

Inquiry into Australia's Workplace Relations Framework

Submission to the Productivity Commission Review



**National Retail
Association**

Prepared by the National Retail Association

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Contents

About the Submitter	3
Australia’s Retail Service Sector.....	4
Proposed Changes to the Workplace Relations Framework	8
1. Introduction of Small Business Schedule to Awards	8
2. Small Business Unfair Dismissal Exemption	9
3. Individual Flexibility Agreements	9
4. Stop the Bullying Orders	10
5. General Protections Applications	10
6. Better Off Overall Test	10
7. Reintroduce Non-Union Employer Greenfield Agreements	11
8. Limit on Role of Bargaining Representative	11
9. Modern Award Objectives	11
10. Small Business Exclusion – Consultation in the event of redundancy	12
Contact information.....	13

About the Submitter

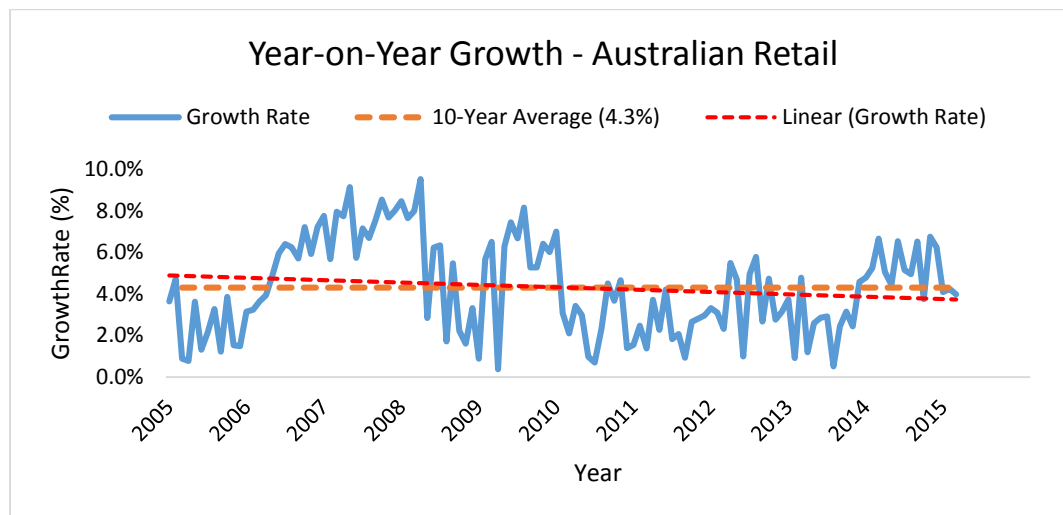
The National Retail Association (NRA) is a not-for-profit industry organisation providing professional services and critical information and advice to the retail, fast food and broader service industry throughout Australia. NRA is Australia's largest and most representative retail industry organisation, representing more than 19,000 stores and outlets.

This membership base includes the majority of national retail chains, as well as independent retailers, franchisees and other service sector employers. Members are drawn from all sub-categories of retail including fashion, groceries, department stores, home wares, hardware, fast food, cafes and personal services like hairdressing and beauty.

The NRA has represented the interests of retailers and the broader service sector for almost 100 years. Its aim is to help Australian retail businesses grow.

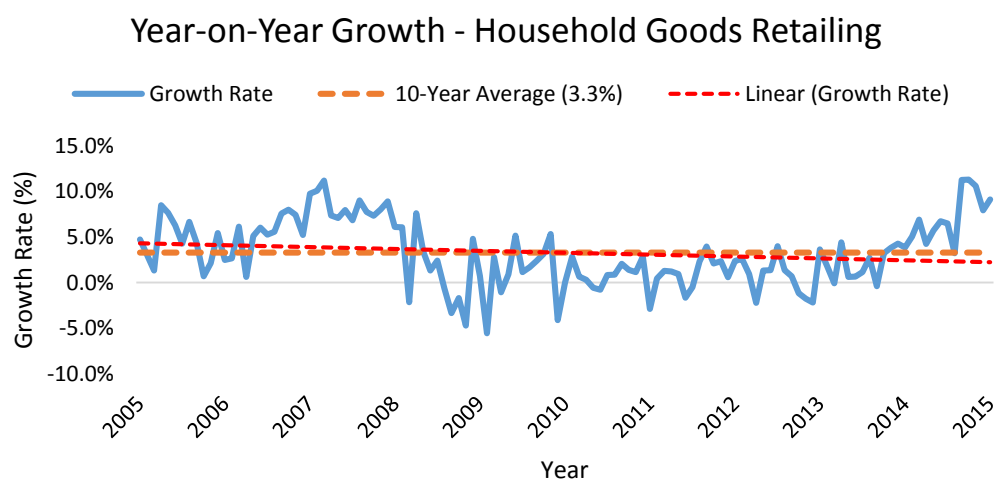
Australia's Retail Service Sector

The long-term performance of the Australian retail sector suggests that business operators have faced incredibly challenging economic conditions for a protractive period of time. For the past ten years, a clear, downward trend has become evident in the retail trade turnover data, released by the Australian Bureau of Statistics. Although strong growth was experienced throughout 2006 and 2007, the Australian Retail industry has had sustained periods of poor sales performance, only recently returning to above average sales growth. However, analysis conducted by the National Retail Association indicates that this trend may not continue into 2015, with the possibility of a return to below average sales growth.



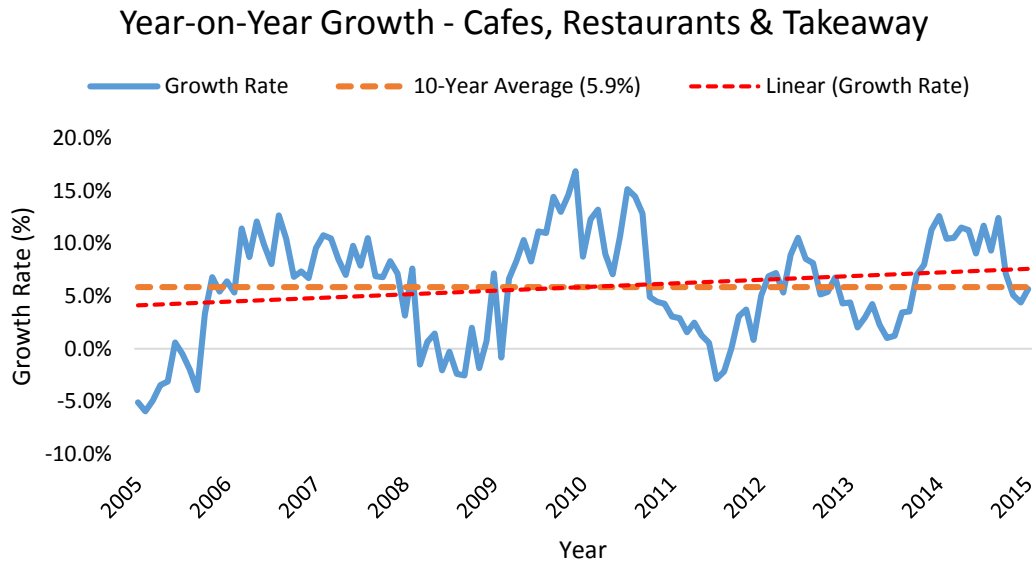
Source: ABS 8501.0 – Retail Trade, Australia, Jan 2015

The downwards trend in retail trade turnover is reflected in a number of category sub-divisions, which are key to the Australian Retail industry. In particular, those businesses that are largely dependent on discretionary expenditure, have experienced a clear downward trend in sales growth across the past ten years. While recent retail trade turnover data suggests short-term improvement, especially for household goods retailing (See below), it is uncertain whether this will develop into a sustained growth trend through 2015. Regardless, most categories in the Australian Retail industry are currently experiencing significant challenges in achieving sales growth that exceeds the 10-year average.



Source: ABS 8501.0 – Retail Trade, Australia, Jan 2015

At present, the only Retail category experiencing a positive, long-term trend in sales growth is cafes, restaurants and takeaway food services. With a 10-year average growth rate of 5.9 per cent, this category experienced double-digit growth, at multiple time points, across the past five years, relative to other industries, which have been growing at an average of less than 3.5 per cent.



Source: ABS 8501.0 – Retail Trade, Australia, Jan 2015

Research conducted by the National Retail Association also indicates that, relative to historical standards, consumer spending is weak. Indeed, as a result of reduced consumer confidence, the viability of many retail businesses have been impacted by a decline in consumer demand, and increases in operating costs including labour, rents, and utilities.

The most recent business data available from the Australian Bureau of Statistics indicates that 3.1 per cent of retail businesses ceased trading in the twelve months to June 2013, with all of these closures occurring in small business (1-19 employees)¹.

Service industry employment now dominates the Australian economy. In 1966 46% of all employed persons in Australia worked in production industries. Today 77% of all employment is attributable to the service sector, rising from 54% in 1966.

In the 1960s, Australia was evolving from a nation of largely primary industries – of sheep, cattle and wheat – to one of manufacturing. By the late 1960s refrigerators, washing machines, vacuum cleaners and cars had become increasingly available to Australians. This is reflected in the industries which employed most people in August 1966; Manufacturing (26%) and Wholesale and retail trade (21%).

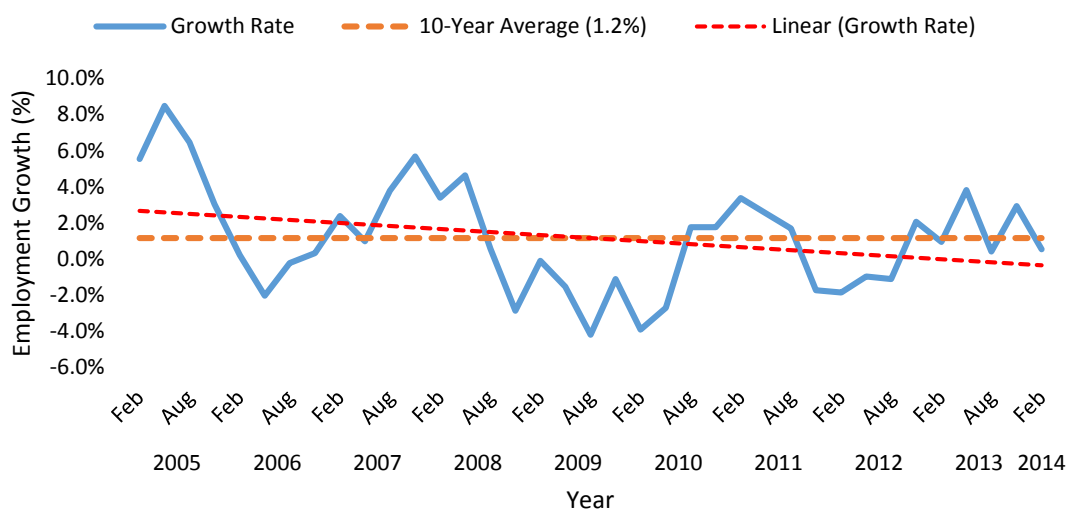
In August 2011, manufacturing was a relatively much smaller component of the economy than it was in the past (accounting for just 8% of employed people). The Health care and social assistance industry was the largest industry (employing 12%), followed by Retail trade (11%) and Construction (9%), while Agriculture and Mining only accounted for 3% and 2% respectively of all employed people.

The growth in some service industries also reflected a changing Australia; some 77% more people worked in the child care industry compared with just 10 years ago. [ABS 4102.0 Australian Social Trends, December 2011]

¹ 8165.0 - Counts of Australian Businesses, including Entries and Exits, Jun 2009 to June 2013

The Australian Retail industry, however, has experienced a sustained, long-term decline in employment growth across the past ten years. Analysis conducted by the National Retail Association reveals a 10-year average growth rate of 1.2 per cent, which ranks the Retail industry as one of the lowest performing sectors in terms of employment growth, and well below the national average of 2.6 per cent for all other industries. While the sheer size of the retail workforce means that any growth means significant numbers of new jobs, nonetheless the declining rate of growth should be a significant concern for policy makers.

Employment Growth - Australian Retail



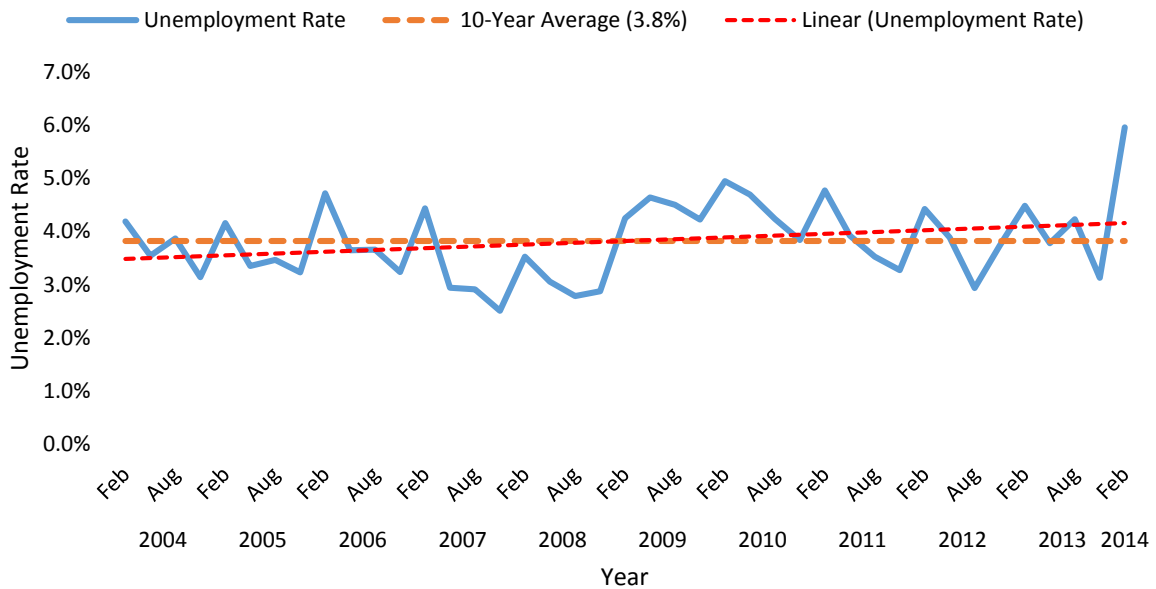
6291.0.55.003 - Labour Force, Australia, Detailed, Quarterly, Feb 2014

Unemployment statistics for the Australian Retail industry also suggest a linear trend towards an increased number of retail workers that are unemployed. Analysis conducted by the National Retail Association indicates that across the past ten years, the Retail industry has had the fourth highest average unemployment rate, at 3.8 per cent, which is higher than the national average for all other industries (3.1 per cent)².

This evidence, combined with a decline in consumer spending, increase in operating costs, and a contracting rate of employment growth, highlights the sustained economic pressure that has been placed on retail businesses in the past ten years.

² The industry unemployment rate was calculated using unemployed people who were employed in an identified industry within the past two years. It does not include people that have been unemployed for more than two years, or have never been in the labour market. As a result, within industry unemployment figures will be lower than the labour force-wide unemployment rate.

Unemployment Rate - Australian Retail



6291.0.55.003 - Labour Force, Australia, Detailed, Quarterly, Feb 2014

These challenging trends for the industry are certainly partially attributable to the structural changes and pressures being experienced in the Australian retail sector. Many of these structural changes have been well-documented in previous reports by the Productivity Commission, such as the Economic Structure and Performance of the Australian Retail Industry (2011) and Relative Costs of Doing Business in Australia: Retail Trade (2014).

For example, in recent years, the Australian Retail industry has also experienced an increased level of competition from online, overseas-based retail businesses, which operate in low-wage economies. It is extremely difficult for business owners to pass on any additional wage cost to customers, particularly in an environment where heavy discounting has become the norm in recent years.

However, the National Retail Association strongly submits that these trends are also significantly attributable to the fact that Australia has a workplace relations regime designed for an older economy, with an emphasis on manufacturing and primary industries, rather than being suitably designed and sufficiently flexible for the modern services economy.

In our submission the Australian workplace relations system remains shaped by the traditional circumstances, union relevance, and working arrangements associated with the manufacturing industry. The Fair Work Act (2009) (Cth) needs to be modernised to reflect the circumstances of the service sector which invariably operates across all seven days of the week and across a spread of hours that extends from 12 to 16 hours a day or more.

Additionally, unlike production or manufacturing demand is considerably more dynamic where operational requirements are significantly influenced by fluctuations in demand, changing consumer preferences and seasonal factors. Finally employment is geared towards the young and dominated by casual engagements. The service sector deserves and needs access to flexible forms of labour and employment arrangements that reflects its operational environment. The Act should be designed accordingly.

The Terms of Reference will require the Commission to assess the impact of the workplace relations framework and consider improvements, taking into account certain key interests, including:

- Job creation;
- Fair and equitable conditions for employees;
- The maintenance of a relevant safety net of conditions for employees;
- Productivity, competitiveness and business investment; and
- The needs of small business.

Proposed Changes to the Workplace Relations Framework

To achieve the aims and interests of this review, listed above, the National Retail Association proposes ten recommendations which would give the service sector the flexibility, modernity and structures needed.

At the outset, it is important to note that the National Retail Association does not support a reduction in the minimum wage, nor the total abolition of penalty rates. There is a need to ensure fair and equitable conditions for employees, based around a reasonable safety net and minimum wage, and there are times and circumstances when penalty rates are appropriate (the current levels of some penalties are notably higher than those in most other industries and those that existed in retail in most states prior to the introduction of the modern awards).

Furthermore, the National Retail Association recognises that the only way to sustainably boost real wages in our sector is to unlock the potential for growth and prosperity in retail businesses throughout Australia, which will require a focus on flexibility, modernity, productivity and competitiveness.

1. Introduction of Small Business Schedule to Awards

Australia's workplace relations regime is highly regulated. This makes it particularly hard for small to medium businesses that don't have the in-house capabilities to navigate these laws. This can often lead to inadvertent breaches of the laws particularly in relation to award interpretation.

Small and medium businesses need flexible workplace arrangements to maximise productivity and encourage such businesses to employ more workers. We consider that the definition of a small business should be universal across the legislation to include businesses with 50 or less fewer employees.

This would include casual employees who work on a regular and systematic basis.

Small business issues will vary from industry to industry and therefore a small business schedule to each modern award should be developed in consultation with industry stakeholders.

The small business schedule would operate to exclude small business from the application of many of the award terms such as hours of work, rostering, minimum shift provisions and may also provide for a more flexible remuneration structure or exclude the application of certain penalties, allowances or overtime.

2. Small Business Unfair Dismissal Exemption

A small business exemption from the application of unfair dismissal laws needs to be restored. The Small Business Fair Dismissal Code does not go far enough to protect small business and further changes are needed. This is because the nominal cost of making an application and the growing trend of no-win no-fee practitioners in this jurisdiction means that a claim following termination is more likely.

This is the case even if there was clearly a valid reason for termination and the Small Business Fair Dismissal Code was followed. The cost of defending such claims can be crippling for small business, both in possible representation costs and valuable time spent out of the business. Unfortunately, the practical reality is that it is not commercially viable for a small business to defend a case to arbitration.

The added frustration for the business owner is that even if there was a valid reason for termination and proper process was followed, the likelihood of costs being awarded against a vexatious litigant are low. It is far more likely that even claims that have no merit are resolved by way of monetary settlement purely on a commercial basis. In our experience this is a practice encouraged by unscrupulous applicant representatives in this area.

The best solution is to exclude small business employers from the jurisdiction altogether.

3. Individual Flexibility Agreements

With the abolition of statutory individual workplace agreements came the reduction in flexible work options for both employers and employees. The introduction of Individual Flexibility Agreements ('IFAs') is a current mechanism whereby employees under Awards and enterprise agreements can attempt to come to mutually beneficial arrangements to vary their current terms of employment, but in our experience they are not widely used. This is because of the restrictive scope of an IFA as well the added concern that an IFA cannot be offered as a condition of employment.

This is of particular concern for small business. Our smaller members have told us of examples whereby they would like to use an IFA but the drawbacks are too great. For example, a business has shifts of between 1 to 2 hours they would like to fill and employees who would be willing to work these shifts. Where the Award or Agreement prescribes a minimum 3 hour shift but the employer does not have a need for an employee to work a 3 hours shift and the employee also does not want to work a 3 hour shift then an IFA may seem like an obvious solution.

There is, however, some legal conjecture as to whether an IFA can be made about the minimum duration of shifts. This creates uncertainty and means that despite there being a genuine need for flexibility from the employer and an employee willing to work – the framework for the IFA regime is too rigid and uncertain to accommodate this.

The problem is compounded by the fact that employers are unable to make an offer of an IFA a condition of employment. Once again if an employer has a genuine need for flexibility, the employer should be able to offer terms of employment that meet that genuine need. An employee who applies for the role then has all the facts available to them to make an informed decision as to whether the terms of the IFA suit their needs or not and either accept or reject the offer.

In our experience, we have also found that in agreement negotiations when a union is a bargaining representative that there is an attempt to limit the scope even further than the model flexibility clause. This often means wasted time and resources in bargaining negotiations, which restrict the flexibility afforded to an individual employee and does nothing more than serve the union's own agenda.

On this basis, we consider that the Act and Regulations should be amended to ensure that an enterprise agreement cannot have terms that are less generous than the model flexibility clause under the Act.

4. Stop the Bullying Orders

While the Act is very prescriptive about who may make a stop the bullying order, the Act does not prescribe the type of orders that the Fair Work Commission may make. The scope of the orders should be limited and the orders considered in light of the business operations and whether such orders would affect productivity and efficiencies at the workplace.

5. General Protections Applications

We propose Part 3-1 relating to General Protections is amended to include a mandatory screening process of applications by the Fair Work Commission before the matters are able to proceed.

In our experience, claims have been allowed to proceed in circumstances where the applicant has not established any basis for making a claim – e.g. an applicant claiming they have been treated adversely because of a workplace right yet not identifying what that workplace right is or what they claim the adverse action to be.

In such situations it is not until the employer attends the conciliation that the Applicant's basis for making a claim is even apparent and not before the employer has spent considerable time and money preparing for the defence of such a claim.

We submit that where an application contains no information that would establish a prima facie case of a breach of the general protections laws then the application should not be able to proceed.

6. Better Off Overall Test

Section 193(1) of the Act outlines when a non-greenfields agreement passes the better off overall test. The section provides that an enterprise agreement that is not a greenfields agreement passes the better off overall test under this section if the Fair Work Commission is satisfied, as at the test time, that each award covered employee, and each prospective award covered employee, for the agreement would be better off overall if the agreement applied to the employee rather than the relevant modern award.

While section 193(7) of the Act provides that the Fair Work Commission, for the purposes of determining whether an enterprise agreement passes the better off overall test, is entitled to assume (in the absence of evidence to the contrary) that if a class of employees to which a particular employee belongs would be better off if the agreement applied to that class than if the relevant modern award applied to that class then the employee would be better off overall if the agreement applied to that employee.

We consider that the BOOT, in its current form, is impractical if there is potential for an enterprise agreement not to pass the BOOT where a single employee can demonstrate they may not be better off overall under the agreement in particular circumstances. In reality this test does not achieve one of the objects of the Act – “achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action”. The BOOT in its current form may act as a deterrent if there were to be decisions made by members of the Fair Work Commission relying on section 193(1) refusing to approve an agreement because an individual employee is not better off under an agreement in comparison to the applicable modern award (in the event such evidence was led).

To rectify this situation, we propose the test in section 193(1) is amended as follows:

(1) An enterprise agreement that is not a greenfields agreement passes the better off overall test under this section if FWC is satisfied, as at the test time, that each class of award covered employee, and each class of prospective award covered employee, for the agreement would be better off overall if the agreement applied to the class of employees than if the relevant modern award applied to the class of employees.

Accordingly, section 193(7) of the Act could then be deleted.

7. Reintroduce Non-Union Employer Greenfield Agreements

We propose Part 2-4 of the Act dealing with Enterprise Agreements is amended to provide for the option of non-union employer greenfield agreements.

The Act in its current form adds unnecessary cost and delay to the agreement making process and acts as a deterrent for an operator of a new enterprise.

All greenfields agreements need to pass the BOOT as determined by the Fair Work Commission and therefore there is no need for union involvement.

8. Limit on Role of Bargaining Representative

A bargaining representative for an employee who has not been involved in the negotiation of an Agreement that was approved by a majority of employees should not be permitted to be heard before the Fair Work Commission in relation to matters of approval nor should they have the ability to apply to be covered by the agreement.

A bargaining representative who has had no involvement in the negotiation of the document itself should not be able to delay the approval process by intervening in a matter that they have no intimate knowledge of and particularly where the union has not been asked to intervene by a member.

9. Modern Award Objectives

Section 134 of the Act outlines the modern award objectives or the factors that the Fair Work Commission must take into account to ensure that the modern awards together with the NES provide a fair and relevant minimum safety net.

These objectives are factors that the Fair Work Commission will be bound to consider particularly in light of the modern award review. Our concern lies with each factor being given equal weight when we consider that some factors should be given greater weight than others. In our view, the following factors should be considered first and foremost and given greatest weight:

- (d) the need to promote flexible modern work practices and the efficient and productive performance of work;
- (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden;
- (h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

If these above factors are being achieved only then should other factors be considered. Another additional consideration we consider should be included in the modern awards objectives is the need of small business to strive, grow and compete.

10. Small Business Exclusion – Consultation in the event of redundancy

Prior to the introduction of modern awards, small businesses were excluded from the operation of redundancy provisions under awards. This included the obligation to consult.

If a small business fails to consult as per the award, it is not only a breach of the instrument but the employer would be prevented from relying on the defence of “genuine redundancy” under the Act in the event an employee who was made redundant made an unfair dismissal application.

This is an overly punitive measure in our view, particularly given the difficult business circumstances a small business would already be confronting in a redundancy situation.

We believe the small business exclusion should be reinstated.

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