Ai GROUP SUBMISSION

Senate Education and Employment References Committee

Inquiry into Penalty Rates

24 July 2017

About Australian Industry Group

The Australian Industry Group (Ai Group) is a peak industry association in Australia which along with its affiliates represents the interests of more than 60,000 businesses in an expanding range of sectors including: manufacturing, engineering, construction, automotive, food, transport, information technology, telecommunications, call centres, labour hire, printing, defence, mining equipment and supplies, airlines, health, community services and other industries. The businesses which we represent employ more than one million people. Ai Group members operate small, medium and large businesses across a range of industries. Ai Group is closely affiliated with many other employer groups and directly manages a number of those organisations.

Ai Group contact for this submission

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Introduction

This submission of the Australian Industry Group (**Ai Group**) is made to the Senate Education and Employment References Committee's *Inquiry into Penalty Rates* (**Inquiry**).

Our submission responds to the following terms of reference for the Inquiry:

a. Claims that many employees working for large employers receive lower penalty rates under their enterprise agreements on weekends and public holidays than those set by the relevant modern award, giving those employers a competitive advantage over smaller businesses that pay award rates;

b. The operation, application and effectiveness of the Better Off Overall Test (**BOOT**) for enterprise agreements made under the *Fair Work Act 2009* (**FW Act**);

c. The desirability of amending the FW Act to ensure that enterprise agreements do not contain terms that specify penalty rates which are lower than the respective modern award;

d. The provisions of the *Fair Work Amendment (Pay Protection) Bill 2017*.

In summary, this submission argues that:

- Claims that enterprise agreements give large employers a competitive advantage over smaller businesses are not correct.
- Claims that many enterprise agreements in the retail and fast food industries disadvantage the employees covered by these agreements are false.
- The BOOT under the FW Act is not working effectively. Section 193 of the Act needs to be amended to restore a workable approach.
- The FW Act must not be amended to prevent enterprise agreements containing lower penalty rates than those in the relevant modern award. To do so would remove important flexibility for employers and employees, disadvantage employers and employees, and undermine the BOOT.
- The *Penalty Rates Decision*[1] was made by the independent Fair Work Commission (**FWC**) on the evidence, and the Decision must not be disturbed.
- The result of the 1 July 2017 changes to awards is beyond doubt. Workers in all industries are better off.

[1] [2017] FWCFB 1001 and [2017] FWCFB 3001

False claims that enterprise agreements give large employers a competitive advantage over smaller businesses

The Terms of Reference for the Inquiry refer to:

> *"Claims that many employees working for large employers receive lower penalty rates under their enterprise agreements on weekends and public holidays than those set by the relevant modern award, giving those employers a competitive advantage over smaller businesses that pay award rates."*

These claims are false, as highlighted by the following facts:

- Any business – large or small – is able to seek to enter into an enterprise agreement with its employees, provided that the agreement passes the BOOT, is supported by the majority of its employees, and meets the other requirements of the FW Act.
- All enterprise agreements that have been approved by the FWC have been assessed by the FWC as passing the BOOT, were supported by the majority of employees, and met the other requirements of the FW Act.
- There is not a shred of evidence that the Shop, Distributive and Allied Employees' Association (**SDA**) has entered into enterprise agreements with large retailers and/or fast food businesses on terms that the union would not be prepared to offer to smaller employers.
- All enterprise agreements are published on the FWC's website. Small businesses can readily offer an agreement to their employees in exactly the same terms as any enterprise agreement that applies to a large retailer or fast food company.

In Ai Group's experience, for the most part small businesses are not interested in enterprise agreement-making. They prefer to have informal arrangements with their staff underpinned by the relevant award. It would be unfair and invalid to use the free choice made by most small businesses in this regard, to attack the different choices made by many large businesses who participate in formal enterprise agreement-making.

False claims that enterprise agreements in the retail and fast food industries disadvantage employees

Each enterprise agreement in the retail and fast food industries has been voted upon by the employees covered by the agreement and the majority of the employees covered by the agreement have voted in support of it (typically the vast majority of employees). Before the vote was taken, each employee received a notice about their rights, was given access to a copy of the proposed agreement, and had the terms of the agreement explained to them.

Before an enterprise agreement takes effect, it must be assessed by the independent FWC as having passed the BOOT. The test requires that the employees covered by an enterprise agreement are better off overall than they would be if the relevant award applied.

The FWC does not just rubber stamp agreements. It subjects agreements to a great deal of scrutiny to satisfy itself that all of the requirements of the Act are met. For example, the national enterprise agreement that applied to McDonalds Australia Limited and its franchisees was subjected to the most rigorous scrutiny by the FWC, initially in proceedings before Commissioner McKenna of the FWC and then by a Full Bench of the Commission. The agreement was held to meet all of the requirements of the FW Act. (See *McDonald's Australia Pty Ltd and Shop, Distributive and Allied Employees' Association*, [2010] FWAFB 4602.)

The idea that, despite all of the numerous protections in the FW Act, and scrutiny by the FWC, the employees covered by retail and fast food industry enterprise agreements are being disadvantaged would be laughable if it were not being repeated far too often, without challenge.

It is worthwhile to consider who is perpetuating this myth, and why.

One such group has declared itself to be the Retail and Fast Food Workers Union (**RAFFWU**). Despite its ambitious and creative declaration, it is, in fact, not a union at all. In Australia, a union is an organisation of employees registered under the *Fair Work (Registered Organisations) Act 2009*. In addition to unions, employer associations like Ai Group are registered under the Act.

Registration brings with it certain rights to represent employees and employers under Australia's workplace relations laws, but also onerous responsibilities and duties to members, backed up by very heavy penalties.

As a non-union, RAFFWU doesn't have the rights of a union, or the responsibilities. It calls itself a union in its media releases but, just like the myths that it perpetuates about the enterprise agreements reached between major companies and their employees, it perpetuates the myth that it is a union when it is not. RAFFWU's real agenda appears to being trying to attack the union that legitimately represents retail and fast food industry employees – the SDA – in order to grow its current small band of supporters.

RAFFWU is seeking to exploit a technical problem in the FW Act relating to the BOOT (see next section below) to unfairly attack some of Australia's largest businesses.

The major retailers and fast food companies are amongst Australia's largest employers and a large proportion of young people take their very first step in the labour market with them. Imagine how much worse the current youth unemployment problem in Australia would be without these businesses.

The operation, application and effectiveness of the BOOT

Enterprise agreement-making in the retail and fast food industries is rapidly grinding to a halt given the decision of a Full Bench of the FWC in *Hart v Coles* [2016] FWCFB 2887. In this decision, the FWC rejected a proposed Coles enterprise agreement on the basis of a very technical interpretation of the provisions of the FW Act relating to the BOOT. The FWC Full Bench decided that each and every employee under a proposed enterprise agreement must be better off overall.

The decision has caused a great deal of concern in the retail and fast food industries. A single disgruntled employee can now potentially frustrate the approval of an enterprise agreement that would apply to tens of thousands of employees, and which is supported by the vast majority of employees and their union representative/s. This is unworkable when the enterprise agreements that apply to major retailers and fast food companies typically apply to tens of thousands of employees who work a vast array of different shifts. The shifts worked by individual employees are heavily based on each employee's own work preferences due to their study, family and other commitments.

Any enterprise agreement that simplifies the rates and loadings payable across the working week will run the risk of disadvantaging a few employees who want to work an unusual pattern of hours, even if the vast majority of employees are much better off.

This is the reason why the Productivity Commission (**PC**), in its recent inquiry into Australia's workplace relations framework, recommended that the BOOT be applied to logical classes of employees and not every single employee. The PC recommended that the FWC consider the employees who are full-time, part-time and casual, and those at each classification level, to check that these classes of employees are not disadvantaged by a proposed enterprise agreement. (PC Recommendation 20.5).

Prior to the decision of the Full Bench in *Hart v Coles*, the FWC was routinely adopting a far more practical approach when applying the BOOT. However, now that this problematic decision has been made by an FWC Full Bench, individual Members of the Commission feel obligated to follow it. For this reason, amendments need to be made to the FW Act without delay to implement the PC's recommendation.

When the FW Act was being developed, concern was expressed by Ai Group and other employer representatives about the unworkability of a BOOT requirement that every employee be better off overall. To address the concerns of employer representatives, the following wording was inserted into the Explanatory Memorandum for the *Fair Work Bill 2008*: (emphasis added)

"Subdivision C – Better off overall test

Clause 193 – Passing the better off overall test

816. This clause provides when an enterprise agreement passes the better off overall test.

817. Subclause 193(1) provides that an agreement that is not a greenfields agreement passes the better off overall if FWA is satisfied, as at the test time, that each award covered employee and each prospective award covered employee would be better offer overall if they were employed under the agreement than under the relevant modern award.

818. Although the better off overall test requires FWA to be satisfied that each award covered employee and each prospective award covered employee will be better off overall, it is intended that FWA will generally be able to apply the better off overall test to classes of employees. In the context of the approval of enterprise agreements, the better off overall test does not require FWA to enquire into each employee's individual circumstances.

Illustrative example

Moss Hardware and Garden Supplies Pty Ltd makes an enterprise agreement to cover approximately 1800 employees working at its national chain of retail garden and hardware supplies outlets. All of these employees are 'award covered employees'. The seven classifications under the agreement broadly correlate to seven classifications under the relevant modern award. Because there will be many employees within each classification under the agreement and the agreement affects each employee within a classification in the same way, FWA could group employees together when assessing the employees against the better off overall test. It is intended that FWA could assess a hypothetical employee in each of the classifications under the agreement against the relevant classification under the modern award.

If FWA were satisfied that the agreement affected each employee within the classification in the same way, and that the agreement passed the better off overall test for the hypothetical employee within the classification, FWA could be satisfied that the agreement passed the better off overall test for each award covered employee and prospective award covered employee within that classification.

Despite the above wording in the Explanatory Memorandum, the Full Bench in *Hart v Coles* determined that the proposed Coles enterprise agreement failed the BOOT because each employee was not better off overall.

As things stand, there is little incentive for employers to maintain enterprise agreements in the retail and fast food industries because there is too much uncertainty about whether each and every employee will be better off overall under a proposed enterprise agreement, given the different work patterns of individual employees.

The specific amendment to the FW Act that Ai Group proposes is:

SECTION 193 PASSING THE BETTER OFF OVERALL TEST

When a non-greenfields agreement passes the better off overall test

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

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When a greenfields agreement passes the better off overall test

(3) A greenfields agreement passes the better off overall test under this section if the FWC is satisfied, as at the test time, that each relevant class of prospective award covered employee for the agreement would be better off overall if the agreement applied to the relevant class of employee than if the relevant modern award applied to the relevant class of employee.

FWC may assume employee better off overall in certain circumstances

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(7) For the purposes of determining whether an enterprise agreement passes the better off overall test, if a class of employees to which a particular employee belongs would be better off if the agreement applied to that class than if the relevant modern award applied to that class, the FWC is entitled to assume~~, in the absence of evidence to the contrary,~~ that the employee would be better off overall if the agreement applied to the employee.

*(8) For the purposes of section 193, a **class** means a classification, job level or type of employment.*

Enterprise agreements in the retail and fast food industries benefit workers and deliver much needed flexibilities and efficiencies to businesses. They also lead to better service levels to the community.

Given all of the problems outlined above, it would not be surprising if major retailers and fast food companies soon decided that enterprise agreement-making is just too unworkable to bother with and that it is far simpler to just apply the relevant award. There is currently a significant risk of this given the minefield that enterprise agreement making has become for employers, particularly employers in the retail and fast food industries. If this occurs, businesses, workers and the community will be disadvantaged.

Should the FW Act be amended to ensure that enterprise agreements do not contain penalty rates that are lower than the relevant modern award?

The answer to this question is obviously No.

It is correct that some enterprise agreements that apply to large retailers and fast food businesses contain lower weekend and/or public holiday penalty rates than award rates but all such agreements contain higher base rates of pay than those in the relevant award. There is nothing unusual or unfair about this. The BOOT under the FW Act (and the previous No Disadvantage Test under the *Industrial Relations Act 1988* and *Workplace Relations Act 1996*) requires that the terms of an enterprise agreement, when considered on **an overall basis**, must not disadvantage employees compared to the relevant award.

If award conditions cannot be simplified under an enterprise agreement for the mutual benefit of the employer and employees, what is the point of having an enterprise agreement?

Ai Group's views on the Greens' *Fair Work Amendment (Pay Protection) Bill 2017*

Ai Group's views on the Greens' *Fair Work Amendment (Pay Protection) Bill 2017* are set out in our 8 May 2017 submission to the inquiry conducted into the provisions of this Bill by the Senate Education and Employment Legislation Committee. As explained in our submission, the provisions of the Bill are problematic and should not be passed by Parliament.

Ai Group's views on Labor's *Fair Work Amendment (Protecting Take-home Pay) Bill 2017*

Labor's *Fair Work Amendment (Protecting Take-home Pay) Bill 2017* would overturn the FWC's *Penalty Rates Decision* and remove much of the independence of the independent umpire. The legislative amendments would operate retrospectively to 22 February 2017 (i.e. the day before the FWC handed down its *Penalty Rates Decision*).

Under Labor's Bill, the FWC would not be able to vary any award in any manner that is likely to reduce the take home pay of any employee, regardless of the circumstances or merits of the award variation.

The Bill needs to be rejected by Parliament. What is the point in having an independent umpire if the umpire is only able to rule in favour of one of the parties? The Bill makes a mockery of the notion of having an independent tribunal to maintain awards.

The arguments in support of Parliament having a greater role in setting penalty rates do not stand the most cursory of scrutiny. Too often decisions of political parties are not evidence-based but, rather, driven by political factors.

The merits of the FWC's *Penalty Rates Decision*

Ai Group Workplace Lawyers represented the fast food industry in the FWC's *Penalty Rates Case*.

A lot of misinformation is circulating about the FWC's *Penalty Rates Decis*ion and it is important that the facts are understood.

First, penalty rates are not being abolished. The Sunday weekend penalty rates for Level 1 fast food workers will be aligned with the Saturday rate of 125% for permanent employees and 150% for casuals. This is a relatively modest reduction from 150% and 175% respectively. Even higher penalties will apply to fast food employees classified at Levels 2 and 3. The public holiday penalty rate has been adjusted to 225% for permanent employees and 250% for casuals. A similar modest reduction.

Second, the adjustment in Sunday penalty rates are being phased-in over a number of annual increments, commencing with a 5% adjustment from 1 July this year. The incremental adjustments in Sunday penalty rates will occur on the same day that employees receive a minimum wage increase through the Commission's Annual Wage Review.

Third, despite the unions' attempts to convince the public that penalty rates for nurses, firefighters and all workers are under threat, the FWC's decision only concerns fast food, retail and hospitality industry workers. There are some unique issues in these industries and no-one is suggesting that penalty rates for nurses or firefighters should be changed.

Fourth, the characteristics of the workforce in the fast food industry are very different to those of workers in other industries. The majority of fast food workers are full-time students, aged between 15 and 19 years. Two thirds of the employees in the industry work less than 25 hours per week. About 60 per cent work on Saturdays and 60 per cent on Sundays.

Fifth, the work preferences of fast food workers are very different to other workers. The FWC accepted the evidence that a large proportion of fast food workers prefer to work in the evenings and on weekends than during regular business hours, and that many prefer to work on Sundays rather than Saturdays. This preference is driven by personal factors such as availability rather than by penalty rates.

Sixth, the peak business times in the fast food industry are very different to those in most other industries. In the fast food industry, weekends and evenings are peak times. Regular business hours have little relevance to the fast food industry and, therefore, the FWC rightly decided that Sunday penalty rates that were designed many decades ago around regular business hours need to be re-set.

Seventh, up to the time when modern awards were introduced in 2010, many of the awards that applied in the fast food industry did not contain any weekend penalty rates. At the time, Ai Group was very vocal in arguing, on behalf of the fast food industry, that the large penalty rate costs that were imposed on fast food businesses were not fair.

Eighth, a large proportion of fast food workers are covered by enterprise agreements. The FWC's *Penalty Rates Decision* does not apply to those workers.

Ninth, the FWC's decision followed the PC's Inquiry in Australia's Workplace Relations Framework. During its inquiry the PC carried out a detailed analysis of penalty rates in the fast food, retail and hospitality industries. Similar, to the FWC, the PC decided that Sunday penalty rates in these industries were too high and should be aligned with Saturday penalty rates.

Tenth, the penalty rates decision was made by a five Member Full Bench of the independent FWC, headed by Justice Iain Ross, the President of the Commission. For over 100 years, the FWC and its predecessors have been responsible for setting and adjusting penalty rates in awards.

After more than two years of proceedings, 39 hearing days, 143 witnesses and 5,900 submissions, the FWC decided that the existing Sunday penalty rates in the retail, fast food and hospitality industries are no longer fair or relevant, and need to be adjusted.

The Full Bench of the FWC made its *Penalty Rates Decision* on the evidence and it is essential that the Decision is not disturbed.

Workers in all industries were better off from 1 July 2017

Two pay adjustments were operative from 1 July 2017 – the Annual Wage Review increase and some sensible adjustments to Sunday penalty rates.

The Annual Wage Review increase of 3.3% applied to all industries. In contrast, the Sunday penalty rate adjustments applied only to the fast food, retail and hospitality industries. The adjustments apply only on one day of the week.

The result of the 1 July 2017 changes to awards is beyond doubt. Workers in all industries are better off.

Employees typically work on more than one day of the week; not just on Sundays. Therefore, in all industries they are going to have their wages boosted to a much greater extent by the 3.3% Annual Wage Review increase, than any adjustment in the Sunday penalty rate.

On 24 July 2017, RMIT ABC Fact Check published an analysis of the Labor Party's claim that *"700,000 of the poorest-paid people in the country would take a pay cut on July 1, 2017".*

RMIT ABC concluded that Labor's ***"claim is fanciful".***

Conclusion

As set out above:

- Claims that enterprise agreements give large employers a competitive advantage over smaller businesses are not correct.
- Claims that many enterprise agreements in the retail and fast food industries disadvantage the employees covered by these agreements are false.

- The BOOT under the FW Act is not working effectively. Section 193 of the Act needs to be amended to restore a workable approach.
- The FW Act must not be amended to prevent enterprise agreements containing lower penalty rates than those in the relevant modern award. To do so would remove important flexibility for employers and employees, disadvantage employers and employees, and undermine the BOOT.
- The *Penalty Rates Decision* was made by the independent FWC on the evidence, and the decision must not be disturbed.
- The result of the 1 July 2017 changes to awards is beyond doubt. Workers in all industries are better off.