It gives me great pleasure to speak today at the Financial Review’s conference on the Future of Retail. The retail industry, like the newspaper business, has been at the forefront of changes associated with the rise of the internet and the online world.

The retail industry is a significant part of the Australian economy and a major source of employment.

Around ten per cent of all employees are employed in the industry.

Other key features of the Retail Industry include:

- 30 years ago, most people employed in Retail were employed on a full-time basis (around two-thirds in May 1986), in the most recent data (May 2016) this has fallen to half. Most employed persons are employed on a full-time basis (68 per cent across the entire workforce).

- Almost 40 per cent (38.7 per cent in May 2016) of employees in Retail are employed on a casual basis, compared with one in five of all employees.

- Over the last 10 years the age profile of retail workers has changed. The proportion of teenagers has fallen from 21 per cent in May 2006 to 15 per cent in May 2016. The proportion under 25 years has fallen from 39 per cent to 32 per cent.

- Employing businesses in the retail industry tend to be small, employing less than 20 employees. At June 2015 there were over 130,000 retail businesses, around 60 per cent had 1 to 4 employees. A further 32 per cent had 5 to 19 employees. Fewer than one half of one per cent employed 200 or more employees.

A number of other significant changes have occurred in the retail trade industry in recent years. Many in the audience will be very familiar with these changes and I need not canvass them in great detail.

But it is worth just reminding ourselves of some these.

First is the arrival of new entrants into the market. International brands such as Aldi, Costco, H & M, Uniqlo are all establishing footprints in Australia. This
brings with it an enhanced level of competition and a new set of challenges for existing players.

Second, the retail experience has changed. It is difficult to believe that the internet was a small disconnected experience 30 years ago and that even 15 years ago online shopping was seen as something very radical. Now it is very much part of the retail experience. Many consumers are both digital and traditional shoppers. They access the internet for some goods and attend personally for others. This creates a different retail experience – consumers have access to goods from anywhere around the world and the shopping experience can vary depending upon a customer’s preferences and purchases between a physical and digital experience.

Third, the nature of retail employment has already experienced some changes. We might assume that there may be even greater changes ahead. For example, stores such as Amazon have a much higher number of pickers and packers – traditional storeperson roles – than retail workers. Other stores may find that the retail worker they are looking for is less a shopkeeper in the traditional sense and more of an IT expert.

There have also been changes in the industrial regulation of the retail sector.

Prior to the award modernisation process, wages and conditions were regulated through a large number of state and Commonwealth industrial instruments. It was generally accepted that there were too many awards which made the system more complex than it needed to be.

The award modernisation process began in 2008 and led to the creation of modern awards. This was a significant undertaking. It involved consolidating 1560 awards and 1839 single enterprise awards into 122 modern awards.

For the retail industry, the transition to the modern award system meant that 20 federal awards, 69 notional agreements preserving state awards (NAPSA’s) and 29 single enterprise awards were consolidated into 3 modern awards. This process led to a simpler award safety net for retail businesses.

The creation of the 122 modern awards marked a beginning as well as an end point. It was the conclusion of the award modernisation process. But, under s.156 of the Fair Work Act, the Commission is required to conduct a 4 yearly review of modern awards.

The modern awards objective – in s.134 of the *Fair Work Act* 1996 (Cth) is at the heart of the Review. It provides that the Commission must ensure that
modern awards, together with the NES, ‘provide a fair and relevant minimum safety net of terms and conditions’.

A ‘relevant’ modern award is one which is suited to contemporary circumstances.

In giving effect to the modern awards objective, the Commission must take into account various matters. (s.134(1)(a)-(h)), including:

‘the need to ensure a simple, easy to understand, stable and sustainable modern award system’.

Making awards simpler and easier to understand is particularly important for the many employees and employers who are not members of a union or employer organisation.

Modern awards need to be easily understood by those who are covered by them. As a Full Bench observed in an Award Review decision last year:

‘An award should be able to be read by an employer or employee without needing a history lesson or paid advocate to interpret how it is to apply in the workplace.’1

The 4 yearly review commenced in January 2014. It has been conducted in three stages.

An initial stage dealt with a range of jurisdictional issues essentially about the nature of the Review.

In the second stage, awards were placed into one of four groups with each group being reviewed sequentially. At the request of the industrial parties the retail award was placed into group 4.

The third stage involves various common issues claims that affect all or a number of awards.

These claims have been grouped together and dealt with as common issue, rather than being argued on an award-by-award basis to ensure a consistent outcome across awards and reduce duplication of effort by both the parties and the Commission.

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A number of key decisions have been made relating to common issues. I intend to refer to just one of those matters, concerning annual leave provisions in modern awards.

In a number of decisions over the course of 2015 and 2016, a Full Bench has inserted a number of model terms into most or all modern awards. The model terms deal with:

- excessive annual leave balances – an employer can direct an employee to take annual leave in certain circumstances;
- cashing out of annual leave – facilitating agreements between an employee and employer to cash out a portion of accrued annual leave provided certain conditions are met;
- granting leave in advance – facilitating agreements between an employer and employee so that the employee can take annual leave prior to the leave being accrued. The model clause also provides a mechanism for employers to recover payment for leave granted in advance; and
- EFT and paid annual leave – 51 modern awards provide that employees are to be paid for a period of annual leave before the leave commences. These 51 awards have been varied so that employees paid by EFT may be paid in accordance with the usual pay cycle.

As with award modernisation, the 4 Yearly Review has been a considerable exercise. To give some idea of the task involved, to date the Commission has received more than 8000 submissions, issued more than 70 statements and made more than 25 separate decisions.

Given the importance of small business in the retail sector, I want to say something about the Review and small business.

Since the commencement of the Review, we have taken a number of steps to reduce the complexity of modern awards including commissioning qualitative research with small business operators to review the usability of modern awards. An ‘Exemplar Award’ was created to address some of the structural issues identified in modern awards. This has become the template structure in the Award stage of the Review.

The Commissions is also undertaking some plain language redrafting of modern awards as part of the Review.
A Full Bench has been constituted to oversee this project and webpage has been established on the Commission’s website to consolidate all the materials related to the project.

The Pharmacy Industry Award has been selected as the pilot award for the plain language project.

Mr Eamonn Moran PSM QC has been engaged as a plain language expert to prepare the first exposure draft. Mr Moran has also trained Commission staff to ensure that further awards can be drafted in plain language efficiently.

There are two broad components to the plain language pilot:

- the plain language redrafting of common award provisions, including:
  - award flexibility
  - consultation
  - dispute resolution
  - National Training Wage and Supported Wage System

- the plain language redrafting of all the provisions of particular awards

The first element applies across the award system and will make these common clauses in all modern awards easier to understand.

The second part of the project – the plain language review of all of the provisions in particular awards – is confined to a limited number of awards, starting with the Pharmacy Award. The actual number will depend on the resources available.

In addition to the Pharmacy Award, four other awards have been selected at this stage.

*Clerks–Private Sector Award 2010*
*General Retail Industry Award 2010*
*Hospitality Industry Award 2010*
*Restaurant Industry Award 2010*

These awards have been selected based on the level of award reliance in the industries they cover. Particular weight was given to award reliance amongst small businesses.

Some parties have resisted the process to simplify awards and initial reactions to the announcement of the plain language pilot were mixed.
However, the Commission is committed to the project and will work closely with the parties to take their concerns into account during the process.

As many of you would be aware, the Commission has been considering applications seeking to vary penalty rates in the retail award, amongst other awards.

The Penalty rates case relates to six modern awards:

- General Retail Industry Award;
- Fast Food Industry Award;
- Pharmacy Industry Award;
- Restaurant Industry Award;
- Hospitality Industry (General) Award; and
- Registered and Licensed Clubs Award

The Penalty rates case has, on its own, been a considerable undertaking:

- Over 70 interested parties
- Over 6000 submissions
- Over 40 days of hearings

A further, and hopefully final, hearing was held yesterday in relation to these applications.

Obviously given that the matter is before the Commission I am not in a position to discuss this matter. I will say that we will hand down the decision as soon as we can.

I want to mention a matter related to penalty rates.

In 2013, a Full Bench considered penalty rates in the Retail Award, as part of the Transitional Review. The Full Bench said:

‘...our preliminary view is that the establishment of loaded rates within these awards would have the capacity to reduce the complexity of their application, particularly for small businesses.

As a means of addressing these issues we consider that there is merit in the parties discussing the concept of incorporating loaded rates within the General Retail and Fast Food awards.’

An example of the use of a ‘loaded rate’ is in the Hospitality Industry (General) Award 2010.

Clause 27.1 of that award provides that an employer and employee can enter into an ‘alternative’ arrangement to the payment of the weekly minimum wages prescribed in the award. In essence, and subject to some important safeguards, they can enter into an agreement to pay the weekly rate + 25 % in lieu of the entitlement to penalty rates and overtime.

I am not suggesting that this provision is necessarily appropriate for the Retail industry. But it should be possible to develop a schedule to the award which provides that employees are paid a higher, ‘loaded’, hourly rate of pay – in lieu of an entitlement to penalty rates. There would need to be appropriate safeguards and interested parties would be given an opportunity to comment on any proposal.

Such a schedule may be of interest to small businesses in the sector. Small businesses face a number of practical impediments to entering into enterprise agreements.

There is a positive correlation between business size and collective agreement making. An increase in business size is associated with an increase in the proportion of employees on collective agreements.

A loaded rates schedule would allow small businesses to access additional flexibility, without the need to enter into an enterprise agreement.

Arising out of the earlier Transitional Review decision a series of conferences were held between the industrial organisations – the unions and the various retail employer associations. But no agreement was reached at that time.

The initiative was, to some extent, overtaken by the Review and the current penalty rates case.

But, this is an issue the Commission intends to revisit – after the Penalty Rates decision.

Finally, it would be remiss of me not to make some comments about the Commission itself. We also face challenges from changes in our operating environment.

The Commission has seen a significant shift in the nature of its work. The composition of our work has fundamentally changed – from collective to individual dispute resolution.
A decade ago, about two thirds of applications were collective in nature – disputes/agreements/bargaining – and one third were about individual dispute resolution, e.g.: unfair dismissals. But the level of industrial disputation has fallen over time and now, generally speaking, it is associated with bargaining following the expiry of the term of a collective agreement.

Now, two thirds of matters are about individuals.

Collective dispute resolution will always be a core Commission function – because of the impact that such disputes may have on the parties and the community generally. But we also recognise that individual dispute resolution is now a substantial part of our work and collective dispute resolution is declining in relative terms. The parties to individual and collective disputes are different.

The parties to collective disputes - unions, employers and employer organisations - are ‘repeat players’. They are familiar with the legislative environment and the Commission’s procedures. The parties to individual disputes are quite different and are generally ‘one shotters’. They are unfamiliar with the Commission’s procedures and the relevant legislative provisions and are often self represented. We have an obligation to explain these matters to self represented parties.

All institutions must respond to change. Institutions which do not innovate and adapt to meet the challenge of change, die.

In response to these challenges, we have embarked on a significant change program, called Future Directions.

The Future Directions initiatives were organised around four key themes of:

- Fairness and access to justice;
- Accountability;
- Innovation and timeliness; and
- Productivity and engagement.

Some 25 initiatives were implemented by the end of 2014. An additional 30 initiatives were commenced in 2014 and will be implemented by the end of this year.

These initiatives include:

- the publication of the Commission’s benchbooks to enable parties to understand the decision-making of the Commission on various issues;
• increased use and access to technology (videoconferencing; audio files; SMS alerts);

• development of pro bono advice schemes to assist unrepresented parties navigate the workplace relations jurisdiction;

• introduction of timeliness benchmarks in relation to agreement approvals and reserved decisions; and

• pilot programs: permission to appeal; enterprise agreement triage and general protections.

I want to briefly mention the agreement triage pilot.

The Commission commenced the pilot in October 2014.

After an independent review of the pilot, the agreement triage process has been progressively extended to all agreement approval applications.

Under the triage process a team of administrative staff analyse agreement approval applications under the supervision of Commission Members.

The team’s analysis assists Members who continue to make decisions on whether or not to approve agreements.

The new arrangements have centralised the process – one Member per sector – to improve consistency.

The triage process has improved the time taken to approve agreements. The average number of days taken to finalise applications dropped from 21 last year to 18 in the year ending 30 June 2016.

The Commission finalised 99.2 per cent of all agreement applications within 12 weeks, 95 per cent within eight weeks and 56.8 per cent within three weeks – all improvements on 2014–15.

The Commission has also published a range of materials to assist parties in agreement making:

• Enterprise Agreements Benchbook
  • Published March 2015
  • Last updated July 2016
The Commission will continue to develop and publish information to assist parties with the agreement making process.

By the end of 2016, we intend to publish:

- A checklist of legislative requirements currently used internally as part of the assessment process
- A webpage containing all agreements listed for approval in one place
- An Agreement Subscription Service
- A date calculator ensuring compliance with pre-approval requirements

The Commission will develop further material in 2017, including continuing to refine information on the Agreement making webpage to better assist parties involved in bargaining.

All of the initiatives we are taking are directed at creating ‘public value’. I want to conclude by saying something about the concept of ‘public value’.

In the private sector the aim of management is, broadly speaking, to improve shareholder value. In simple terms it is about producing products or services that can be sold to generate revenue. Success can be measure in terms of profitability, market share and share price.

It is more difficult to define and measure success in the public sector.

Harvard Professor Mark Moore defines the aim of managers in the public sector in terms of creating ‘public value’. Program evaluation and cost effectiveness analysis can help define public value in terms of collectively defined objectives.

We are applying this conceptual framework to the Commission’s activities.

We can enhance the Commission’s ‘public value’ by providing an efficient dispute resolution service - a service which resolves disputes in a timely and
appropriate way, and minimises the costs incurred by the parties. That is why
we have taken a number of steps to improve our service delivery and reduce
transaction costs for parties. It is also about enhancing access to justice.

The information and assistance provided by the Commission to parties,
particularly self represented parties – employees and employers – is an
important part of providing affordable access to justice.

The implementation of the initiatives set out in our Future Directions change
program will be a major achievement. It is a testament to the hard work and
commitment of our staff, our Members and our stakeholders.

But the implementation of these initiatives marks a beginning rather than an
end.

We are intent on continuing to improve our performance across the range of
our statutory functions. We will continue to consult with industry participants
and the community to develop further initiatives to enhance the public value of
our organisation.

I look forward to your contribution to that process and to your support in
making a great national institution better.

Thank you.