

Victorian Government Submission to the Productivity Commission Inquiry into the Workplace Relations Framework

10 April 2015

Table of Contents

Executive Summary	5
Section 1 Introduction	9
Section 2 Safety Nets	12
Minimum Wages.....	12
<i>Rationale for the minimum wage</i>	<i>12</i>
<i>Impact of the minimum wage on particular groups of people.....</i>	<i>13</i>
<i>Impact of the minimum wage on employment as a whole.....</i>	<i>14</i>
<i>Effect of minimum wages throughout the wage system</i>	<i>16</i>
<i>Continuing rationale for penalty rates.....</i>	<i>20</i>
<i>Retail and hospitality sectors.....</i>	<i>23</i>
<i>Penalty rates: Examples</i>	<i>23</i>
<i>Mechanisms available under the Fair Work laws enable employers to modify penalty rate outcomes.....</i>	<i>25</i>
Section 3 Impact on Women Workers.....	27
<i>Fair Work Act reforms: Equal remuneration provisions.....</i>	<i>27</i>
<i>The gender wage gap.....</i>	<i>29</i>
<i>Family friendly work arrangements.....</i>	<i>30</i>
<i>Domestic violence.....</i>	<i>32</i>
Section 4 Promoting Productivity.....	33
Productivity and the workplace relations framework	33
<i>The link between flexible working arrangements and productivity. 34</i>	
<i>Victoria's productivity performance.....</i>	<i>35</i>
<i>National productivity performance.....</i>	<i>36</i>
Section 5 The Bargaining Framework.....	38
Enterprise Bargaining.....	38
<i>Good faith bargaining</i>	<i>38</i>
<i>The link between enterprise bargaining and productivity.....</i>	<i>39</i>
<i>Fair Work Amendment (Bargaining Processes) Bill 2014.....</i>	<i>42</i>

	Industrial Disputation	43
	<i>Low levels of industrial disputation</i>	43
	<i>The relationship between bargaining and industrial action</i>	46
	<i>Right to take industrial action and ILO standards</i>	46
	<i>Protected industrial action and disputes</i>	47
	<i>Alternatives to lockouts</i>	49
Section 6	Alternative Forms of Employment and the Growth in Insecure Work	51
	Introduction.....	51
	Labour Hire	52
	<i>Prevalence of labour hire in Victoria</i>	52
	<i>Labour hire arrangements</i>	53
	<i>Treatment of labour hire workers</i>	54
	Sham Contracting	57
	<i>Prevalence of sham contracting</i>	57
	<i>Fair Work Act protections against sham contracting</i>	59
Section 7	Employee Protections	60
	Unfair Dismissal	60
	<i>So-called ‘go away money’</i>	61
	<i>Quick, flexible and informal procedures</i>	62
	Anti-Bullying Laws	63
Section 8	Public Sector Workplace Relations	66
	<i>The Victorian Government as a public sector employer</i>	66
Section 9	Long Service Leave	68
Appendices	70

List of Figures

Figure 1:	Comparison of Award rates and average weekly ordinary earnings by industry, percentage (May 2012 & 2014).....	19
Figure 2:	Post-GFC annual average contribution to Victorian and national labour productivity growth	36
Figure 3:	Australian multifactor productivity (gross value added, market sector)	37
Figure 4:	Working days lost per 1000 employees, rolling four quarter total, Victoria, 1986 to 2014	44
Figure 5:	Working days lost (000s), Australia and selected states, 1986 to 2014.....	45
Figure 6:	Working days lost and total employees involved, Australia, 1985 to 2014	45

List of Tables

Table 1:	Australian average annual labour productivity growth by industry (per cent).....	70
Table 2:	Australian average annual multifactor productivity growth by industry (per cent)	70
Table 3:	Retail and hospitality employees' earnings: ordinary hours, overtime/evening work, Saturday and Sunday penalty rates.....	70
Table 4:	Retail and hospitality employees' earnings: ordinary hours, overtime/evening work, no Saturday and Sunday penalty rates.....	71

Executive Summary

1. The Victorian Government strongly supports a fair and comprehensive safety net of minimum wages and conditions, penalty rates, cooperative work practices that improve productivity and encourage innovation, and the right to collectively bargain including a democratic right to take protected industrial action.
2. The Victorian Government is concerned that the Commonwealth Government intends to use the Commission's inquiry to erode employee protections to the detriment of the most vulnerable and low paid Victorian workers.
3. The Productivity Commission should pay careful attention to the impact that any erosion of existing safety nets would have on employees in Victoria and across Australia. The human cost of such decisions must not be underestimated.
4. The Victorian Government submits that maintaining a fair minimum safety net is essential to support potentially vulnerable categories of workers, including young people, women, the disabled and people in insecure forms of work.
5. The Victorian Government is concerned that while real earnings have generally increased over the past decade, earnings inequality is increasing. Award rates are generally at or less than 50 per cent of average weekly earnings across industry sectors. This contributes to a reduction in the relative living standards of the low paid and a steady erosion of the value of minimum wages when compared with average earnings.
6. Maintaining a fair minimum safety net can help to improve the relativity of wages outcomes between awards and agreements, mitigating against the effects of increasing earnings inequality. Adjusting the minimum wage can also ensure a fairer distribution of economy-wide productivity gains.
7. The Victorian Government believes that in 2015, the Fair Work Commission should provide an increase to low wage earners by increasing the National Minimum Wage (NMW) and all modern award wages. The increase should reflect prevailing economic and social conditions, particularly noting growing inequalities in award wages and wages outcomes in agreements through bargaining.
8. The Victorian Government supports the position that modest increases in minimum wages have a negligible effect on employment. If there is small impact at the margin, the costs of this on the few can be offset by the benefits large numbers of employees receive from the minimum wage.
9. A low-paid job is not always a bridge to better opportunities. Those with lower education levels, lone parents and people with a long-term health condition or disability are more likely to be in, and remain in, low paid employment.

10. There are significant, broad-based, non-economic benefits in ensuring the country's lowest paid workers receive a minimum wage.
11. The Victorian Government submits that penalty rates have been and continue to be a fundamental and inherent component of the regulatory structure: penalty rates are necessary to provide a fair and relevant safety net for Victorian employees and employees should continue to be compensated for working unsocial or irregular hours.
12. While it may suit some workers to work on weekends and in the evenings, employees with little or no bargaining power may be obliged to work extended evening or weekend hours.
13. Of employees who received penalty rates for working unsociable hours, over one third (34.6 per cent) relied on penalty rates for household expenses, and these employees are more likely to be women, sole parents, living in rural or regional locations or employees with combined household incomes less than \$30 000.
14. Abolishing penalty rates could lead to:
 - a retail worker facing an effective pay cut of \$300 per week or 24.5 per cent;
 - a construction worker having an effective pay cut of \$428 or 32.8 per cent;
 - a builders labourer facing an effective pay cut \$366 or 32.8 per cent; and
 - an electrical worker suffering an effective pay cut of \$392 or 32.8 per cent.
15. One of the areas not specifically addressed in the terms of reference for the inquiry or the Issues Papers released by the Commission is the impact of the workplace relations framework on female workers. The Victorian Government is of the view that consideration should be given to this issue, especially in light of recent data suggesting the gender pay gap is widening rather than contracting.
16. According to ABS data, the gender pay gap over all industries was 18 per cent in 2014, with women earning 82 per cent of male average weekly earnings. Women in the Australian workforce also have a greater reliance on award earnings.
17. The Victorian Government is committed to reducing inequality between women and men and has introduced a number of policy measures directed at supporting the economic, social and civil participation of women in all aspects of Victorian life.
18. The Victorian Government submits that whilst it is important for the law to reflect contemporary community expectations and standards, constant change is unsettling for employees and costly for business.
19. There is limited evidence to support a correlation between productivity and the workplace relations framework.

20. The Victorian Government's focus is on improving productivity through a strategy that encourages growth and investment, creates the right environment for jobs, and positions the Victorian economy for strong and sustained growth.
21. The Victorian Government considers that the ease of access to lockouts available to employers under WorkChoices combined with the myriad of constraints on employee initiated industrial action, tips the balance of power firmly in favour of employers.
22. It is noted that employer industrial action is less regulated and encumbered than is employee action. For an employer to take protected employer response action all that is required is for written notice to be given to the employees' bargaining representatives and for reasonable steps to be taken to notify affected employees. By contrast, for employees the right to take protected industrial action is limited and there are a number of restrictions and numerous procedural requirements.
23. The Victorian Government does not support measures proposed by the Commonwealth Government to make a number of changes to the Fair Work Act, which would introduce further requirements before protected industrial action can be taken.
24. The Victorian Government is concerned that labour hire arrangements can make labour hire workers vulnerable to exploitation, can create uncertainty for workers around continuity in employment and income, and can allow unscrupulous operators to evade taxation and other obligations.
25. The Victorian Government is committed to undertaking an inquiry into insecure work, including into issues relating to the operation of the labour hire industry, the business practices of companies in the industry, and sham contracting.
26. The Victorian Government will consider the most appropriate options to regulate the industry. This may help to protect vulnerable workers by promoting ethical and compliant labour hire firms, and build the reputation of the industry as a whole.
27. The Victorian Government supports genuine independent contracting and recognises that this is a legitimate way to do business. However, the Victorian Government does not support arrangements that allow employer obligations, including annual leave, sick leave, long service leave entitlements, employer superannuation contributions or other employer obligations such as work cover payments, to be illicitly avoided.
28. The Victorian Government is concerned that vulnerable and less informed workers, including young and overseas workers, are particularly susceptible to sham contracting.
29. As one of Victoria's largest employers, the Victorian Government values good faith bargaining requirements as an essential and productive component of enterprise

agreement negotiations and expects all public sector agencies to bargain in good faith. The Victorian Government is committed to working with public sector employers and unions. The Victorian Government will provide value for money to Victorians, while ensuring fair and consistent outcomes for public sector employees.

30. The Victorian Government has proposed amending the *Fair Work (Commonwealth Powers) Act 2009 (Vic)* (**Referral Act**) to provide the Fair Work Commission with jurisdiction to approve agreements containing matters that are otherwise excluded from the referral of powers. This proposal is currently being developed and will take into account the recent Federal Court decision in *UFU v CFA*.
31. The Victorian Government supports the creation of a uniform national minimum Long Service Leave standard, provided there is no diminution of standards for Victorian workers. Long Service Leave is a longstanding and valuable entitlement of Victorian workers.

Section 1 Introduction

- 1.1. The Victorian Government welcomes the opportunity to make a submission to the Productivity Commission (**Commission**) inquiry into the workplace relations framework (**Inquiry**).
- 1.2. The Commonwealth Government has asked the Commission to undertake a comprehensive and broad review of the workplace relations framework encompassing the *Fair Work Act 2009* (**Fair Work Act**), including the institutions and instruments that operate under the Fair Work Act; and the *Independent Contractors Act 2006* (Cth).
- 1.3. The five Issues Papers released by the Commission raise questions that go to the core of Australia's workplace relations system. They include questions such as the rationale for the minimum wage in contemporary Australia and the function of penalty rates, the effectiveness of bargaining arrangement, the strengths and weaknesses of the current system, what are the biggest risks from changing the system and how such risks could be moderated or avoided.
- 1.4. The Victorian Government strongly supports a fair and comprehensive safety net of minimum wages and conditions, penalty rates, cooperative work practices that improve productivity and encourage innovation, and the right to collectively bargain including a democratic right to take protected industrial action.
- 1.5. Valuing and treating workers with respect is a priority for the Victorian Government, as is the protection of worker's rights.
- 1.6. The Victorian Government is concerned that the Commonwealth Government intends to use the Commission's Inquiry to erode employee protections to the detriment of the most vulnerable and low paid Victorian workers.
- 1.7. The Victorian Government's focus is on improving productivity through a strategy that encourages growth and investment, creates the right environment for jobs, and positions the Victorian economy for strong and sustained growth.
- 1.8. The Victorian Government will support and create jobs, invest in skills and education, and provide secure employment for Victorians by:
 - Getting Victorians back to work with policies that support jobs growth and grow the economy. The Government's has a *Back to Work* plan and has identified six high-growth industries to further develop and drive expansion into and connect to overseas markets. The Government's *Back to Work Bill 2014*¹ will also provide financial assistance to businesses to support the long-term unemployed and retrenched workers.

¹ As at 19 March 2015, the Bill has passed both Houses of the Victorian Parliament and is awaiting Royal Assent.

- Preparing Victoria’s workforce for an increasingly ‘knowledge based economy’, by rebuilding and strengthening Victoria’s Technical and Further Education (TAFE) institutes, delivering community service obligations and enhancing the regulation of training providers; and
 - Conducting its own inquiry into insecure work in Victoria, including issues relating to the operation of the labour hire industry and sham contracting.
- 1.9. The Victorian Government submits that whilst it is important for the law to reflect contemporary community expectations and standards, constant change is unsettling for employees and costly for business.
- 1.10. The Victorian Government notes that the Fair Work Act was comprehensively reviewed in 2012. The Expert Panel undertaking that review found that ... *the current laws are working well and the system of enterprise bargaining underpinned by the national employment standards and modern awards is delivering fairness to employers and employees.*² While recommending a number of mainly technical changes to improve the Fair Work Act’s operation, the Expert Panel concluded that the Fair Work Act was broadly meeting its objectives and did not require wholesale change.
- 1.11. A number of other reviews into Australia’s workplace relations framework have considered issues that are the subject of this Inquiry. For instance, in the life of the current Federal Parliament, the Senate Education and Employment Committee has conducted or is conducting four separate inquiries into workplace relations legislation, (not including health and safety or skills matters).³ The Commission itself has also conducted separate inquiries into other matters related to workplace relations.⁴ In addition, annual wage reviews and test cases have produced relevant research material, as well as clearly delineating the respective positions of the key players.
- 1.12. In the past five years, the Fair Work Act has been amended on 24 occasions.⁵ The Commonwealth Government has three workplace relations Bills before the Senate,

² McCallum, R., Moore, M and Edwards, J., Towards more productive and equitable workplaces: an evaluation of the Fair Work legislation, 15 June 2012, p.3 (**2012 Fair Work Act Review**). Accessed at: <<http://employment.gov.au/fair-work-act-review>>

³ *Fair Work (Registered Organisations) Amendment Bill 2013* Legislation Committee inquiry, report tabled 2 December 2013; *Fair Work (Registered Organisations) Amendment Bill 2013* References Committee inquiry, report tabled 27 March 2014; *Fair Work Amendment Bill 2014* Legislation Committee inquiry, report tabled 5 June 2014; and *Fair Work Amendment (Bargaining Processes) Bill 2013* Legislation Committee inquiry, report due to be tabled 25 March 2015.

⁴ For example: Business Set-up, Transfer and Closure Inquiry, Default Superannuation in Modern Awards Inquiry and the Paid Maternity, Paternity and Parental Leave Inquiry.

⁵ Creighton, B. ‘Why can’t ‘they’ leave our labour laws alone?’ Phillipa Weeks Lecture in Labour Law, 15 October 2014, p.2. Accessed at: <<http://law.anu.edu.au/events/anu-college-law/phillipa-weeks-lecture-labour-law>>.

which if passed will implement further substantial reform.⁶ A fourth Bill, the *Fair Work (Registered Organisations) Amendment Bill 2014* was recently defeated in the Senate. That Bill was criticised by employer and employee associations alike. Notwithstanding, on 19 March 2015, the Commonwealth Government has re-introduced that Bill.

- 1.13. Victorian workers and employers (with limited exceptions) are covered by the Commonwealth Fair Work laws as a result of the Victorian Parliament's referral of certain workplace relations matters to the Commonwealth. The Victorian Government continues to support a national system of industrial relations that is fair and balanced for all Victorian workers, employers and unions.
- 1.14. The Victorian Government considers that while there are some areas worthy of closer policy consideration, the Fair Work Act is generally meeting its objective to *provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians.*⁷ The Victorian Government supports that objective, and is not advocating significant reform to the Fair Work Act, nor holistic change to the national workplace relations system.
- 1.15. The Victorian Government notes with concern the broad scope of the Inquiry and the tight timeframes within which the Commission has been tasked to consider, develop and make recommendations about a wide range of issues of significance to Australian workers and employers.
- 1.16. The Victorian Government welcomes the Commission's approach that any policy recommendations will be directed to improving the wellbeing of the Australian community as a whole. This requires careful attention being given to the impact that any erosion of existing safety nets would have on employees in Victoria and across Australia.
- 1.17. This submission does not address all of the questions or topic areas raised by the Commission, but focuses on key issues of importance to the Victorian Government and to Victorians. The Victorian Government notes there will be an opportunity to make a further submission, once the Commission has handed down its draft report.

⁶ *Fair Work Amendment Bill 2014; Fair Work Amendment (Bargaining Processes) Bill 2014; and Fair Entitlements Guarantee Bill 2014.*

⁷ *Fair Work Act 2009* (Cth) s 3.

Section 2 Safety Nets

Minimum Wages

- 2.1. The Productivity Commission seeks views on, among other things, the rationale for the minimum wage in contemporary Australia.⁸

Rationale for the minimum wage

- 2.2. The Victorian Government believes in the value and dignity of work, and acknowledges the efforts of Victorians working in both the public and private sectors. The Victorian Government stands for fairness in the workplace: employers, unions and workers should work together in the interests of economic prosperity for all Victorians and a fair, comprehensive safety net of wages and conditions is essential to that interest.⁹
- 2.3. The Victorian Government believes that a measure of a civilised society is how they treat the most vulnerable.
- 2.4. The Victorian Government submits that the existence of a minimum wage and a mechanism to periodically review and adjust that wage, is fundamental to the objective of a fair and effective safety net of conditions underpinning the national workplace relations framework to protect society's most vulnerable workers.
- 2.5. The object in section 3 of the Fair Work Act is to be achieved by a range of means, including by:
- (b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders;*
- 2.6. The minimum wages objective in s284 is to establish and maintain a safety net of fair minimum wages, whilst balancing performance and growth of the national economy with factors such as social inclusion through workforce participation and relative living standards and the needs of the low paid.
- 2.7. The Victorian Government strongly supports the minimum wage objectives in the Fair Work Act. It also supports the current system of setting minimum wages by an independent minimum wage panel: a system affirmed by the Expert Panel reviewing the Fair Work Act in 2012, in the following terms:
- ...the Panel believes the minimum wage objective, outlining the matters which must be considered in the annual wage review is fulsome and appropriate, and*

⁸ Issues Paper 2, p. 6.

⁹ Annual Wage Review 2013-14 [2014] FWCFB 3500.

⁹ Premier of Victoria, The Hon Daniel Andrews MP, 'One in Six Workers to Suffer Under Minimum Wage Plans', Media Release, Tuesday 3 February 2015. Accessed at: <<http://www.premier.vic.gov.au/one-in-six-workers-to-suffer-under-minimum-wage-plans>>.

*that the Minimum Wage Panel is the right body to conduct the process. The Panel therefore recommends that no changes be made to the annual wage review process.*¹⁰

Impact of the minimum wage on particular groups of people

- 2.8. The Commission is also seeking views about the impact of minimum wages on particular groups of people and on employment as a whole.¹¹
- 2.9. The overriding aim of a fair and effective safety net should be to provide fair minimum employment standards that reflect the general expectations of the Australian community.¹² Central to this, is a fair minimum wage that is adjusted to reflect those standards and **protect those workers who are in a poor bargaining position to individually negotiate improved wages outcomes.**
- 2.10. The Victorian Government submits that maintaining a fair minimum safety net is essential to support potentially vulnerable categories of workers, including young people, women and people in insecure forms of work.
- 2.11. Further, the Victorian Government submits that maintaining a fair minimum safety net can help to improve the relativity of wages outcomes between awards and agreements, mitigating against the effects of increasing earnings inequality. A minimum wage can also ensure a fairer distribution of economy-wide productivity gains and increase incentives to work, particularly for welfare dependent youth,¹³ thus promoting the minimum wages objective of social inclusion through workforce participation.
- 2.12. ABS data shows that women in the Australian workforce have a greater reliance on award earnings. Women are more likely to depend on minimum wage regulation in certain industries and occupations, such as the wholesale trade, retail trade and the accommodation and food services sectors. According to 2014 ABS data, 18.7 per cent of employees in Australia are paid by an award only. Of these, 57.6 per cent are women, 47.9 per cent are casual employees and of these casual employees, 64.3 per cent are women.¹⁴ Many other low paid employees are paid just above award rates.
- 2.13. Over the past five years, the value of the minimum wage for award reliant workers has reduced relative to average earnings and wages set by enterprise agreements.¹⁵

¹⁰ 2012 Fair Work Review, pp.114-115 (note 2).

¹¹ Issues Paper 2, p. 6.

¹² See, for example, *The Essential Report – Minimum Wage*, 3 February 2015 and 25 February 2014. Accessed at: <<http://essentialvision.com.au/minimum-wage>>.

¹³ Watts, Martin J. (2010), 'How Should the Minimum Wage be Set in Australia?' *Journal of Industrial Relations*, 52(2), 131-149, p. 145; Cowling S. and Mitchell W. (2007) 'Taking the Low Road: Minimum Wage Determination under WorkChoices', *Journal of Industrial Relations*, 49(5) 741-756, p. 751.

¹⁴ Australian Bureau of Statistics (2015) Catalogue Number 6306.0 *Employee earnings and Hours*, Australia, May 2014 (Released January 2015). Accessed at: <<http://www.abs.gov.au/ausstats/abs@nsf/mf/6306.0/>>

¹⁵ Annual Wage Review 2013-14 [2014] FWCFB 3500.

This contributes to a reduction in the relative living standards of the low paid and a steady erosion of the value of minimum wages when compared with average earnings. This affects these cohorts of employees who are over-represented in the low paid category of the labour market.

- 2.14. In handing down its Annual Wage Review 2013-2014 decision the FWC stated *while real earnings have generally increased over the past decade, **earnings inequality is increasing***. Australian Bureau of Statistics (ABS) data shows there is a persistently wide ratio between the wages outcomes of employees paid under awards and other methods of setting pay with **award rates generally around 50 per cent or lower of average weekly earnings across industry sectors**. Over the decade to 2014, the ratio is particularly pronounced when award rates are compared with individual agreements.
- 2.15. The Victorian Government believes that in 2015, the FWC should provide an increase to low wage earners, by increasing the National Minimum Wage (**NMW**) and modern award wages. The increase should reflect prevailing economic and social conditions, particularly noting growing inequalities in award wages and wages outcomes in agreements through bargaining.

Impact of the minimum wage on employment as a whole

- 2.16. The Commission is also seeking views about the impact of minimum wages on employment as a whole.¹⁶
- 2.17. The Victorian Government supports the need to foster employment and business conditions that will support inclusive economic growth. However, it submits that there continues to be mixed evidence as to the [adverse] impact on employment in Australia of increasing the minimum wage in an economically sustainable fashion.
- 2.18. The relationship between the minimum wage and employment has been extensively studied, including by the former Fair Work Australia as part of Annual Wage Review proceedings.¹⁷
- 2.19. The Victorian Government submits that modest increases in minimum wages have a negligible effect on employment, and that firms will absorb the increases without any change to the number of people they employ. If there is small impact at the margin, the costs of this on the few can be offset by the benefits large numbers of employees receive from the minimum wage. The policy benefits of a minimum wage outweigh the costs of a system that does not have a minimum wage and does not support Australia's lowest paid workers.
- 2.20. The majority of research on the relationship between a minimum wage and employment has been conducted in OECD countries other than Australia, with

¹⁶ Issues Paper 2, p. 6.

¹⁷ See for example [2010] FWA FB 4000 at [246].

varying findings as to the magnitude of the impact. There are mixed views about the relevance of overseas studies for the Australian context¹⁸ and how directly applicable the body of overseas empirical work is, given the unique institutional arrangements applying in Australia.

- 2.21. When considering the international data on the impact of the minimum wage on employment and submissions as to its relevance to Australia, the Expert Panel for the 2012-13 Annual Wage Review was not convinced to alter its position from previous reviews that a modest increase in minimum wages has a very small or even zero, effect on employment. This position was affirmed by the Fair Work Commission (FWC) in their 2013-14 decision on the Annual Wage Review.¹⁹
- 2.22. The Commission also seeks information on how long employees remain in low paid employment. The Commission stated that *the degree to which people remain at low pay levels is important when considering the long-run impacts of minimum wages on individuals*. The Commission then cited the example of a young person who starts at the minimum wage and then progresses to higher wages.
- 2.23. Recent Commonwealth Government policy has stressed the importance of getting people into work as a way to increase labour market participation and reduce welfare dependence. In their submission to the *Fair Work Commission Annual Wage Review 2013-14* the Commonwealth Government stated that:
- ...low paid work is often a stepping stone to higher paid work, and therefore the Panel should consider the importance of ensuring sufficient entry level job opportunities, and should note the worrying trend of the past few years of increased rates of youth unemployment.*²⁰
- 2.24. However, a low-paid job is not always a bridge to better opportunities. Many low paid jobs are temporary and provide little by way of skills enhancement. Low paid workers can oscillate between periods of unemployment and the next temporary, low paid job: a “no pay, low pay” cycle.²¹
- 2.25. Perkins and Scutella’s research found:

¹⁸ Some studies argue that it is possible to extrapolate across countries to draw meaningful conclusions about the employment impacts of a minimum wage, for instance see Joel Butler, (2006) ‘Minimum Wage Laws and Wage Regulation: Do Changes to a Minimum Wage Affect Employment Levels?’, *University of New South Wales Law Journal*, 29(1) 181-202. Other studies would disagree with this view; see for instance Watts, Martin J. (2010).

¹⁹ Decision Annual Wage Review 2013-14, [2014] FWCFB 3500 [406] and [426].

²⁰ Australian Government Submission to the Fair Work Commission Annual Wage Review 28 March 2014, paragraph 28. Accessed at: http://www.fwc.gov.au/documents/sites/wagereview2014/submissions/ausgovt_sub_awr1314.pdf.

²¹ Perkins, Daniel and Scutella, Rosanna (2008) ‘Improving Employment Retention and Advancement of Low-paid Workers’ *Australian Journal of Labour Economics*, 11(1) 97-114.

[L]ow paid work does appear more likely to lead to joblessness than higher paid work for males, those not completing secondary school, lone parents, those born overseas in English speaking countries, and those born outside of major cities.²²

- 2.26. Males who were jobless in the previous year are 2.6 times as likely to be in low-paid employment one year later than males that were employed.²³ Persistent low-paid work affects not only individuals but also those communities in which low pay is more concentrated.²⁴
- 2.27. These trends are also evident from Pocock's research. Pocock concluded that, with reference to Household Income and Labour Dynamics in Australia (HILDA) data, while a sizable proportion (40.6 per cent) of low paid workers in 2001 had stepped up into higher-paid positions by 2002-2003; over a quarter remained in low paid jobs. A further fifth either slid from a higher paid job back into low pay or were not working at all.²⁵
- 2.28. Additionally, those with lower education levels, lone parents and people with a long-term health condition or disability are more likely to be in, and remain in, low paid employment.²⁶ *Low pay is not a life-stage experience confined to the young.²⁷*
- 2.29. Pocock concluded that:
...low pay is far from a trivial issue in Australia's labour market conservatively affecting more than one in ten workers. While low pay does not align with low household income for many, it is a long-term experience for the majority of low-paid workers, sometimes interleaved with periods of unemployment and/or underemployment. Low pay is not a 'life style' experience just for the young: it affects many older workers as well. More women are affected than men, and low pay is very concentrated by occupation, industry and skill level.²⁸

Effect of minimum wages throughout the wage system

- 2.30. The Commission seeks views on the flow-on of minimum wages throughout the wage system and the desirability of this.²⁹
- 2.31. The Victorian Government submits that as there continues to be mixed evidence as to the impact on employment in Australia of increasing the minimum wage, there is

²² Perkins, Daniel and Scutella, Rosanna (2008) p. 103.

³⁶ Perkins, Daniel and Scutella, Rosanna (2008) p. 104.

²⁴ Masterman-Smith, Helen and Pocock, Barbara (2008) *Living low paid: The dark side of prosperous Australia*, Allen & Unwin, Sydney.

²⁵ Pocock, Barbara (2009) *Low-paid workers, changing patterns of work and life, and participation in vocational education and training: A discussion starter*, Centre for Work + Life, University of South Australia, p.13.

²⁶ Perkins, Daniel and Scutella, Rosanna. (2008) p. 103, 107.

²⁷ Pocock, Barbara (2009) p.7.

²⁸ Pocock, Barbara (2009) p.14.

²⁹ Issues Paper 2, p. 6.

not a sufficient basis upon which to consider change to this element of the national system.

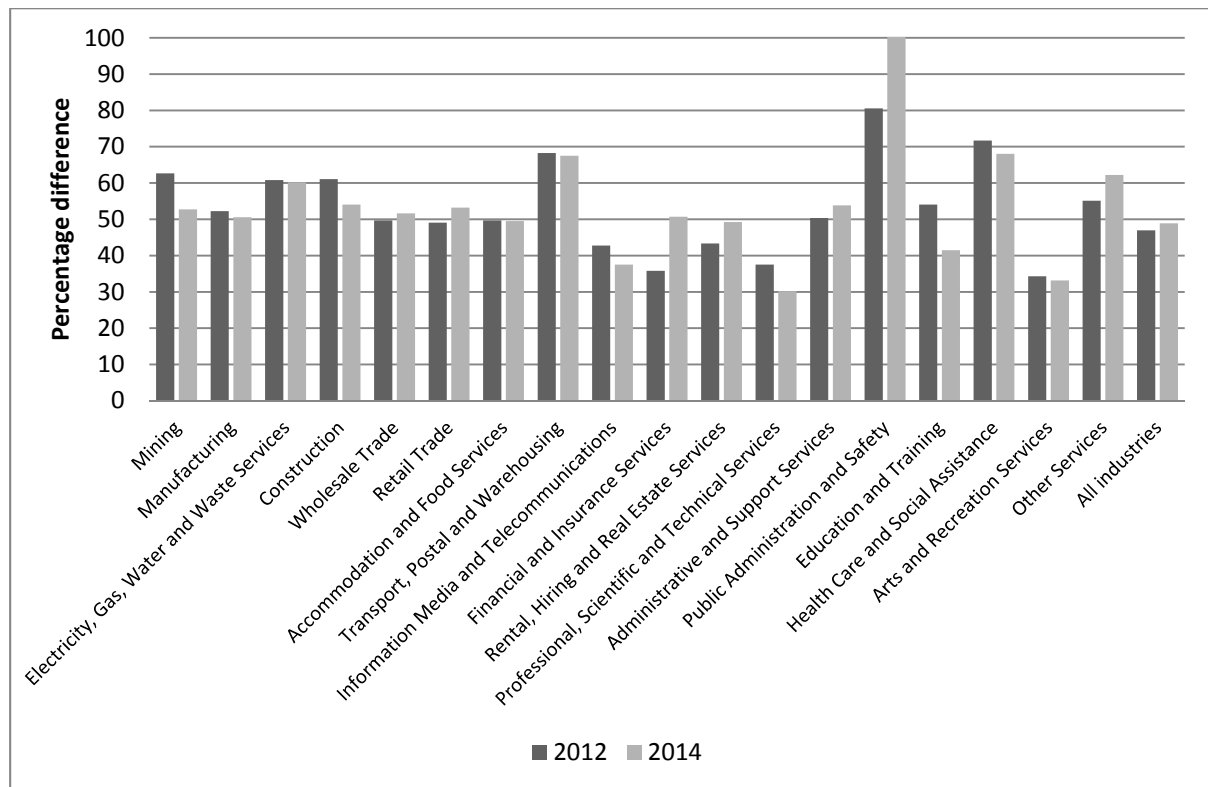
- 2.32. The Victorian Government submits that there are significant, broad-based, non-economic benefits in ensuring the country's lowest paid workers receive a minimum wage.
- 2.33. The Victorian Government also submits that flow-on effects of changes to the minimum wage and to modern award wages, are a positive element of the national workplace relations framework, benefitting employees paid by award or close to award wages, consistent with the broad objectives of the Fair Work system.
- 2.34. The Victorian Government has examined Australian Bureau of Statistics (ABS) data on employee earnings and hours (EEH),³⁰ and average weekly earnings (AWE),³¹ which provide comparative information on wage rates by industry, method of setting pay, occupation, employment type and gender in order to consider the flow-on of minimum wages throughout the wage system.
- 2.35. The EEH and the AWE data for 2012 and 2014, show a significant percentage difference between award rates and average weekly ordinary full time earnings, with **award rates generally being at or less than 50 per cent of average weekly earnings across industry sectors (Figure 1)**.
- 2.36. When all the industries in Figure 1 are taken together, award rates in 2012 and 2014 were 47 and 49 per cent of average weekly earnings respectively: a narrowing of two percentage points over two years. When the gap between award rates and average weekly earnings is compared by industry, industry specific differences are noted.
- 2.37. The percentage difference in the value of award rates compared to average weekly earnings was relatively steady or exhibited marginal change in the *Wholesale Trade* (49.7 in 2012 to 49.5 in 2014); *Retail Trade* (49.1 in 2012 to 53.2 in 2014); and *Accommodation and Food Services* (49.7 in 2012 to 49.5 in 2014). This may reflect the continued major reliance in these sectors on wages and entitlements being determined by Awards, rather than collective or individual agreements.
- 2.38. The percentage difference in the value of award rates compared with average weekly earnings had widened in between 2012 and 2014 in the following industries:

³⁰ ABS Catalogue Number 6306.0 *Employee Earnings and Hours, Australia, May 2014*, released 22 January 2015. Accessed at: <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/6306.0/>>. This issue contains estimates from the 2014 Survey of Employee Earnings and Hours (EEH), which was conducted with respect to the last pay period on or before 16 May 2014. The EEH survey is conducted every two years and designed to provide detailed statistics on the composition and distribution of employee earnings, hours paid for and the methods used to set employees' pay.

³¹ ABS Catalogue Number 6302.0 *Average Weekly Earnings, Australia, May 2014*, released 14 August 2014. Accessed at: <<http://www.abs.gov.au/ausstats/abs@.nsf/detailspage/6302.0May%202014>>

- *Information, Media and Telecommunications*: in 2014, award rates were 37.5 per cent of average weekly earnings compared to 2012, when award rates were 42.79 per cent of average weekly earnings;
 - *Professional, Scientific and Technical Services*: in 2014, award rates were 30 per cent of average weekly earnings compared to 2012, when award rates were 37.53 per cent of average weekly earnings; and
 - *Education and Training*: in 2014, award rates were 41.5 per cent of average weekly earnings compared to 2012, when award rates were 54.08 per cent of average weekly earnings.
- 2.39. In the following industries the percentage difference in the value of award rates compared with average weekly earnings was over 50 per cent, but there had been a widening of the gap from 2012 to 2014:
- *Manufacturing*: from 52.3 per cent in 2012 to 50.6 per cent in 2014;
 - *Construction*: from 61.1 per cent in 2012 to 54.1 per cent in 2014; and
 - *Health Care and Social Assistance*: from 61.1 per cent in 2012 to 54.1 per cent in 2014.
- 2.40. In some industries, there have been some pleasing improvements in the differential in the value between award rates and average weekly earnings in certain industries from 2012 to 2014:
- *Public Administration and Safety*: from 80.57 per cent in 2012 to 101.5 per cent in 2014;
 - *Financial and Insurance Services*: from 35.8 per cent in 2012 to 50.7 per cent in 2014;
 - *Rental, Hiring and Real Estate Services*: from 43.3 per cent in 2012 to 49.3 in 2014; and
 - *Other Services*: from 55.11 per cent in 2012 to 62.2 per cent in 2014.

Figure 1: Comparison of Award rates and average weekly ordinary earnings by industry, percentage (May 2012 & 2014)



Source: ABS Catalogue No. 6306.0 *Employee Earnings and Hours, Australia, May 2012 and 2014*.

Wages outcomes by method of setting pay

- 2.41. ABS data shows there is a persistently wide ratio between the wages outcomes of employees paid under awards and other methods of setting pay. Over the decade to 2014, the ratio was particularly pronounced when award rates are compared with individual agreements.
- 2.42. Research commissioned by the FWC on minimum wages, their role in the bargaining process and incentives to bargain, found that annual wage review decisions had a direct impact on some enterprise agreement rates of pay in some of the examined industries, usually in workplaces paying very close to award rates. Among non-award-reliant organisations, 36 per cent reported basing wages on awards even though they did not pay any employees exact award rates. The research also suggested a relationship between internal wage relativities in modern award classifications and in enterprise instruments.³²
- 2.43. The relationship between award rates and wages outcomes in enterprise agreements has been explored in the FWC’s recent Australian Workplace Relations

³² Fair Work Commission (2013), *Minimum wages and their role in the process and incentives to bargain*, Research Report 7/2013, pp. 141-143.

Study (**AWRS**) with initial data outlined in the First Findings report.³³ According to the AWRS, 58.8 per cent of enterprise agreement (**EA**) pay setting structures across all industries sat well above award wages rates, with 27.2 per cent setting EA structures just above award rates. However, there are industries that notably set EA pay structures by replicating award rates or by setting EA wage rates just above awards at a combined rate of 40 per cent or more. This AWRS data supports and reinforces some of the conclusions outlined above.

Continuing rationale for penalty rates

- 2.44. The Victorian Government submits that penalty rates have been and continue to be a fundamental and inherent component of the regulatory structure: penalty rates are necessary to provide a fair and relevant safety net for Victorian employees and employees should continue to be compensated for working unsocial or irregular hours.
- 2.45. Section 139 of the Fair Work Act sets out the terms that may be included in modern awards so as to ensure that modern awards provide a *fair and relevant minimum safety net of terms and conditions*, these include the need to provide additional remuneration for:
- (i) employees working overtime;
 - (ii) employees working unsocial, irregular or unpredictable hours; or
 - (iii) employees working on weekends or public holidays; or
 - (iv) employees working shifts.
- 2.46. These provisions aim to ensure that modern awards balance the *need to fairly compensate employees who work long, irregular, unsocial hours, or hours that could reasonably be expected to impact their work/life balance and enjoyment of life outside of work*,³⁴ and the likely impact on business, including productivity, employment costs and regulatory burden, employment growth, performance and competitiveness of the national economy.
- 2.47. It is acknowledged that technological, economic and demographic changes have resulted in changes in the nature, frequency and extent of working hours. Weekend and evening trading is a commercial reality for industries such as *Retail and Accommodation and Food Services*, reflecting changing consumer preferences and trading deregulation.
- 2.48. It is also recognised that there can be benefits to employees associated with greater flexibility in working hours and that some prefer to work on weekends and in the evenings for lifestyle reasons. For example, it can assist employees to balance the

³³ Fair Work Commission (2015) *Australian Workplace Relations Study- First Findings Report: consolidated content from online publication*, 29 January 2015. Accessed at: <<https://www.fwc.gov.au/documents/awrs/AWRS-First-Findings.pdf>>.

³⁴ Explanatory Memorandum, *Fair Work Amendment Bill 2013*, p.1.

demands of family and work and enable students who may not be able to work on weekdays to earn an income.

- 2.49. However, while it may suit some workers to work on weekends and in the evenings, some employees with little or no bargaining power may be obliged to work extended evening or weekend hours against their domestic responsibilities, social structural commitments such as school hours, or personal preference, in order to gain or retain employment.³⁵ Many low paid community workers have little protection from unsocial hours.³⁶
- 2.50. It is important to bear in mind that working unsocial hours is a minority experience.³⁷ While an increasing number of Australians report having some form of non-traditional pattern of working hours, the majority of Australians (70 per cent) continue to work a 'standard' Monday to Friday week.³⁸
- 2.51. According to the ABS national data, in November 2012:
- 29 per cent of single jobholders and 57 per cent of multiple job holders worked on both weekdays and weekends;
 - 14 per cent of single jobholders usually worked on Saturdays and 8 per cent usually worked on Sundays; and
 - 37 per cent of multiple jobholders usually worked on Saturdays and 26 per cent usually worked on Sundays.³⁹
- 2.52. Based on this national data, in November 2012 it is estimated that in Victoria:
- 374,000 employees usually worked Saturdays in their main job;
 - 213,000 employees usually worked Sundays in their main job;
 - 328,000 employees usually worked paid overtime in their job; and
 - 157,000 employees usually worked between 7pm and 7am
- 2.53. The recognition of working unsocial hours has been a consistent one. In 2004, the Australian Industrial Relations Commission determined that the extension of Sunday trading did not diminish the unsociability of weekend work.⁴⁰ In the 2012 Modern Awards Review, the FWC noted that: *...there are disabilities associated with work at unsociable times and recognition through additional rates is generally warranted as*

³⁵ See: Commissioner Hingley in AIRC Q9229, January 1999.

³⁶ Charlesworth, S. (2012) 'Decent working conditions for care workers? The intersections of employment regulation, the funding market and gender norms', *Australian Journal of Labour Law*, 25(2), 107-127.

³⁷ Skinner, N and Pocock, B (2014) *The Persistent Challenge: Living, Working and Caring in Australia in 2014*, The Australian Work and Life Index 2014, Centre for Work and Life, University of South Australia, p.11.

³⁸ According to ABS data, in November 2012, 66 per cent of single jobholders worked five days per week and 70 per cent worked on weekdays only: *ABS Working Time Arrangements, Australia*, November 2012 (Cat No. 6342.0).

³⁹ *ABS Working Time Arrangements, Australia*, November 2012 (Cat No. 6342.0).

⁴⁰ *Shop, Distributive & Allied Employees' Association & \$2 and Under and Others* AIRC [PR941526] at [106].

*part of the modern award safety net.*⁴¹ In 2014, the FWC recognised the disability associated with working on Sundays, being the loss of a day of family time and personal interaction upon which special emphasis is placed by Australian society.⁴²

- 2.54. There have been a number of studies confirming the detrimental impact on health, family and personal relationships that working at night or weekends can have. Daly's analysis of 2014 Australian Work and Life Index (**AWALI**) data showed that working on Sundays is associated with higher levels of work-life interference, significantly more than working Saturdays or weekdays.⁴³
- 2.55. As Daly reports, working early mornings or nights *not only presents challenges to biological functions such as sleep, it is often incompatible with the rhythms and schedules of social, family and community activities.*⁴⁴
- 2.56. There is also evidence to suggest that for many workers, the choice to work unsocial hours is driven largely by the financial incentive of penalty rates.⁴⁵
- 2.57. A reduction in the penalty rates of award dependent employees will, as a first round impact, reduce the incomes and consumer sentiment of this segment of the population, which could lead to reduced consumption and aggregate demand within the economy. The net effect of such changes can be difficult to quantify with certainty, particularly at the state or regional level.
- 2.58. Of employees who received penalty rates for working unsociable hours, over one third (34.6 per cent) relied on penalty rates for household expenses, and these employees are more likely to be women, sole parents, living in rural or regional locations or employees with combined household incomes less than \$30 000.⁴⁶ For these employees, their ability to choose whether or not to work unsocial hours is constrained by their economic realities. Employees whose combined household income was at or above \$90 000 were less likely to receive or rely upon penalty rates.
- 2.59. Of those employees who did receive penalty rates, Daly found that 62.2 per cent would choose to stop working non-standard hours if penalty rates or additional pay were not offered.⁴⁷ However, for households that depend upon penalty rates for household expenses, implications could include households attempting to manage on less income and a consequent lowering of living standards or in an effort to maintain living standards, employees needing to work longer to earn in standard

⁴¹ Modern awards review 2012 – Penalty rates [2013] FWCFB 1635 at [218].

⁴² Restaurant and Catering Association of Victoria [2014] FWCFB 1996 at [128].

⁴³ Daly, Tony (2014) 'Evenings, nights and weekends: working unsocial hours and penalty rates' Centre for Work + Life, University of South Australia, p.3.

⁴⁴ Daly, Tony (2014) pp. 1-2.

⁴⁵ Daly, Tony (2014) p. 3.

⁴⁶ Daly, Tony (2014) pp. 13, 18.

⁴⁷ Daly, Tony (2014) p 13.

hours what they would have earned if they worked non-standard hours with penalty rates.

Retail and hospitality sectors

- 2.60. The *Retail and Accommodation and Food Services* industries are important industries for the Victorian economy and are a vital component of Victoria's tourism sector. Together they account for 7.6 per cent of the Victorian economy, 18.6 per cent of employment (at November 2014) and 16.0 per cent share of total hours worked.⁴⁸
- 2.61. The *Retail Trade* industry is the largest employer of Victorian youth, with 108 500 persons aged 15-24 years employed over the year to November 2014, followed by the *Accommodation and Food Services* industry (78 000 persons).⁴⁹ These industries also have among the highest proportions of females as a percentage of employment (at 57 per cent for *Accommodation and Food Services* and 56 per cent for *Retail*).⁵⁰
- 2.62. These industries also contain the highest number of award reliant workers. According to the ABS, nationally, the *Retail Trade* industry has the largest number of award reliant employees (17.2 per cent), followed by the *Accommodation and Food Services* industry (17 per cent).⁵¹
- 2.63. For low paid workers in these industries, penalty rates comprise an important part of their take home pay. According to our modelling (below), such workers would see a significant reduction in wages, for example, if Sunday penalty rates did not apply.
- 2.64. The Victorian Government notes that there is no current, comprehensive and comparative data source from which the scope and application of penalty rates in the Australian workforce can be specifically quantified. Therefore, any modelling relies on a number of reasonable assumptions and available data on working time arrangements⁵² and award wage rates.

Penalty rates: Examples

- 2.65. The examples provided below are hypothetical based on modelling for a particular classification of worker, with particular shift patterns over a 38 hour working week including a Saturday, a Sunday and one night shift, in addition to three hours of overtime.
- 2.66. A level one full time adult retail employee works five days per week in a department store, including Saturday and Sunday, and three hours after 6pm during late night shopping. That employee, with current overtime and penalty rates applied, would

⁴⁸ ABS *Labour Force, Australia*, Feb 2015, Cat. No. 6202.0.

⁴⁹ ABS *Labour Force, Australia*, Feb 2015, Cat. No. 6202.0.

⁵⁰ ABS *Labour Force, Australia*, Feb 2015, Cat. No. 6202.0.

⁵¹ ABS *Employee Earning and Hours, Australia*, May 2014 (Cat. No. 6306.0).

⁵² ABS *Working Time Arrangements, Australia*, November 2012 (Cat. No. 6342.0).

expect weekly gross earnings for that roster of \$963.14.⁵³ On the same roster, a level one full time adult food & beverage employee working in the stores' café, would expect gross earnings of \$816.21 (**Table 3**).⁵⁴

- 2.67. However, if the penalty rates for working on Saturday and Sunday were not applied (with the three hours after 6pm retained), retail and food & beverage employees would have gross earnings for that roster of \$787.12 and \$717.26. This would represent an 18 and 12 per cent reduction in wages respectively (
- 2.68. **Table 4**).
- 2.69. If similar scenarios as above included penalty rates for working a public holiday, the loss of earnings if penalty rates were removed would be significantly greater and similarly with the removal of over time rates.
- 2.70. Further modelling based on the relevant award and assuming a loss of penalty and overtime rates on a 38 hour working week, including a Saturday, a Sunday, one night shift and formerly three hours of overtime, shows that:
- a retail worker level 8 could face an effective pay cut of \$300 per week or 24.5 per cent;
 - a construction worker level 6 could face an effective pay cut of \$428 or 32.8 per cent;
 - a builders labourer level 4 could face an effective pay cut \$366 or 32.8 per cent; and
 - an electrical worker level 5 could face an effective pay cut of \$392 or 32.8 per cent.
- 2.71. The further examples provided below are also hypothetical, based on modelling for particular classifications of workers in the public sector in Victoria, demonstrating the significant, adverse effect on the wages of those workers if penalty rates were removed:
- for a custodial officer in the order of \$290 a week taken out of their pay, or 24 per cent;
 - for a paramedic, in the order of \$260 a week taken out of their pay, or 22 per cent;
 - for a nurse, in the order of \$280 a week taken out of their pay, or 20 per cent; and
 - for a train or tram driver, in the order of 25 per cent a week taken out of their pay.

⁵³ FWO (2014) *Pay Guide for the General Retail Industry Award 2010*, July 2014. Accessed at: <<http://www.fairwork.gov.au/ArticleDocuments/712/general-retail-industry-award-2010-%5BMA000004%5D-pay-guide.rtf.aspx>>.

⁵⁴ FWO (2014) *Pay Guide for the Restaurant Industry Award 2010*, July 2014. Accessed at: <<http://www.fairwork.gov.au/ArticleDocuments/836/restaurant-industry-award-2010-MA000119-pay-guide.pdf.aspx>>.

Mechanisms available under the Fair Work laws enable employers to modify penalty rate outcomes

- 2.72. It is the view of the Victorian Government that there is sufficient flexibility in the Fair Work Laws currently to adequately balance the needs of employees who rely upon penalty rates and therefore should be compensated for working unsocial hours, and employers wishing to adopt more flexible and productivity enhancing provisions in enterprise agreements.
- 2.73. The Victorian Government notes that there are mechanisms available under the Fair Work laws to enable employers to modify the default penalty rate regime through enterprise bargaining and that the modern awards review being conducted by the FWC is the appropriate forum for consideration of penalty rates matters.
- 2.74. The Commission in its report on the *Economic Structure and Performance of the Australian Retail Industry*, observed that *compared to other Australian workers, the wages received by retail employees are low and that cutting the pay and conditions of retail workers could potentially have detrimental impacts on productivity and the performance of the industry.*⁵⁵ In its submission to that inquiry, the ACTU noted that *investing in decent wages and conditions assists employers to sustain a skilled and efficient workforce, which delivers high quality customer service and solid returns.*⁵⁶
- 2.75. Employers have raised concerns that penalty rates discourage them from trading at times when penalty rates apply, resulting in a decrease in employment levels.⁵⁷ Some employers have made applications to vary penalty rates in a number of modern awards, including those with application to the retail and hospitality sectors, as part of the four yearly modern award review.
- 2.76. In responding to such applications, the FWC is required to consider the modern award objective – for example, whether these awards provide a fair and relevant minimum safety net of terms of conditions having regard to a number of factors, including the need to promote social inclusion through increased workforce participation, the impact on business, including on productivity, and employment costs, the need to promote flexible modern work practices, and the need to provide additional remuneration for working unsociable hours.⁵⁸
- 2.77. In so doing, the FWC will hear expert evidence about the likely impacts on employees, employment levels, businesses, and the community. The Victorian Government considers that the FWC review process is the appropriate forum for gathering and considering the evidence and determining these issues.

⁵⁵ Productivity Commission, 'Economic Structure and Performance of the Australian Retail Industry' (Inquiry Report, no. 56, 4 November 2011) p.329.

⁵⁶ Productivity Commission (2011) p.329.

⁵⁷ For instance, see Australian Hotels Association Position Statement, *Four Year review of Hospitality Industry (General) Award 2010*, Updated 16 February 2015.

⁵⁸ S 134, *Fair Work Act 2009*.

- 2.78. The Fair Work laws enable employers to modify the default penalty rate regime through enterprise bargaining – provided the arrangements result in employees being better off overall. For example, the *McDonald's Australia Enterprise Agreement 2009* rolled penalty rates into base rates of pay, and the *Svitzer Australia Pty Ltd Limited Bunker Tanker 'Anatoma' Enterprise Agreement 2012* rolled penalty rates into the annual salary.⁵⁹
- 2.79. The Commission's own analysis of enterprise agreements in the retail sector, found that a major focus of such enterprise agreements has been to increase employers' ability to tailor employee hours to match variable levels of demand, including between ordinary hours and hours that attract penalty rates.⁶⁰ The Commission noted that many retail enterprises that entered into agreements did not take full advantage of the opportunity to adopt flexibility and productivity enhancing provisions.⁶¹

⁵⁹ See: Australian Government, (2012) Submission in relation to application to vary penalty rates in the retail, hospitality, fast food, restaurant and hair and beauty awards (AM2012/8 and others), [8.3].

⁶⁰ Productivity Commission (2011) p.359.

⁶¹ Productivity Commission (2011) p.360.

Section 3 Impact on Women Workers

- 3.1. One of the areas not specifically addressed in the terms of reference for the Inquiry or the Issues Papers released by the Commission is the impact of the workplace relations framework on female workers.
- 3.2. The Victorian Government is of the view that consideration should be given to this issue, in light of recent data, which suggests the gender pay gap, rather than contracting, is widening.⁶²
- 3.3. Improving gender equality in the workplace has significant benefits. In addition to improving equity, gender equality can also yield not only increases in economic growth and incomes but also improvements in productivity, competitiveness, social outcomes, and living standards.
- 3.4. The Fair Work Act strengthened the equal remuneration provisions to overcome historical obstacles to successful claims and also introduced a right to request flexible work arrangements to assist in caring for a child under school age. The Victorian Government considers these are important reforms and have contributed to progress towards improving women's pay and conditions.
- 3.5. However, the Victorian Government also recognises that the factors contributing to gender equality are complex and multi-faceted and will not be addressed through the Fair Work Act framework alone. Progress in this area requires coordinated and concerted effort across government, business and the community. The Victorian Government is committed to continuing action to close the pay gap between men and women, including through funding its fair share of the Victorian component of the Equal Remuneration Order in the Social and Community Services case.

Fair Work Act reforms: Equal remuneration provisions

- 3.6. The Fair Work Act addresses the objective of pay equity in two ways. The first is that the 'modern awards objective' and the 'minimum wages objective' require the FWC to take into account 'the principle of equal remuneration for work of equal or comparable value' in the setting and adjustment of pay rates through modern awards or national minimum wage orders.⁶³
- 3.7. Secondly, the FWC may make equal remuneration orders to ensure that there will be equal remuneration for men and women workers for work of equal or comparable value in relation to the employees to whom the order will apply.⁶⁴

⁶² Workplace Gender Equality Agency, Media release, National gender pay gap rises to 18.2 per cent, 14 August 2014.

⁶³ Ss 134 and 284 *Fair Work Act 2009*.

⁶⁴ S 302(1) *Fair Work Act 2009*.

- 3.8. These provisions utilise a broader concept of equal remuneration than under previous legislation and remove two significant limitations on the operation of the provisions:
- (a) the provisions are uncoupled from the definitions used in the Conventions and Recommendations. This means that it is no longer necessary to demonstrate discrimination based on sex in the fixing or setting of the remuneration complained of; and
 - (b) proof that there is not equal remuneration may be based on a reference to work of comparable value, rather than being restricted to a consideration of work of equal value.
- 3.9. The provisions in the Fair Work Act reflect the aim 'of removing the historical barriers to pay equity claims in the federal jurisdiction by removing the requirement for applicants to prove discrimination as a prerequisite to an equal remuneration claim.'⁶⁵
- 3.10. The first application made under the Fair Work Act equal remuneration provisions, resulted in substantial wage increases (of between 19 and 41 per cent depending on classification) to around 150,000 low paid social and community services (SACS) workers, the majority of whom are women.⁶⁶ In 2010, the Victorian Government participated in this case in support of the principle of equal remuneration for work of equal value.
- 3.11. To date, this case is the only equal remuneration claim that has succeeded under Commonwealth workplace relations law. Prior to the Fair Work Act, 16 equal remuneration applications had been brought in the federal system and all were unsuccessful.⁶⁷ As such, the SACS case was an important step in closing the pay gap between women and men workers.
- 3.12. A second equal remuneration case is currently underway in the FWC. Unions have applied to the FWC seeking an equal remuneration order for child care workers employed in long day care centres and pre-schools. The Full Bench of the FWC has reserved its decision in the first stage of this case, which considered a number of questions related to the operation of the equal remuneration provisions.
- 3.13. It is acknowledged that issues associated with equal remuneration are complex, however as noted by Layton, Smith and Stewart 'the capacity for equal remuneration orders, together with the development in regulation provided by the undervaluation

⁶⁵ Equal Remuneration Case, Fair Work Australia, Australian Government Submission, 18 November 2010, p.8

⁶⁶ Social and Community Services Pay Equity Special Account Bill 2012, Second reading speech, 10 October 2012, at 11770.

⁶⁷ Australian Government, Towards more productive and equitable workplaces: an evaluation of the Fair Work legislation, 2012, p.115.

approach, contributes to a changed regulatory framework to address equal remuneration.⁶⁸

The gender wage gap

- 3.14. Despite important reforms under the Fair Work Act, there remains a long way to go in addressing gender inequality.
- 3.15. According to ABS data, the gender pay gap over all industries was 18 per cent in 2014, with women earning 82 per cent of male average weekly earnings.⁶⁹
- 3.16. Recent data (2013-2014) from employers reporting to the Commonwealth Government's Workplace Gender Equality Agency (**WGEA**) indicates that the disparity between men and women's remuneration levels is not contracting, and in some industries and occupations, the gap is widening.
- 3.17. According to the WGEA, the gender pay gap is particularly pronounced in the following sectors (some of which are, historically, female dominated): administrative and support services; arts and recreation services; construction; financial and insurance services; information, media and telecommunications; professional, scientific and technical services; rental, hiring and real estate services; and transport, postal and warehousing.
- 3.18. WGEA data shows that women are paid less than men at every level of management. The largest gender gap occurs at key management personnel level (28.9 per cent), followed by other executives/general managers (27.5 per cent), then other managers (24.6 per cent) and senior managers (23.5 per cent).⁷⁰ Pay inequity also persists below management ranks with pay gaps favouring men in every non-manager occupation.⁷¹
- 3.19. The gender pay gap is compounded by data that indicates that less than 15 per cent of employers have a strategy for flexible working and a strategy to support employees with family or caring responsibilities, as opposed to just offering flexible hours or flexible leave arrangements on an individual basis.⁷² A national review undertaken by the Australian Human Rights Commission found that 'discrimination towards pregnant employees and working parents remains a widespread and

⁶⁸ Layton, R., Smith, M., and Stewart, A. (2013) *Equal remuneration under the Fair Work Act 2009*, A report for the Pay Equity Unit of the Fair Work Commission, the University of Adelaide, p.124.

⁶⁹ ABS Catalogue No. 6306 Employee Earnings and House, Australia, May 2014.

⁷⁰ Workplace Gender Equality Agency (2015) Media release, 'Gender pay gap biggest in manager ranks', 17 February 2015.

⁷¹ Workplace Gender Equality Agency (2015).

⁷² Workplace Gender Equality Agency, *Australia's Gender Equality Scorecard: Key Results from the Workplace Gender Equality Agency's 2013-2014 reporting data*, November 2014, p. 7.

systematic issue which inhibits the full and equal participation of working parents, and in particular, women, in the labour force'.⁷³

- 3.20. While labour regulation has an important role to play in addressing unequal remuneration between men and women, it is also recognised that it is a multifaceted problem that requires an integrated response.
- 3.21. The Victorian Government is committed to reducing inequality between women and men and has previously introduced a number of policy measures directed at supporting the economic, social and civil participation of women in all aspects of Victorian life.
- 3.22. The Victorian Government is committed to standing up for the rights of women in the workforce, and to equal opportunity. The Victorian Government will use its position as a major Victorian employer to show leadership and look for innovative ways to assist public sector employees to better balance work and family commitments, and will promote women with family responsibilities into senior positions in the public sector.
- 3.23. The Victorian Government has committed that at least fifty percent of all future appointments to paid Government boards and Victorian courts will be women. The Victorian Government has a record number of women in Cabinet, however female representation on government boards in Victoria dropped from 40 per cent to 35.6 per cent over the last four years.
- 3.24. Other key initiatives directed at women include the Victorian Honour Roll of Women, which celebrates remarkable women across Victoria for their vision, leadership and exceptional contributions to the development of Victoria and their field of expertise, the Victorian Women's Governance Scholarships Program designed to strengthen women's performance and contribution to boards and the Victorian Women's Register, an electronic database of women suitable for government boards and committees.

Family friendly work arrangements

- 3.25. The Victorian Government notes the importance of the Fair Work Act provisions in providing family friendly working arrangements but submits that more could be done to promote awareness amongst employers and employees of the section 65 right to request such arrangements, with particular support for small business.
- 3.26. The Fair Work Act includes provisions directed to the promotion of work and family responsibilities such as a new legislated entitlement for parents or carers of a child

⁷³ Australian Human Rights Commission, Supporting Working Parents: Pregnancy and Return to Work National Review – Community Guide, 2014, p. 2.

under school age to request a change in working arrangements to assist with the care of the child.⁷⁴

- 3.27. A report by the FWC found that, in the period 1 January 2010 to 30 June 2012:
- almost five per cent of employers had received a written request from an employee for a flexible working arrangement under section 65 of the Fair Work Act;
 - the majority of these requests (76 per cent) were received from females;
 - around 70 per cent of employers who received a single request and around 77 per cent of employers who received multiple requests cited the reason given as to provide care for a child. The next most common set of reasons were related to childcare, with over half of both categories of employers citing childcare related reasons; and
 - the majority of employers granted the requests (91 per cent granted the request without variation; 8 per cent granted the request with variation and around 1 per cent refused the request).⁷⁵
- 3.28. While these results indicate that the right to request provisions were, in 2012, used quite sparingly, as noted by the expert panel reviewing the Fair Work Act in 2012, this could be expected given the relatively narrow situations to which the provisions apply. The Panel further noted that the high percentage of requests that led to flexible working arrangements being put in place, and the comparatively low rate of refusals indicates employers are taking the provisions seriously and that they are being used effectively to alter their working arrangements to suit their circumstances.⁷⁶
- 3.29. The Panel concluded that the introduction of the right to request flexible working arrangements represented an important development in providing additional rights to certain types of working carers, but recommended that the provisions be expanded to reflect a wider range of caring responsibilities.⁷⁷
- 3.30. As a result of the Panel's recommendations, the former Commonwealth Government, amended the Fair Work Act to broaden the right to request Fair Work Act provisions to more groups of employees and also introduced a number of new family friendly arrangements. This included expanding the right for pregnant women to transfer to a safe job, providing further flexibility in relation to concurrent unpaid parental leave, and ensuring that any special maternity leave taken will not reduce an employee's entitlement to unpaid parental leave.⁷⁸

⁷⁴ Explanatory Memorandum, Fair Work Bill 2008.

⁷⁵ Fair Work Commission, General Manager's report into the operation of the provisions of the National Employment Standards relating to requests for flexible working arrangements and extensions of unpaid parental leave (2009- 2012), November 2012

⁷⁶ 2012 Fair Work Act Review p.97 (note 2).

⁷⁷ 2012 Fair Work Act Review p.98 (note 2).

⁷⁸ Fair Work Amendment Bill 2013.

- 3.31. The new provisions *provide greater flexibility in working arrangements for modern families. This includes greater flexibility in parental leave, increased rostering protections and broader rights to request flexible working arrangements.*⁷⁹
- 3.32. However, the FWC report found that only 66 per cent of employers and 48 per cent of employees are aware of the right to request, with small employers having the lowest awareness rate, at around 62 per cent.⁸⁰ Further, even if respondents were aware of rights to request flexible working arrangements, they may not have been aware that the National Employment Standard (**NES**) entitles the employee to these rights, or understand in which situations the NES applies as opposed to, for example, a specific provision in an enterprise agreement.⁸¹

Domestic violence

- 3.33. Another issue that has a disproportionate impact on women is domestic violence. Victims of domestic violence may need time off work to access support services or for other related reasons. This need is increasingly recognised by the insertion clauses in enterprise agreements aimed at supporting victims of domestic violence.
- 3.34. In 2010 the Australian Services Union successfully negotiated the world's first enterprise agreement clause (with the Surf Coast Shire) supporting victims of domestic violence. Since then clauses have been included in over 110 agreements in Victoria and Tasmania alone.
- 3.35. As part of the four-yearly modern awards review, the ACTU has also applied to insert a model family and domestic violence leave clause in all modern awards.
- 3.36. The Victorian Government considers that these are important developments, with family violence the leading cause of death and disability in Victorian women under 45. It has profound physical, psychological and emotional consequences for women and children and the estimated cost to the Victorian economy in 2009 was \$3.4 billion.
- 3.37. The Victorian Government is committed to tackling family violence and has established a Royal Commission into Family Violence, to be chaired by Justice Marcia Neave. The Commission will examine the most effective ways to prevent family violence, improve early interventions, support victims, and make perpetrators accountable.

⁷⁹ Explanatory Memorandum, Fair Work Amendment Bill 2013, p.3.

⁸⁰ Fair Work Commission (2012) General Manager's report into the operation of the provisions of the National Employment Standards relating to requests for flexible working arrangements and extensions of unpaid parental leave (2009- 2012), November 2012, pp.26, 30.

⁸¹ Fair Work Commission (2012) p.26.

Section 4 Promoting Productivity

- 4.1. Growth in productivity is a key factor in improving wealth and living standards in the community.
- 4.2. The Commission invites participant's views on the impacts of the workplace relations system and the mechanisms through which the workplace relations system affects aggregate economic outcomes.⁸²

Productivity and the workplace relations framework

- 4.3. The Victorian Government submits that it is difficult to conclude with certainty that any changes to the workplace relations system will have predictable, measurable and positive impacts on productivity.
- 4.4. The Victorian Government acknowledges that the impacts on productivity growth are complex and it is difficult to distinguish the effects of the workplace relations system, from other variables - including industry factors and micro-economic reform - that have an impact on labour market outcomes. While productivity has moderated since the Global Financial Crisis (**GFC**), there is no tangible evidence relating the workplace relations system to the decline in productivity growth.
- 4.5. The Victorian Government's focus is on improving productivity through a strategy that encourages growth and investment, creates the right environment for jobs, and positions the Victorian economy for strong and sustained growth.
- 4.6. The Victorian Government's view accords with the conclusion reached by the Expert Panel undertaking the 2012 Fair Work Act Review; that there was no correlation between the implementation of changes to industrial relations legislation and changes in the rate of productivity growth apparent in the data.⁸³
- 4.7. A comparison of the following periods illustrates the difficulty in attempting to draw conclusions about a correlation between productivity and the industrial relations legislative framework. Australia experienced some of its strongest productivity growth in the 1970s, when the industrial relations environment was more centralised and there was a high rate of industrial disputation.⁸⁴ In the early 1990's Australia experienced a period of productivity growth. This was in an environment where the workplace relations system become more flexible with the introduction of an industrial framework that supported enterprise bargaining. Whether the growth in productivity was in part the result of changes to the workplace relations framework, or broader economic reforms (airlines, banking) is unclear. In contrast, over the period to 2011, labour productivity growth was subdued and this was an

⁸² Issues Paper 1, p. 17.

⁸³ 2012 Fair Work Act Review, p. 72 (note 2).

⁸⁴ ACTU submission to the Post Implementation Review of the *Fair Work Act 2009* (Volume 1), 17 February 2013, p.27.

environment where the workplace relations system (under WorkChoices), imposed the fewest constraints on management decisions.⁸⁵

- 4.8. Analysis undertaken by the Commission suggests that most of the recent decline in productivity growth is accounted for by only a few industries:
- mining, with declining resource quality and large capital investment that has not yet translated into output;
 - electricity, gas & water, with capital investment and reduced rainfall; and
 - agriculture, with prolonged drought across many areas of Australia.⁸⁶
- 4.9. The difficulty in distinguishing the effects of the workplace relations system from other variables that have an impact on labour market outcomes is also relevant to questions raised by the Commission about the relationship between enterprise agreements, bargaining and productivity at the organisational level. This is discussed further in section 5 of this submission.

The link between flexible working arrangements and productivity

- 4.10. The Victorian Government submits that, rather than being restrictive, the Fair Work Act currently provides sufficient scope for employers to negotiate flexible working arrangements with their employees, which can in turn support productivity improvements.
- 4.11. The recent 2015 Australian Workplace Relations Study (**AWRS**) found widespread availability of flexible work options by employers:
- 62 per cent of employers made available flexible start and finish times for all or most employees;
 - 60 per cent of employers made available flexible leave arrangements for all or most employees; and
 - 51 per cent of employers made available time off in lieu of overtime for all or most employees.⁸⁷
- 4.12. The 2012 Fair Work Act Review Panel similarly found that: *the Australian industrial relations system exhibits a reasonably high level of flexibility and mobility.*⁸⁸
- 4.13. Further, just under half (48 per cent) of all federally registered enterprise agreements contain general commitments to productivity and 38 per cent identify

⁸⁵ 2012 Fair Work Act Review, p.72 (note 2).

⁸⁶ Productivity Commission, Submission no.20 to House of Representatives Standing Committee on Economics, *Inquiry into Raising the Levels of Productivity Growth in the Australian Economy*, September 2009, p.4.

⁸⁷ Australian Workplace Relations Study (AWRS) (2015), First Findings Report, Employment Practices. Accessed at: <<https://www.fwc.gov.au/first-findings-report/4-employment-practices/workforce-management-practices/flexible-working>>.

⁸⁸ 2012 Fair Work Act Review, p. 78 (note 2).

specific productivity measures.⁸⁹ This supports the Victorian Government's view that the workplace relations system delivers the flexibility and incentives required for productivity performance, when employers and employees are committed to these improvements and utilise available mechanisms.

- 4.14. The relationship between enterprise agreements and productivity is discussed further in section 5 of this submission. Through bargaining, the workplace relations framework provides the opportunity for employees to share in the benefits employers receive from productivity improvements.

Victoria's productivity performance

- 4.15. Presented below to assist the Commission, is an overview of Victoria's and Australia's productivity outlook, providing a context and background to these submissions.

- 4.16. Over the last 20 years, Victoria's labour productivity growth has been 1.6 per cent per year on average. This is similar to the national average over the same period (1.7 per cent).⁹⁰

- 4.17. However, labour productivity growth has slowed in the most recent (incomplete) productivity cycle (2007-08 to 2013-14), which includes the impact of the GFC. In this period, Victoria's average labour productivity growth has been 0.9 per cent per year, which is below the national average of 1.6 per cent. Much of this difference can be explained by the relative contributions of industries to labour productivity growth, in particular the contribution of the mining industry (in its boom period).

- 4.18. **Figure 2** illustrates industry contributions to Victorian and national labour productivity growth in the latest productivity cycle, disaggregated along two lines: within industry contributions (i.e. reflecting the change in productivity resulting, for example, from the improved use of technology; and the change in the share of labour in that industry, (i.e. recognising that total productivity increases with the net movement of labour from low to high productivity industries).

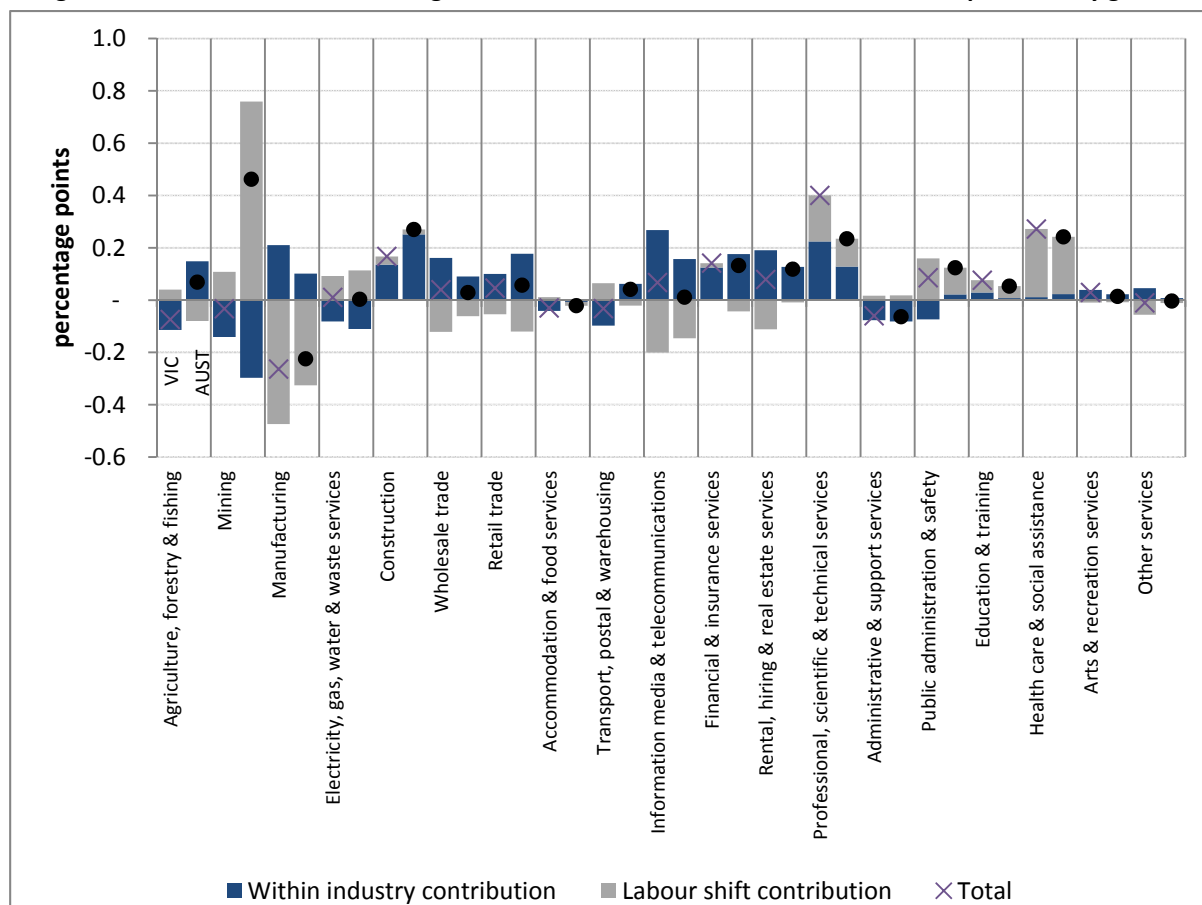
- 4.19. Figure 2 shows that there has been a significant positive contribution from the mining industry to national labour productivity growth, driven by the labour reallocation effect. Noting that the highly capital intensive mining industry has high labour productivity levels, this contribution reflects the net movement of labour into the mining sector during the boom.

⁸⁹ Fair Work Commission (2014) (Preston, P., Katic, M., Farnakis-Gamboni, S. and Yuen, K), *Future Directions 2014-15: Initiative 29*, Productivity and innovation in enterprise agreement clause: an overview of literature, data and case studies at the workplace level, December 2014, p.31. Accessed at: <<http://www.fwc.gov.au/documents/documents/resources/PIEAC-Report-23-Dec-2014.pdf>>.

⁹⁰ Source: ABS, Australian National Accounts: State Accounts, 2013-14, Cat. No. 5220.0. Tables 3 & 10; ABS, Labour Force, Australia, Detailed, Quarterly, Nov 2014, Cat. No. 6291.0.55.003. Datacube E03; Department of Treasury and Finance.

4.20. Conversely, the contribution of the mining industry to Victoria’s labour productivity growth has been effectively zero over the same period. This is largely a reflection of Victoria’s small mining industry, which comprised just 0.5 per cent of state employment over the year to November 2014, well below the national average of 2.2 per cent.⁹¹

Figure 2: Post-GFC annual average contribution to Victorian and national labour productivity growth



Sources: Australian Bureau of Statistics; Department of Treasury and Finance

National productivity performance

4.21. It is important to note that despite the boost to national labour productivity growth from the mining industry, Australia’s average labour productivity growth has moderated and Australia’s multifactor productivity (MFP) has been flat.

4.22. The deterioration in Australian MFP is illustrated in **Figure 3**, which shows average annual growth easing from 2.6 per cent a year in the cycle ending 1998-99 to -0.4 per cent a year in the cycle ending 2007-08. Preliminary data from the current incomplete cycle (2007-08 to 2013-14) suggests that average annual MFP growth is unchanged.

⁹¹ Source: ABS, Labour Force, Australia, Detailed, Quarterly, Nov 2014, Cat. No. 6291.0.55.003. Tables 4&5; Department of Treasury and Finance.

Figure 3: Australian multifactor productivity (gross value added, market sector)



Source: ABS, *Estimates of Industry Multifactor Productivity, 2013-14*, Cat No 5260.0.55.002. Table 1. *Due to a gap in market sector industry data, selected industry data used. **Incomplete productivity cycle

- 4.23. **Table 1** shows that Australia’s average annual labour productivity growth rates have softened from 1.8 per cent a year to 1.0 per cent a year over the past two productivity cycles (between 1998-99 to 2007-08). Since 2010-11, labour productivity growth has shown signs of improvement, increasing to 2.4 per cent in 2011-12, and 3.4 per cent in 2012-13 before moderating to 1.5 per cent in 2013-14. Over the most recent (incomplete) cycle, (2007-08 to 2013-14) average annual growth has improved to 1.6 per cent a year.
- 4.24. When the MFP data in **Table 1** is considered in conjunction with the data in **Table 2**, it is evident that for both measures of productivity, all sectors in the cycle ending 2007-08 reported a lower average annual productivity growth rate compared to the previous cycle. However, in the most recent (incomplete) cycle ending 2013-14, productivity growth has seen a relative upswing in industries, particularly in Retail Trade.
- 4.25. There is limited evidence to support a correlation between productivity and the workplace relation framework. This reinforces Victoria’s commitment to build jobs and improve both economic performance and social wellbeing using other measures.

Section 5 The Bargaining Framework

Enterprise Bargaining

5.1. The Commission is seeking views on a range of matters related to the enterprise bargaining framework. This submission does not address each of the questions raised, but focuses on questions directed to the effectiveness of the good faith bargaining arrangements and of existing productivity clauses in enterprise agreements.

Good faith bargaining

5.2. The Victorian Government strongly supports the Fair Work Act's emphasis on collective bargaining and good faith in the bargaining process, noting that collective agreements in one form or another have been a part of the Australian industrial relations system for more than 100 years. It considers that a co-operative approach to workplace relations will deliver high-performing workplaces that are fair to workers, improve productivity and encourage innovation.

5.3. As one of Victoria's largest employers, the Victorian Government values good faith bargaining requirements as an essential and productive component of enterprise agreement negotiations and is committed to working cooperatively with public sector employers and unions. The Victorian Government expects all public sector agencies to bargain in good faith.

5.4. The promotion of collective bargaining in good faith is a core objective of the Fair Work Act that is firmly supported by the Victorian Government. The objects of Part 2-4 of the Fair Work Act are:

(a) To provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits; and

(b) To enable FWC to facilitate good faith bargaining and the making of enterprise agreements...

5.5. A key principle underpinning the bargaining framework in the Fair Work Act, and a significant change from previous legislation, is the obligation to bargain in good faith. While it is acknowledged that *most employers and employees in Australia voluntarily and successfully bargain collectively*, the current bargaining mechanisms are intended to facilitate bargaining where employers and employees are not successfully able to bargain together.⁹²

5.6. Good faith bargaining is not intended to *require bargaining participants to make concessions or sign up to an agreement where they do not agree to the terms' but to*

⁹² Explanatory Memorandum, Fair Work Bill 2008, p.xxxvii.

*encourage and assist 'employers and employees to consider the issues central to bargaining and work efficiently towards making an agreement.'*⁹³

- 5.7. The International Labour Organization has noted the importance of parties bargaining in good faith, emphasising that *genuine and constructive negotiations are a necessary component to establish and maintain a relationship of confidence between the parties.*⁹⁴
- 5.8. In 2010, Forsyth examined the collective bargaining framework in Australia, including the good faith bargaining requirements in comparison with the good faith bargaining laws in the USA and Canada, concluding that there were *positive early signs* that Part 2-4 of the Fair Work Act was achieving the objective of encouraging collective bargaining.⁹⁵
- 5.9. The Expert Panel that undertook the 2012 Fair Work Act Review also concluded that *where bargaining orders have been sought the principles appear to be operating effectively to promote positive bargaining. Decisions to date demonstrate that the FW Act good faith bargaining principles are flexible and responsive to the particular bargaining circumstances being considered.*⁹⁶ The Panel also noted that there had been an increase in collective agreement making in the period from July 2009 to September 2011.⁹⁷
- 5.10. The Panel noted that applications for bargaining orders had been made in only a very small number of cases relative to the number of agreements that have been made under the Fair Work Act, suggesting that most parties voluntarily conduct bargaining in accordance with the good faith bargaining principles.⁹⁸
- 5.11. The Expert Panel's findings and research of Forsyth suggest that good faith bargaining provisions are working effectively and there is no need for reform.

The link between enterprise bargaining and productivity

- 5.12. One object of the Fair Work Act is to *provide a balanced framework for cooperative and productive workplace relations that promote national economic prosperity and social inclusion for all Australians, including through achieving productivity and fairness through an emphasis on enterprise-level collective bargaining.*⁹⁹

⁹³ Forward with Fairness: Labor's plan for fairer and more productive workplaces, April 2007, p.15; also see *Endeavour Coal Pty Ltd v Association of Professional Engineers, Scientists and Managers Australia* [2012] FCA 764.

⁹⁴ Business Council of Australia, Embedding Workplace Collaboration – Good Faith Bargaining, Paper 2, January 2010, p. 6.

⁹⁵ Forsyth A. The Impact of 'Good Faith' Obligations on Collective Bargaining Practices and Outcomes in Australia, Canada and the USA. June 2010, p. 30.

⁹⁶ 2012 Fair Work Act Review, p.138 (note 2).

⁹⁷ 2012 Fair Work Act Review, pp.151-2 (note 2).

⁹⁸ 2012 Fair Work Act Review, p.138 (note 2).

⁹⁹ S 3, *Fair Work Act 2009*.

- 5.13. The Commission is seeking views about the effectiveness of existing productivity clauses in enterprise agreements, whether they are needed in the current bargaining process, and why there are not already sufficient commercial incentives (and competitive pressures) for parties to improve productivity.
- 5.14. The Victorian Government submits that productivity can be substantively influenced by workplace management practices and rather than being restrictive, the Fair Work Act provides sufficient scope for employers to negotiate flexible working arrangements with their employees that can, in turn, support productivity improvements.
- 5.15. Recent research conducted by the FWC on productivity and innovation in enterprise agreement clauses found that almost half (48 per cent) of federally registered enterprise agreements contain general commitments to improve productivity and 38 per cent identify specific productivity measures.¹⁰⁰ The FWC's research identified three types of agreement clauses that focus on productivity:
- clauses perceived as providing increased workplace flexibility, for example, when work was to be performed or attendance for work;
 - clauses perceived to help develop workforce skills, including through incentives or links with classification structures; and
 - clauses perceived to engage employees in identifying, formulating and/or implementing improved workplace practices through consultation, or through incentives.¹⁰¹
- 5.16. The FWC research found that there is some evidence to suggest enterprise bargaining improves firm level productivity. Based on a series of case studies, it was found that employers, employees and representatives in the case studies reported that the clauses they nominated as being productivity enhancing or innovative, contributed to an increase in workplace flexibility, a higher skilled workforce or improved work practices.¹⁰²
- 5.17. However, the FWC research also noted that there are a wide range of workplace level drivers of productivity (including increasing employee skill levels, introducing new machinery or making changes to firm level organisation, management practices and work arrangements), and it is difficult to isolate the manner and the extent to which various factors contribute to productivity.¹⁰³ The FWC, in undertaking a detailed study of nearly 300 enterprise agreements from 2000 to 2013, found that ... *it is hard to isolate numerically the effects of workplace arrangements, including*

¹⁰⁰ Fair Work Commission (2014), p.19 (note 89).

¹⁰¹ Fair Work Commission (2014), p.31 (note 89).

¹⁰² Fair Work Commission (2014), p.32 (note 89).

¹⁰³ Fair Work Commission (2014), p.30 (note 17).

*industrial relations, from all other factors shaping workplace productivity, especially given small and inadequate datasets and statistical noise.*¹⁰⁴

5.18. The FWC concluded that:

*there is significant scope for further qualitative or other research to examine if and how the operation of enterprise agreement clauses can enhance workplace productivity or innovation. Such research could enable clear and targeted resources (industry or otherwise) in relation to enterprise agreement clauses and productivity.*¹⁰⁵

5.19. The Victorian Government supports this view.

5.20. The FWC also found that the operation and effect of enterprise agreement clauses was highly dependent on the organisational context and shaped by policies or practices and particular work or operations to which they relate.¹⁰⁶

5.21. This is supported by a number of studies, which indicate that improvements in management practices contribute to productivity.

5.22. For instance, a study conducted by the Centre for Economic Performance (London School of Economics) (**CEP**), Stanford University and McKinsey and Company, which examined the practices and performance of more than 4,000 medium sized manufacturing operations in 15 countries in Europe, the US and Asia, found that:

*...firms across the globe that apply accepted management practices well perform significantly better than those that do not. This suggests that improved management practice is one of the most effective ways for a firm to outperform its peers... We have also found that better-managed firms also have a more highly educated workforce, among managers and non-managers alike.*¹⁰⁷

5.23. A Commonwealth Government commissioned study conducted by the University of Technology, Sydney (**UTS**) as part of above world-wide study, similarly found that improvements in management practices are associated with significant improvements in productivity and output. The study noted that *the research findings indicate that national debate about the productivity performance of our economy should include thinking about how effectively Australian firms and organisations are managed.*¹⁰⁸

¹⁰⁴ Fair Work Commission (2014), p.18 (note 89).

¹⁰⁵ Fair Work Commission (2014), p.34 (note 89).

¹⁰⁶ Fair Work Commission (2014), p.31 (note 89).

¹⁰⁷ Bloom, N., Dorgan, S., Dowdy, J. and Van Reenan, J. (2007) *Management Practice and Productivity: Why they Matter*, Centre for Economic Performance, London School of Economics and McKinsey & Company, July 2007, p.3. Accessed at: <http://cep.lse.ac.uk/management/Management_Practice_and_Productivity.pdf>.

¹⁰⁸ Green, R. (2009) *Management matters in Australia: Just how productive are we? Findings from the Australian Management Practices and Productivity global benchmarking project*, University of Technology, Sydney, November 2009, p.9.

- 5.24. The UTS study noted that, while there is a relationship between labour market ‘rigidity’ and people management, the dimensions and determinants of people management are primarily under management control and will only be improved if organisations change their practices with a view to creating more innovative and collaborative workplaces.¹⁰⁹
- 5.25. A report by Monash University’s Centre for Employment and Labour Relations also found that:
- the adoption of employment practices that promote fairness in the workplace, and that take a co-operative approach to labour management through employee participation and productive union-management relationships, can at the same time have positive consequences for business performance.*¹¹⁰
- 5.26. These studies show that while there is a link between enterprise agreements and productivity, the practical effects of such a link will depend upon how clauses in enterprises are implemented, which in turn depends upon management practices within the organisation.

Fair Work Amendment (Bargaining Processes) Bill 2014

- 5.27. The Victorian Government notes that the *Fair Work Amendment (Bargaining Processes) Bill 2014*, which is currently before the Commonwealth Parliament, proposes new requirements for the bargaining framework, including that, before approving an agreement, the FWC must be satisfied that productivity improvements at the workplace were discussed during bargaining for the agreement.¹¹¹
- 5.28. The Victorian Government is not convinced that the measures in this Bill will enhance productivity and is concerned that these measures may result in no change other than to create additional red tape, increase costs and generate uncertainty for employers, unions and employees.
- 5.29. These concerns have been raised by some stakeholders - that the Bill will create unnecessary red tape and reduce certainty without improving productivity,¹¹² and that there is a danger that productivity will become just a box to be ticked rather than an important element of continuing business strategy.¹¹³
- 5.30. Former Fair Work Australia President Geoffrey Giudice has expressed the view that requiring parties to formally take productivity into account in enterprise bargaining

¹⁰⁹ Green, R. (2009) p.8 (note 108).

¹¹⁰ Gahan, P., Taft, D., Mitchell, R. and Bion, K. (2008) *Current Initiatives to encourage fair and cooperative workplace practices: an international study*, Report for the Victorian Office of the Workplace Rights Advocate, Monash University Work & Employment Rights Centre, p.3.

¹¹¹ Explanatory Memorandum, Fair Work Amendment (Bargaining Processes) Bill 2014, p.i

¹¹² See for example, Andrew Stewart quoted in Thomson Reuters (2014) ‘Bargaining Bill creates ‘red tape’ and ‘uncertainty’’, Workforce Daily, 27.

¹¹³ Parliamentary Library, Bills Digest, Fair Work Amendment (Bargaining Processes) Bill 2014, 4 February 2015, p.4.

is likely to raise *definitional and quantitative issues*; that for parties who are already having difficulty reaching agreement *any additional requirement would not be helpful*; and where parties are in agreement, *there would be a temptation to find spurious productivity improvements where none existed in order to satisfy the statutory requirements.*¹¹⁴

- 5.31. The Victorian Government shares the ACTU's concerns that these amendments risk creating *incentives for an employer to refuse to 'discuss' productivity improvements at all, or unless or until, all other claims are resolved in a manner acceptable to it. As such, it could function as a veto right which could be exercised strategically during bargaining to prevent the future approval of any enterprise agreement.*¹¹⁵

Industrial Disputation

- 5.32. The Commission is seeking views as to whether any policy changes to deal with industrial disputes are needed.

- 5.33. The Victorian Government supports the right to take lawful industrial action, and supports the continuation of the current framework regulating the taking of industrial action as set out in the Fair Work Act at Part 3-3, particularly the right to take protected industrial action during bargaining in support of claims made in relation to a new enterprise agreement.

- 5.34. The Victorian Government notes that under the current framework, industrial action, as typically measured (days lost per 1000 workers) is now very uncommon, that industrial action can play an important role in resolving conflicts of interests and that a right to strike in support of economic and social interests is expressly protected by Article 8 of the United Nations *International Covenant on Economic, Social and Cultural Rights*, which Australia ratified in 1975.

Low levels of industrial disputation

- 5.35. It is notable that a significant decline in the rate of employee industrial action in Australia coincided with the introduction of a 'right to strike' in 1993.¹¹⁶ Prior to 1993, although the form and extent of legal prohibition varied, there was effectively no legal right to take industrial action. However, despite the fact that virtually all such industrial action was unlawful, levels of industrial disputation were relatively high by international standards.¹¹⁷

¹¹⁴ Geoffrey Giudice (2012) 'The review of the Fair Work Act and its implications', *Melbourne University, Insights*, Volume 12.

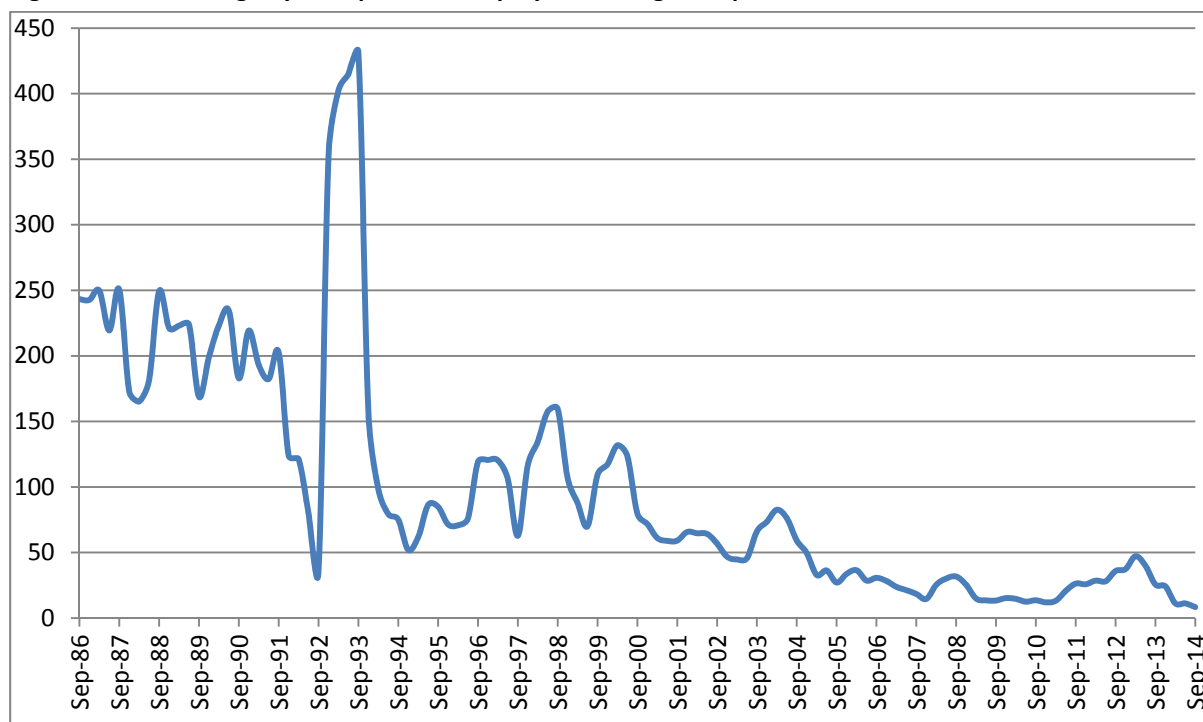
¹¹⁵ Australian Council of Trade Unions (2014) Submission to the Senate Education and Employment Legislation Committee inquiry in the Fair Work Amendment (Bargaining Processes) Bill 2014, p. 16.

¹¹⁶ Commonwealth Government (2012) *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation*, p.174.

¹¹⁷ Creighton & Stewart (2010) *Labour Law*, Fifth edition, p.763.

- 5.36. Since this time, there has been a significant decline in industrial disputes (whether measured in terms of days lost, number of disputes or number of workers involved), both nationally and in Victoria.
- 5.37. In Victoria, in the period from September 1986 to 1993, an average of 54 working days per year per 1000 employees were lost to disputation. This compares with the period since 1993 to September 2014, when the annual average working days lost per 1000 employees has been 12, a reduction of nearly 78 per cent (**Figure 4**).
- 5.38. **Figure 5** shows the total working days lost in Australia and selected states from 1986 to 2014. In the 12 months to September 2014 in Victoria there were 21 700 working days lost due to industrial disputation, with 90 600 working days lost nationally.¹¹⁸
- 5.39. Australia-wide, in the period September 1993 to September 2014, the number of employees involved in disputes decreased by 90.5 per cent (**Figure 6**).
- 5.40. In addition, most recent disputes are of short duration. In the 12 months to June 2014, the majority of disputes (120) lasted up to and including 1 day (60.6 per cent), with 33 disputes lasting over one day and up to including two days (16.7 per cent).¹¹⁹

Figure 4: Working days lost per 1000 employees, rolling four quarter total, Victoria, 1986 to 2014

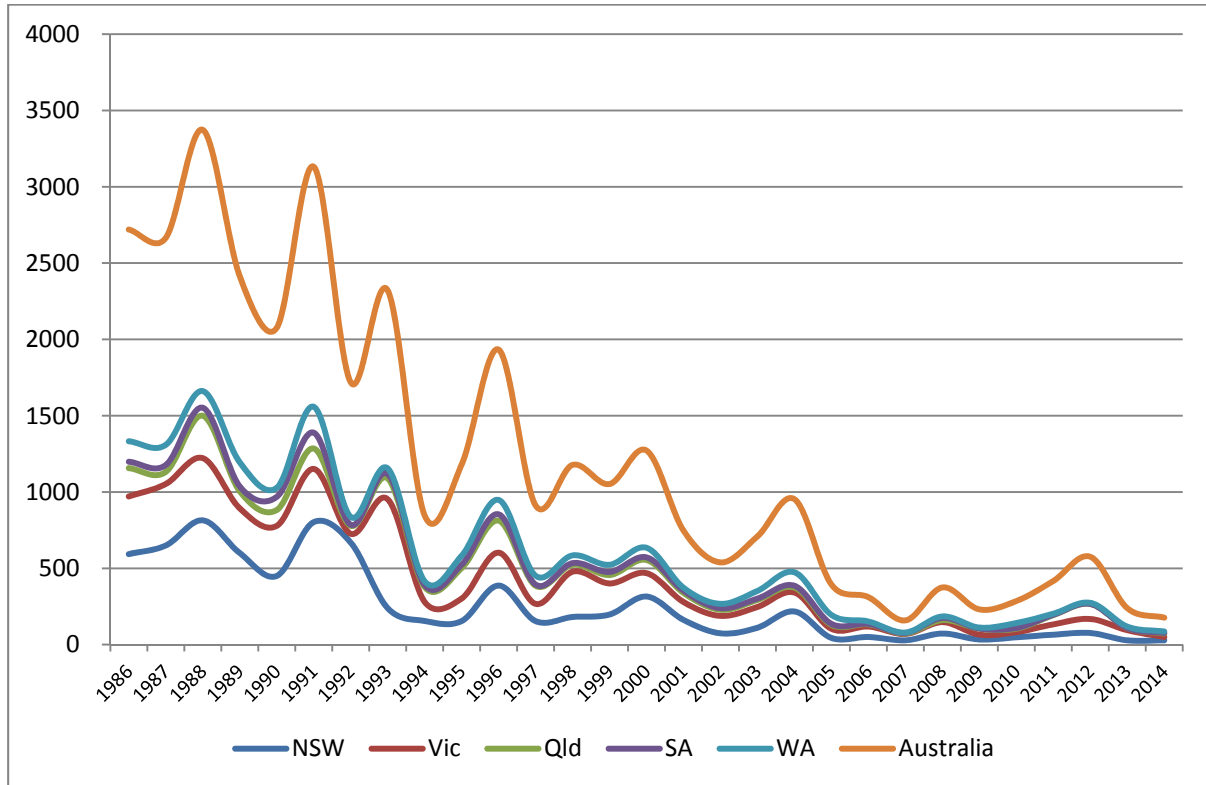


Source: ABS Cat. No. 6321.0. 55.001 (December 2014) *Industrial Disputes, Australia*

¹¹⁸ Includes all protected and unprotected industrial action. Disputes are included in ABS data if the work stoppage amounts to 10 or more working days lost. Ten working days lost equals the amount of ordinary time that would have been worked. For example: a stoppage of ten employees for 1 day equals 10 working days lost.

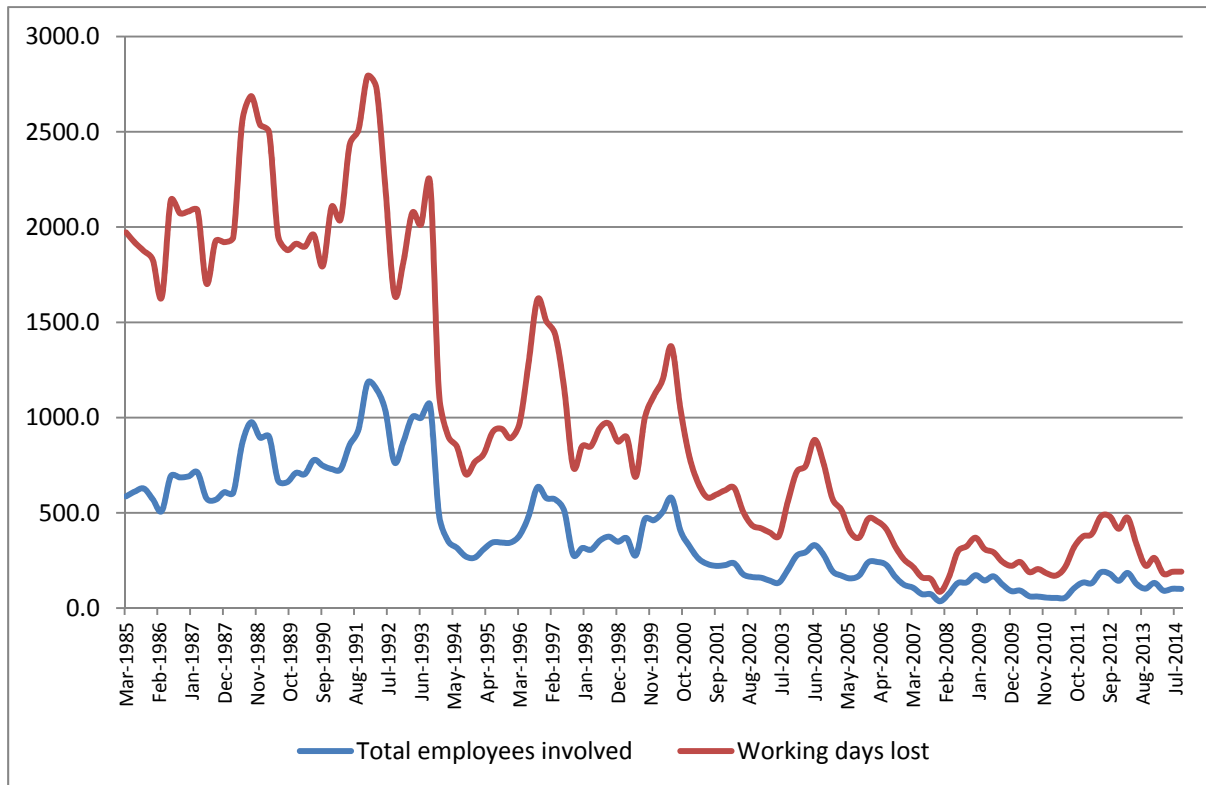
¹¹⁹ Australian Bureau of Statistics Catalogue Number 6321.0.55.001 *Industrial Disputes, Australia*.

Figure 5: Working days lost (000s), Australia and selected states, 1986 to 2014



Source: ABS Cat. No. 6321.0. 55.001(December 2014) *Industrial Disputes, Australia*

Figure 6: Working days lost and total employees involved, Australia, 1985 to 2014



Source: ABS Cat. No. 6321.0. 55.001(December 2014) *Industrial Disputes, Australia*

The relationship between bargaining and industrial action

- 5.41. A right to strike has been widely recognised as a fundamental element of stable collective bargaining and one of the essential means available to employees to promote and protect their economic and social interests and resolve industrial disputes.¹²⁰
- 5.42. While it is recognised that industrial action can have a negative impact on the ability of employers to operate their businesses and on the take home pay of employees, within a context in which there are clear limitations, industrial action can play an important role in resolving conflicts of interest.
- 5.43. As Weiler observes: *work stoppages inflict harm and put pressure on both the employer and the union as a lever towards settlement*. Impending strike action is a powerful prod to agreement, particularly if parties have had previous experience of it:
- The ability to compromise simply would not be there unless the parties were both striving mightily to avoid the harmful consequences of a failure to settle. In the larger system, it is the credible threat of the strike to both sides, even more than its actual occurrence, which plays the major role in our system of collective bargaining.*¹²¹
- 5.44. There is also some evidence to suggest that our current system, which encourages parties to reach agreement and allows limited industrial action, leads to better macro or micro-economic outcomes in the longer term.¹²² As observed by the Commission, disputes are a bargaining tool that may reduce power imbalances between parties, and can therefore result in long-run income re-distribution to employees, and in some instances, efficiency gains.

Right to take industrial action and ILO standards

- 5.45. The Commission asks: what are the implications of International Labour Organization (ILO) standards for Australia's workplace relations system?
- 5.46. A right to strike in support of economic and social interests is expressly protected by Article 8 of the United Nations *International Covenant on Economic, Social and Cultural Rights*, which Australia ratified in 1975.
- 5.47. Australia is a founding member country of the ILO since its establishment in 1919. Since 1945, the ILO has operated as a specialised agency of the United Nations with a tripartite structure representing governments, employer and employee organisations.

¹²⁰ Jane Romeyn, *Striking a balance: the need for further reform of the law relating to industrial action*, Parliament of Australia Research Paper no.33, 2007-08.

¹²¹ P. Weiler (1980) *Reconcilable differences: New directions in Canadian labour law*, Carswell, Toronto, p. 66.

¹²² T. Novitz (2003) *International and European protection of the right to strike*, Oxford University Press, Oxford, pp. 75, 83.

- 5.48. Ratified ILO conventions set out internationally agreed minimum labour standards and have treaty status. The Commonwealth has a longstanding agreement to consult with states and territories on treaty matters, such as ILO conventions. Where the implementation of an ILO Convention is wholly or partly the responsibility of the States and Territories, the Commonwealth will not normally proceed with ratification unless compliance has been established in all jurisdictions and each state and territory government has provided formal agreement to ratification
- 5.49. Ratification of a convention has no direct effect on Australian law. Ratification of a convention may give the Commonwealth additional power to legislate with respect to the convention's subject-matter (via the Constitution's "external affairs" power).
- 5.50. Comparatively to some other member states of the ILO, Australia's law and practice is commonly equivalent to standards contained in ILO conventions, as a consequence of its highly developed workplace and occupational health and safety laws. In broad terms, this means that ratification of ILO conventions does not necessarily require significant change to Australian law for compliance.

Protected industrial action and disputes

- 5.51. The Commission seeks views on any appropriate changes to what constitutes protected industrial action under the FWA and arrangements that might practically avoid industrial disputes.¹²³
- 5.52. The Victorian Government supports the on-going right of employers and employees to take industrial action, within the parameters set by the Fair Work Act.
- 5.53. The Victorian Government does not support measures proposed by the Commonwealth Government to make a number of changes to the Fair Work Act, which would introduce further requirements before protected industrial action can be taken.
- 5.54. The Victorian Government considers that the Fair Work Act provides sufficient limitations to ensure that strikes are used sparingly and as a last resort and that this Bill, if passed, would create uncertainty and unnecessarily and wrongly curtail the right to strike.
- 5.55. In their submission to the recent Australian Law Reform Commission Inquiry into Traditional Rights and Freedoms — Encroachment by Commonwealth Laws, Creighton et al. conclude from their survey of literature that:

The introduction and retention of protection against common law liability for industrial action is an essential element of any system of collective bargaining. The right to engage in such bargaining is, in turn, an essential element of respect for the principle of freedom of association. And that in turn is an essential precondition for the establishment and maintenance of a liberal democracy

¹²³ Issues Paper 3, p. 13.

*governed by the rule of law. These precepts, including the need for respect for the right to strike, find recognition in the Constitutions of many industrialised democracies. They are also embodied in international law....*¹²⁴

- 5.56. Protection against common law liability for industrial action is not a privilege but a recognition of a critical element of collective bargaining; a necessary incident of respect for a fundamental human right; and necessary to ensure and maintain Australia's compliance with international law.¹²⁵
- 5.57. Under the Fair Work Act, employees can take 'protected' industrial action only in certain circumstances. A number of requirements must be met for industrial action by employees to be protected, including that:
- action can only be taken during bargaining for a new enterprise agreement, to support or advance claims during collective bargaining;
 - the action must be approved in a ballot of employees;
 - before a ballot can take place, bargaining representatives must have genuinely tried to reach agreement with the other negotiating parties;¹²⁶
 - the notice requirement for action must be met;
 - the action must only be engaged in for the purpose of supporting or advancing claims about 'permitted matters';
 - the action must not be taken in support of 'unlawful terms'; and
 - the action cannot be in support of 'pattern bargaining' (the person is a bargaining representative for two or more proposed enterprise agreements and seeks common agreement terms with two or more employers).¹²⁷
- 5.58. There are also a number of grounds on which bargaining periods may be suspended or terminated by the FWC, ending the action. The FWC may suspend or terminate protected industrial action where that action is, or is threatening to: cause significant economic harm to the negotiating parties; or cause significant harm to a third party (suspension order only); or endanger the life, safety or welfare of the population or cause significant damage to the Australian economy.¹²⁸
- 5.59. The *Fair Work Amendment (Bargaining Processes) Bill 2014*, which is currently before the Commonwealth Parliament, proposes new requirements for protected industrial action and bargaining, including a requirement that the FWC not make a protected action ballot order if it is satisfied that the applicant's claim(s) 'would have a significant adverse impact on productivity at the workplace'.¹²⁹ The Victorian

¹²⁴ Creighton, B., et al. (2015) 'Justifying Tort Immunities for Industrial Action', submission to the ALRC Inquiry into Traditional Rights and Freedoms — encroachments by Commonwealth laws, p. 8.

¹²⁵ Creighton, B., et al. (2015) p. 10 (note 124).

¹²⁶ S 413 Fair Work Act.

¹²⁷ See ss 409 and 412 of the Fair Work Act.

¹²⁸ S 423 Fair Work Act.

¹²⁹ See Schedule 1(4) of the *Fair Work Amendment (Bargaining Processes) Bill 2014*.

Government is deeply concerned that this will curtail the right to take protected industrial action.

- 5.60. The Victorian Government notes concerns by Professor Andrew Stewart that the proposed requirement, if passed, is a ‘recipe for uncertainty’ and could have the effect of making it impossible for protected industrial action to occur as a rigorous application of the test may conclude that all claims adversely impact on productivity.¹³⁰
- 5.61. Professor Stewart has said that even if the FWC was satisfied a claim would have an impact on productivity if it were granted, questions remain as to how the FWC could know what else would be agreed to that might offset that impact, and on that basis the FWC may never be able to be satisfied. Further, it is expected that when there is genuine enterprise bargaining both sides advance claims, which may have an impact one way or the other on labour costs, productivity and flexibility.¹³¹
- 5.62. The ACTU has also criticised the Bill as a further restriction on the right to strike and as inconsistent with the principles embodied in the *Freedom of Association and Protection of the Right to Organise Convention* and the *International Covenant on Economic, Social and Cultural Rights*, both of which are binding on the Australian Government.¹³²

Alternatives to lockouts

- 5.63. The Commission has asked for views on whether there should be more options beyond a lockout, for employers wanting to take protected industrial action.¹³³
- 5.64. The Victorian Government submits that bargaining participants should retain the right to take protected industrial action and an employer should have a right to provide a proportionate response. While the Victorian Government supports the right of employers to provide a proportionate response to employee action, it is important for effective bargaining that balance is maintained between the rights of employees and employers.
- 5.65. The Victorian Government considers that the ease of access to lockouts available to employers under WorkChoices combined with the myriad of constraints on employee initiated industrial action, tipped the balance of power firmly in favour of employers.¹³⁴

¹³⁰ Thomson Reuters (2014) ‘Bargaining Bill creates ‘red tape’ and ‘uncertainty’.

¹³¹ Thomson Reuters 2014 (note 130).

¹³² ACTU submission to the Senate Education and Employment Legislation Committee inquiry into the *Fair Work Amendment (Bargaining Processes) Bill 2014*.

¹³³ Issues Paper 3, p 14.

¹³⁴ Briggs, C. (2007) ‘Lockout law in Australia: The case for reform’, *Journal of Industrial Relations*, 49(2), pp. 167 – 185.

- 5.66. It is noted that employer industrial action is less regulated and encumbered than is employee action.¹³⁵ For an employer to take protected employer response action all that is required is for written notice to be given to the employees' bargaining representatives and for reasonable steps to be taken to notify affected employees.¹³⁶ By contrast, as noted above, for employees the right to take protected industrial action is limited and there are a number of restrictions and numerous procedural requirements.
- 5.67. It is also recognised that effective enterprise bargaining is premised on comparable bargaining power between employers and employees. In comparison to Australia, other OECD countries have rejected an equal right to strike and lockout, reserving lockouts for exceptional circumstances in recognition of the desirability of maintaining the broad equilibrium of power that underpins effective agreement making.¹³⁷

¹³⁵ Sangkuhl, E., *The Fair Work Australia decision on Qantas: entrenching the imbalance of power between employers and employees*, University of Western Sydney. Accessed at:

<<http://www.austlii.edu.au/au/journals/UWSLRev/2011/9.pdf>>

¹³⁶ S 414(5) *Fair Work Act 2009*.

¹³⁷ Jane Romeyn (2007-08) 'Striking a balance: the need for further reform of the law relating to industrial action', Parliament of Australia Research Paper no.33.

Section 6 Alternative Forms of Employment and the Growth in Insecure Work

Introduction

- 6.1. Along with fundamental changes in the Australian labour market, there has been growth in what the Commission has termed “alternative forms of employment,” such as casual employees, independent contractors and labour hire workers, who now make up a significant proportion of the workforce.
- 6.2. The Victorian Government is concerned that increased casualisation of the workforce over time and engagement in alternative forms of employment has led to a growth in insecure work. For example, the ACTU inquiry into insecure work found that the most common complaint from labour hire employees was the lack of certainty around continuity in employment and income.¹³⁸
- 6.3. The Victorian Government believes that all workers should have access to decent working conditions and secure employment, and that mechanisms be in place to ensure vulnerable workers in alternative forms of employment are adequately protected. The Victorian Government is committed to undertaking an inquiry into insecure work, including into issues relating to the operation of the labour hire industry, the business practices of companies in the industry, and sham contracting.
- 6.4. As earlier stated, the Victorian Government recognises that alternative forms of employment can provide employers with flexibility to manage their workforce and some workers may choose these types of work because of the flexibility they provide to balance work and family, study and other commitments. Other workers, however, do not have a choice as to the type of work arrangement they enter. In particular, vulnerable workers with limited bargaining power, such as migrant workers, those with less education and fewer skills, may enter these arrangements out of necessity.
- 6.5. The Victorian Government notes concerns by unions, community groups and academics that alternative forms of work can be detrimental to job security, job safety and job satisfaction.
- 6.6. Howe, Newman and Hardy from Melbourne University’s Centre for Employment and Labour Relations Law note that workers engaged under non-standard employment and work arrangements are more likely to experience precarious or insecure employment.¹³⁹

¹³⁸ Australian Council of Trade Unions (2012) p.34 (note 140).

¹³⁹ Howe, J., Newman, A. and Hardy, T, Submission to Independent Inquiry into Insecure Work in Australia, the University of Melbourne, Centre for Employment and Labour Relations Law, undated, pp. 2-3.

- 6.7. The ACTU's inquiry into insecure work found that workers engaged as independent contractors or as labour hire are more likely than other workers to be in insecure work and that the characteristics of these jobs can include:
- unpredictable and fluctuating pay;
 - inferior rights and entitlements;
 - limited or no access to paid leave;
 - irregular and unpredictable working hours;
 - a lack of security and/or uncertainty over the length of the job; and
 - a lack of any say at work over wages, conditions and work organisation.¹⁴⁰

Labour Hire

Prevalence of labour hire in Victoria

- 6.8. The Commission is seeking contemporary data about the prevalence of labour hire and the industries and occupations in which they predominate. As noted, the Victorian Government has committed to undertaking an inquiry into insecure work, including issues relating to the operation and regulation of the labour hire industry in Victoria.
- 6.9. The Victorian Government agrees that consideration should be given to methods of collecting data about labour hire firms and workers to assist in an accurate picture of the prevalence of labour hire in Australia.
- 6.10. It is noted that estimates of the number of labour hire firms in Victoria vary and it is difficult to obtain an accurate picture.¹⁴¹
- 6.11. The lack of information may be linked to difficulties associated with researching labour hire that arise from: the temporary and itinerant nature of labour hire arrangements; that labour hire workers are unsure about the nature of their employment status; and that labour hire workers may refuse to participate in research on the grounds that it would jeopardise their job.¹⁴²
- 6.12. Data provided by the Victorian WorkCover Authority (**VWA**) provides some information about labour hire businesses in Victoria. According to VWA data, the number of labour hire businesses¹⁴³ registered for WorkCover premium services in Victoria over the last four years is as follows:
- 2011-12: 968

¹⁴⁰ Australian Council of Trade Unions, (2012) *Lives of Hold: unlocking the potential of Australia's workforce, Independent Inquiry into Insecure Work*, p. 14.

¹⁴¹ See: Parliament of Victoria, (2005) *Inquiry into Labour Hire Employment in Victoria: Final Report*, pp.7-9; Australian Council of Trade Unions, (2011) *Insecure work, anxious lives: the growing crisis of insecure work in Australia*, September, p.8.

¹⁴² Parliament of Victoria (2005) p.8 (note 141).

¹⁴³ It is noted that the VWA data excludes businesses predominantly engaged in listing employment vacancies and referring or placing applicants for permanent employment (employment placement agencies).

- 2012-13: 947
- 2013-14: 916
- 2014-15: 933

6.13. In 2014-15, of these labour hire businesses, 531 employed 100 or less labour hire employees; 136 employed 500 or less labour hire employees; and 52 employed more than 500 labour hire employees.

6.14. Total remuneration spend on labour hire in 2014-15 was highest in the following sectors: administrative and support services; professional, scientific and technical services; manufacturing and financial insurance services. However, it is noted that larger total remuneration spend in the above industries may be reflective of higher salaries paid and it is possible that other sectors may have more labour hire workers.

Labour hire arrangements

6.15. The Victorian Government submits that there are difficulties in defining labour hire arrangements and that changes to existing employment law should be given careful and detailed policy development and consideration.

6.16. The lack of data relating to labour hire, is also compounded by confusion about what labour hire is - a number of different terms are used to describe labour hire arrangements (such as 'on-hire', 'temp' or 'agency' employment), and the line between recruitment services and labour hire is often blurred.¹⁴⁴

6.17. The majority of labour hire workers are engaged as casual employees¹⁴⁵, but they can also be engaged as fixed term employees or as independent contractors.

6.18. Labour hire arrangements are characterised by a triangular relationship between host employer, labour hire agency and labour hire worker. While the host utilises the workers' labour and exercises day-to-day control over the worker, there is no employment relationship between the host employer and the labour hire worker. The labour hire agency assumes responsibility for key legal obligations, including that the worker receive their minimum employment entitlements in accordance with the Fair Work laws.

6.19. The ACTU, in its *Inquiry into Insecure Work* suggests that the tests and conditions applicable to standard employment relationships are not well-adapted to triangular relationships between host employer, labour hire agency and labour hire employee or contractor.¹⁴⁶ The ACTU recommended that the Fair Work Act be amended to

¹⁴⁴ The Recruitment and Consulting Services Association (RSCA) believe that 'the absence of precise terminology is contributing to the confusion and lack of accountability among any non-compliant elements of the industry'. (RSCA, Submission to the Independent Review of Integrity in the Subclass 457 Programme, April 2014, p.3.

¹⁴⁵ Parliament of Victoria (2005) p.54 (note 141).

¹⁴⁶ Australian Council of Trade Unions (2012) p.34 (note 140).

allow the FWC to determine that where two or more parties are exercising functional control or taking the benefits from a work arrangement, such that a joint employment relationship exists.¹⁴⁷

- 6.20. Whether there is a need for a definition of 'joint employment' was a question considered by the 2011 inquiry into sham contracting conducted by the Office of the Australian Building and Construction Commission.¹⁴⁸ A number of submissions to this Inquiry argued in support of such a definition. For instance, Howe and Hardy in their submission commended a research thesis that argued that a definition of joint employment should be given statutory recognition in Australia, with the aim of protecting vulnerable labour hire workers.¹⁴⁹
- 6.21. However, a number of submissions also argued against such a definition. Stewart and Roles, for instance, submitted that they did not see the need for a general doctrine of 'joint employment'.¹⁵⁰ Elsewhere, Stewart has noted practical difficulties with a 'joint employment' approach, while acknowledging that it might work well in relation to, for example, the rehabilitation of injured workers..¹⁵¹
- 6.22. The Inquiry concluded that given the serious concerns raised in submissions it would not explore the prospect of a definition of joint employment further.
- 6.23. A 2005 report by the Victorian Parliament Economic Development Committee also noted that the triangular nature of labour hire presents some ambiguities that unscrupulous agencies and hosts may exploit to the detriment of workers.¹⁵²

Treatment of labour hire workers

- 6.24. The Commission is seeking views about the treatment of labour hire workers under the Fair Work Act.
- 6.25. The Victorian Government is concerned that labour hire arrangements can make labour hire workers vulnerable to exploitation, can create uncertainty for workers around continuity in employment and income, and can allow unscrupulous operators to evade taxation and other obligations.
- 6.26. The Victorian Government will consider the most appropriate options to regulate the industry, such as a licensing or registration system for labour hire operators or accreditation scheme. This may help to protect vulnerable workers by promoting ethical and compliant labour hire firms, and build the reputation of the industry as a whole.

¹⁴⁷ Australian Council of Trade Unions (2012) p.34 (note 140).

¹⁴⁸ Office of the Australian Building and Construction Commission (2011) *Sham Contracting Inquiry Report*.

¹⁴⁹ Office of the Australian Building and Construction Commission (2011) p.105 (note 148).

¹⁵⁰ Office of the Australian Building and Construction Commission (2011) p.105 (note 148).

¹⁵¹ Stewart, A. (2002) 'Redefining Employment? Meeting the Challenge of Contract and Agency Labour' *Australian Journal of Labour Law*, Volume 15: pp. 235-276.

¹⁵² Parliament of Victoria (2005) (note 141).

- 6.27. The Victorian Government considers that it is important that the FWO is properly resourced to enable it to promote compliance and enforce workplace laws to ensure vulnerable employees are protected.
- 6.28. Labour hire can assist businesses to organise work to meet genuine operational needs, to match peaks and troughs in demand, and to manage staff absences and skills shortages.
- 6.29. However, as other research studies and inquiries have shown, the labour hire industry in Australia also raises issues particular to that industry (although the extent of the problem is unknown), including:
- Labour hire can be used as a form of substitution (rather than supplementation) of an existing, directly employed workforce.¹⁵³
 - Some on-hire operators are driven by price considerations, to the detriment of compliance with workplace laws.¹⁵⁴
 - The barriers to entry into the labour hire sector are low, which means opportunistic operators can easily enter and work in the industry, and there is a need to promote ethical and compliant firms to build the reputation of the industry as a whole.¹⁵⁵
 - Labour hire employment has implications for job security. The ACTU inquiry into insecure work found that the most common complaint from labour hire employees was the lack of certainty around continuity in employment and income.¹⁵⁶
- 6.30. Labour hire has also been linked to significant “phoenix” activity, which involves the transfer of assets of an indebted company into a new company (such as an associated labour hire entity operated by the same director/s), to evade tax and other liabilities. A 2012 report by PricewaterhouseCoopers prepared for the Fair Work Ombudsman reported stakeholder concerns that phoenix activity is a significant issue in the labour hire industry.¹⁵⁷ The Commonwealth Treasury identified the structure of a typical fraudulent phoenix activity as one involving several labour hire entities.¹⁵⁸ The Commonwealth Treasury provided this case study of fraudulent phoenix activity:¹⁵⁹

A labour hire business with negligible assets and turnover of \$30m per annum fragmented its operations across 53 related companies, lodged accurate business

¹⁵³ Parliament of Victoria (2005) (note 141); Australian Council of Trade Unions (2012) p.28 (note 140).

¹⁵⁴ Parliament of Victoria (2005) (note 141); Australian Council of Trade Unions (2012) p.28 (note 140).

¹⁵⁵ Australian Centre for Research in Employment and Work (ACREW), ‘Best practice models for managing joint responsibilities in the labour hire sector’, (Labour hire research report, August 2007), p. 5.

¹⁵⁶ Australian Council of Trade Unions (2012) p.34 (note 140).

¹⁵⁷ PricewaterhouseCoopers, ‘Phoenix Activity: sizing the problem and matching solutions’, a report prepared for the Fair Work Ombudsman, June 2012, p.17.

¹⁵⁸ Australian Government (2009) ‘Action against fraudulent phoenix activity’, Proposals Paper, November 2009, p.2 Accessed at: < http://archive.treasury.gov.au/documents/1647/PDF/Phoenix_Proposal_Paper.pdf>

¹⁵⁹ Australian Government (2009) (note 158).

activity statements (BAS) for all companies, but failed to remit the required amounts under the PAYG(W) system. The single company director then liquidated every one of these companies within a week, moved his workforce of 2,700 into eight new entities and continued trading. He has since fled Australia. Over \$8m in taxes remain unpaid. This labour hire business is still trading and failing to comply with its obligations.

- 6.31. There is also some evidence that labour hire arrangements are used to avoid paying minimum workplace entitlements. In a 2014 decision, the Federal Court fined Crystal Carwash Case and two individuals \$90,000 for underpaying more than 250 workers \$177,000 by setting up a series of 10 ‘sham’ labour hire companies to disguise their true employer, and thereby avoid workplace laws. Justice Buchanan noted that the employees concerned were low skilled and from non-English speaking backgrounds, and *‘particularly vulnerable given the asymmetrical bargaining power that existed between them and the respondents.’*¹⁶⁰
- 6.32. The Fair Work Ombudsman (**FWO**) plays an important role in ensuring the enforcement of minimum employment standards on behalf of vulnerable workers, including labour hire workers. In August 2013, the FWO began a three year ‘Harvest Trail’ campaign to help employers and employees working in the horticulture industry understand their rights and obligations at work. On-hire employment arrangements are common in the horticulture industry and the FWO campaign aims to educate employees and employers about this type of arrangement and alert participants about possible illegal arrangements, with a view to driving behavioural change and ensuring industry-wide compliance.
- 6.33. The Victorian Government notes with concern, that the FWO has recently reported complaints by backpackers and seasonal workers working in the horticultural industry, in which labour hire arrangements are common. The FWO reported that it had *received fresh complaints about backpackers being lured to regional centres by dodgy labour-hire operators allegedly treating them poorly, bullying and sexually harassing them and ripping them off to the tune of hundreds of dollars.*¹⁶¹
- 6.34. The FWO has also commenced proceedings against a recruitment and labour hire company that allegedly falsified records and unlawfully deducted \$130,183 from workers’ wages.¹⁶² The seriousness of the breaches and involvement of vulnerable workers were significant factors in the FWO’s decision to commence legal action.
- 6.35. The Victorian Government endorses the FWO approach and considers that it is important that the FWO is properly resourced to enable it to promote compliance and enforce workplace laws to ensure vulnerable employees are protected.

¹⁶⁰ *Fair Work Ombudsman v Crystal Carwash Café Pty Ltd (No 2)* [2014] FCA 827 (7 August 2014) [at 27]

¹⁶¹ Fair Work Ombudsman, Media release, ‘Growers, hostels, labour-hire contractors cautioned over backpacker, seasonal worker entitlements’, 5 January 2015.

¹⁶² Fair Work Ombudsman, Media release, ‘Cleaners allegedly had \$130,000 unlawfully deducted from their wages’, 14 February 2014.

Sham Contracting

- 6.36. According to the ABS, in November 2013 there were 279,000 persons in Victoria who identified themselves as independent contractors, representing ten per cent of all employed people.¹⁶³ Fundamentally different from employees, genuine independent contractors are regulated by commercial rather than employment laws.
- 6.37. The Victorian Government supports genuine independent contracting and recognises that this is a legitimate way to do business. However, the Victorian Government does not support arrangements that allow employer obligations to be illicitly avoided, including annual leave, sick leave, long service leave entitlements, employer superannuation contributions or other employer obligations such as work cover payments.
- 6.38. By disguising an employment relationship as independent contracting, workers can be denied important entitlements and the statutory protections inherent in employment, such as protection from unfair dismissal laws and the benefit of ongoing job security.¹⁶⁴

Prevalence of sham contracting

- 6.39. The Commission is seeking information about the industries where sham contracting is most prevalent.
- 6.40. As noted by the Fair Work Act Review Panel, there is a lack of data about the prevalence of sham contracting in Australia.¹⁶⁵ However, there is evidence to suggest that it exists to some degree in the construction, cleaning services, hair and beauty and call centre industries.
- 6.41. According to ABS data, of all independent contractors, the highest proportion work in the construction industry (31 per cent). Research commissioned by Fair Work Building and Construction (**FWBC**) found that approximately 13 per cent of self-defined contractors in the building and construction industry are possibly misclassified in that they exhibit practices and arrangements typical of an employee.¹⁶⁶ The research found that non-English speaking workers are more likely to be misclassified, with employer-driven arrangements associated with the opportunity to take advantage of sometimes vulnerable and less informed

¹⁶³ Australian Bureau of Statistics, *Forms of Employment, Australia, November 2013* (cat. no. 6359.0).

¹⁶⁴ Fair Work Ombudsman (2011) 'Sham contracting and the misclassification of workers in the cleaning services, hair and beauty and call centre industries', Report on the preliminary outcomes of the Fair Work Ombudsman Sham Contracting Operational Intervention, November 2011, pp.4, 7

¹⁶⁵ 2012 Fair Work Act Review p. 241 (note 2).

¹⁶⁶ TNS Consultants, Working arrangements in the building and construction industry further research resulting from the 2011 Sham Contracting Inquiry, December 2012, pp. 6, 7.

workers.¹⁶⁷ The FWBC noted that the finding confirms ‘that a regulatory response is indeed justified.’¹⁶⁸

- 6.42. In 2011, the FWO selected the cleaning services, hair and beauty and call centre industries for audit on the basis that they were industries which had a known prevalence of contractors, and one in which the FWO thought, from experience, a problem may exist.¹⁶⁹ The audit found that of 91 enterprises, 21 (23 per cent) were assessed as having misclassified employees as independent contractors and one third of those were assessed as either knowingly or recklessly having done so.¹⁷⁰
- 6.43. The FWO found a ‘heightened risk’ of sham contracting arrangements in the cleaning services industry, noting that ‘the ability to access a large and potentially vulnerable labour pool; a need to keep costs low to remain competitive; and labour typically representing the most significant cost to the enterprise, the environment is one that presents a high risk of non-compliance with workplace laws and obligations.’ It recommended that the cleaning services industry should remain the focus of ongoing regulatory compliance activities.
- 6.44. It is also noted that the FWO has issued proceedings against businesses in a range of other industries for contraventions of sham arrangements provisions of workplace laws.¹⁷¹
- 6.45. For example, the FWO has recently instituted proceedings in the Federal Circuit Court against a fundraising company, who allegedly engaged a young overseas backpacker as a contractor, rather than an employee.¹⁷² This is the second time the FWO has instituted proceedings against this company, who was previously fined \$23,000 for underpaying five young employees, including 417 working holiday visa-holders, wrongly classified as independent contractors. In finding against the company, Justice Hartnett stated that the workers ‘were willing to consider any type of work as they were desperate for work and desperate for payment for the work performed by them. They included highly vulnerable, foreign nationals in need of remuneration to meet the daily necessities of life.’¹⁷³
- 6.46. The Victorian Government is concerned that vulnerable and less informed workers, including young and overseas workers, are particularly susceptible to sham contracting.

¹⁶⁷ FWBC (2012) response to *Working Arrangements in the Building and Construction Industry – further research resulting from the 2011 Sham Contracting Inquiry*, 21 December 2012.

¹⁶⁸ FWBC (2012) (note 167).

¹⁶⁹ Fair Work Ombudsman (2011) pp. 13-14 (note 164).

¹⁷⁰ Fair Work Ombudsman (2011) p. 14 (note 164).

¹⁷¹ Fair Work Ombudsman (2011) pp. 11-12 (note 164).

¹⁷² Fair Work Ombudsman, Media Release, ‘Court action over alleged sham contracting and underpayment of backpacker’, 28 November 2014.

¹⁷³ *Fair Work Ombudsman v Australian Sales and Promotions Pty Ltd* [2013] FCCA 1502 (7 October 2013) at [18]

Fair Work Act protections against sham contracting

- 6.47. The Commission is seeking views on whether the current provisions in the Fair Work Act are sufficient to discourage sham contracting and whether changes could be made to strengthen the provisions.¹⁷⁴
- 6.48. The Victorian Government submits that stronger protections for employees against sham contracting arrangements are needed. The Fair Work Act prohibits an employer from representing to a worker that the worker is an independent contractor, when as a matter of law the worker is being employed under a contract of employment.¹⁷⁵ An employer who has made such a representation may escape liability if they can prove that they did not know, and were not reckless, as to whether the contract was a contract of employment.¹⁷⁶
- 6.49. The Commission notes that there were several submissions to the 2012 Fair Work Act Review, which commented that the provisions of the Fair Work Act that dealt with sham contracting are insufficient.
- 6.50. The Panel recommended the Fair Work Act be amended to remove the present 'reckless' defence to the prohibition of sham contracting on the basis that it 'does not fit within a legislative scheme designed to be fair for working Australians'.¹⁷⁷ The Panel recommended that the present defence be replaced by a narrower 'reasonableness' defence. That is, that an employer may escape liability if the employer believed that the contract was a contract for services rather than a contract of employment, and could not reasonably have been expected to know otherwise.¹⁷⁸
- 6.51. The Victorian Government supports this recommendation (which has not yet been implemented), which it considers would provide stronger protections for employees against sham contracting arrangements.

¹⁷⁴ Issues Paper 5, p12.

¹⁷⁵ S 357, *Fair Work Act 2009*.

¹⁷⁶ S 358, *Fair Work Act 2009*.

¹⁷⁷ 2012 Fair Work Act Review p.243 (note 2).

¹⁷⁸ Recommendation 48, 2012 Fair Work Act Review (note 2).

Section 7 Employee Protections

Unfair Dismissal

- 7.1. The objects of the unfair dismissal provisions in the Fair Work Act include:
- establishing a framework that balances the needs of businesses and employees;
 - establishing quick, flexible and informal procedures to deal with unfair dismissal claims; and
 - providing remedies if a dismissal is found to be unfair, with an emphasis on reinstatement.¹⁷⁹
- 7.2. The Victorian Government considers that these provisions of the Fair Work Act provide an appropriate balance between the need to protect workers from unfair dismissal and ensuring employers have sufficient flexibility to manage their workforce.
- 7.3. Australia's unfair dismissal laws have been developed over many years. While, the federal tribunal first gained the power to determine unfair dismissal applications in 1993, State tribunals in Australia had long enjoyed the power to hear and determine unfair dismissal claims.
- 7.4. Under WorkChoices, many employees were excluded from access to unfair dismissal laws. The policy intent was to deliver an economic benefit to employers, however, as noted by the independent panel undertaking the 2012 Fair Work Act Review *these benefits were not readily apparent, but resulted in what was said to be 'clear injustices and real feelings of insecurity for workers who realised they could be dismissed at any time for no reason'*.¹⁸⁰
- 7.5. The Fair Work Act reinstated coverage of unfair dismissal laws to employees of small businesses with fewer than 15 employees provided they have worked in the business for 12 months and that other eligibility requirements are met.¹⁸¹
- 7.6. While this means more employers are potentially subject to an unfair dismissal claim, this must be balanced against restoring a level of employment security to employees who had previously been excluded under WorkChoices.¹⁸² Unfair dismissal laws provide important benefits to employees because of the protection they offer via increased job security and a reduced feeling of vulnerability in the workplace.¹⁸³
- 7.7. It is also noted that data provided by the FWC, suggests that the removal of the jurisdictional cap for businesses with less than 100 employees has not had a

¹⁷⁹ S 381, *Fair Work Act 2009*.

¹⁸⁰ 2012 Fair Work Act Review, p.209 (note 2).

¹⁸¹ Ss 23, 385 and 388 *Fair Work Act 2009*.

¹⁸² 2012 Fair Work Act Review p.215 (note 2).

¹⁸³ Explanatory Memorandum, Fair Work Bill 2008, p.iii.

dramatic effect on the small business sector. According to FWC data, in the period 1 July 2010 to 30 June 2012, unfair dismissal applications involving businesses with 15 or more employees comprised 70 per cent of all applications that proceeded to conciliation, compared with 23 per cent that involved a small business employer.¹⁸⁴ This is despite the fact that ABS data showed that as at June 2011, 45.7 per cent of employed persons in Australia worked in a small business that employed fewer than 20 persons.¹⁸⁵ Further, only 15 per cent of employees found to be unfairly dismissed during the period 1 July 2010 to 30 June 2012 were employed by a small business employer.¹⁸⁶

- 7.8. There is also some evidence to suggest that the cost to business of unfair dismissal laws is small. Freyens and Oslington concluded that *...the actual costs imposed on business by unfair dismissal regulation are small, as are the impacts on aggregate employment.*¹⁸⁷ The 2012 Fair Work Act Review panel also concluded that *there is no evidence that the FW Act's unfair dismissal framework has made a discernible difference to overall employment, compared to the prior framework.*¹⁸⁸
- 7.9. Conversely, there is evidence that unfair dismissal laws can have a positive impact on business procedures. A 2002 University of Melbourne study of around 1800 companies employing 200 or fewer employees found that the unfair dismissal laws had *resulted in large and intended changes in the recruitment and staff management procedures of small and medium sized businesses ... in the direction of what might be described as more formal and arguably fairer and more transparent human resource management procedures and practices.*¹⁸⁹

So-called 'go away money'

- 7.10. The Commission is also seeking views about evidence of the practice of paying so-called 'go away money'.¹⁹⁰
- 7.11. The Victorian Government submits that there is little evidence of the practice of paying so-called 'go away money'.¹⁹¹
- 7.12. It is noted that the question of 'go away money' was considered by the Expert Panel undertaking the 2012 Fair Work Act Review. The Panel acknowledged that

¹⁸⁴ Fair Work Australia (2012) *General Manager's report into the operation of the first three years of the Fair Work Act 2009 (Cth) unfair dismissal system*, p. 26.

¹⁸⁵ Fair Work Australia (2012) p.26.

¹⁸⁶ Fair Work Australia (2012) p.52.

¹⁸⁷ Freyens, B. and Oslington, P. (2013) 'A First Look at Incidence and Outcomes of Unfair Dismissal Claims under Fair Work, WorkChoices and the Workplace Relations Act', *Australian Journal of Labour Economics*, 16(2) pp. 295-306.

¹⁸⁸ Freyens, B. and Oslington, P. (2013) p. 82.

¹⁸⁹ Don Harding, 'The Effect of Unfair Dismissal Laws on Small and Medium Sized Businesses', Melbourne Institute of Applied Economic and Social Research, University of Melbourne 29 October 2002

¹⁹¹ Issues Paper 4, p 2.

¹⁹¹ Issues Paper 4, p 2.

employers undoubtedly make commercial decisions to settle unfair dismissal claims and that these practices existed under the legislation before the Fair Work Act.¹⁹²

- 7.13. However, in response to the contention that the Fair Work Act has led to an increase in the incidence of employers paying compensation to settle unmeritorious claims, the Panel concluded that:

*There was no statistical analysis to support the contention, and it is difficult to see how one could be compiled. Assessment of the merits of particular claims will necessarily involve subjective judgments that are impossible to quantify. The contention was based in the main on feedback from employers to their associations.*¹⁹³

- 7.14. While noting that it was difficult to assess the extent to which employers are paying money to settle claims they believe are without substance, the Panel accepted that it was undesirable that payments of this character are made.

- 7.15. The Panel made some recommendations in relation to processes and procedures directed at avoiding such a situation, a number of which were implemented by the former Commonwealth Government. This includes: enabling the FWC to administratively dismiss an unfair dismissal application in circumstances where a claim is pursued in an improper or unreasonable manner; and enhancing the FWC's ability to order costs against a party and/or their representative in unfair dismissal matters.¹⁹⁴

- 7.16. These amendments were designed to 'discourage frivolous and speculative claims' and *strike a balance between the need to protect workers from unfair dismissal, and to provide a deterrent against unreasonable conduct during proceedings.*¹⁹⁵

- 7.17. It is also noted that data published by the FWC shows that when payments are made as a result of conciliation, the amounts are generally modest. In the financial year July 2010 to 30 June 2012, where a monetary settlement was reached at a conciliation, the most common result was a payment of \$2000-3999, with about 80 per cent of settlements reached at conciliation being below \$8000.¹⁹⁶

Quick, flexible and informal procedures

- 7.18. The Victorian Government considers that the Fair Work Act has met its objective of establishing quick, flexible and informal procedures to deal with unfair dismissal claims.

- 7.19. Since the commencement of the Fair Work Act, the FWC has implemented a number of measures directed to the performance of its functions and exercise of its powers

¹⁹⁷ S 577, Fair Work Act 2009.

¹⁹⁷ S 577, Fair Work Act 2009.

¹⁹⁷ S 577, Fair Work Act 2009.

¹⁹⁷ S 577, Fair Work Act 2009.

¹⁹⁷ S 577, Fair Work Act 2009.

in a manner that is fair and just, is quick, informal and avoids unnecessary technicalities, is open and transparent, and promotes harmonious and cooperative workplace relations.¹⁹⁷ These include:

- conducting conciliations by telephone;
- developing new information materials to assist parties to understand the unfair dismissal process, including a video virtual tour of the processes and procedures of an unfair dismissal matter; additional information for self-represented parties; and an online unfair dismissal bench book;
- a pilot three-day ‘cooling off’ period for settlements reached during conciliation;
- a 30 per cent reduction in the time between an application being lodged and the conciliation; and
- **developing** a dedicated small business portal on the Commission’s website, with a specific page on unfair dismissals.

7.20. A 2010 survey commissioned by the FWC into unfair dismissal conciliations found a high degree of satisfaction with the FWC’s administration of unfair dismissal applications, with 86 per cent of applicants and 82 per cent of respondents reporting they were satisfied or extremely satisfied with the service provided by the FWC. The research further notes that 87 per cent of applicants and 82 per cent of respondents were satisfied or extremely satisfied with the cost effectiveness of the process.

7.21. In relation to telephone conciliations, the survey found that:

- 78 per cent of applicants and 81 per cent of respondents agreed or strongly agreed the conciliation of an unfair dismissal application by telephone conference works well;
- 86 per cent of applicants and 88 per cent of respondents considered that having the conciliation over the telephone was convenient and time effective; and
- 72 per cent of applicants and 59 per cent of respondents reported that having the conciliation over the telephone was more comfortable than being in the same room with the other party.¹⁹⁸

Anti-Bullying Laws

7.22. The Commission has asked, amongst other things, what are the impacts, disadvantages and advantages of the FWC anti-bullying orders regime, to what extent are these provisions substitutes for or complementary to other jurisdictional laws and the impacts of overlapping laws.¹⁹⁹

7.23. The Victorian Government strongly supports the right of every person to feel safe in our community and believes that no one should be subject to bullying. In Victoria,

¹⁹⁷ S 577, *Fair Work Act 2009*.

¹⁹⁸ Wearne N, Stafford N, Southall A and Battams J (2010), *Fair Work Australia unfair dismissal conciliation research: survey results*, TNS Social Research, research commissioned by Fair Work Australia, Melbourne.

¹⁹⁹ Issues Paper 4, p.5.

employers have a statutory obligation to provide a healthy and safe workplace and to ensure that employees are not subject to discrimination.

- 7.24. The Victorian Government submits that the period of operation of the FWC anti-bullying orders is insufficient to draw specific conclusions about their effectiveness.
- 7.25. The Victorian Government also considers that as the operation of the FWC anti-bullying regime is linked to the Commonwealth's corporation's power, and referrals of power were not sought by the Commonwealth when it introduced the laws, referring states may wish to consider the effectiveness of those laws and their coverage, in consultation with the Commonwealth and the FWC.
- 7.26. The FWC anti-bullying jurisdiction only applies to workers in a "constitutionally covered business." It does not apply to partnerships, sole traders, not-for-profit associations and other corporations not engaged in trading or financial activities, such as State government departments and some State public sector agencies.
- 7.27. Whilst State public servants are not covered, employees in a number of public sector agencies will be covered if those organisations have significant trading and financial activities and come within the definition of a "constitutionally covered business."
- 7.28. State public sector employees not covered by the FWC anti-bullying jurisdiction have a range of other avenues for redress available to them at the State level. Additionally, in Victoria, the *Crimes Act 1958* has been amended by the *Crimes Amendment (Bullying) Act 2011* (Brodies law), to extend the stalking provisions to include bullying behaviour. This followed the tragic death of 19 year old Brodie Panlock.
- 7.29. The Victorian Government notes that the number of complaints to the FWC have been smaller than originally anticipated. However, it also notes that the FWC can provide successful triaging of bullying concerns - the number of inquiries is not reflected in the number of applications proceeding to final stages and the number of final orders is not necessarily a reflection of the success of the available remedy. Knowing there is a forum and a capacity to make a complaint, can be a significant positive for persons wishing to raise bullying concerns.
- 7.30. At a forum in Melbourne in March 2015,²⁰⁰ Commissioner Hampton, the head of the FWC's anti-bullying panel noted that FWC figures indicate significant numbers of enquiries have been made – in 2014, the FWC's website received 185,633 unique hits about bullying and 6995 telephone enquiries (although only two orders have been made).
- 7.31. Commissioner Hampton said the tribunal resolved 156 of the 701 cases during the course of proceedings, while applicants withdrew 148 early in the case management

²⁰⁰ Workplace Express article, as reported 18 March 2015. Accessed at: http://www.workplaceexpress.com.au/nl06_news/.

process and 93 prior to proceedings. It closed 77 applications after a conference or hearing but before a decision. Of the matters dealt with by Commission members, 15 per cent were dismissed for lack of jurisdiction or merit, 40 per cent were resolved and 44 per cent were closed without a formal result, which included withdrawals and where the applicant was satisfied with the response.

- 7.32. Commissioner Hampton said that women lodged just over half the cases and almost two thirds of applicants were between 30 and 59 years old, with the two biggest employment sectors clerical and health & welfare services. Most complaints related to a manager rather than to another worker. Commissioner Hampton stressed that the demographic and results statistics used in his paper were unaudited, preliminary figures and should be taken to be indicative

Section 8 Public Sector Workplace Relations

- 8.1. The Commission asks how should workplace relations arrangements in state and public services (and any relevant state-owned enterprises) be regulated? In particular, to what extent and why should workplace relations provisions vary with the public or private status of an enterprise?²⁰¹
- 8.2. It is noted that, as public sector arrangements vary across the states, the Commission's question regarding coverage of the public sector may have more relevance to those jurisdictions that have not referred powers to the Commonwealth relating to their public sectors.

The Victorian Government as a public sector employer

- 8.3. The Victorian public sector is a significant employer, with around 260 000 employees covered by approximately 160 enterprise agreements.
- 8.4. The Victorian public sector provides public services such as health, education and law and order; regulates areas such as the environment, essential services, planning and building; and administers programs and contracts for service delivery by not-for-profit organisations, private firms and local government. It builds and maintains infrastructure (both physical and social), manages state finances and resources, supports ministers to develop and implement policies and legislation, and facilitates relationships with service providers and investors in the not-for-profit and private sectors.
- 8.5. As a public sector employer, the Victorian Government recognises there can be tensions between the Government's role providing input to the policy underpinning the national workplace relations framework, and its other roles and objectives. However, the Victorian Government is committed to working with employees and unions. The Victorian Government will provide value for money to Victorians in a fiscally sustainable way while ensuring fair and consistent outcomes for public sector employees.

Victorian referral arrangements under the Fair Work Act

- 8.6. The Victorian Government continues to support a single, unitary national system of industrial relations which is fair and balanced for all Victorian workers, employers and unions and which is developed through cooperative and rational negotiations between the various stakeholders.
- 8.7. Victoria's view is that, in general, other than where constitutional and sovereignty issues apply, there is merit in a consistent application of Federal workplace relations provisions across the public and private sector.

²⁰² *United Firefighters' Union of Australia v Country Fire Authority* [2015] FCAFC 1 (18 January 2015)

- 8.8. The Commission has noted that the key features of the FW Act apply to most private sector employees, but public sector employees are generally in a different situation, with coverage varying in different jurisdictions and some continuing uncertainty, for example as a result of the recent Federal Court *UFU v CFA* decision.²⁰²
- 8.9. Victoria initially referred the majority of its industrial relations powers to the Commonwealth in 1996. Since then, Victorian employers and employees have had their employment arrangements regulated in the main by Commonwealth laws and industrial tribunals.
- 8.10. The operation of the Fair Work Act in Victoria is supported by the Referral Act, which extends its application to the majority of the Victorian public sector. The High Court of Australia decisions in *Melbourne Corporation, Victoria v the Commonwealth, and Re: AEU*²⁰³ expressed an implied constitutional limitation based on the principle that the Commonwealth could not make laws that would impair the states' capacity to function as governments. Similarly, the Referral Act excludes certain matters from Victoria's referral of industrial powers to the Commonwealth, including matters relating to the number, identity and appointment, and redundancy of public sector employees with the objective of ensuring that the State can function without impairment from Commonwealth laws.
- 8.11. The Victorian Government has proposed amending the Referral Act to provide the FWC with jurisdiction to approve agreements containing matters that are otherwise excluded from the referral of powers. This proposal is currently being developed and will take into account the recent Federal Court decision in *UFU v CFA* noted above.
- 8.12. The Public Sector Workplace Relations Policies 2012 referred to by the Productivity Commission in Issues Paper 5, reflect the former Victorian Government's expectations for industrial relations in the public sector. The Victorian Government is in the process of reviewing its public sector industrial relations policies, including the internal governance arrangements for the approval of public sector enterprise agreements, with the objective of ensuring those policies support timely processes, fair and consistent outcomes for public sector employees that promote job security and encourage excellence in service delivery, and provide an appropriate level of government oversight.

²⁰² *United Firefighters' Union of Australia v Country Fire Authority* [2015] FCAFC 1 (18 January 2015)

²⁰³ *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, *Victoria v Commonwealth* (1971) 122 CLR 353, *Re Australian Education Union* (1995) 184 CLR 188.

Section 9 Long Service Leave

- 9.1. The Commission asks what are the costs with existing differences in long service leave (**LSL**) arrangements across jurisdictions? Do these costs justify the adoption of a uniform national standard?
- 9.2. The Victorian Government supports the creation of a uniform national minimum LSL standard, provided there is no diminution of standards for Victorian workers. LSL is a longstanding and valuable entitlement of Victorian workers and a fair national standard could assist in clarifying LSL entitlements, whilst reducing complexity and cost for employers. The Victorian Government is committed to reviewing its own Long Service Leave Act to improve the operation.
- 9.3. The Commission notes that LSL is primarily regulated at a state level, meaning that there are a number of schemes operating in parallel. The Commission further notes that there have been a number of attempts at harmonisation, which have not proved successful.
- 9.4. It is noted that formulating a new national standard is a challenging exercise, because the differences in LSL entitlements across jurisdictions mean that a new standard could increase costs for business in some jurisdictions or lower existing employee entitlements in others.
- 9.5. Pending the development of a national LSL standard (**LSL NES**), the Fair Work Act establishes an interim LSL NES, which generally preserves pre-existing award and agreement-based long service leave entitlements (that is, the status quo prior to 1 January 2010).
- 9.6. The Victorian Government submits that there are many practical difficulties with the interim standard.
- 9.7. Firstly, the interim LSL NES can be very complex for employers and employees to apply because it may require them to look at the interaction between the Fair Work Act, old award entitlements and State or Territory LSL laws.²⁰⁴ Secondly, the interim LSL NES appears to lock-in any old award-derived entitlements, with any mechanism for these eventually to be phased-out or overridden through enterprise bargaining. Thirdly, the rules largely lock-in the differences in LSL entitlements under State and Territory LSL laws, without any mechanism for State and Territory laws to be overridden through enterprise bargaining. In addition, the interim LSL NES provides only very limited means for employers operating businesses across jurisdictions to introduce uniform LSL arrangements for their employees. Further, the interim LSL NES can lead to confusion as to whether the FWO or a State body is the appropriate

²⁰⁴ See for example, 2012 Fair Work Act Review p.101 (note 2) (The Panel noted that concerns centred around determining the entitlements of employees, given the various instruments and legislation from which the entitlement may be derived.).

enforcement agency, depending on whether the entitlements arise under Commonwealth or State or Territory laws.

- 9.8. The 2012 Fair Work Act Review report noted broad support for a national standard in submissions and discussions during the Review and recommended that the Commonwealth expedite negotiations for a long service leave NES with a view to introducing it by 1 January 2015.²⁰⁵ However, inter-jurisdictional negotiations have stalled for a considerable period. While the Commonwealth Coalition Policy to Improve the Fair Work Laws expresses support for this recommendation,²⁰⁶ the Commonwealth has not given any indication yet as to when it intends to progress this work.
- 9.9. It is considered that the Commonwealth Government needs to drive the development of the LSL NES, in consultation with state and territory governments, as a matter of priority, given the difficulty inherent in maintaining the interim arrangements.

²⁰⁵ 2012 Fair Work Act Review p.101-102 (note 2).

²⁰⁶ The Coalition's Policy to Improve the Fair Work Laws, May 2013, p.36.

Appendices

Table 1: Australian average annual labour productivity growth by industry (per cent)

Cycle	Accom. and food	Retail	Health and social	Arts and rec.	Manuf.	Transp. and postal	All
1998-99 to 2003-04	1.5	2.9	2.2	2.1	2.5	2.7	1.8
2003-04 to 2007-08	1.6	1.7	0.9	-1.7	1.0	2.0	1.0
2007-08 to 2013-14 [^]	-0.1	3.2	0.5	2.4	1.2	1.2	1.6

Source: ABS, *Australian System of National Accounts, 2013-14*, Cat. No. 5204.0, Table 15, GVA per hour worked.
[^]Incomplete productivity cycle.

Table 2: Australian average annual multifactor productivity growth by industry (per cent)

Cycle	Accom. and food	Retail	Health and social	Arts and rec.	Manuf.	Transp. and postal	All
1993-94 to 1998-99	2.1	2.3	na	-1.7	0.9	2.3	2.6
1998-99 to 2003-04	1.0	2.0	na	0.9	1.0	1.7	1.0
2003-04 to 2007-08	0.6	0.4	na	-1.6	-1.2	0.9	-0.4
2007-08 to 2013-14 ^{**}	-0.2	2.2	na	1.1	0.0	-0.4	0.0

Source: ABS, *Estimates of Industry Multifactor Productivity 2013-14*, Cat. No. 5260.0.55.001 Table 1.

Note: MFP data is only available for the market sector of the economy. As such, MFP data is not available for the health care and social assistance industry. All industries series are based on selected industry data due to incomplete data for some industries. ^{**}Incomplete productivity cycle.

Table 3: Retail and hospitality employees' earnings: ordinary hours, overtime/evening work, Saturday and Sunday penalty rates

Day	Retail employee (Level 1)		Food and beverage employee (Level 1)	
	Roster/rate	Earnings	Roster/rate	Earnings
Wednesday	7.6 hours x \$18.52	\$140.75	7.6 hours x \$17.35	\$131.86
Thursday	(7.6 hours x \$18.52) + (3 hours x \$27.79)	\$224.12	(7.6 hours x \$17.35) + (3 hours x \$19.32)	\$189.82
Friday	7.6 hours x \$18.52	\$140.75	7.6 hours x \$17.35	\$131.86
Saturday	7.6 hours x \$23.15	\$175.94	7.6 hours x \$21.69	\$164.84
Sunday	7.6 hours x \$37.05	\$281.58	7.6 hours x \$26.03	\$197.83
Total gross weekly earnings:		\$963.14		\$816.21

Table 4: Retail and hospitality employees' earnings: ordinary hours, overtime/evening work, no Saturday and Sunday penalty rates

Day	Retail employee (Level 1)		Food and beverage employee (Level 1)	
	Roster/rate	Earnings	Roster/rate	Earnings
Wednesday	7.6 hours x \$18.52	\$140.75	7.6 hours x \$17.35	\$131.86
Thursday	(7.6 hours x \$18.52) + (3 hours x \$27.79)	\$224.12	(7.6 hours x \$17.35) + (3 x \$19.32)	\$189.82
Friday	7.6 hours x \$18.52	\$140.75	7.6 hours x \$17.35	\$131.86
Saturday	7.6 hours x \$18.52	\$140.75	7.6 hours x \$17.35	\$131.86
Sunday	7.6 hours x \$18.52	\$140.75	7.6 hours x \$17.35	\$131.86
Total gross weekly earnings:		\$787.12		\$717.26

Source: FWO (2014) *Pay Guide for the General Retail Industry Award 2010*, July 2014; FWO (2014) *Pay Guide for the Restaurant Industry Award 2010*, July 2014.