFA clause.[24]

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[23] [2010] FWAFB 2762. The decision can be found here: http://www.fwa.gov.au/fullbench/2010fwafb2762.htm

[24] Australian Mines And Metals Association Individual Flexibility Arrangements (under the Fair Work Act 2009) - The Great Illusion, Research Paper, 2010.

3.3.1 Recommendations

78. In addition to the recommendations contained in the ACCI Services Blueprint, and pending a review of the Fair Work system, ACCI recommends in the interim that changes must be made to the Fair Work Act 2009 which requires, at a minimum, that the terms in an IFA included in an enterprise agreement are no less favourable as compared to the model modern award clause/regulation. This is not creating a new right, but is giving effect to an existing law which is not working as the Government, nor Parliament, had intended.

3.4 Unfair Dismissal Laws

79. The new employment protection laws impact upon the capacity of services sector employers to manage their workforce. For example, the new Fair Work laws "general protections" regime significantly extends the capacity for employees and unions to litigate in the federal courts, including obtaining injunctions stopping legitimate business decisions from occurring (i.e. redundancies and restructuring). Employers who wish to terminate or alter the working arrangements may be liable under these laws if the employee alleges that action was taken as a result of a "workplace right".

80. This is an entirely new area of law and avenue for litigation that may impact on the ability of employers to structure their workplace arrangements to enhance their business operations and productive capacity. This very recent substantial extension of regulation is at odds with recommendations by key international organisations, such as the OECD.

81. Similarly, the unfair dismissal laws under the Fair Work system also have the effect of limiting the capacity of a firm to terminate the employment of an employee, where an employee has a right to challenge that dismissal on procedural grounds, despite the employer having a valid reason to terminate the employee. A firm who wishes to restructure and make redundancies may also be required to reinstate the worker if they do not follow certain procedures under the Fair Work laws. A right to challenge redundancies on procedural grounds bears no relationship to the actual operational requirements or needs of the firm to restructure, but penalises employers for failing to comply with procedural rules (ie. form is elevated above substance). Other requirements force a service industry business within a large corporate

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http://www.amma.org.au/home/publications/AMMA_Paper_IFAs.pdf; Hannan, E., 'New workplace laws failing Julia Gillard's flexibility test', The Australian (17 September 2009).

group to consider alternative positions not only within its own business, but across hundreds of other disparate business operations which imposes significant red-tape and challenges on even the most well-resourced companies.

82. In the Econtech report commissioned by ACCI, the authors concluded that *"the assessment of the international and national evidence presented later in this section concludes that there is an adverse impact of unfair dismissal legislation in Australia on the structural unemployment rate and labour productivity."*[25]

83. The fair work laws removed an exemption for smaller firms (100 or fewer employees) and replaced this by a special small business employer rule (under 15 employees) that extends qualifying periods of time before an employee can make an unfair dismissal claim, and allows employers to rely upon a Fair Dismissal Code when a business does dismiss an employee after serving the required qualifying period. Smaller service industry employers may benefit from this dismissal code, depending on whether they can successfully defend their reliance on the Code. In any even, reliance on the Code does not prevent a claim being brought by an employee with a small business employer having the onus to defend their actions and reliance on the Code before Fair Work Australia. Following these changes, there has been a significant increase in the number of unfair dismissal applications made against employers, with 13,054 applications made in 2009/10 compared with 6,707 made in 2004/5 (prior to the *WorkChoices* reforms).[26]

84. A growing number of cases illustrate that employers are being penalised for dismissing an employee despite having a valid reason for doing so. For example, employers have been successfully sued by employees in circumstances where serious misconduct has occurred (i.e. not following strictly OH&S protocols[27], or trying to protect other employees from sexual harassment and stalking[28]) or where redundancies were overturned because procedural requirements were not followed strictly.[29]

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[25] Econtech 1993, The Economic Effects Of Industrial Relations Reforms Since *(prepared for the Australian Chamber of Commerce and Industry*; Econtech 2007, http://www.econtech.com.au/information/Industry/EcontechAugust2007_ACCI.pdf.
[26] Fair Work Australia, *Fair Work Australia: Annual Report 2009/10.*
[27] See Hannan, E., 'Bosses rapped for valid sacking', The Australian, 19 February, 2010.
[28] See *Sex offender wins unfair dismissal case,* online news, ABC, 7 July 2010, http://www.abc.net.au/news/stories/2010/07/07/2947360.htm
[29] *Ulan Coal Mines Limited v A. Honeysett, A. Oldfield, C. Michaelides, G. Atkinson, R. Butler and D. Dixon* (C2010/4468); *R. Murray, M. Butler and C. Butler v Ulan Coal Mines Limited* (C2010/4457) ([2010] FWAFB 7578).

85. Despite assurances to business that the new Fair Work laws would *"remove 'go away money" from the unfair dismissal system",*[30] anecdotal and independent research suggests that this is not occurring. At recent Senate Education, Employment and Workplace Relations Committee, FWA officials indicated that in the two months from July 1, 2010 (when official records started to be kept of unfair dismissal settlements), 979 of conciliated unfair dismissal claims - or 75 per cent of the total – involved a payment to an employee, with the most common ranging from $2,000-to-$4,000, and 1% involving sums of between $30,000 and $40,000. Furthermore, a recent report commissioned for Fair Work Australia indicated that 76 per cent of employer participants surveyed wanted to avoid the *"cost, time, inconvenience or stress of further legal proceedings"* by settling the matter at *"out of court",* rather than defending the matter in further arbitral proceedings.[31]

86. Unfair dismissal laws or unlawful termination laws (general protections provisions of the *Fair Work Act*) should not penalise an employer where they have terminated an employee based on a valid reason. Often procedural defects in how an employer terminates an employee's employment, makes an otherwise lawful termination, unlawful.

3.4.1 Fair Dismissal Code

87. The Small Business Fair Dismissal Code (see below) was negotiated by the Government with unions and employer representatives and applies to small firms (under 15 employees). Where an employer relies on the Code and can demonstrate compliance before FWA (if challenged by an employee), the termination will be considered fair and provide a defence to the employer.

88. The existing Code is set out below:[32]

[30] ALP *Forward with Fairness – Policy Implementation Plan,* August 2007, p.20.
[31] Fair Work Australia, Fair Work Australia: Unfair Dismissal Conciliation Research Survey Results, November 2010: http://www.fwa.gov.au/documents/dismissals/report.pdf
[32] Under s.388 of the *Fair Work Act 2009*, the Minister can declare a Code. http://www.fairwork.gov.au/Templatesformschecklists/Small-Business-Fair-Dismissal-Code-2011.pdf

The Code

Summary Dismissal

It is fair for an employer to dismiss an employee without notice or warning when the employer believes on reasonable grounds that the employee's conduct is sufficiently serious to justify immediate dismissal. Serious misconduct includes theft, fraud, violence and serious breaches of occupational health and safety procedures. For a dismissal to be deemed fair it is sufficient, though not essential, that an allegation of theft, fraud or violence be reported to the police. Of course, the employer must have reasonable grounds for making the report.

Other Dismissal

In other cases, the small business employer must give the employee a reason why he or she is at risk of being dismissed. The reason must be a valid reason based on the employee's conduct or capacity to do the job.

The employee must be warned verbally or preferably in writing, that he or she risks being dismissed if there is no improvement.

The small business employer must provide the employee with an opportunity to respond to the warning and give the employee a reasonable chance to rectify the problem, having regard to the employee's response. Rectifying the problem might involve the employer providing additional training and ensuring the employee knows the employer's job expectations.

Procedural Matters

In discussions with an employee in circumstances where dismissal is possible, the employee can have another person present to assist. However, the other person cannot be a lawyer acting in a professional capacity.

A small business employer will be required to provide evidence of compliance with the Code if the employee makes a claim for unfair dismissal to Fair Work Australia, including evidence that a warning has been given (except in cases of summary dismissal). Evidence may include a completed checklist, copies of written warning(s), a statement of termination or signed witness statements.

3.4.2 Recommendations

89. Pending the review of the Fair Work laws, one possible solution to the challenges faced by employers in the above situations may be to modify the Code and extend it to all businesses.

90. Secondly, the Code could also be modified to clearly indicate that a valid reason for dismissal includes the existing reasons but also other relevant reasons. The Code could therefore be expanded to include the following paragraph:

"It is also considered fair if an employee's employment is terminated for reasons such as complying with laws relating to discrimination, sexual harassment or any other relevant matters as prescribed".

4. REGULATORY BURDENS

91. The Government has considered a number of reforms to ease the regulatory burden on business. Such reform measures are welcome by industry generally, but also the retail sector. One example of easing the administrative burden on small business is the creation of a Small Business Superannuation Clearing House. The clearing house is administered by Medicare Australia, and is a free service for employers who are able to make multiple superannuation guarantee payments into one clearing house whilst satisfying the superannuation guarantee legislation and reducing the burden of administering payments to multiple superannuation funds. However, there are other programmes and possible reforms that threaten to increase the regulatory burden on smaller firms. Whilst these are not limited to the retail sector, they do deserve consideration by the PC within the context of the retail sector inquiry.

92. These recommendations are from a workplace policy perspective. ACCI recommends that the PC consider the ACCI Services Blueprint which contains industry specific and general recommendations to ease the regulatory burden on services industry firms.

4.1 National Privacy Law Reforms

93. Following terms of reference, on 11 August 2008, the Australian Law Reform Commission (ALRC) released a 3 volume (and over 2,500 pages and 295 recommendations) report. The ALRC recommended that most existing exemptions should be removed from the *Privacy Act 1988*, including the small business and records exemptions. The ALRC also recommending creating new model Unified Privacy Principles (UPPs) that would apply to both the public and private sector.

94. The primary ALRC recommendations which were of particular concern to business included:

    a. Repealing the existing small business exemption which currently applies to business with an annual turnover of $3 million (Chapter 39, Volume 2, p.1315).

    b. Repealing the existing employee records exemption (Chapter 40, Volume 3, p.1363).

    c. Creating a new statutory cause of action for invasion of privacy (Chapter 74, Volume 3, p.2533).

d. Greater enforcement powers for the Privacy Commission, including the ability to issue compliance notices, and creating civil offences for "serious or repeated interference with the privacy of an individual" (Chapter 50, Volume 2, p.1649).

95. The Government has accepted many recommendations and has already referred draft legislation to create new UPPs to replace the existing privacy principles to the Senate Finance and Public Administration Committee. [33] Whilst the Government has deferred its consideration on the existing exemptions, ACCI has concerns that the existing privacy exemptions for small business and employee records, if removed, will create new red-tape and compliance obligations.[34]

96. Removing the employee records exemption, will require employers to comply with all of the privacy principles which may limit the ability of an employer to request, use, access and disclose records which are routinely held in the employment relationship. This may also expose employers to penalty breaches for non-compliance and possible litigation by disgruntled employees. There has been no evidence of substantial misuse of personal information by employers and therefore, no justification to remove the exemption. Moreover, removing the small business exemption will introduce increased compliance costs for smaller firms who are generally exempt from complying with privacy principles. This exemption has operated successfully since the privacy laws were extended to cover the private sector and were the result of a concession to industry.

4.1.1 Recommendations

97. The existing exemptions should be retained in full.

4.2 Paid Parental Leave – Payroll Function

98. The Government has introduced a Paid Parental Leave (PPL) Scheme which is broadly consistent with the recommendations made by an earlier dedicated PC inquiry into paid parental leave. Whilst there are aspects of the scheme which reduce the impact on business, particularly smaller firms, ACCI remains concerned over the regulatory burden that this is placing on employers who are forced to act as the government's "paymaster". The mandatory role for employers

[33] The Senate Finance and Public Administration Committee handed down its report on 15 June, which can be found here: http://www.aph.gov.au/Senate/committee/fapa_ctte/priv_exp_drafts/index.htm
[34] See Department of Prime Minister & Cabinet, http://www.dpmc.gov.au/privacy/reforms.cfm

commenced on 1 July 2011 and feedback to ACCI suggests that the scheme is complex and requires additional paper work for employers.

99. ACCI does not support the paymaster function and believes that the New Zealand PPL Scheme has been working sufficiently well and has not needed the formal involvement of employers to pass on government monies to employees.

100. ACCI is also concerned that the Government's keeping in touch (KIT) provisions, are different to the recommendations contained in the PC report, in so far as the Government's KIT provisions stipulates that any access to work during a period of PPL payments, be paid for by the employer in all circumstances. This has resulted in a perverse outcome for some employees who wish to attend during PPL period but requests are not acceded to because of possible payment obligations (and this is despite the employee not wanting to be paid for their brief attendance). For decades standing (going back to the 1970s when maternity leave was introduced), employees have been able to, in various and individual ways, to "keep in touch" with the workplace (including with the employer and staff), without any law dealing with the subject matter. The NZ PPL Scheme, which has been working perfectly well, does not have KIT provisions. Moreover, the Productivity Commission's final report recommended a KIT scheme on the lines of the UK scheme to enhance attachment to the workplace. It did not explicitly recommend that the employee should be paid when taking a KIT (see recommendation 2.13 of the PC final report).

4.2.1 Recommendations

101. In addition to the recommendations contained in the ACCI Services Blueprint, the PC should recommend that the new "keeping in touch" provisions in the *Paid Parental Leave Act 2010* be amended to ensure that it is not obligatory for employees to be paid during a KIT day, unless the employer and employee agree.

4.3 Superannuation Levy

102. ACCI is concerned that the Government intends to progressively increase the existing 9% superannuation levy to 12% by 2019-2020, which will be a considerable cost impost on employers generally, but will be particularly challenging for employers in the retail industry which operate on tight margins and have little ability to off-set the increases against wages. A 33% rise would see the employer levy rise from 9% of payroll to 12% - at a cost to the business bottom line of over $20 billion

a year once fully implemented. This comes after the Government's own Henry Tax Review concluded that there was no general case to raise the 9% compulsory employer levy on the grounds that retirement incomes would be inadequate. It said that increasing the employer levy would be counterproductive and instead proposed adding value to existing contributions through tax concessions.

103. ACCI has consistently argued since the Government announced its policy to increase the levy that employers will be the ones that will fund the increase, unless there is a real ability to off-set the amounts from other imposts (**Attachment C**).

4.3.1 Recommendations

104. The Productivity Commission should recommend that the Henry Tax Review recommendations against increasing the compulsory superannuation levy be preferred over the Government's current policy which is to progressively increase the levy by 2019/2020.

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AUSTRALIAN FOOD & GROCERY COUNCIL
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AUSTRALIAN INTERNATIONAL AIRLINES OPERATIONS GROUP
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AUSTRALIAN RETAILERS' ASSOCIATION
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