

8 September 2011



Mr Gary Banks
Chairman
Productivity Commission
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Dear Mr Banks

**Re: Draft Report – Economic Structure and Performance of the
Australian Retail Industry**

As Victoria's largest and most influential employer organisation, the Victorian Employers' Chamber of Commerce and Industry (VECCI) welcomes the opportunity to provide a submission on the Productivity Commission's Draft Report – Economic Structure and Performance of the Australian Retail Industry.

VECCI commends the Federal Government for directing the Productivity Commission to undertake this inquiry.

This submission responds to those aspects of the Draft Report pertaining to workplace relations regulation.

Background

VECCI is a member of Australian Chamber of Commerce and Industry (ACCI) and, as such, supports ACCI's response to the Draft Report.

VECCI's membership comprises a significant number of employers in the retail sector, most of which operate small and medium-sized enterprises.

Accordingly, VECCI is well placed to advise on the impact of the regulatory context in which the retail industry operates and makes this submission on behalf of our members in this important sector of the economy.

**Chapter Ten of the Draft Report – Workplace Regulation and its
Significance for the Retail Industry**

Across VECCI's membership, the majority of our retail members are small to medium-sized enterprises. It is this segment of the market that is typically award reliant. Accordingly, the Productivity Commission is correct to observe this award reliance, but does not go far enough in evidencing the complexities or identifying the appropriate sources of the issues. At page 285 of the Draft Report, this theme of award reliance is (as elsewhere in the Report) summarised in the following terms:

The industry remains relatively award reliant and many employers and their employees appear not to have taken full advantage of opportunities to examine how workplace practices might be improved. It is critical that employers, employees and unions work constructively to implement productivity enhancing workplace arrangements, including those focused on operational and trading hours flexibility and improved customer service.

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While the Productivity Commission places the responsibility for the resolution of the consequences and effect of this award reliance upon immediate industry stakeholders, the Draft Report ellipses two separate concepts and the operation of two different aspects of the regulatory framework. Namely; the available terms of modern awards and the framework of the *Fair Work Act 2009*.

In our view, greater recognition of the complexity of award reliance on the one hand, and the capacity of business to adopt and implement workplace practices/arrangements on the other should be included in the Final Report with antecedent resolutions to these discrete regulatory challenges.

VECCI has identified that award reliance is a regulatory challenge for all businesses. This is something that highlights the limitations of the Fair Work reform and is of particular relevance to the retail industry. The retail industry works non-standard hours, is subject to a complex of regulatory frameworks, and is subject to macro-economic and institutional influences.

Award-reliant employers are impacted by the modern award, not only in respect of workplace practices/arrangements – and employee entitlements – but also in respect of wage pressures. As ACCI research has demonstrated, award reliant employers are also much more vulnerable to the effect of minimum wage review outcomes, often due to economic circumstances from which award reliance may arise in the first instance.

Our observation is that improvements in workplace practices are much more complex than what is suggested by the construction of ‘award reliance’ and ‘workplace arrangements’ on page 285 of the Draft Report.

In respect of the capacity of business – particularly SMEs – to adapt to and ‘take advantage’ of opportunities to leverage the regulatory framework to achieve practical improvements in productivity, the focus must turn to the nature and construction of the regulatory framework.

While the Fair Work framework is predicated on enterprise bargaining, this framework does not require that a nexus be established between wage increases and productivity improvements in the workplace.

Furthermore, ‘flexibility’ terms in modern awards have not been something – despite their perhaps misleading descriptor – which have facilitated much more than the construction of contractual terms allowing for the creation of remuneration arrangements. Some industrial parties have sought flexibility terms in enterprise agreements that narrows their application and effect. More often than not, the outcomes of flexibility terms in enterprise agreements and modern awards have led to reduced flexibility for employers.

It is a credit to the Productivity Commission that the Draft Report acknowledges the “constraints on the negotiation and operation of individual flexibility arrangements have meant that they do not, in practice, offer the sort of flexibility promised”.

As such, the Productivity Commission must approach this issue with a full comprehension of the features of the existing statutory framework that are, in fact, constraining rather than enabling of the formation of workplace practices or workplace arrangements within the retail industry.

The narrative proffered by both the Federal Government and the ACTU that the inflexibilities of the Fair Work Act reflect a lack of imagination on behalf of employers is predicated on a series of flawed assumptions about the material effect of the Fair Work reforms on business. These assumptions must be corrected – the material effect of the Fair Work Act must be more closely examined. The Productivity Commission's recommendation 10.2 in respect of this research base and its relevance for future reviews of the Fair Work Act and modern awards is further explored below.

It is VECCI's contention that the capacity of employers to reach meaningfully flexible workplace arrangements that drive productivity-enhancing workplace practices should be addressed by further recommendations in the Final Report. They should attend, firstly, to the limitations of flexibility terms in modern awards, and secondly, to the construction of the statutory framework. The linkage between productivity and flexibility is all-important, and is deserving of closer scrutiny and analysis.

The *General Retail Industry Award 2010*

The implementation of modern awards has proven, for a number of reasons, to be contentious for many employers. This has as much a bearing on the survival of enterprises in the retail industry as it does on other industries.

The real impact of the implementation of the modern *General Retail Industry Award 2010* was demonstrated in a much-reported story in February 2010 – that of the fate of full-time school students engaged by Terang Co-Operative on a casual, after-school basis. The minimum engagement of three hours prescribed by the award proved to be a significant hurdle for the employer. The Terang Co-Operative could no longer continue to engage the employees without contravening the modern award.

There are many more stories like this, particularly in Victoria, where the minimum engagement of three hours in the modern *General Retail Industry Award 2010* expanded on a minimum engagement of two hours prescribed by the pre-modern award.

In the absence of statutory mechanisms enabling an employer and employee to vary award conditions – and the reintroduction of minimum engagement provisions for part-time employees – minimum engagement provisions and penalty rates are two of the key ways in which the character of the regulatory framework introduced by the *Fair Work Act 2009* commonly impact on employers.

This experience clearly demonstrates how the movement from one regulatory framework to another has proven to be proscriptive for many employers, with often deleterious consequences for employees. We consider this to be a perverse policy outcome.

The impact of the implementation of modern awards on award-reliant employers has been closely observed by VECCI. The absence of flexibility for employers to engage certain kinds of employees in particular ways – for example, the traditional labour arrangement of after-school shifts for school students on which the retail industry has relied for some time – has increased pressures on small and medium-sized employers to work longer hours in their own businesses. Taken together, award reliance, accompanied by limitations in the regulatory framework, constitute constraints on the capacity of business to *do* business. Many employers are working in, rather than on, their business. This is nowhere more true than in the retail industry.

Despite Government commitments to the contrary, many employers – and, indeed, employees – are worse off as a consequence of the introduction of modern awards. The mechanisms to relieve this – transitional or phasing arrangements in modern awards applicable to the sector – have themselves proven to be a kind of regulatory burden, and have made the task of award interpretation and application all the more complex.

Across VECCI's membership, many employers have taken the view that the transitional arrangements represent a kind of opportunity cost – and, accordingly, have not taken them up.

This is not about a failure of imagination or strategy on the part of employers, but reflects the lack of resources, expertise and knowledge facing many employers as they confront the regulatory framework. The phasing provisions are, like the modern awards themselves, ripe with technical complexity and interpretative uncertainty.

Thus, while minimum engagement is itself a reasonable minimum standard, it must be accompanied by more meaningful capacity within the regulatory framework for greater flexibility. This is not achieved by the model flexibility term that must be included in all modern awards. The limitations and content of these flexibility terms is acknowledged in part 10.6 of Chapter Ten of the Draft Report.

For these reasons, VECCI commends the findings of the Productivity Commission regarding the “particular constraints limiting the effectiveness of IFAs” on page 313 of the Draft Report. The constraints identified by the Draft Report mirror the experience of VECCI members. As such, VECCI considers that the model flexibility terms in modern awards are a key component of the regulatory framework and must be attended to in the reviews undertaken in 2012; this is addressed below.

It is also appropriate at this point to address VECCI's own response to the lack of flexibility experienced by our members as a consequence of the implementation of modern awards.

It is our view that minimum engagement terms in key industries such as the retail industry must be accompanied by an individual facilitative clause. Individual facilitative clauses have been a characteristic of industrial awards in Australia for some time, although this is not addressed by the Draft Report's characterisation of the history of industrial regulation proffered in Chapter Ten.

VECCI is currently awaiting the decision of Fair Work Australia regarding its application to vary the *Clerks – Private Sector – Award 2010*.

Another relevant matter is the application to vary clause 13.4 of the *General Retail Industry Award 2010* by the National Retailers' Association (NRA). While the decision has been appealed by the SDA and has been stayed, it has the potential to resolve a number of issues highlighted by VECCI's own application and by other, similar applications to vary the modern award.

The draft variation proposed to clause 13.4 is as follows:

"provided that the minimum engagement period for an employee will be one hour and thirty minutes if all of the following circumstances apply:

- a) the employee is a full time secondary school student; and
- b) the employee is engaged to work between the hours of 3.00 pm and 6.30 pm on a day which they are required to attend school; and
- c) the employee agrees to work, and a parent or guardian of the employee agrees to allow the employee to work, a shorter period than 3 hours; and
- d) employment for a longer period than the period of the engagement is not possible either because of the operational requirements of the employer or the unavailability of the employee."

Should the appeal be overturned, we consider that this variation to the award would go some way to addressing the kinds of issues arising from the inflexibilities of the modern award, and would benefit both employers and employees.

The Post-Implementation Review of the *Fair Work Act 2009*

VECCI provides conditional support for draft recommendation 10.2, which states:

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

This recommendation is a complex proposition which takes into account a number of factors. As such, it is at risk of being too general in intent and effect. A further identification of the work to be undertaken within the review processes would address many of the concerns of the retail industry.

Accordingly, VECCI submits that this recommendation needs to be expanded to include modern award model flexibility terms and the prescription of hours of work and penalty rates within the modern *General Retail Industry* award as part of the 'consideration of options' undertaken by the Australian Government and Fair Work Australia within the review processes outlined for 2012. At this time, Fair Work Australia has not determined the parameters of the review and more specific guidance is needed.

Conclusion

In our view, the challenges facing the retail industry are evidence of the limitations of the statutory framework. They are shared by many other industries and warrant a substantive reform strategy that is leveraged to achieve improvements in both flexibility and productivity at the workplace level.

Such a strategy must extend beyond the short-term electoral cycle and must be informed by consultation with the full range of industry stakeholders.

We would welcome the opportunity to discuss our submission with you in greater detail, if required.

Yours sincerely

Denis James
Acting Chief Executive