From the desk of Aaron Lane, Legal Fellow

Institute of Public Affairs
THE VOICE FOR FREEDOM
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18 July 2017

Mr Stephen Palethorpe
Committee Secretary
Senate Education and Employment Committee
By email: <eec.sen@aph.gov.au >

Dear Mr Palethorpe

Inquiry into Penalty Rates

I refer to the above inquiry, and provide a submission to the Senate Education and Employment Committee ('Committee') on behalf of the Institute of Public Affairs ('IPA'). The IPA has a strong research program on employment and industrial relations issues centred on fostering the dignity of work for all Australians.

About the Institute of Public Affairs

The IPA is an independent, non-profit public policy think tank, dedicated to preserving and strengthening the foundations of economic and political freedom. The IPA supports the free market of ideas, the free flow of capital, a limited and efficient government, evidence-based public policy, the rule of law, and representative democracy. Throughout human history, these ideas have proven themselves to be the most dynamic, liberating and exciting. Our researchers apply these ideas to the public policy questions which matter today.

Summary of IPA submission

Recent IPA research shows that penalty rates were introduced in order to deter weekend work. Over time, the justification of penalty rates has shifted to being a compensatory measure. As preferences and circumstances have changed over time, the need for additional compensation for weekend and public holiday work has also changed. On this basis, the recent decision of the Fair Work Commission to reduce prohibitive penalty rates in some industries reflects this wider trend. The IPA considers that centralised mandated penalty rates are an outdated penalty on jobs. The IPA's submission is that the Committee should recommend changes that would empower employers and employees to directly negotiate their own penalty rates. Additionally, the IPA submits that the various legislative proposals before the parliament are misguided because the bills seek to make the system more centralised and less flexible – moves that will have a negative impact employment and the economy.

IPA Research on Penalty Rates

Earlier this month, the IPA published a research paper '*Penalising Work: A historical account of penalty rates in Australia*', authored by myself and IPA Research Fellow Gideon Rozner. This submission is based on this research. I have enclosed a copy of this research paper, and trust that it will be of assistance to the Committee in this inquiry.

The IPA report shows that penalty rates have been a fixture of Australian industrial relations regimes since the late 1800s. The history indicates that that penalty rates were imposed not as a compensatory measure for workers for performing weekend work in order to deter the 'social evil' of Sunday labour. This rationale obviously became less relevant throughout the post-war economic

boom, as attendances at religious services declined while Australian work and consumption habits underwent significant change. The introduction of penalty rates in the late nineteenth century formed part of wider industrial relations laws which were anti-competitive in nature. For instance, the restrictions on weekend trading had similar motivations to penalty rates. Yet unlike penalty rates, trading hours have been either completely or substantially deregulated in all states and territories. The result is a regulatory anomaly in which businesses are no longer restricted from trading on the weekend, but remain penalised if they employ staff during this time.

The impetus for this inquiry is the recent decision of the Fair Work Commission to reduce weekend and public holiday penalty rates in some industries. The IPA report contends that this decision should not be seen as unique or radical. It is part of a wider – if incremental – trend towards recognition of changing work and consumption habits. The Fair Work Commission accepted that prohibitive penalty rates were no longer meeting the modern award objective. The Fair Work Commission found that a reduction in prohibitive penalty rates would have a positive effect on employment in those industries, citing numerous examples in evidence.

The fundamental issue, however, is whether there should be any centrally imposed penalty rates. Centralised, mandated penalty rates are imposed on all individual businesses and employees regardless of their circumstances or preferences. Even if we accept the compensatory rationale for penalty rates, there is still a knowledge problem sitting at the heart of the issue. Who is in the best position to decide on the right compensatory premium for weekend and public holiday work? Some individuals will demand a high premium for weekend and public holiday work. Others may prefer to work on these times, and would instead prefer that they received compensation for weekday work. Some will not have much preference, and will be happy with any opportunity to work. Only individuals know their own circumstances and preferences and they are incapable of being properly aggregated by a centralised commission. In this way, mandated penalty rates have displaced individual decision-making, while restricting choice, opportunity, and the chance for particularly younger unskilled people to enjoy earned success. For this reason, the IPA report recommends that future reforms of penalty rates should be pursued with the objective of giving decision-making power to businesses and workers.

Large employers and enterprise bargaining

The terms of reference noted 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. The IPA considers that this is problematic, and in the IPA report noted a number of examples highlighted by the Office of the Minister for Employment. The IPA's submission is that these examples provide further justification for the Fair Work Commission's penalty rates decision. The IPA's submission is that the solution to this distortion is not to mandate that EBA penalty rates cannot fall below the Award rate (as some legislative proposals seek to do). That would undermine the EBA framework by limiting the scope for negotiation. A better solution would be introducing a fast track EBA process, allowing new businesses to adopt an existing EBA from within the same industry as a pro-forma for their own greenfields agreement. Small businesses could also be assisted by allowing employers and employees to come to their own individual arrangements.

Better Off Overall Test

The IPA report endorsed the Productivity Commission's recommendation to abolish the current better-off overall test (BOOT) and reinstating the no-disadvantage test (NDT), which would achieve the same outcomes as the BOOT with greater flexibility and efficiency[1]. The BOOT has reversed the onus of proof which has had the effect of limiting enterprise bargaining. As Gideon Rozner explains in a separate IPA research report:

> While the BOOT superficially resembles the old no-disadvantage test (NDT) which has applied to EBAs prior to Fair Work, the BOOT represents a significant departure from the NDT insofar as it requires that the FWC be positively satisfied that all employees under the award will be better off under the proposed EBA. By contrast, the NDT simply prohibited the certification of agreements if it could be proven that employees would be put at a disadvantage relative to the award.[2]

Legislative Proposals

There are a number of legislative proposals before the Commonwealth Parliament:

i. *Fair Work Amendment (Protecting Take-Home Pay) Bill* 2017 (introduced by the Hon. Bill Shorten MP in the House of Representatives, and Senators Doug Cameron and Richard Di Natale in the Senate)
ii. *Fair Work Amendment (Protecting Take Home Pay of All Workers) Bill* 2017 (introduced by George Christensen MP in the House of Representatives)
iii. *Fair Work Amendment (Protecting Weekend Pay and Penalty Rates) Bill* 2017 (introduced by Adam Bandt MP in the House of Representatives)
iv. *Fair Work Amendment (Pay Protection) Bill* 2017 (introduced by Senator Lee Rhiannon in the Senate)

The IPA report comments directly on the first two of these bills, but the conclusions are equally applicable to all proposals. Essentially, the bills seek to reverse the Fair Work Commission's penalty rates decision. In addition, the first and third bills seek to prevent a future Full Bench from reducing penalty rates – even where it is found that prohibitive penalty rates no longer meet the modern award objective; the second and fourth bills seek to limit the scope of enterprise bargaining.

The IPA's submission is that all of these proposals are misguided. Of course, some workers will receive lower take home pay after the changes to penalty rates become effective, but this is one of the costs of a centralised industrial relations system where the decision of a single commission is empowered to impact the working conditions of hundreds of thousands of people. As we have stated above, the real policy question at hand is not whether the labour market has a premium for weekend and public holiday work, the question is whether this decision is 'to be done centrally, by one authority for the whole economic system, or is to be divided among many individuals'.[3] The IPA's view is that individuals are in the best position to make these decisions. Legislative proposals seek to make the system even more centralised, and penalise work by reintroducing the concept of a deterrence effect. Penalising work will have a detrimental impact on employment and economic growth.

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[1] Productivity Commission, Workplace Relations Framework, Inquiry Report no. 76, 30 November 2015.
[2] Gideon Rozner, 'Fair Work and the Right to Work', Institute of Public Affairs, June 2017, available online: < https://www.ipa.org.au/wp-content/uploads/2017/06/IPA_Report_Fair_Work_And_The_Right_To_Work 26062017.pdf>
[3] Hayek, FA 1945, 'The use of knowledge in society', vol. 34, no. 4, pp. 520-521.

Conclusion

The IPA trusts that this submission will be of assistance to the Committee. Of course, the IPA would be pleased to present our submission at a public hearing.

If you have any questions, please do not hesitate to contact myself: in writing to L2, 410 Collins Street, Melbourne 3000;

Yours faithfully,

AARON LANE
Legal Fellow, Institute of Public Affairs

Encl.

July 2017

PENALISING WORK - A HISTORICAL ACCOUNT OF PENALTY RATES IN AUSTRALIA

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Institute of Public Affairs
SECURING FREEDOM FOR THE FUTURE
1943 - 2018

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PENALISING WORK - A HISTORICAL ACCOUNT OF PENALTY RATES IN AUSTRALIA

About the Institute of Public Affairs

The Institute of Public Affairs is an independent, non-profit, public policy think tank, dedicated to preserving and strengthening the foundations of economic and political freedom.

Since 1943, the IPA has been at the forefront of the political and policy debate, defining the contemporary political landscape.

The IPA is funded by individual memberships and subscriptions, as by well as philanthropic and corporate donors.

The IPA supports the free market of ideas, the free flow of capital, a limited and efficient government, evidence-based public policy, the rule of law, and representative democracy.

Throughout human history, these ideas have proven themselves to be the most dynamic, liberating and exciting. Our researchers apply these ideas to the public policy questions which matter today.

About the authors

Aaron M. Lane is a Legal Fellow at the Institute of Public Affairs. He specialises in employment, industrial relations, regulation and workplace law. He is a lawyer, admitted to the Supreme Court of Victoria in 2012. He has appeared before the Fair Work Commission, the Productivity Commission, and the Senate Economics Committee, among other courts and tribunals. Aaron holds a Bachelor of Commerce, a Bachelor of Laws (Honours) (Deakin University), a Graduate Diploma in Legal Practice (College of Law), a Master of Arts (Vice-Chancellor's Scholar at the University of Divinity), and is currently a PhD candidate in law and economics at RMIT University.

Gideon Rozner is a Research Fellow at the Institute of Public Affairs. He is a lawyer, admitted to the Supreme Court of Victoria in 2011 and spent several years practicing as a lawyer at one of Australia's largest commercial law firms, as well as acting as general counsel to an ASX-200 company. Gideon has also worked as a policy adviser to ministers in the Abbott and Turnbull Governments. Gideon holds a Bachelor of Laws (Honours) and a Bachelor of Arts from the University of Melbourne.

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Executive Summary

Penalty rates have been a fixture of Australian industrial relations regimes since the late 1800s. With federation, a series of decisions by various state and federal wage-setting bodies began, culminating in the first 'national' penalty rate decision in 1947.

These early decisions indicate that penalty rates were imposed not as a compensatory measure for workers for performing weekend work, but in order to deter the 'social evil' of Sunday labour. This rationale obviously became less relevant throughout the post-war economic boom, as attendances at religious services declined while Australian work and consumption habits underwent significant change. While proponents maintained that penalty rates were a vital means of compensating for weekend work, there was growing community acceptance that greater flexibility would benefit consumers and businesses.

However, reforms to penalty rates have been, at best, piecemeal, particularly when compared to the liberalisation of weekend trading hours during the same period. Like penalty rates, restrictions on weekend trading hours had an anti-competitive and religiously-motivated rationale. Yet unlike penalty rates, trading hours have been either completely or substantially deregulated in all states and territories. The result is a regulatory anomaly in which businesses are no longer restricted from trading on the weekend, but remain penalised if they employ staff during this time.

Nevertheless, there have been a few minor reforms to penalty rates, including a number of recent decisions by the Fair Work Commission, including a reduction in certain industries as part of the consolidation of various state awards in 2010 and a reduction in Sunday penalty rates under the Restaurants award in 2014.

The recent decision by the Fair Work Commission to reduce Sunday penalty rates in certain awards should therefore not be seen as unique or radical. It is part of a wider – if incremental – trend towards recognition of changing work and consumption habits.

Still, the modest reductions occasionally meted out by the Fair Work Commission do little to address the fundamental problem with penalty rates: That they distort the labour market and limit economic opportunities of both businesses (which would otherwise employ more staff for weekend work) and workers (who would otherwise have more work opportunities available).

Further, the way in which penalty rates are determined under the Fair Work Act gives rise to a number of broader structural problems. For instance, the limited ability to 'trade away' penalty rates via enterprise bargaining agreements place small businesses at a competitive disadvantage relative to larger businesses with the resources to negotiate favourable agreements.

Proposals to place legislative limits on the ability of the Fair Work Commission to lower penalty rates further would obviously be a retrograde measure. The ideal situation is one in which penalty rates – if any – are determined directly between employers and employees. The priority of policy-makers in this area should, therefore, be reforms to allow for greater flexibility over penalty rates in what is currently a highly centralised system.

Section 1: A history of penalty rates in Australia

The original purpose of penalty rates was not, as is commonly believed, as a means of compensation to workers disadvantaged by irregular hours. Rather, early Australian industrial courts imposed penalty rates in order to discourage the 'social evil' of Sunday labour. The notion of penalty rates as a deterrent, rather than as compensation, lasted well into the 20th century, until changing work and consumption habits created the need for some flexibility on the price of weekend work.

Early awards – 1901-1947

Awards of higher wages for work performed outside 'ordinary' hours existed prior to federation, largely through decisions of the then-colonial governments and their industrial relations regimes.

The first minimum wages and conditions in Australia were set by the independent Victorian wages boards. In establishing these boards in 1896, the government introduced the requirement for employers to provide 'tea money' for men and women working in excess of a certain number of hours per week.[1] Later, boards were required to determine premium hourly rates to apply to work done during overtime.[2] Similar regimes were established in other colonies.[3]

With federation came the Commonwealth Court of Conciliation and Arbitration, established in 1904,[4] with jurisdiction over industrial disputes that extended 'beyond the limits of any one state'.[5] The new court made the first federal penalty rate award in 1909, in relation to a dispute over the wages paid by the Broken Hill Proprietary Company to workers at its mining operations in New South Wales and South Australia.[6] As part of its determination, the court ordered that the seventh consecutive day worked in any week should be subject to overtime pay:

> Overtime shall be paid at the rate of time and a quarter, including *all time of work on a seventh day in any week*, or on official holidays, and all time of work done in excess of the ordinary shift during each day of twenty-four hours shall be reckoned as overtime.[7]

Ten years later, the court recognised Sunday specifically – as opposed to any consecutive seventh day of work – as a day on which higher wages should be paid:

> It is a bitter tax on human powers to work all of the seven days... [but t]he true position seems to be that the extra rate for all Sunday work is given on quite different grounds from an extra rate for work on the seventh day. The former is given because of the grievance of losing

1 *Factories and Shops Act 1896* (Vic), s 21.

2 *Factories and Shops Act 1900* (Vic), s 25.

3 Fair Work Commission, *Waltzing Matilda and the Sunshine Harvester Factory* (2 February 2017) < https://www.fwc.gov.au/waltzing-matilda-and-the-sunshine-harvester-factory/introduction>. See also, for example, *Factories and Shops Act 1896* (NSW), s 37.

4 *Conciliation and Arbitration Act 1904* (Cth).

5 Ibid; *Australian Constitution*, s51(xxxv).

6 *Barrier Branch of the Amalgamated Miners Association v Broken Hill Proprietary Company Limited* (1909) 3 CAR 1.

7 Ibid, at 37 (emphasis added).

> Sunday itself – the day for family and social and religious reunions...[8]

Penalty rates and the 'evil' of Sunday labour

While there was some acknowledgement of increased pay for work on Sunday as a compensatory measure for workers, the primary motivation appears to be as a deterrent for employers – a literal 'penalty' for encouraging Sunday labour. In determining the additional payment for Sunday work in one early award, the Court of Conciliation and Arbitration specified that 'the rate should be such as to discourage the practice, to prevent it except under the stress of great necessity'.[9]

The attitude of the courts towards Sunday work reflected that of the parliaments of the day, which often engaged in lengthy debates about awarding penalty rates to workers in state-owned industries, such as the railways.

Like the courts, the main focus of these debates was not compensating workers for work on Sunday, but preventing it altogether. A motion before the Victorian Legislative Assembly in 1900 calling in part for Sunday penalty rates in government workshops received almost unanimous support from members who sought to 'discourage Sunday labour',[10] which was regarded as 'highly undesirable'.[11] The call for penalty rates was 'aimed at the evil of working overtime'.[12]

Work on Sunday was no more palatable to the Victorian parliament 10 years later, when a debate ensued over the payment of penalty rates to workers on Victorian railways. To the member moving the motion, Sunday work was, at best, a necessary evil, and should be limited to essential public utilities:

> I am with every honourable member in the House in endeavouring to reduce [Sunday labour] as far as we possibly can; but we have to consider the fact, when we are endeavouring to limit Sunday labour in every possible way, that there are certain businesses, enterprises and trades from which Sunday labour cannot be altogether eliminated... We cannot do away with Sunday labour in the railways, and we cannot do away with it in connexion to electric lighting.[13]

The strength of members' opposition to Sunday labour was largely, though not entirely, religiously motivated:

> [A] great number of men in the community... have forgotten the lessons they learned in their earlier days in Sunday school, or at their mother's knee... but [even] under modern conditions the desire of modern people, if they are wise, is to obey the Mosaic instruction [to observe the Sabbath].[14] Therefore a community such as ours endeavours to minimize [sic] as far as possible the infractions of the Mosaic law.[15]

To that end, some members suggested increasing Sunday penalty rates even further, on the basis that

8 *Federated Gas Employees' Industrial Union v Geelong Gas Co* (1919) 13 CAR 437 at 469.

9 Ibid.

10 Victoria, *Parliamentary Debates*, Legislative Assembly, 25 July 1900, 481 (Samuel Mauger).

11 Ibid, 486 (Hugh Rawson).

12 Ibid, 485 (William Arthur Trenwith).

13 Victoria, *Parliamentary Debates*, Legislative Assembly, 3 November 1910, 2010 (George Swinburne).

14 Exodus 20:8-11.

15 Ibid, 2013 (William Alexander Watt).

their purpose was the prevention of work, not compensation for the workers:

> There is one thing certain in connexion with this motion... and that is that a great many will support it, not because Sunday work should be paid for at time and a half, but for the purpose of preventing all Sunday labour as far as possible... I am inclined to think that time and a half is not sufficient to prevent Sunday labour... but if the rate is increased to double time, it will decrease the number of men employed on Sunday.[16]

Demands for penalty rates intensify

While, emboldened trade unions demanded penalty rates in other industries and jurisdictions, penalty rates for railway workers remained contentious. The most notable dispute occurred in Western Australia, where a series of aggressive demands by unions threatened to double the state railway department's wages budget, as well as 'rendering the workings of the railways from a practical standpoint almost impossible', according to the state Railway Commissioner.[17] Frustrated, the unions demanded the abolition of weekend services, unless penalty rates were awarded, appealing to the State Arbitration Court:

> One witness said that Sunday running [of trains] was unnecessary. If the people wanted it, they should pay penalty rates. So far as long trips, such as Kalgoorlie to Adelaide, were concerned, passengers could arrange to stop at Kalgoorlie or camp on the way.[18]

Standardised penalty rates – 1947

Penalty rates were a recurring feature of state and federal industrial awards until 1947, but decisions were inconsistent, and the terms of penalty rates awarded varied considerably between jurisdictions and industries. Some decisions used the term 'penalty rates' in relation to Sunday work only, others included overtime and work performed outside ordinary business hours. Increasingly, some courts awarded penalty rates for Saturday work; others refused. The rates awarded varied from time and a quarter to double time.[19] As a result, as noted later by the Court of Conciliation and Arbitration, there were 'chaotic differences from one industry to another with respect to classes of payments'.[20]

A national penalty rate

In 1947, a campaign by Australian Council of Trade Unions (ACTU) for national penalty rates culminated in a joint claim before the Court of Conciliation and Arbitration by ten separate trade unions. Workers represented included those in the railways, gas industry, manufacturing and emergency services, but the case would have a much wider impact.

The unions' claims, which were largely agreed to by the court, would effectively establish national penalty rates. It was a 'test case' that sought to 'establish firmly the principle of time and a half

16 Ibid, 2021 (George Michael Prendergast) (emphasis added).

17 'Industrial matters', *Kalgoorlie Miner* (Kalgoorlie, WA), 7 December 1920, 3.

18 'Selfish unionists: Public not considered', *The Argus* (Melbourne), 3 June 1921, 9.

19 See *Re National Security (Industrial Peace) Regulations and of the Metal Trades Award 1941 re Rheem Manufacturing Co Pty Ltd* (1947) 58 CAR 610 at 615 (Dale-Brockman ACJ and Sugerman J).

20 Ibid.

payments for Saturday and double time for Sunday work throughout all Australian industry'.[21]

For the first time, a national definition of the term 'penalty rate' was introduced, being 'payment higher than normal to be made for work outside the prescribed limits'.[22] Sunday penalty rates were recognised as a standard industrial entitlement, in acknowledgement of 'the very special position of Sunday in relation to religious and family life'.[23] A one-off increase was awarded to Sunday penalty rates that were already in place under existing awards.[24]

The court also awarded Saturday penalty rates for certain shift workers, but stopped short of recognising the day as a general holiday as it did with Sunday.[25] Saturday penalty rates were eventually awarded by the court in a subsequent case 10 years later.[26]

From a deterrence to an incentive

The landmark 1947 case established penalty rates as a permanent staple of Australia's industrial relations regime. Equally noteworthy is that it arguably marked a tempering of the view that the primary purpose of penalty rates was as a deterrent to Sunday labour.

While the court did recognise that Sunday labour was 'appropriate for discouragement or deterrence' via penalty rates, it also conceded that in some instances, penalty rates were a necessary device to encourage weekend work.[27] As a result of heavy-handed regulations at the time, employers in certain industries were restricted in their ability to pay wages above the award rate.[28] As a result, the court was forced to consider whether it was necessary to incentivise Sunday labour, rather than deter it:

> [T]he employers in question are great public utilities providing those services – transport, supply of gas and supply or electricity – which are not only fundamental to the conduct of industry but are also essential to life itself in a modern community... And certain of these employers point to shortages and unduly rapid turnover of labour and suggest that some additional payment is necessary to attract new labour and retain existing labour... [W]e should propose therefore that in the extremely limited group of industries abovementioned... in cases where the employer has either agreed or indication non-opposition to an increase to time and a half, a statement should be submitted... in favour of an alteration to time and a half instead of time and a quarter as in the generality of cases.[29]

Changing work habits – 1947-1993

Economic and cultural change

Within a few decades, the nature of Australians' work and consumption habits would undergo

21 'Gas strike is ACTU "test case"', *The Age* (Melbourne), 7 January 1947, 12.

22 Above n19, 616.

23 Ibid, 627.

24 Ibid, 630.

25 Ibid, 624.

26 *Re the Conciliation and Arbitration Act 1904 and of the Bank Officials (Federal) Award 1955* (1957) 87 CAR 598.

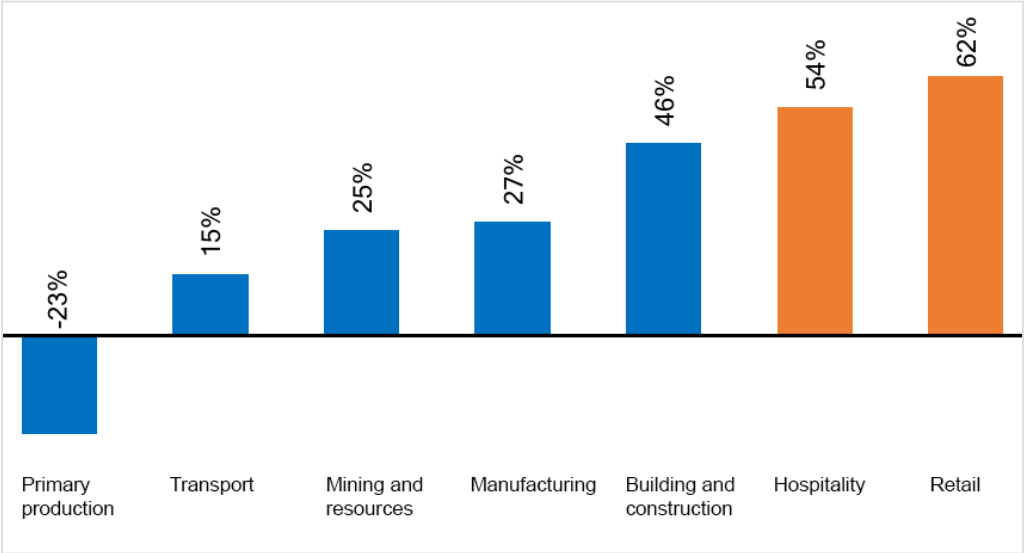
27 Above n19, 633 (Kelly J).

28 See *National Security (Economic Organisation) Regulations* 1942 (Cth).

29 Above n19, 624-626.

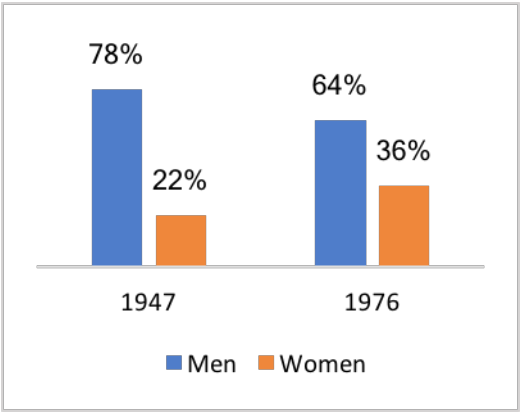
significant change.

Figure 1.1 – Growth in persons employed by industry, 1947-1976



Source: Australian Bureau of Statistics

Figure 1.2 – Australian work force by gender, 1947-1976



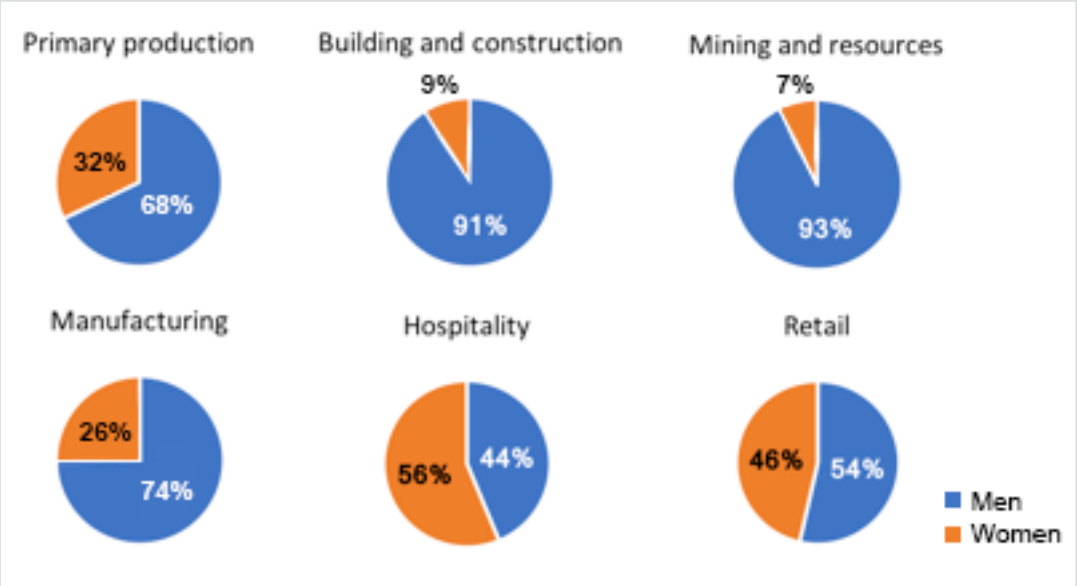
Source: Australian Bureau of Statistics

The post-war economic boom brought significant change to the composition of the Australian economy, including the growth of the services sector. In the three decades following the national penalty rates award, a growing number of Australians were working in hotels, restaurants and licensed venues, with employment in the hospitality sector more than doubling.[30] The growth of the retail sector was even greater: In 1947, less than 270,000 Australians worked in retail; by 1976, more than 700,000 did.[31]

30 Australian Bureau of Statistics, 1947 Census: *Part XVII – Industry* (2109.0); Australian Bureau of Statistics, 1976 Census: *Population and Dwellings – Summary Tables* (2417.0).

31 Ibid.

Figure 1.3 – Workforce by gender by industry, 1976



Source: Australian Bureau of Statistics

Another significant cultural change was the growing number of women seeking work, many of whom sought part-time or casual employment. At the time of the weekend penalty rates decision in 1947, women comprised less than a quarter of the Australian work force. By 1976, they made up over one third.[32]

Relevantly, the increase in the employment of women appears to have occurred largely in the sectors of the economy that themselves were experiencing significant growth. Unlike other 'old' industries, workers in hospitality and retail were fairly evenly divided in terms of gender.[33]

The need for workplace flexibility

The economic and cultural change during the post-war boom challenged Australia's industrial relations regime. Over time, centralised wage-fixing and rigid conditions of employment proved insufficiently flexible to meet the needs of the growing hospitality and retail sectors and the rise in women's employment. In particular, weekend penalty rates proved problematic for a society which increasingly sought to trade and work on the weekend.

By 1975, there were reports that penalty rates were having a 'severe adverse effect' on the hospitality industry.[34] A comprehensive study of employees' attitudes across a range of hotels, motels and restaurants indicated a growing desire for shift work, including on weekends.[35] Reasons given ranged from convenience (such as missing peak hour traffic and shopping without the crowds) to family and domestic reasons (such as being able to pick the children up from school).[36]

Importantly, the report found that in most cases, penalty rates did not factor in employees'

32 Ibid.

33 Australian Bureau of Statistics, 1976 Census: *Population and Dwellings – Summary Tables* (2417.0).

34 Peat, Marwick, Mitchell and Co, *The Impact of Penalty Wage Rates on the Australian Hospitality Industry* (August 1975).

35 Ibid.

36 Ibid.

preference for shift work:

> Penalties were not regarded as a reason for preferring shift work. It is the life style [sic] which the shifts themselves permit which the employees seek.[37]

In fact, some workers preferred shift work despite penalty rates, not because of them. Further, demands for higher penalty rates by the trade union movement were seen as a threat to job security:

> Employees were confused by the complexity of the penalty rate structure and would prefer a higher base wage. Many were not sure of penalty rate entitlements, and those on fixed shifts... particularly had regard only for their total wage... [E]xcessive union demands and industrial action were seen as a threat to individual security or to the jobs of fellow workmates.[38]

The report concluded that increasing penalty rates were damaging the hospitality industry, to the detriment of workers:

> [P]enalty rates are threatening the ongoing viability of the industry as we know it today... New investment in the industry is declining, with adverse future effects on the availability to the community of hospitality facilities... It is clear that the industry cannot withstand further increases in penalty rates which could result in widespread business closures and consequential unemployment... Employees are confused by penalty rates and would prefer a higher base wage.[39]

Unintended consequences

It also became apparent that Australia's penalty rate regime was having unintended consequences, such as the increased use of inexperienced casual labour at times of high demand. Problems emerged as employers used casual staff as a means for employers to remain competitive on weekends by effectively circumventing penalty rate requirements. A study in 1985 observed that:

> Casuals have proved to be an effective way of avoiding overtime working... and especially in covering non-standard hours of work. Junior casuals have been extensively used for the latter purpose, especially in the less skilled functions. In so doing employers not only avoid penalty rates but pay lower base rates because of wage provisions for juniors.[40]

The use of junior casuals was found to generally hurt the consumer:

> The quality or skill of service arguably declines with the replacement of full or part-time employees with casual employees... It appears that management responds to retail trading hours and penalty rate provisions by reducing the level and quality of staff employed in non-standard hours. This lower quality takes the form of relatively low levels of manpower to assist customers; and of less knowledgeable, less experienced casuals.[41]

37 Ibid.

38 Ibid.

39 Ibid.

40 Peter Dawkins, *Penalty Rates and the Organisation of Working Time (National Institute of Labour Studies, 1985) (emphasis added).*

41 Ibid.

Changing industrial relations regimes – 1993-2009

Workplace flexibility eventually came as part of the suite of economic reforms that occurred in Australia beginning in the 1980s. The nature of Australia's industrial relations framework continued to change, in a 'tug of war' between the two major parties in which the system oscillated between more flexibility and tighter regulation. However, flexibility over penalty rates remained, to varying degrees, a feature.

Enterprise bargaining (1993)

Throughout their terms in office, the Hawke and Keating Governments embarked on a series of wide-ranging economic reforms with the support of the trade union movement, based on a series of agreements between the Australian Labor Party and the ACTU known as the Accord. Among the last of these agreements were the Accords Mark VI and VII, focusing on flexibility in industrial relations. As the then-Minister for Industrial Relations explained in 1991:

> [T]he Accord [is] more important than ever during the current period of change in the Australian industrial system. The system has been highly centralised... [and] Mark VI is a particularly significant stage in the Accord process because it decentralises wage bargaining to the workplace level...[42]

Accordingly, the Keating Government introduced its industrial relations reform package in 1993. In introducing the Bill into the house, the new minister underscored the need for flexibility in industrial relations:

> [O]ne thing that has changed since 1904, and radically so, is the nature of the Australian economy. What was a protected, insular and agrarian economy is now open, multifaceted and outward looking...In its previous incarnation our economy could live comfortably with a system of centralised arbitration and high tariff barriers. In the modern era—it cannot... This legislation marks the culmination of the government's break with the past—our move as a nation from a centralised to a decentralised industrial relations system, to a system based primarily on bargaining at the workplace, with much less reliance on arbitration at the apex.[43]

The centrepiece of the new regime was enterprise bargaining, which allowed for workplace-level agreements that varied conditions of the applicable industry award, so long as it could be proven that workers on the new agreement were not at a disadvantage relative to workers on the award.[44]

As a result, a number of entitlements and conditions that formed part of industrial awards could, in effect, be 'traded off' for higher pay to accommodate the needs of both employers and employees. Relevantly, this included penalty rates.

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42 Peter Cook, 'The Accord: An Economic and Social Success Story' (Paper presented to the London School of Economics and Political Science, 13 June 1991), 7.

43 Commonwealth, *Parliamentary Debates, House of Representatives, 28 October 1993, 2777-84 (Laurie Brereton).*

44 See *Industrial Relations Reform Act 1993 (Cth), pt 5.*

Australian workplace agreements (1996) and WorkChoices (2005)

The early industrial relations reforms of the Howard Government provided for further flexibility by establishing Australian workplace agreements (AWAs), which provided for variation of award conditions directly between employers and employees.[45] Like the enterprise bargaining agreements introduced by the Keating Government, AWAs were required to leave employees no worse off than the relevant award.[46]

The Howard Government later strengthened the role of AWAs as part of its 2005 WorkChoices legislation.[47] Importantly, the 'no disadvantage' test that had applied to previous flexibility agreements was abolished and replaced by a series of minimum conditions applying to every individual and collective workplace agreement, dealing with matters such as maximum ordinary hours worked per week.[48]

Penalty rates were included in a separate list of 'protected award conditions', which were deemed to be part of new AWA conditions unless expressly excluded or modified by the employer and employee.[49]

Fair Work (2009)

The new Rudd Government significantly re-regulated the labour market with its 2009 Fair Work package.[50] These reforms abolished AWAs, restored centrally-fixed awards as the primary mechanism for setting employee pay and conditions and restricted flexibility to workplace-level bargaining with a dominant role for trade unions.

The new industrial relations authority, Fair Work Australia (now the Fair Work Commission) would embark on a 'modernisation' of industrial awards,[51] which could now deal with a significantly-expanded range of matters.[52] As with Howard-era awards, the new 'modern' awards could include terms relating to penalty rates.[53] The Fair Work Commission now reviews the terms of awards every four years.[54] The most recent decision of the Commission will be examined in Section 3 of this report, while we firstly consider the contrasting case of the regulation of trading hours in Section Two (below).

45 See *Workplace Relations and Other Legislation Amendment Act 1996 (Cth), sch 5.*

46 Ibid.

47 See *Workplace Relations Amendment (Work Choices) Act 2005 (Cth).*

48 Ibid, sch 1, item 71.

49 Ibid, sch 1, item 101B.

50 See *Fair Work Act 2009 (Cth).*

51 Explanatory Memorandum, Fair Work Bill 2008, xxvi.

52 Above n50, s 136.

53 Ibid, s 139(e).

54 Ibid, s 156.

Section 2: The contrasting case of trading hours regulation

Curiously, the regulation of trading hours has a similar genesis to penalty rates.

Trading hours regulation was introduced around the similar time as other industrial legislation in the late nineteenth century and at the turn of the twentieth century. Indeed, in some colonies, the laws were contained within the same legislation. Trading hours were first restricted in colonial Victoria in 1885 in the Factories and Shops Act. In Western Australia, the Early Closing Act passed in 1898. Acts of the same names passed in New South Wales in 1899 and South Australia in 1990; in Queensland, the Factories and Shops Act was legislated in 1900, and in Tasmania hours were restricted in the Factories Act 1910.

Like the other industrial legislation of that era, retail trading laws had an explicitly anti-competitive (and seemingly racist) intent. For instance, in introducing the legislation to restrict trading hours to the Western Australian Legislative Assembly, Walter James argued:

> I think I am right in saying there is an overwhelming majority of European shopkeepers, not only in Perth, but throughout the larger country towns, who are in favour of legislation being introduced which will protect them against the unfair competition of Asiatics and others, who are not subject to the same influences as Europeans are.[55]

Certainly, one of the influences would include 'maintaining the sanctity of Sunday as the "Lord's day"' as identified by the Productivity Commission.[56] Other justifications included reducing the need for employees to work outside of 'traditional' hours, and thereby synchronising leisure time across families and communities.[57] However, due to changing times, Australian trading hours have been progressively deregulated – in stark contrast to Australia's labour market. The Productivity Commission notes that:

> Changes in social patterns — such as more flexible and non-traditional working hours, the growing participation of women in the workforce and growth of both dual income and single-parent households — have contributed to decisions by state and territory governments to make shopping hours more flexible over time.[58]

As previous IPA research has noted, although some restrictions remain in Queensland, South Australia and Western Australia, 'between the mid-1990s and early 2000s, many states completely repealed or significantly reduced their trading hours laws'.[59] Indeed, the growth in the hospitality and retail sectors can be attributed in part to the deregulation of trading hours, increasing employment opportunities. There is no evidence that trading hours have had an adverse impact on community participation in leisure activities.[60]

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55 Western Australia, *Parliamentary Debates, Assembly, 22 November 1897, 491 (W.H. James)*

56 Productivity Commission 2011, *Economic Structure and Performance of the Australian Retail Industry, Report no. 56, Canberra, 276.*

57 Ibid.

58 Ibid, 280.

59 Husek, M 2016, *Trading Hours Restrictions: a significant red tape burden on Queensland, Institute of Public Affairs, accessed online: <https://www.treasury.qld.gov.au/fair-safe-work/industrial-relations/trading-hours-review/documents/submission-139.pdf> 19 June 2017.*

60 Productivity Commission 2011, *Economic Structure and Performance of the Australian Retail Industry, Report no. 56, Canberra, 277.*

The economic evidence is that the deregulation of trading hours will result in increased employment, increased consumer expenditure, and increased productivity.[61] For instance, where brick-and-mortar stores compete with 24-hour online shopping, deregulation of trading hours makes sense, allowing businesses to respond effectively to consumer preferences.[62] The same case can be presented for the deregulation of penalty rates. Where technological advances continue to drive down the cost of communication, trade and the movement of capital, the ability to conduct operations offshore is a real threat.

A notable difference is that while penalty rates regulation has become centralised over time, the regulation of trading hours has remained decentralised, with different laws applying in each state and territory. Competitive federalism has tended trading hours towards deregulation, with the recent Queensland review of its trading restrictions noting that 'New South Wales, Victoria and Tasmania have substantially deregulated' and that 'it is possible that less restrictive trading hours may help enhance the overall competitiveness of Queensland's tourism industry'.[63] Although the legal reality now is that the *WorkChoices case*[64] has entrenched the centralised system, these comments raise questions about the justification for a centralised penalty rates regime. It is not clear why penalty rates could not be left to individual states to judge based on their own circumstances. That is not to say that a future federal government could not pursue decentralisation. The last section of this paper considers some options in this regard.

In summary, the regulation of penalty rates and trading hours have similar origins and anti-competitive policy intentions. However, as times have changed, these two issues have evolved in very different ways. While trading hours restrictions have been progressively deregulated, and the Productivity Commission have recently recommended that remaining trading hours restrictions be fully deregulated in all Australian states[65], penalty rates remain a feature of Australia's centralised industrial relations regime. The deregulation of trading hours has increased the possibilities for businesses operating 'after-hours', and on weekends and public holidays. Yet prohibitive penalty rates are limiting employees and employers from realising the full benefits of this deregulation. The next section of the report will consider a recent decision of the Fair Work Commission to slightly reduce that discrepancy.

61 Mickel, J 2016, *A review of Queensland's Trading (Allowable Hours) Act, Queensland Treasury, p. 18, accessed online at < https://www.treasury.qld.gov.au/fair-safe-work/industrial-relations/trading-hours-review/documents/trading-hours-review-final-report.pdf> 19 June 2017; Productivity Commission 2011, Economic Structure and Performance of the Australian Retail Industry, Report no. 56, Canberra.*

62 Productivity Commission 2011, *Economic Structure and Performance of the Australian Retail Industry, Report no. 56, Canberra, 278-279.*

63 Mickel, J 2016, *A review of Queensland's Trading (Allowable Hours) Act, Queensland Treasury, p. 18, accessed online at < https://www.treasury.qld.gov.au/fair-safe-work/industrial-relations/trading-hours-review/documents/trading-hours-review-final-report.pdf> 19 June 2017.*

64 *New South Wales v Commonwealth (2006) 229 CLR 1.*

65 Productivity Commission, *Economic Structure and Performance of the Australian Retail Industry (2011), Report no. 56, Canberra.*

Section 3: Recent decision of the Fair Work Commission

Background to the decision

As identified in Section 1 of this paper, the Fair Work Commission ('Commission') is required to undertake four yearly reviews of modern awards.[66] The purpose of these reviews is to decide if a modern award meets the 'objective' set out in the Fair Work Act 2009 ('Act'). This 'modern award objective' is considered in further detail below.

On 23 February 2017, the Full Bench of the Commission handed down its decision in the 4 yearly review of modern awards – penalty rates – hospitality and retail sectors ('Penalty Rates Decision').[67] The issues in the review centred around weekend and public holiday penalty rates because a number of employer groups made applications to vary those provisions of the relevant awards.

The Full Bench

Position	Name	Appointed by Minister	Background/occupation prior to appointment
President	Hon. Iain Ross AO	Hon. Bill Shorten MP (ALP), 24 Feb. 2012[68]	Assistant secretary, ACTU Vice-President, AIRC Judge, Supreme Court of Victoria and President, VCAT
Vice-President	Joe Catanzariti	Hon. Bill Shorten MP (ALP), 28 Mar. 20132[69]	Partner, Clayton Utz Adjunct Professor, Sydney University
Deputy President	Ingrid Asbury	Hon. Bill Shorten MP (ALP), 28 Mar. 2013[70]	National Industry Group Commissioner, AIRC
Commissioner	Peter Hampton	Hon. Julia Gillard MP (ALP), 15 Dec. 2009[71]	Deputy President, AIRC SafeWork SA
Commissioner	Tim Lee	Sen. Hon. Chris Evans (ALP), 2 Sep. 2011[72]	Australian Services Union Public Servant Ministerial Adviser General Manger, Fair Work Australia

Awards under review

The awards considered by the Full bench in their decision were:

- Fast Food Industry Award 2010 (Fast Food Award);
- General Retail Industry Award 2010 (Retail Award);

66 *Fair Work Act 2009 (Cth); s. 156.*

67 [2017] FWCFB 1001

68 https://ministers.employment.gov.au/shorten/new-president-leads-fair-work-australia

69 https://ministers.employment.gov.au/shorten/new-appointments-fair-work-commission

70 Ibid.

71 https://ministers.employment.gov.au/gillard/fair-work-australia-commissioners-appointed

72 https://ministers.employment.gov.au/evans/new-fair-work-australia-commissioners-appointed

- Hospitality Industry (General) Award 2010 (Hospitality Award);
- Pharmacy Industry Award 2010 (Pharmacy Award);
- Registered and Licensed Clubs Award 2010 (Clubs Award); and
- Restaurant Industry Award 2010 (Restaurants Award).

Modern Awards Objective

The 'modern awards objective' is central to the Commission's decision. The Act requires the Commission to take into account a range of matters to ensure that modern awards, together with the legislated National Employment Standards, provide a 'fair and relevant minimum safety net of terms and conditions'.[73]

These factors are:

> (a) relative living standards and the needs of the low paid; and
>
> (b) the need to encourage collective bargaining; and
>
> (c) the need to promote social inclusion through increased workforce participation; and
>
> (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
>
> (da) the need to provide additional remuneration for:
>
> > (i) employees working overtime; or
> >
> > (ii) employees working unsocial, irregular or unpredictable hours; or
> >
> > (iii) employees working on weekends or public holidays; or
> >
> > (iv) employees working shifts; and
>
> (e) the principle of equal remuneration for work of equal or comparable value; and
>
> (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
>
> (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and
>
> (h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.[74]

It is significant that the modern award objective now specifically provides for a consideration of penalty rates. This was not always the case. Although section 139 of the Act has always provided that a modern award may include terms about penalty rates, including for employees working on weekends or public holidays, section 134(1)(da) was inserted by the 2013 Amendment Act.[75] The purpose of this provision, according to then Employment Minister Bill Shorten, was to 'ensure that

73 *Fair Work Act 2009 (Cth); s 134.*

74 Ibid (emphasis added).

75 *Fair Work Amendment Act 2013 (Cth), sch 2.*

work at hours which are not family friendly are fairly remunerated'.[76] While the intention of this provision was seemingly to make penalty rates further entrenched into the modern award system, in effect it opened the door for the Commission to make changes to penalty rates over time as the 'need to provide additional remuneration' changes. Relevantly, the Full Bench of the Commission held that section 134(1)(da) does not require penalty rates.[77]

The decision

The Commission decided to reduce Sunday penalty rates for the Hospitality, Fast Food, Retail and Pharmacy awards, but left the Clubs and Restaurant awards unchanged. For the Hospitality Award, the Commission lowered rates for permanent staff from 175 percent to 150 percent, but the casual penalty would remain the same at 175 percent. For the Fast Food Award, both permanent and casual rates will be reduced by 25 basis points – from 150 percent to 125 percent, and 175 percent to 150 percent, respectively. For the Pharmacy and Retail awards, permanent rates will be reduced by 50 basis points from 200 percent to 150 percent, and casual rates will be reduced by 25 basis points from 200 percent to 175 percent.

Public Holiday penalty rates will also reduce from 250 percent to 225 percent across the Hospitality, Fast Food, Retail, Restaurants and Pharmacy awards. The Commission opted not to change public holiday penalty rates for clubs.

The decision is summarised in Tables 3.1 and 3.2

Table 3.1

Sunday Penalty Rates				
Award	Permanent Staff		Casual Staff	
	Current	New	Current	New
Fast Food Award (Level 1 only)	150%	125%	175%	150%
Hospitality Award	175%	150%	175%	175%
Pharmacy Award (7:00pm – 9:00pm only)	200%	150%	200%	175%
Retail Award	200%	150%	200%	175%

Source: Fair Work Commission.

76 Commonwealth, *Parliamentary Debates, House of Representatives, 21 March 2013, 2903 (Bill Shorten).*

77 [47] – [48]; see contra: *Re Restaurant and Catering Association of Victoria [2014] FWCFB 1996 at [295] per Watson, VP and Roberts, C.*

Table 3.2

Public Holiday Penalty Rates				
Award	Permanent Staff		Casual Staff	
	Current	New	Current	New
Clubs Award	250%	250%	250%	250%
Fast Food Award	250%	225%	275%	250%
Hospitality Award	250%	225%	275%	250%
Pharmacy Award	250%	225%	275%	250%
Retail Award	250%	225%	275%	250%
Restaurant Award	250%	225%	250%	250%

Source: Fair Work Commission.

An analysis of the Commission's reasoning and the impact of the decision are provided further below.

Discussion

Previous decisions

The decision of the Commission should be seen within the context of other recent decisions that have reduced penalty rates. For example, in 2010, Fair Work Australia reduced penalty rates for some employees in the fast food, restaurant and hospitality industries when various state awards were consolidated into a national award.[78] Further, in 2014, the Fair Work Commission reduced Sunday penalty rates for casual workers employed under the Restaurants Award, from 175 per cent to 150 per cent.[79]

In the 2014 decision, the majority of the Full Bench made a distinction between career restaurant industry workers, and transient and lower-skilled casual employees on one hand, and younger workers on the other. In relation to the latter category, the Commission found that 'the superimposition of the casual loading of 25% in addition to of the Sunday penalty of 50%, resulting in a total loading of 75%, would tend to overcompensate them for working on Sundays and is more than is required to attract them to work on that day'.[80] In relation to the former categories, although the majority accepted that lower penalty rates would have some effect on employment (particularly for owner-operators working on Sundays rather than paying staff for additional hours) it did not consider those effects to be significant enough to alter penalty rates, citing consistent employment growth in the industry.[81]

Within this context, it is clear that the 2017 decision of the Commission is not unique, but forms part of a wider trend.

78 Cash, M, Media Release: Another Day, Another ACTU Lie, 24 May 2017.

79 *Re Restaurant and Catering Association of Victoria [2014] FWCFB 1996.*

80 Ibid at [138].

81 Ibid at [122].

Developments in the rationales for penalty rates and the effect on employment

The Commission began by framing its reasoning in terms of the two historical rationales for penalty rates. First, the need to mandate extra compensation payable to employees for working outside 'normal hours' (the compensatory element) and second, the need to deter employers from operating outside 'normal hours' (the deterrence element).[82] As section one of this report has identified, the deterrence element was the original intention behind penalty rates, whereas the compensatory or incentive element developed in the second half of the twentieth century.

The Commission held that 'deterrence is no longer a relevant consideration in the setting of weekend and public holiday penalty rates'.[83] Although the Commission made a concession that penalty rates may have the effect of deterring employers from scheduling work after hours, on weekends and on public holidays, it stated that this was not the objective of penalty rates.[84] Of course, in reality the two justifications are hard to disentangle. For instance, the entire concept of a public holiday – especially those that coincide with religious holidays – seem to only work if most employers close. This is perhaps why the Productivity Commission, in an earlier review, considered that the 'earlier concept of deterrence continues to have relevance' for public holidays.[85] The decision is nevertheless significant because it reinforces a line of authority that the original intention of penalty rates regulation is anachronistic, an important development after the 2013 legislative changes.[86]

The dispute in this case then, is in relation to the compensatory element: What is the wage premium for working on a weekend or public holiday? The Commission held that answering this question requires a consideration of a range of matters:

(i) the impact of working at such times or on such days on the employees concerned (i.e. the extent of the disutility;

(ii) the terms of the relevant modern award, in particular whether it already compensates employees for working at such times or on such days; and

(iii) the extent to which working at such times or on such days is a feature of the industry regulated by the particular modern award. [87]

Factors (ii) and (iii) are relatively straightforward matters for the Commission to adjudicate. Factor (i), however, sets an impossible task. According to the Commission, this requires 'an assessment of the impact of such work on employee health and work/life balance, taking into account the preferences of the employees for working at those times'.[88] Of course, the Commission will carefully consider the information presented before it properly and discharge its legal obligations according to the law, but it can never receive all of the relevant information. In this case, the Commission heard evidence given by 143 lay and expert witnesses over 39 days of hearings.[89] But there are millions of workers in Australia, each with their own preferences, and it will never be feasible for a centralised body to hear from all of them – and even if that was attempted, the information would be already out of date as soon as it was collated because the workforce's

82 [2017] FWCFB 1001 at [38]

83 Ibid at [39].

84 Ibid.

85 Productivity Commission, Workplace Relations Framework, Inquiry Report no. 76, 30 November 2015, 406.

86 See, for example, PR 941526 [2003] AIRC 1504; [2013] FWC 7840.

87 [2017] FWCFB 1001 at [45].

88 Ibid at [46]

89 Fair Work Commission, 4 yearly review of modern awards — Penalty Rates – Summary of Decision, at [4].

composition and preferences are dynamic. This problem is something that F.A. Hayek reflected on in his influential work 'The use of knowledge in society':

> If we can agree that the economic problem of society is mainly one of rapid adaption to changes in the particular circumstances of time and place, it would seem to follow that the ultimate decisions must be left to people who are familiar with those circumstances, who know directly of the relevant changes and of the resources immediately available to meet them. We cannot expect that this problem will be solved first by communicating all this knowledge to a central board which, after integrating *all* knowledge, issue its orders.[90]

Hayek's fundamental insight in that paper was that prices are a mechanism for communicating information dispersed among many individuals. Applied here to the labour market, the market wage coordinates knowledge of the value of weekend work and public holidays. Mandated penalty rates by a centralised commission imposing a deliberately high price floor to weekend and public holiday work undermines that exchange of information, with the real risk that it limits economic exchange – i.e. employment – from taking place. The Commission's decision to reduce penalty rates in this instance reduces the height of the information barrier, but not the barrier itself.

That said, under the Act the Commission is required to deal with the information before it. In summary, the Commission made two key findings relating to the common evidence before it:

1. There is a disutility associated with weekend work, above that applicable to work performed from Monday to Friday. Generally speaking, for many workers Sunday work has a higher level of disutility than Saturday work, though the extent of the disutility is much less than in times past.
2. We agree with the assessment in the PC Final Report that there are likely to be some positive employment effects from a reduction in penalty rates, though it is difficult to quantify the precise effect. Any potential positive employment effects from a reduction in penalty rates are likely to be reduced due to substitution and other effects.[91]

Both findings are significant.

The first finding sets out the compensatory justification for maintaining penalty rates. The Commission found that the 'disutility'[92] of working on public holidays is greater than the disutility of working on Sundays – and that Sundays is greater than Saturdays.[93] It is for this reason that the Commission decided upon separate penalty rates for Saturdays, Sundays and public holidays. The Commission found that there was a difference in attitudes to weekend work for different types of workers. For example, the Commission heard evidence that younger students are more likely to prefer weekend work than more experienced workers.[94] The Productivity Commission had previously noted that hospitality, entertainment, retail, restaurants and cafes industries were where penalty rates was of the greatest concern:

> These are industries where consumer expectations of access to services has expanded over time so that the costs of penalty rates affect consumer amenity in ways they did not when penalty rates were first introduced. Such industries are also important sources of entry-level

90 Hayek, FA 1945, 'The use of knowledge in society', vol. 34, no. 4, 524.

91 [2017] FWCFB 1001 at [68]

92 This is the language used by the Commission. We note that in considering the available options and choosing to work, at a given wage rate, this would tend to imply that a person's overall utility remains positive.

93 [2017] FWCFB 1001 at [73]

94 e.g. Ibid at [1304], [1353], [1378]

> jobs for, among others, relatively unskilled casual employees and young people (particularly students) needing flexible working arrangements.[95]

This leads into the second finding. In the Penalty Rates Decision, the Commission heard evidence that high penalty rates meant that owner operators performing work on Sundays, instead of employees, was a common occurrence in small and medium sized businesses.[96] It also heard that penalty rates were restricting trading hours – confirming the hypothesis presented in section two of this paper – as well as lower staffing levels, and a restriction on the type and range of services provided.[97] These findings are not surprising given our earlier observation about mandated penalty rates acting as a barrier. Some examples cited by the Commission include:

- Mr Trengove, Owner and Manager of the Mulga Hill Tavern, Broken Hill, NSW (33 employees) said that the hotel is run with 'skeleton staff on Sundays and public holidays' and he will personally 'cover certain shifts on those days as a measure to cut costs'.
- Mr Waller, Owner and Licensee of The Heads Hotel, Shoalhaven Heads, NSW (28 employees) said that he works weekends 'to save costs' and 'would prefer to allocate that work to 2 casual staff members in his place'
- Mr Bullock, Chief Executive Officer of 1834 Hotels in Adelaide, South Australia (which manages over 16 individually owned hotels employing 500 employees) said that because of penalty rates there are reduced trading hours on Sundays
- Mr Tony Cakmar, General Manager of Clarion Suites Gateway, Melbourne, Victoria (70 employees) said that the Hotel operates on a skeleton staff on Sundays and public holidays and where possible casual employees are not rostered on those days.
- Mr Hakfoort, Chief Executive Officer of the Hakfoort Group in Queensland (231 employees) said that the following restrictions are placed on services at establishments within the Group to reduce the cost of penalty rates on Sundays and public holidays:
    - The restaurant area of the Burke & Wills Hotel is closed on Sundays and public holidays;
    - The hours for breakfast service have been reduced at the Conservatory Restaurant at the Burke & Wills Hotel;
    - The dinner service at Albert's Restaurant at the Burke & Wills Hotel has been reduced
    - Rooms in accommodation Hotels in the group are not cleaned on Sundays or public holidays unless necessary and only refreshment of rooms and the delivery of breakfast is provided
- Ms Walder, Director of Human Resources of the InterContinental Sydney Double Bay in Sydney, NSW (105 employees) also said that the rooftop area of the hotel is closed on public holidays when there is not strong occupancy and where possible the servicing of accommodation rooms was 'rolled over' from Sunday to Monday 'to avoid paying housekeeping staff on Sunday'.[98]

(Commission's own summaries)

95 Productivity Commission, Workplace Relations Framework, Inquiry Report no. 76, 30 November 2015, p. 406.

96 [2017] FWCFB 1001 at [70]-[72]

97 Ibid.

98 Ibid at [778]-[783].

The Office of the Minister for Employment, Senator the Hon. Michaelia Cash, provided a number of examples that smaller businesses operating under the Award are put at a competitive disadvantage against larger businesses in the same industry operating under union-negotiated EBAs.

For example:

a bed and breakfast must pay $10 an hour more than a 5-star hotel;

a family chicken shop must pay $8 an hour more than KFC;

a family-owned takeaway must pay $8 an hour more than McDonalds;

a family pizza takeaway must pay $8 an hour more than Pizza Hut; and

a family greengrocer must pay $5 an hour more than Woolworths.[99]

The finding of the Commission goes to what the Productivity Commission has highlighted about the burden of proof:

> ...much of the assessment of regulated penalty rates centres on whether there is sufficient evidence that lowering their rates would be beneficial, rather than on whether there is sufficient evidence to sustain the current high levels.[100]

In this case, the Commission has previously held that if parties are seeking a reduction in penalty rates – or other variations of an award – it will be up to that party to prove the need for change. In the current context, it meant that the employer associations had the burden of proof in demonstrating sufficient evidence. This decision shows that this is not an impossible burden, and the Commission will be convinced by a weight of real world examples where penalty rates have negative consequences.

However, this point should not be overstated. The Commission were careful to state that the retail and hospitality industries were a unique case. The industry is categorised by a workforce that is young, work part-time hours, work casually, and have a high turnover in the lower classifications. For this reasons, the Commission made clear that given 'the distinguishing characteristics of the Hospitality and Retail sectors, the decisions we have made in respect of the Hospitality and Retail Awards provide no warrant for the variation of penalty rates in other modern awards. Each case must be determined on its merits'.[101] The Commission cited, with approval, the Productivity Commission's 2015 findings on weekend penalty rates:

> There is no case for common penalty rates across all industries. The [Productivity] Commission is not recommending a reduction in the Sunday penalty rates beyond [hospitality, entertainment, retail, restaurants and cafes]. Regulated penalty rates as currently constructed for essential services and many other industries are justifiable. The original justifications have not altered materially: they align with working arrangements that often involve rotating

99 Cash, M, 'Media Release: Fair Work Commission transitional arrangements for Sunday penalty rates', 5 June 2017, < https://ministers.employment.gov.au/cash/fair-work-commission-transitional-arrangements-sunday-penalty-rates> accessed 22 June 2017.

100 Productivity Commission, Workplace Relations Framework, Inquiry Report no. 76, 30 November 2015, p. 489.

101 [2017] FWCFB 1001 at [81].

> shifts across the whole week, are not likely to reduce service availability meaningfully, are commensurate with the skills of the employees, and are unlikely to lead to job losses.[102]

Accordingly, the Australian Council of Trade Unions ('ACTU') political campaign against the Commission's decision are disingenuous. The ACTU are taking figures that estimate penalty rates for all weekend work across awards, enterprise bargaining agreements and individual contracts,[103] and imply that this total amount is under threat.[104] The methodological errors in this are obvious in that the scope of employment considered is far beyond the modern award system considered in the four-yearly reviews, and the implication that penalty rates would be reduced to zero is without any proper foundation. Other analysis used by the ACTU can be discounted because it fails to model the positive impact on working hours and employment that the Commission explicitly based its decision on.[105] The partisan political agenda of the union movement is laid bare when unions such as the CFMEU threaten a campaign against the federal government and hold rallies around the country, despite its members not being affected by the decision.[106] In Victoria, the state Labor government are assisting the union movement in their political campaign by initiating a parliamentary inquiry into penalty rates, despite that state referring much of its industrial relations powers to the Commonwealth in 1996.[107]

Transitional arrangements

On 5 June 2017, the Commission announced the transitional arrangements that would apply to the Penalty Rates Decision ('Transitional Decision').[108] In summary, the Commission decided that the changes to Sunday rates would be phased in over three annual increments from 1 July 2017 for those employees under the Fast Food Award, the Hospitality Award, and casual employees under the Retail Award, and over four annual increments for employees under the Pharmacy Award and permanent employees under the Retail Award. The union movement, a number of state governments and the federal parliamentary Labor Party made submissions that the Penalty Rates Decision be set aside or delayed indefinitely.[109] One argument was that section 134(1)(da) of the Act did not allow the Commission to reduce rates – i.e. it was only empowered to increase penalty rates.[110] The Commission did not accept the submissions.[111]

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102 Productivity Commission, Workplace Relations Framework, Inquiry Report no. 76, 30 November 2015, p. 493.

103 Stanford, J 2017, 'Tip of the iceberg: weekend work and penalty pay in 108 Australian industries, Centre for Future Work at the Australian Institute, <https://d3n8a8pro7vhmx.cloudfront.net/theausinstitute/pages/1462/attachments/original/1493883227/Tip_of_the_Iceberg.pdf?1493883227> accessed 22 June 2017.

104 ACTU Media Release, '$14 billion could go from wages if penalty rate cuts are spread', 2 May 2017, <https://www.actu.org.au/actu-media/media-releases/2017/14-billion-could-go-from-wages-if-penalty-rate-cuts-spread> accessed 22 June 2017.

105 Rajadurai, E, Cavanough, E 2017, 'Unfair Burden: The Impact of Sunday Penalty Rate Reductions on Regional and Rural Australia', McKell Institute , <https://mckellinstitute.org.au/app/uploads/The-McKell-Institute-Unfair-Burden.pdf> accessed 22 June 2017.

106 Galloway, A, 'Penalty rate cuts: Workers march through Melbourne CBD in protest', *Herald Sun, 8 March 2017, <http://www.heraldsun.com.au/news/victoria/penalty-rate-cuts-workers-march-through-melbourne-cbd-in-protest/news-story/bbc57875613c15c71cf597dcb48af9a0> accessed 22 June 2016.*

107 See https://www.parliament.vic.gov.au/penaltyratesfairpay/inquiry/915

108 *Re 4 yearly review of modern awards – penalty rates – hospitality and retail sectors – transitional arrangements [2017] FWCFB 3001*

109 Ibid at [16]-[45]

110 Ibid.

111 Ibid.

Legislative proposals in response to the penalty rates decision

Of course, some workers will receive lower take home pay after the changes to penalty rates become effective, but this is one of the costs of a centralised industrial relations system where the decision of a single commission is empowered to impact the working conditions of hundreds of thousands of people. The real policy question at hand is not whether the labour market has a premium for weekend and public holiday work, the question is whether this decision is 'to be done centrally, by one authority for the whole economic system, or is to be divided among many individuals'.[112] Under the current system, changes in preferences and circumstances that mean that where a modern award no longer meet its objectives there must be a costly and time-consuming investigation followed by uniform changes being imposed on all those people employed under the award. A fairer system would allow individual employees and employers to make those changes when individual preferences and circumstances change.

Legislative proposals seek to make the system even more centralised, and penalise work by reintroducing the concept of a deterrence effect.

On 20 March 2017, the Federal Leader of the Opposition, the Hon. Bill Shorten MP, introduced a private members bill into the House of Representatives. In a similar vein to the union campaign, Shorten said of the reduction in penalty rates 'make no mistake, they are the Prime Minister [Malcolm Turnbull's] cuts, and the coalition's cuts, to penalty rates'.[113] (Of course, it was a decision of the Fair Work Commission under legislation that Shorten introduced as minister and Shorten appointed three members of the Full Bench.)

The Fair Work Amendment (Protecting Take-Home Pay) Bill 2017 ('Labor's Bill') seeks to overturn the Penalty Rates Decision, and provide that in the future the Commission could not vary a modern award 'that would, or would be likely to, reduce the take-home pay of any employee covered by the award'.[114] Further, it would not even require individual employees to provide evidence to the Commission of actual loss of take-home pay.[115] A hypothetical reduction in pay would be enough to remove the discretion of the Commission to make a similar decision to the Penalty Rates Decision. Such a limitation implicitly reintroduces the historical deterrence rationale of penalty rates regulation. That is, if preferences or circumstances changed which lessened the need to provide additional remuneration for working weekends and public holidays[116], the Commission could not decrease penalty rates. In this case, employees under the award would be receiving a penalty rate in excess of the compensatory element – that excess is the deterrence element. The only way this could be addressed would be through legislative action, characterised by high transaction costs. Another issue is that it would negate the four-yearly review process contained in the Act, as there would be nothing to gain from a review that could not adjust penalty rates in line with the submissions and evidence brought before the Commission. There are potentially broader implications for the modern award regime, as the Commission could not make changes to classifications as just one example.

On 21 March 2017, the Labor Bill was introduced in to Senate and passed on 30 March

112 Hayek, FA 1945, 'The use of knowledge in society', vol. 34, no. 4, pp. 520-521.

113 Commonwealth, *Parliamentary Debates*, House of Representatives, 20 March 2017, 2269 (Bill Shorten).

114 Fair Work Amendment (Protecting Take-Home Pay) Bill 2017, sch 1.

115 Explanatory Memorandum, Fair Work Amendment (Protecting Take-Home Pay) Bill 2017, 3.

116 *Fair Work Act 2009*, s 134(1)(da).

2017. It remains before the House of Representatives, but is unlikely to pass in the current Parliament. Another private members bill, Fair Work Amendment (Protecting Take Home Pay of All Workers) Bill 2017, was introduced by the Liberal National Party's George Christensen in a private capacity on 19 June 2017 ('Christensen Bill'). This Bill proposes to negate the Penalty Rates Decision and provide restrictions on trading away penalty rates in enterprise bargaining agreements.[117] It is similarly unlikely to pass.

117 Fair Work Amendment (Protecting Take Home Pay of All Workers) Bill 2017, sch 1.

Section 4: Conclusion

Penalty rates were borne out of the notion of Sunday labour as a social evil which government, appropriately, saw fit to discourage. With economic and social change in the mid-20th century, the deterrence rationale of penalty rates ceased to be relevant, yet penalty rates remained a constant staple of Australia's industrial relations regime, with defenders arguing that they were necessary to compensate workers for the hardship of working outside regular hours. As work and consumption habits continue to trend towards a '24-hour' economy, the need to compensate weekend workers is arguably also drifting towards irrelevance.

Even if we accept the compensatory rationale for penalty rates, there is still a knowledge problem sitting at the heart of the issue. Who is in the best position to decide on the right compensatory premium for weekend and public holiday work? Some individuals will demand a high premium for weekend and public holiday work. Others may prefer to work on these times, and would instead prefer that they received compensation for weekday work. Some will not have much preference, and will be happy with any opportunity to work. Only individuals know their own circumstances and preferences and they are incapable of being properly aggregated by a centralised commission. Yet the history of industrial relations laws in Australia (summarised in section one of this paper) is centralised wage fixing, coupled with mandated penalty rates.

This has led to distortions in the labour market. The Commission cited numerous examples of businesses that testified that they would like to employ more people and/or give existing employees greater hours. Some of these are extracted above in section three. In summary, the Commission accepted that reducing weekend and public holiday penalty rates would lead to a positive change in employment – and made the decision on this basis that prohibitively high levels of penalty rates were no longer meeting the modern award objective. Recall that the aim of modern awards is to provide a safety net of terms and conditions of employment, decided by the Commission, in addition to the National Employment Standards prescribed in the Act. Where prohibitive rates are preventing employment this must be addressed. On this basis, the Penalty Rates Decision is a step in the right direction and fits a wider trend of Commission decisions to reduce prohibitively high penalty rates. Ultimately, the only way to remove distortions in the market is to have penalty rates being a binding arrangement between an employee and employer. Legislation could provide that penalty rates are a legal possibility, but they should not continue to be mandatory.

Mandatory rates will have the effect of penalising work, even if it is not the objective. Although it must be said that the current system of an independent commission is certainly better than misguided proposals to enshrine penalty rates in legislation, which would increase the transaction costs of responding to changes in preferences and circumstances and further politicising the process.

The major beneficiaries of the reduction of penalty rates will be award-reliant employers. Research shows that small businesses in the retail and hospitality industries are more reliant on the award system than their larger competitors, and compared to other industries.[118] For existing employees, weekend work will be more secure. However, the positive employment effects of the Penalty Rates Decision will be limited by subsequent decision of the 2017 Annual Wage Review

118 Farmakis-Gambon, S, Rozenbee, D, Yuen, K 2012, Award-reliant small businesses, Fair Work Commission, Research Report 1/2012.

case, where the Commission increased the minimum wage.[119] Previous IPA research has found that, on balance, increasing the minimum wage will have an adverse effect on employment for unskilled workers.[120] However, the minimum wage increase will limit the negative effects on employees facing lower take-home pay due to reduced penalty rates – adding further weight to our contention in section three that the union movement's campaign is exaggerated.

Other distortions exist between the Award system and the Enterprise Bargaining system. Section one noted that a feature of the 1993 reforms was that penalty rates could be traded away for other terms and conditions on an enterprise level. This continues today, where changes must meet the 'better off overall test'.[121]

To be clear, the solution to this distortion is not mandating that EBA penalty rates cannot fall below the Award (as the Chistensen Bill attempts to do). This would undermine the EBA process by limiting the scope of negotiations. A better solution would be introducing a fast track EBA process, allowing new businesses to adopt an existing EBA from within the same industry as a pro-forma for their own greenfields agreement.

Additionally, the government could address the recommendations to improve the EBA process from the Productivity Commission's inquiry into the workplace relations framework.[122] One recommendation that could be adopted is abolishing the current better-off overall test and reinstating the no-disadvantage test, which would allow greater flexibility to reduce or trade off penalty rates at the enterprise level.

In any event, future reforms of penalty rates should be pursued with the objective of giving decision-making power to businesses and workers, to be settled as a matter of negotiation. Centralised, mandated penalty rates are imposed on all individual businesses and employees regardless of their circumstances or preferences. In this way, mandated penalty rates have displaced individual decision-making, while restricting choice, opportunity, and the chance for particularly younger unskilled people to enjoy earned success. Regardless of the intention or justification, it is counterproductive for government to impose a penalty on work.

119 Annual Wage Review 2016-17, [2017] FWCFB 3500.

120 Novak, M, Lane, A 2014, 'Submission to the Fair Work Commission: Annual Wage Review 2014', Institute of Public Affairs.

121 *Fair Work Act*, s 193.

122 Productivity Commission, Workplace Relations Framework, Inquiry Report no. 76, 30 November 2015

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