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## 9 Penalty rates for long hours and night work

### Key Points

- Many Australians work long hours and during nights.
- The working time regulations discussed in this chapter exist to protect employees. They do not apply to the self-employed or contractors.
  - Around 2.8 million Australian employees report working more than 40 hours per week and over 1.5 million reported working 50 hours or more per week.
  - Almost 1.2 million Australian employees report working schedules likely to involve night work.
- Current regulations of long working hours and night work for employees are contained within both the National Employment Standards (NES) and modern awards.
  - The NES specify a maximum weekly limit of 38 hours, giving employees the right to refuse unreasonable additional hours.
  - Most awards specify wage premiums for both long hours and night work.
- The case for working time regulation is strong where overtime is imposed on employees and they lack the bargaining power to negotiate wage premiums that reflect additional personal costs.
- There is strong evidence that sustained long hours and night work impose substantial costs on the health of employees.
- Given this, the current restrictions on hours worked (with a capacity to vary these when reasonable) and premium rates of pay for long hours or work at night are justified. Few participants contested this.

Many employees work non-standard hours, either more than the National Employment Standards (NES) maximum or at non-standard times, such as at night or on weekends. A substantial number of these employees are rewarded by regulated premiums on normal wage rates (sometimes generically categorised as ‘penalty’ rates).

Indeed, under the modern awards objective, the *Fair Work Act 2009* (Cth) (FW Act) requires that modern awards take into account the need to provide additional remuneration for overtime, weekends, public holidays, shift work and, more generally, ‘unsocial,

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irregular or unpredictable hours' (s. 134 (1)(da)).<sup>113</sup> Various awards specify premium rates for such work, with the premium rates depending on the industry and/or occupation.

Premium rates of pay are strongly dependent on when work is undertaken and the total time spent working. The three principal time related wage rates are:

- shift loadings, and weekend and evening pay premiums. These are requirements placed on employers to pay additional wages at certain times of the day or on certain days of the week, and are not dependent on how many hours in total a person has worked during the week
- overtime rates, which represent higher wage rates for hours worked greater than the usual ordinary hours listed under an award or an agreement
- holiday pay. Public holidays are a form of paid leave, with the exception that, unlike personal leave, they are prescribed for days with a cultural or religious significance that society has deemed should involve widespread community participation (with its implications for cultural identity). If people work on such days, they typically receive additional pay.

The Fair Work Ombudsman categorises all the above premium rates as 'penalty' rates, while the Fair Work Commission (and awards) distinguish between penalty rates and overtime rates.

The different types of work mean that there can be a complex set of overlapping time related payments (table 9.1). Unfortunately, the various debates about the determination of such rates, or their 'right' level, have sometimes intermingled the quite separate issues that relate to the different forms of non-standard hours. This chapter focuses on penalty rates for long hours and night (and associated shift) work, and explains why the Productivity Commission concludes that the preserving the status quo is largely justified and, if anything, the community should be more aware of the risks entailed by such work patterns.

The next six chapters have a quite distinct orientation. They concentrate on daytime penalty rates on weekends for consumer-focused industries (such as retailing and restaurants) where social changes and consumer preferences have increasingly prompted weekend trading. The application of penalty rates for weekend work requires the assessment of quite separate empirical, analytical and policy issues.

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<sup>113</sup> While the concept of compensation for asocial hours has a long legacy in WR legislation, s. 134(da) is a recent insertion (following the passage through Parliament of the Fair Work Amendment Act 2013, No. 73, 2013).

**Table 9.1 The types of work covered by this and the next chapter <sup>a</sup>**

	Weekend			Weekday		
	Ordinary daytime	Evening	Night and rotating shifts	Ordinary daytime	Evening	Night and rotating shifts
Not public holiday or overtime	B	C	A	N	D	A
Public holiday	C	C	A	C	C	A
Overtime	A	A	A	A	A	A

<sup>a</sup> 'A' describes the focus of this chapter — premium rates that relate to overtime at any time of the week and to night and rotating shifts. 'B' describes the focus of the following chapters — penalty rates that relate to normal daytime hours worked on a weekend. 'C' and 'D' relate to the other areas of interest of the following chapters. 'C' relates to public holiday pay arrangements on any day, except where there are night, long hour or rotating shifts in place. 'D' relates to evening work on any day of the week (excepting public holidays). Ordinary daytime work (N), a reducing norm, is not considered in either this chapter or those following.

## Working time regulations affect a wide range of employers and employees

Many Australians work long hours and during nights. In early 2015, 2.8 million Australian employees reported working more than 40 hours per week, while over 1.5 million employees reported working 50 hours or more per week (ABS 2015f). Although there are no current statistics that record the prevalence of night work per se, work schedules typically associated with night work are common. In 2014, almost 1.2 million Australian employees reported working schedules likely to involve night work (including night and rotating shifts, as well as irregular working patterns).<sup>114</sup>

Regulation of long hours and night work have multiple and sometimes conflicting objectives.<sup>115</sup> They aim to balance the needs of business with those of employees. On the one hand, extending the hours of existing employees avoids the fixed costs of hiring. Moreover, in some roles, employees may be more effective working long hours. On the other hand, employees can bear significant additional personal costs from working long hours. There is strong evidence that persistently working long hours increases the risk of a range of illnesses.

<sup>114</sup> Calculated from the HILDA Survey, Release 13.0.

<sup>115</sup> References to 'regulation' in this chapter relate to the NES and to award provisions, and not any other forms of regulation.

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Working time regulations apply to a heterogeneous body of employees and workplaces. Regulations aimed at employees most burdened by overtime and night work will invariably affect some who prefer such arrangements. As such, these regulations must balance the potential benefits of reducing the personal costs of long hours and night work against the inefficiencies from intervening in otherwise mutually beneficial arrangements.

In Australia, long working hours and night work are regulated by both statute and modern awards. Under the FW Act, the NES provide for maximum weekly hours, while modern awards define ordinary hours, along with overtime and shift loading rates.

The case for regulation rests on the existence and extent of detrimental effects to employees, and the degree to which market mechanisms minimise these costs and/or compensate those who bear them. Where the market fails to provide adequate compensation to affected workers, the effectiveness of regulations is a key consideration.

This chapter is structured as follows. It outlines past and present working time regulation in Australia to provide context and lessons for any future policy developments (section 9.1). The chapter then examines the prevalence of long working hours and night work, along with the characteristics of those who work these schedules (section 9.2). Finally, the chapter assesses the impact of long hours and night work regulation (section 9.3), and provides options for reform (section 9.4).

## 9.1 Current regulation of long hours and night work

Regulations targeting working hours use varied terminology. While the chief concerns in this chapter are long working hours and working at night, provisions that regulate ‘overtime’ or ‘shift work’ may or may not deal with these concerns (box 9.1).

### Box 9.1 Some terminology for this chapter

Working time regulation is generally concerned with how many hours an employee works, and when he or she works those hours. This chapter focuses on people who work long hours, and people who work at night.

#### **Overtime means working in excess of ordinary hours**

The terminology of working time regulation can be confusing. For example, the term ‘overtime’ has two distinct meanings. It refers to both the number of hours worked in excess of aggregates of ‘ordinary hours’ (specified within awards), as well as work outside the daily or weekly span of ‘ordinary hours’ (also specified within awards), which generally includes evening, night and weekend work. For part-time employees, the number ‘ordinary hours’ corresponds to an employee’s typical weekly hours. In this chapter, the term ‘overtime’ is used to refer to work in excess of ordinary hours. Weekend and afternoon/evening work are covered in chapters 10 to 15.

#### **Night work is work during nights, whether ‘shift’ or ‘overtime’**

Many awards contain specific provisions for night shift work. However, in industries where shift work is uncommon, ‘overtime’ provisions may contain wage premiums for night work. This chapter will consider all of the above as regulations pertaining to night work.

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For the purposes of this chapter, ‘overtime’ refers to hours worked in excess (rather than outside) of ‘ordinary hours’. This may refer to excess hours worked within a day, week, or number of weeks. Night work refers to work undertaken between roughly 7 pm to 7 am. While shift work provisions within modern awards generally apply to these hours, ‘overtime’ provisions may also apply where they refer to the span of hours.

## **A brief history of working time regulations in Australia**

Working hour regulations have long been a central component of Australia’s Workplace Relations (WR) law. Awards have historically regulated this area, though more recently, statutory provisions have arisen to provide an upper limit to working hours.

In the mid–19th century, Australia led the world in reducing the length of the standard working week. Following the 48–hour week negotiated by Victorian building unions in the 1850s, award conditions progressively reduced weekly hours. In 1947, the standard week was reduced to 40 hours.

By the turn of the 21st century, the majority of awards stipulated a 38–hour week. Following the Working Hours Case 2002, in which the Full Bench of the Australian Industrial Relations Commission mandated a maximum working week of 38 hours with reasonable additional hours, the 38-hour week became the national standard (box 9.2). These conditions, however, remained limited to employees covered by awards.

### **Box 9.2      The Working Hours Case (2002)**

The Working Hours Case 2002 114 IR 390 was brought by the Australian Council of Trade Unions (ACTU) to incorporate various working time related provisions within all awards. Specifically, the ACTU proposed that awards contain restrictions on the number of additional hours employees that may be asked to work, along with provisions for additional paid leave following periods of extreme working hours. The ACTU was successful with the former, but not the latter. The Australian Industrial Relations Commission Full Bench determined that the following be inserted into awards:

- 1.1 Subject to clause 1.2 an employer may require an employee to work reasonable overtime at overtime rates.
- 1.2 An employee may refuse to work overtime in circumstances where the working of such overtime would result in the employee working hours which are unreasonable having regard to:
  1. any risk to employee health and safety;
  2. the employee’s personal circumstances including any family responsibilities;
  3. the needs of the workplace or enterprise;
  4. the notice (if any) given by the employer of the overtime and by the employee of his or her intention to refuse it; and
  5. any other relevant matter.

*Source:* Working Hours Test Case [2002] PR072202 [23 July 2002].

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The conditions borne of the Working Hours Case were extended to all employees following the introduction of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), which contained the Australian Fair Pay and Conditions Standard (AFPCS). The AFPCS largely inherited its ‘ordinary hours’ conditions from the Working Hours Case, with its key provision that employers could not request or require employees to work unreasonable additional hours.

## Current arrangements

Current working time arrangements are a product of their history. Though statutory maximum hours provisions are now located within the NES under the FW Act, they closely resemble those of the AFPCS. Similarly, although awards have undergone substantial rationalisation and simplification, they remain the main vehicle for regulating long hours and night work by specifying ordinary hours, overtime and night shift loading.

For full-time employees, the NES specify that an employer must not request or require an employee to work more than 38 hours per week, unless the additional hours are reasonable. Similarly, part-time employees must not be asked to work more than their ‘ordinary hours’ — where the term ‘ordinary hours’ refers to the number of hours typically worked — unless the additional hours are reasonable. The NES specify various criteria for assessing whether additional hours are reasonable (box 9.3). These include factors such as the risk to employee health and safety, as well as the needs of employees and employers. Although the relevant provisions of the NES have rarely been invoked, the limited numbers of cases highlight the importance of context in the interpretation of the legislation.

### Box 9.3 What are ‘reasonable additional hours?’

Two notable cases provide some insight into the application of working time provisions in the NES. The outcomes of each case reveal the importance of context in the determination of whether additional hours are ‘reasonable’.

*MacPherson v Coal & Allied Mining Services* involved a judgment on the increase of an employee’s weekly hours from 40 to 44 per week. The Federal Magistrates Court found that the additional hours associated with the new rostering were reasonable given a number of compensating factors, such as an associated pay increase, the increase in day work, prior notice from the employer, industry norms around working hours and the potential for the mitigation of safety risks.

*Brown v Premier Pet* involved the dismissal of an employee following refusal to work additional hours. Mr Brown refused to work three additional hours on non-trading days to complete maintenance work. The court found that Mr Brown had the right to refuse additional working hours, and that his dismissal constituted adverse action. Relevant factors in this decision included Mr Brown’s circumstances, the needs of the workplace, lack of attempts to negotiate rostering arrangements and the fact that the additional work fell on weekends.

*Sources:* Stewart (2013, p. 224); *Brown v Premier Pet Pty Ltd* (2012) FMCA 1089 [6 November 2012]; *MacPherson v Coal & Allied Mining Services Pty Ltd (No.2)* (2009) FMCA 881 [9 September 2009].

Long working hours are also regulated by modern awards. Awards typically define ‘ordinary hours’ of work (which are separate and sometimes different from the 38 hours notional maximum contained within the NES) and provide some compensation for working in excess of these hours (table 9.1). As compensation for work beyond ordinary hours, awards generally offer either overtime premiums or time off in lieu. For example, the Nurses Award 2010 defines ‘ordinary hours’ to be 10 hours per day (exclusive of meal breaks) and 38 hours per week. Work in excess of 10 hours in a day accrues double time pay (a premium of 100 per cent). However, working hours can be averaged over four weeks such that hours worked in excess of ‘ordinary hours’ for a given week may not accrue overtime. The award also defines the span of ordinary hours, which allows for overtime due to work outside ordinary hours.

Modern awards also regulate night work. For industries and occupations in which shift work is common (that is, work that regularly takes place outside ‘ordinary hours’), modern awards generally define shift times (including night shifts) and their corresponding loadings (table 9.2). For example, the Nurses Award 2010 defines a night shift as beginning after 6.00 pm and finishing before 7.30 am the following day. A loading of 15 per cent is associated with night shift.

**Table 9.2 Long hours regulations are fairly consistent across awards**  
Working time regulations in various awards

<i>Award</i>	<i>Span</i>	<i>Hours per day</i>	<i>Hours per week</i>	<i>Averaging</i>	<i>Premiums (per cent)</i>
Aged Care Award 2010	6am – 6pm, Mon-Fri <sup>a</sup>	8 (day) 10 (night)	38	4 weeks	50 100 <sup>c</sup>
Social, Community, Home Care and Disability Services Industry Award 2010	6am – 8pm, Mon-Sun <sup>a</sup>	10	38	4 weeks	50 100 <sup>c</sup>
Building and Construction General On-site Award 2010	7am - 6pm, Mon-Fri <sup>a</sup>	8	38	4 weeks	100
Nurses Award 2010	6am – 6pm, Mon-Fri <sup>a</sup>	10	38	4 weeks	50 100 <sup>c</sup>
General Retail Industry Award 2010	7am – 9pm, Mon-Fri, 7am – 6pm, Sat 9am – 6pm, Sun	<b>g</b> <sup>b</sup>	38	4 weeks	50 100 <sup>d</sup>
Hospitality Industry (General) Award 2010	—	11.5	38	4 weeks	50 100 <sup>c</sup>
Mining Industry Award 2010	6am – 6pm, Mon- Sun <sup>a</sup>	10	38	26 weeks (for NES purposes)	50 100 <sup>d</sup>

<sup>a</sup> Separate conditions apply for shift workers. <sup>b</sup> One 11-hour day per week is permitted. <sup>c</sup> After two hours of overtime. <sup>d</sup> After three hours of overtime.

**Table 9.3 Night work regulations vary substantially across awards**

Night shift regulations in various awards

<i>Award</i>	<i>Commences</i>	<i>Finishes</i>	<i>Premiums (per cent)</i>
Aged Care Award 2010	4pm – 4am	—	15
	4am – 6am		12.5
Social, Community, Home Care and Disability Services Industry Award 2010	before 6am	after 12am	15
Building and Construction General On-site Award 2010	3pm-11pm	—	15
Nurses Award 2010	after 6pm	before 7.30am	15
General Retail Industry Award 2010	after 6 pm	before 5am	30 <sup>a</sup>
Hospitality Industry (General) Award 2010	7 pm	12am	10
Mining Industry Award 2010	—	12am – 8am	15

<sup>a</sup> For a permanent employee on a weeknight.

## Not all workers are covered

Although the AFPCS (and later the NES) vastly broadened the coverage of weekly hour limits, this did not extend to all Australian workers. The WR system does not stipulate any minimum conditions associated with hours of work or pay rates for genuine contractors. A contractor might include overtime or penalty rates in a service contract, but that would be a matter for the two contracting parties.<sup>116</sup> For obvious reasons, working business owners do not face any regulatory constraints on their hours of work or the compensation they receive for them.

## Arrangement overseas

Internationally, limits on weekly work hours and overtime pay are the most common forms of working time regulation. Over the last century, working hour limits across countries have broadly converged to a 40-hour working week. However, the application of limits varies across countries (table 9.4). Some jurisdictions (for example, Canada) stipulate a maximum number of hours above which wage premiums apply, while others (for example, New Zealand) specify a maximum which employers require written agreement to exceed.

<sup>116</sup> It is conceivable that a contract that required very long hours of work for little additional remuneration might be deemed as being harsh or unfair under the *Independent Contractors Act 2006* (Cth), but the case law is too limited to reach a firm conclusion about the interpretation of the Act.



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**Table 9.4 Overseas long hours regulation**

<i>Country</i>	<i>Long working hours regulations</i>
New Zealand	Employers and employees are not restricted in the hours of work to which they may agree, provided that these hours are reasonable and that they do not endanger the health of employees. In instances where an employment agreement does not specify weekly hours, the Minimum Wage Act applies, specifying 40 hours as a maximum working week. Compensation for work in excess of agreed weekly hours is also subject to the employment contract.
Canada	The Canada Labour Code outlines overtime provisions for industries over which the federal government has jurisdiction. In these industries, employees are entitled to overtime if their hours on average exceed 40 hours per week. Over the period of averaging, however, an employee may not work in excess of 48 hours in any week. Managers, superintendents, and employees who carry out management functions are exempted. Architects, dentists, engineers, lawyers, and medical doctors are also excluded.
United Kingdom	The United Kingdom's Working Time Regulations specify a maximum weekly limit of 48 hours, though employees may opt out of this through written agreement. A reference period of 17 weeks applies over which weekly hours may be averaged. No overtime premium is provided within the Working Time Regulations.

*Sources:* GOV.UK (2014); Immigration New Zealand (2013); Government of Canada (2010).

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## 9.2 The prevalence of long hours and night work

### Working hours have been falling on average

Over the last century, average annual working hours have declined in Australia and internationally (figure 9.1). In 1918, the average Australian employed person<sup>117</sup> worked just under 2600 hours per year. This figure had dropped to just over 1600 hours by 1998. Similar patterns are evident in comparable economies, such as Canada, New Zealand and the United Kingdom. The decline in average working hours was most pronounced in the first half of the 20th century, with a less marked decline observed more recently.

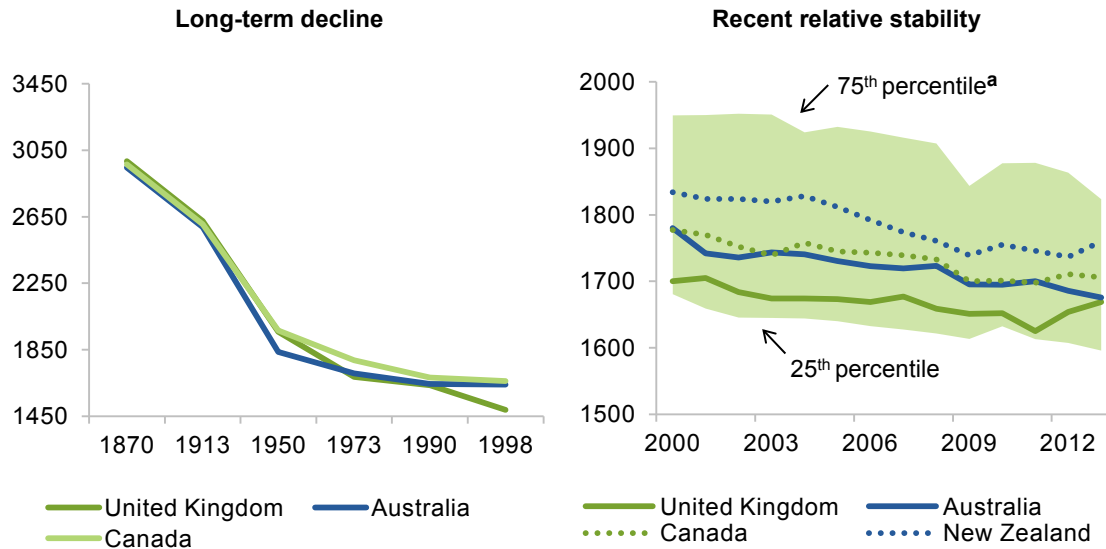
Several factors explain this fall in average working hours. These include norms about the appropriate balance of work and other activities, workplace health and safety issues, and union and employee pressures. Indeed, unions had a central role in the gradual reduction of 'ordinary hours' in Australia. This followed similar movements in other countries, particularly the United Kingdom (Cahill 2007).

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<sup>117</sup> These averages include the working hours of not only employees, but all employed persons. As non-employees, such as business owners, generally work longer hours, the average annual hours reported above are likely higher than those of the employee population.

**Figure 9.1 Average annual working hours have declined over time**

Average annual working hours of employed persons



<sup>a</sup> Among 34 OECD countries.

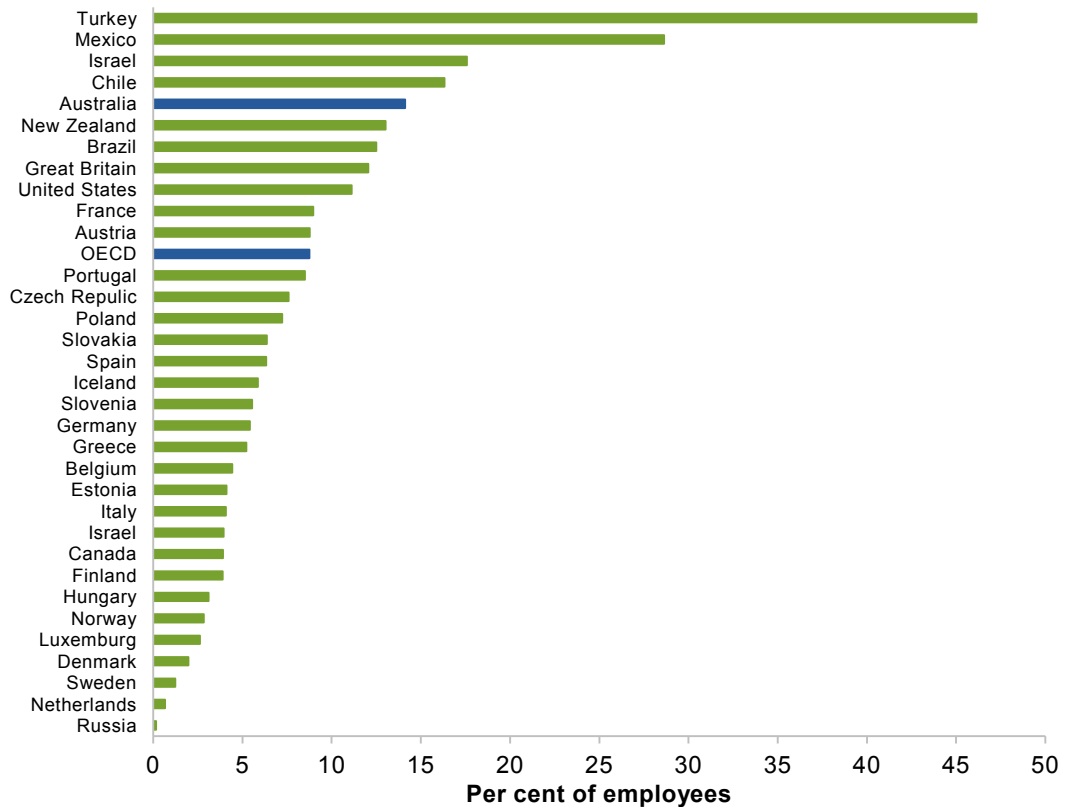
Sources: OECD (2001, 2015e).

## But some still work very long hours

Australia’s average annual hours of work are not high by international standards. In 2011, it ranked only 19th highest among 34 OECD countries (OECD 2015e). However, aggregate annual working hours provide an incomplete story because they mask compositional changes in the ways that Australians are working. For example, part-time work as a proportion of employment has increased from around 16 per cent in 1980 to just over 30 per cent in 2014.

Supporting this notion, Australia has a particularly high proportion of employees working very long hours, as compared with other OECD countries (figure 9.2). According to OECD data, just over 14 per cent of Australian employees work 50 hours or more per week. This is much higher than the OECD average of just under 9 per cent, and exceeds many comparable economies such as the United Kingdom and the United States. That said, variations in reported long hours may reflect not only differences in actual hours worked, but also the data collection techniques of the various national statistical agencies.

**Figure 9.2 Australia has a high proportion of employees working very long hours**  
Per cent of employees working more than 50 hours, 2011



Source: OECD (2013c).

## Who works long hours?

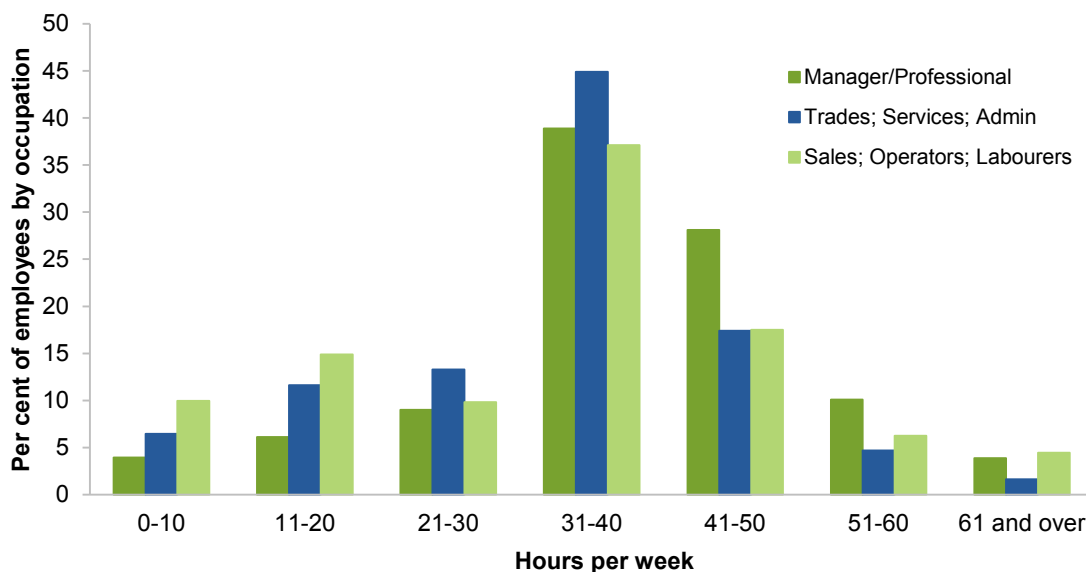
Long working hours are particularly common in high-skill occupations. People who work more than 40 hours per week are much more likely to be a manager or professional (figure 9.3). Several factors explain the prevalence of long hours by occupation:

- award-based overtime premiums create incentives for employers to avoid employing staff for hours in excess of their ‘ordinary hours’. For salaried employees that are not award based, no such premiums apply
- norms about working longer hours vary by occupation and workplace. In part, this may reflect employees’ perceptions that long working hours signal commitment to the enterprise (affecting job security and promotion). The non-pecuniary benefits of some types of work — its learning opportunities and job stimulation — may also lead to long hours

- the nature of work in some industries/enterprises is more conducive to employing many employees on short shifts than others. For example, it is relatively easy to coordinate the activities of many retail assistants working short hours in a retail outlet. This is not true for many professions, where it is difficult to transfer knowledge that is important to the efficient functioning of the business between different employees.

**Figure 9.3 Managers and professionals are more likely to work long hours**

Weekly hours worked, by occupation



Source: Productivity Commission estimates based on HILDA Release 13.

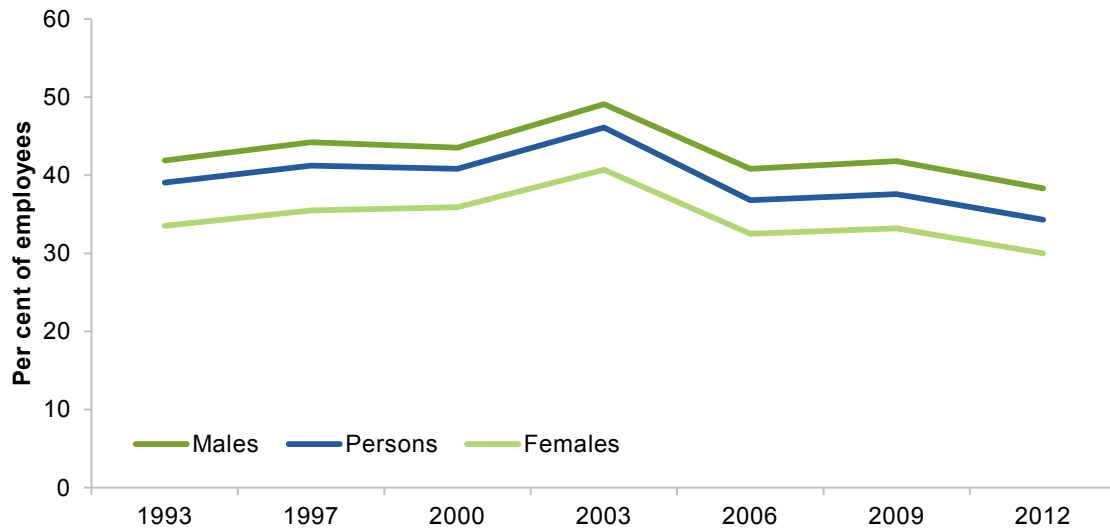
## Overtime

As discussed above (box 9.1), ‘overtime’ is an ambiguous concept, and although the data on overtime may capture more than long working hours, which are the focus of this chapter, they can provide some general insights for policy consideration.

The available data suggest overtime is common for many employees. In 2012, roughly a third of employees reported usually working overtime (both paid and unpaid) (figure 9.4), although this was substantially lower than the recent peak of just under one half of all employees in 2003.

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Figure 9.4 **Proportion of employees working overtime**  
1993–2012



Source: ABS (various years), *Working Time Arrangements*, Cat. No. 6342.0, table 1.

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Overtime rates vary considerably by industry and occupation (figure 9.5). In terms of industry, the highest rates of paid overtime are seen in construction, followed by electricity, gas, water and waste services. In terms of occupation, mobile plant operators work the highest number paid overtime hours, followed by construction and mining labourers. The lack of overtime recorded among occupations traditionally associated with long hours — such as health workers and various types of managers — reflects that these employees are typically in salaried work, without defined ordinary hours.

**Figure 9.5 Overtime by industry and selected occupations**

Weekly hours of overtime

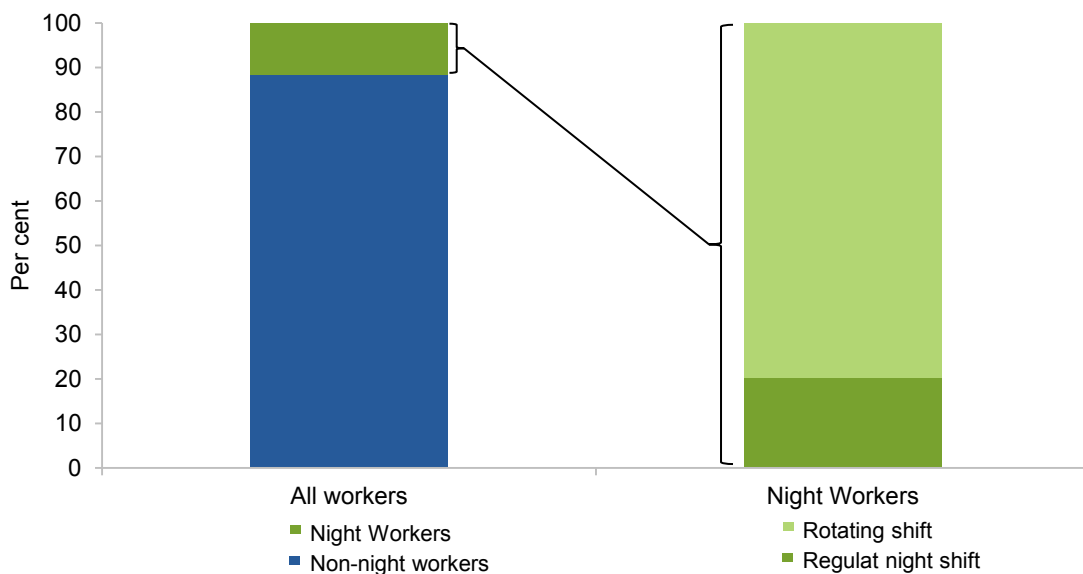


Source: Productivity Commission estimates based on ABS (2014) *Employee Earning and Hours*, Expanded CURF, Cat No. 6306.0.55.001.

## Night work

In 2013-14, almost 1.2 million Australian employees (around 11 per cent) reported working schedules likely to involve night work (including regular night shifts and rotating shifts) (figure 9.6). Among these workers, rotating shifts were most common. Only around 2.5 per cent of employees were involved in regular night shift work. This distribution of working schedules has remained fairly stable since 2001.<sup>118</sup>

Figure 9.6 **Night-working employees in Australia<sup>a</sup>**  
Proportion of workers, 2013 14



<sup>a</sup> Night workers includes those who work a regular night shift and a rotating shift. The figures do not count people who work irregular hours and split shifts or who are on call. Some work undertaken as part of these working patterns will involve working at night, and so the figures in the main text and the chart are likely to underestimate the actual prevalence of night work. If the former categories of work were included in the estimates then up to 2 million Australian employees (almost 20 per cent) could be involved in night work. The underestimate due to the omissions will be partly mitigated by the fact that rotating shifts may not always involve night work.

Source: Productivity Commission estimates based on HILDA Release 13.

<sup>118</sup> There is considerable uncertainty over these estimates because night shift work is not separately identified in any of the relevant surveys. The ABS recorded 1.5 million employees who worked on shift work in November 2012 (or 16.1 per cent of all employees), which included rotating shifts, regular shifts (covering any of regular evening or graveyard shifts, regular morning shifts and regular afternoon shifts), and irregular shift, split shift, on call arrangements (ABS 2013, *Working Time Arrangements, Australia*, November 2012, Cat. No. 6342, table 7, released 3 May). Many of these arrangements will not involve night shift at all. The 2014 Australian Work and Life Index (AWALI) survey undertaken by the University of South Australia found that 19.1 per cent of employees ‘often or always’ worked evenings or nights past 9 pm (based on Productivity Commission analysis of the survey).

## Who works nights?

The incidence of schedules likely to involve night work (regular night shift and rotating shifts) varies substantially across industries, ranging from just under 40 per cent of employees in accommodation and food services to around 5 per cent in financial and insurance services (table 9.5). Other industries with high proportions of night workers include agriculture, arts and recreation services, mining, transport and warehousing, and health and social assistance — all with over 25 per cent of employees regularly working nights.

In absolute terms, the health care and social assistance industry contains the largest number of night working employees, followed by accommodation and food services and retail trade — each with over 200 000 of these night workers.

**Table 9.5 Work schedule varies substantially by industry**  
Per cent of employees by work schedule, average from 2009-10 to 2013-14 <sup>a</sup>

<i>Industry</i>	<i>A regular night shift</i>	<i>A rotating shift</i>	<i>Irregular schedule</i>	<i>Other</i>
Accommodation and Food Services	7.6	17.6	13.6	61.2
Arts and Recreation Services	1.8	15.2	19.6	63.4
Mining	1.5	28.7	2.8	67.0
Transport, Postal and Warehousing	5.5	13.7	11.9	68.9
Health Care and Social Assistance	4.0	16.7	7.6	71.8
Agriculture, Forestry and Fishing	0.7	1.7	25.3	72.4
Retail Trade	2.8	8.9	9.4	78.9
Public Administration and Safety	1.8	11.4	4.8	82.0
Rental, Hiring and Real Estate Services	0.9	2.7	14.0	82.4
Information Media and Telecommunications	1.3	5.8	9.5	83.4
Administrative and Support Service	1.7	4.9	9.1	84.4
Manufacturing	3.3	6.4	4.7	85.7
Other Services	0.2	2.7	10.5	86.7
Professional, Scientific and Technician	0.0	1.3	10.9	87.8
Wholesale Trade	0.9	1.3	7.1	90.8
Electricity, Gas, Water and Waste Services	0.1	5.8	2.7	91.3
Construction	0.6	1.5	6.6	91.4
Education and Training	0.3	1.1	5.0	93.7
Financial and Insurance Services	0.4	1.4	3.5	94.7
All Industries	2.3	7.9	8.5	81.4

<sup>a</sup> Estimates are averages from the last 5 waves of the HILDA Survey.

Source: Productivity Commission estimates based on HILDA Release 13.0.



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## 9.3 Assessing long hours and night work regulation

Long hours and night work can be detrimental to employees, however regulatory responses that restrict work schedules must balance the potential gains from regulation against the impacts on individuals who genuinely benefit from long working hours and night work.

### The personal costs of working overtime and night shifts

There is a wide body of evidence suggesting that long hours and night work impose health costs on employees. The existence of such personal costs may justify regulatory intervention, such as working hour limits and wage premiums, to compensate employees.

#### The personal impact of working long hours

Studies of health effects for long hours primarily relate to coronary health, sleep behaviours and psychological and social wellbeing.

Both heart disease and its precursors have been linked to working long hours. Raised blood pressure has been attributed to both daily and weekly long hours, with work beyond 40 hours per week found to be detrimental (Nakamura et al. 2012; Nakanishi et al. 2001). Moreover, working 11–12 hours per day has been estimated to cause a 1.56 fold increase in incidence of coronary heart disease, and a 1.67 fold increase in incidence of coronary death or non-fatal myocardial infarction (heart attack) (Virtanen et al. 2010).

Disrupted sleep behaviours are also linked to long working hours. Both low duration of sleep and difficulty falling asleep appear to result from long hours (Virtanen et al. 2009). Moreover, long hours of work have been linked to lower sleep quality and reduced daytime function (Nakashima M et al. 2011; Sekine et al. 2006).

Psychological impacts of long working hours have been found for various measures of mental health. For example, Nash et al. (2010) found higher rates of psychiatric morbidity among Australian doctors working long hours. Other studies have linked long working hours to poor performance in cognitive measures, such as reasoning and vocabulary tests. A number of studies have found working long hours to be associated with increased likelihood of anxiety, depressive symptoms, and major depressive episodes (Virtanen et al. 2012).

Additionally, the social wellbeing of workers and their family can be affected by long hours of work. Skinner and Pocock (2014) found that employees who work more than 48 hours per week score substantially worse on a work-life interference index<sup>119</sup>. Other

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<sup>119</sup> The AWALI work-life index is a composite measure of five aspects of work-life interferences, including: time strain; work-to-community interference; satisfaction with overall work-life balance; feelings of being pressed for time; and general interference.

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Australian research has found harmful effects on the wellbeing of children in families where parents work long hours (Andrews et al. 2014) .

### The personal impact of working nights

The most obvious effects of night work are those relating to sleep. Night work can disrupt circadian rhythms and result in long-term sleep deprivation. Across a number of studies, night shift workers have been found to sleep less and have lower quality of sleep (de Cordova et al. 2012). Indeed, the International Classification of Sleep Disorders recognises Shift Work Disorder (SWD) as a condition characterised by excessive sleepiness and insomnia due to non-standard work hours.

However, the effects of night shift are not limited to sleep. Shift work has been linked to higher rates of smoking, increased stress, higher body mass index, and metabolic syndrome — a cluster of risk factors including elevated blood pressure, obesity, and problems with cholesterol (Bannai and Tamakoshi 2014). Furthermore, some research suggests a direct link between night work and cancer, supporting the notion that high exposure to light during the night suppresses secretion of melatonin, which in turn distorts the levels of other hormones and increases risk of cancer (IARC 2007; Stevens 1987).

Mental and social wellbeing can also be affected by working nights. Chapter 12 outlines links between evening work and several measures of work-life interference, finding reduced time spent with family and friends, reduced ability to engage with the community and increased feelings of time pressure.

### Impacts of regulation on employment, working hours and wages

The primary rationale for working time regulations examined in this chapter is to mitigate the detrimental effects of long hours and night work on employees. However, in addition, some argue that regulations have broader impacts, particularly on equilibrium levels of employment. These potential effects and their supporting evidence are discussed below.

#### *Overtime regulations and working hours*

There is strong evidence that long working hours decrease following regulation. For example, Hamermesh and Trejo (2000) compare rates of overtime work for males and females in California before and after the introduction of laws that increase overtime rates for men only. Their estimates of the relationship between overtime rates and overtime work suggest that 1 per cent increase in overtime premiums corresponds to a 0.5 per cent reduction in overtime hours, a hardly surprising outcome given that the demand for the total hours of work are inversely related to its price.

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### *Overtime regulations and equilibrium levels of employment*

Some consider that working hour restrictions and wage premiums increase overall levels of employment, even though they reduce the average hours of work for any given employee. However, the net employment impacts are uncertain.

- Some employers may hire new employees because of limits on overtime hours per employee or higher overtime rates. However, employers face fixed costs hiring additional employees, especially for higher-skill employees. Moreover, labour is not a homogeneous input, and additional employees may not be as effective as existing employees.
- Businesses may substitute away from employment to production equipment and technology, decreasing overall employment.
- As business costs rise, some firms may restrict their operating hours, which could also reduce employment.

Accordingly, regulations limiting hours or adding a premium to shift work may reduce overall labour demand (measured in hours) without increasing the number of jobs. Overall, there is little empirical evidence that levels of employment increase as a result of increased (or newly introduced) overtime premiums (Oaxaca 2014).

### **Further regulatory considerations**

Working time regulations appear effective in reducing the incidence of overtime. Both economic theory and empirical evidence suggest that overtime rates reduce the prevalence of long working hours. To the extent that they are complied with, by definition, working time limits reduce the prevalence of long working hours.

Given the health costs associated with long hours and night work, and the lack of bargaining power of many employees, there is a strong case for retaining a policy response. Current arrangements implement a mix of working time limits imposed by the NES, along with wage premiums contained within awards. The appropriateness of current regulations rests on answers to a number of questions:

- To what extent do long hours of work reflect the preferences of employees?
- Are long hours of work only a temporary issue for most employees?
- To what extent do employers (and employees) comply with current overtime regulations?

### **Volunteers or conscripts?**

While the NES stipulate a maximum 38-hour week for full-time employees, employers may request 'reasonable' additional hours of work. The subjective concept of 'reasonable'

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hours means that there is no specific cap on weekly hours, not only because reasonable additional hours may vary by circumstance, but also because employees may volunteer to work additional hours.

Multiple sources of evidence reveal a mixture of voluntary and involuntary overtime. Some inquiry participants have reported dissatisfaction with requests to work overtime, while others appreciate the opportunity to earn additional income (box 9.4). Figure 9.7 illustrates the variation in working preferences according to length of working week reported in HILDA (see appendix B for a summary of the HILDA survey). Employees are much more likely to prefer fewer hours when working in excess of 50 hours per week, while a minimal number of employees prefer additional hours from around 40 hours onwards.

#### **Box 9.4 Participant attitudes towards overtime varies**

A number of participants have expressed dissatisfaction with the hours that they work, and many indicate little control over these arrangements:

We are called in to work extra hours sometimes not given the right amount of notice and only paid at part time rates, we could turn it down but have to find someone else to take our place which makes you feel like you are a bad employee. (Group of individuals, sub. 188, p. 268)

76 hours per week. No say in the shift I get managers do rosters and You have to swap with co workers or have sickies to juggle personal life with work hours. (Group of individuals, sub. 188, p. 270)

On the other hand, some employees see welcome overtime work, and see it as opportunity to earn additional income.

I try to do as much OT as I can. I also try to work the Sunday shift they offer once a month to help with paying my bills. (Group of individuals, sub. 188, p. 264)

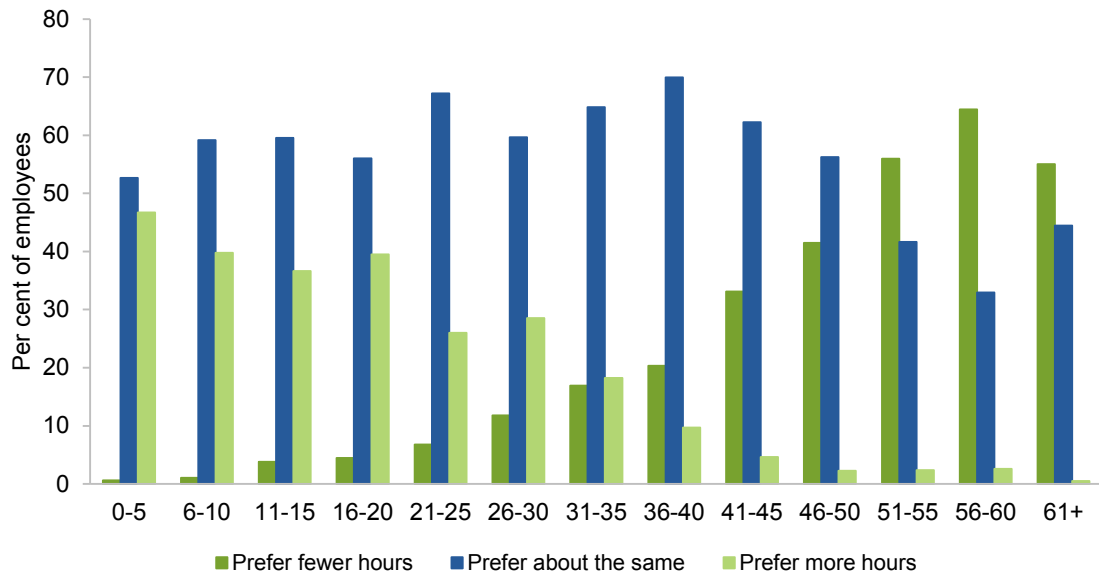
I work overtime every week at the moment, which is excellent as the penalty rates help with the cost of living. I am able to strike a fair balance currently between work and life, however I am concerned that this will soon change. (Group of individuals, sub. 188, p. 270)

I have contract hours which I'm obliged to complete and am often offered work beyond those hours, which I don't have to accept. Work can be offered literally hours before it's due to be done due to staff illness etc. If I'm available I'm happy to accept extra work. It supports clients and creates goodwill with the supervisors and colleagues. (Group of individuals, sub. 188, p. 271)

Drago, Wooden and Black (2006) differentiate long hours employees as either 'volunteers' or 'conscripts' using data from HILDA. Those who work long hours (more than 50 hours per week) and prefer to work less are termed 'conscripts', while the remaining long hours employees are labelled 'volunteers'. Importantly, HILDA respondents were asked to take into account the impact of their preferred hours on income. In 2013-14, 10.4 per cent of employees met the criteria of 'conscripts'.

**Figure 9.7 Working hours preferences**

Per cent of respondents working a given amount of hours indicating preference for fewer, the same or more hours, 2013-14



Source: HILDA Release 13.

### How long do conscripts persist?

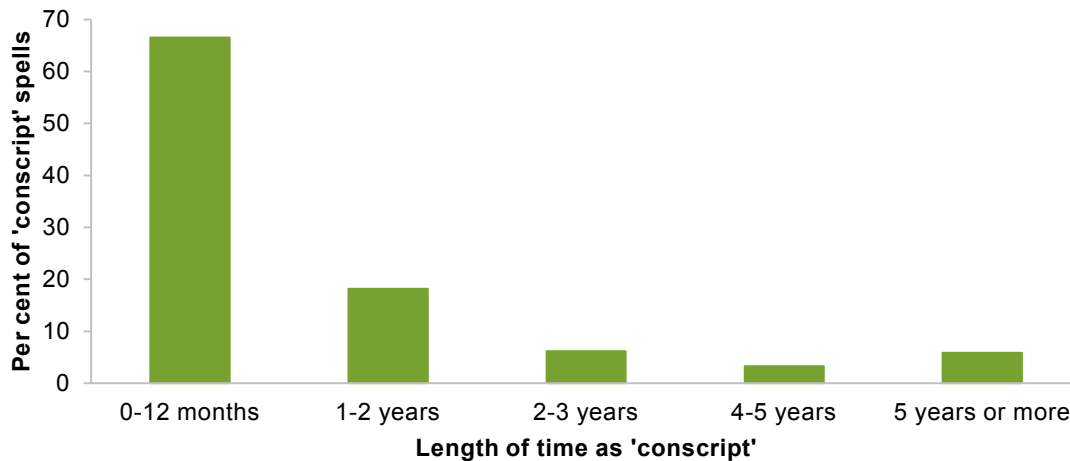
Mismatch between working hours and the preferences of employees is inevitable. However, a WR system should help to prevent extended periods of long hours in order to limit personal costs. That said, these costs must be balanced against the benefit of permitting long working hour arrangements where these are unavoidable and/or mutually preferred by employers and employees.

Moreover, there are common-sense limits to what can be achieved by regulatory intervention. Some individuals' preferences will incline them towards taking risks even where this may involve actions that medical advice indicates are against their longer term interests.

Evidence from HILDA suggests that employees tend to spend a short amount of time working more than 50 hours while preferring to work less. Among all conscript spells recorded in HILDA from 2001 to 2014, over 65 per cent lasted 12 months or less. Just over 90 per cent of spells lasted three years or less (figure 9.8). Around 50 per cent 'conscript' spells were followed by reduced hours in the same job, while around 30 per cent of 'conscripts' became long hours 'volunteers' (figure 9.9).

**Figure 9.8 How long do employees remain 'conscripts'?**

Distribution of conscript spells according to length <sup>a,b</sup>

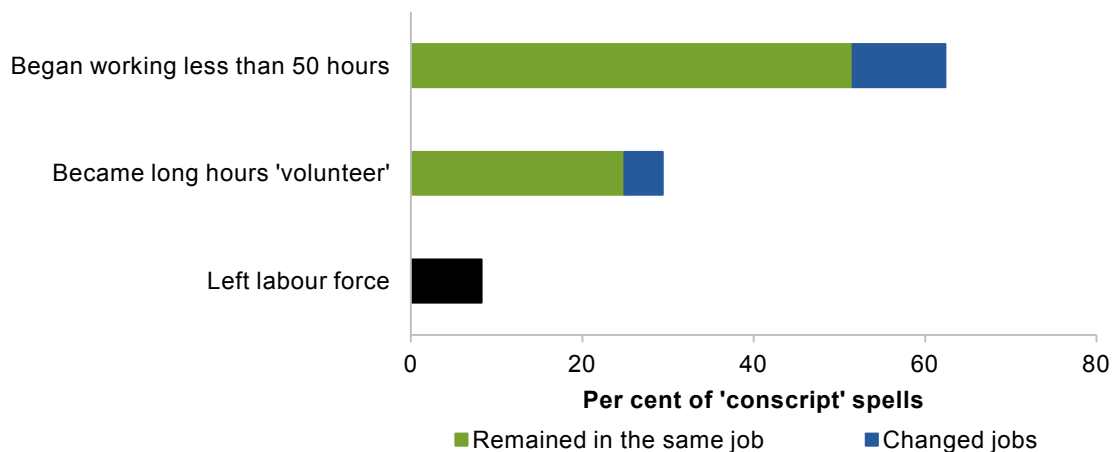


<sup>a</sup> Conscript spell refers to a period in which an employee works 50 hours or more while preferring to work less. <sup>b</sup> This figure refers to the distribution of all conscript spells recorded across the first 13 waves of HILDA. Employees can register multiple spells. For example, if an employee is a conscript in waves 2 and 3, and again in waves 7 and 8, both these spells will be counted in the figure above.

Source: Productivity Commission estimates based on HILDA Release 13.0.

**Figure 9.9 How do employees leave 'conscript' work schedules?**

Type of working schedule following spell as 'conscript' <sup>a</sup>



<sup>a</sup> See note for figure 9.8.

Source: Productivity Commission estimates based on HILDA Release 13.0.

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## Unpaid overtime

Several participants report working unpaid overtime (box 9.5). Indeed, nationally, just over a quarter of employees report working overtime with no additional explicit compensation (figure 9.10). However, this overtime work is not necessarily exploitative. For example, some employees may work long hours in exchange for implicit compensation in the form of better prospects of promotion. Several studies have found higher rates of pay to be associated with working long hours in earlier years, all other things equal (Anger 2005). Moreover, employees may be implicitly compensated in other ways, and content to occasionally work unpaid overtime given the nature of their work and overall conditions. However, in other instances, employees are required to work long hours against their preference, with no additional explicit or implicit compensation. The views of inquiry participants reflect the varied nature of unpaid overtime (box 9.5).

### **Box 9.5 Participant views on unpaid overtime**

A number of participants report working unpaid overtime. Many have expressed dissatisfaction with these arrangements:

I stay at work until my notes are written and I have safely handed over the care of my patients to the next nurse/midwife. Paid overtime is like hens teeth. (Group of individuals, sub. 188, p. 266)

I am contracted for 40 hours per week, although I often work 6-12 hours overtime each Fortnight- which is unpaid and I don't recoup 'time in lei'. (Group of individuals, sub. 188, p. 271)

My particular job is one which demands much of my time - I am paid for 35 hpw, but often work 50 hpw. I am only paid overtime for a small percentage of that - maybe one or two hours out of 15. This is typical of teachers (school and TAFE). (Group of individuals, sub. 188, p. 263)

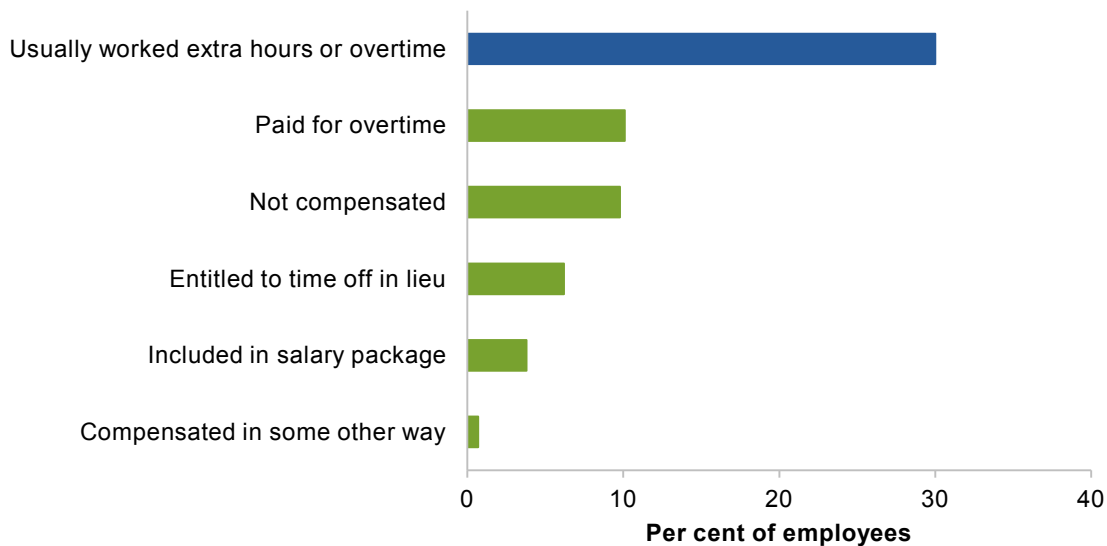
However, some participants consider work beyond 'ordinary hours' an implicit part of their remuneration:

As a former teacher I spent many nights and week-ends working - checking student reports/papers - preparing lessons etc. I saw that as part of my salary - and professional responsibility. But there were many over-and-aboves which I and my teaching colleagues performed which might properly have in other professional contexts attracted bonuses/extra considerations! (Group of individuals, sub. 188, p. 264)

The often subtle nature of compensation for overtime precludes quantification of what is exploitative unpaid overtime and what is not. Some unpaid overtime is undoubtedly exploitative, but some is the product of longer term career investment or a reflection of strong personal commitment beyond the expectation of the employer. Where regulation will struggle to identify let alone solve a problem, it may be preferable to rely on individuals applying personal judgment.

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**Figure 9.10 The prevalence of overtime and its compensation**  
Share of respondents that report usually working overtime, 2012



Source: ABS 2013, *Working Time Arrangements, Australia*, November 2012, Cat. No. 6342.0 (table 1).

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### Overtime — but not working long hours

Like full-time employees, part-time employees can be asked to work ‘reasonable’ additional hours, with their maximum weekly hours defined as their typical hours of work. As noted earlier (box 9.1), overtime rates can sometimes apply to these additional hours.

While some of the concerns outlined in this chapter relating to the effects of working long hours may not apply to such overtime, there are other implications to consider.

- Working in excess of ordinary hours can impose personal costs through the effects on caring arrangements or other responsibilities outside of work.
- Such employees may not have sufficient bargaining power to negotiate wage premiums that reflect these additional costs.

Unfortunately, the full extent of these sorts of overtime arrangements are unknown, and there is limited discussion in the literature around this issue.



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## 9.4 A case for reform?

### Maximum weekly hours of work?

The ‘maximum weekly hours’ provisions of the NES stipulate a 38-hour working week, and provide that employers may not request ‘unreasonable’ additional hours of work. This does not preclude outcomes where both the individual employee and employer agree to working greater than 38 hours, since this would typically pass a ‘reasonableness’ test. The allowance for ‘reasonable additional hours’ highlights a tradeoff between the ability of working time regulations to consider unique employee circumstances and the prevention of exploitative working arrangements.

A dilemma in this area is that the definition of ‘reasonable’ is subject to interpretations of the courts, and can be unclear. The inherent ambiguity of a reasonableness test means that some employers will avoid requesting additional hours of work if employees object, even if those requests were in fact reasonable.

In enterprise agreements, the issue becomes more complex as the working time arrangements apply to whole groups of employees, and the business’s operations may be planned around the expectation that employees are all able to work the designated hours. *MacPherson v Coal & Allied Mining Services Pty Ltd* has established that rosters affecting multiple employees can exceed the maximum weekly hours. However, how far such arrangements can go depends on context and therefore can be uncertain. Some employers and employer groups suggest that the ‘maximum weekly hours’ provisions are not flexible enough. In its submission, ALDI states:

ALDI recommends that the National Employment Standards (NES) be amended to enable employers and employees greater flexibility to determine reasonable additional working hours above the standard 38 hour week. This would allow employees to work the hours they wish and enhance the ability of employers to utilise labour more productively. If an employee seeks additional hours — as occurs regularly at ALDI — it is not clear why they should be denied the opportunity to boost their income. (ALDI, sub. 146, p. 2)

Some employee representatives conceived the problem in the opposite way, with the view that the flexible application of the ‘maximum weekly hours’ provisions undermine their enforceability. For example, the Australian Services Union states that:

... the ‘entitlement’ to a maximum working week of 38 hours per week is immediately qualified by the rider ‘unless the additional hours are reasonable’ which largely renders the entitlement unenforceable. (Australian Services Union, sub. 128, p. 7)

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Similarly, Professionals Australia state:

Professionals Australia considers that some employers are taking advantage of the fact that there is no legislative definition of what constitutes ‘reasonable’ additional hours. Instead section 62(3) of the Fair Work Act 2009 (Cth) lists a number of factors which must be taken into consideration when determining whether additional hours are reasonable. Whilst this is a practical approach to what can be a complicated issue and the outcome of a test case which was subsequently reflected in legislation, Professionals Australia submits that the concept of ‘ordinary hours’ needs to be clarified. (Professionals Australia, sub. 212, p. 12)

The relatively few disputes relating to the reasonableness test suggests that its subjective nature has created little uncertainty in practice. Indeed, Ai Group group notes that the provisions are ‘well-understood and work effectively’ (Ai Group, sub. DR346, p. 38). Courts use this test in many contexts, and a more definitive test might fail to take account of the varying contexts of workplaces and individuals.

Along with the evidence of additional personal costs associated with working long hours, the above suggests that current restrictions on hours worked (with a capacity to vary these when reasonable) and premium rates of pay for long hours are justified. However, it is possible that the Fair Work Commission could provide guidelines with simple examples. The existing case law (box 9.3) already provides some guidance, which could be converted into plain English explanations.

### **Changing regulation of night shift work?**

There is strong evidence that night work has adverse health costs. Moreover, these costs are unlikely to be factored into freely negotiated wages given the imbalance of market power between many employers and employees. Given that night shift loadings likely reduce the incidence of night work, and compensates employees for the additional costs associated with working these hours, there is a case for a regulated wage premium associated with night work.

As discussed in subsequent chapters, the established premiums for night shift work are relatively low compared with penalty rates for weekend work, which appears to involve far fewer risks.

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## 10 Regulated penalty rates for selected consumer services

### Key points

- Regulated penalty rate payments for weekend day work vary substantially across industries and the labour market. Around half of Australia's 122 awards do not stipulate them, and salaried employees and sub-contractors do not receive higher pay rates on weekends. Nevertheless, regulated penalty rates are common in some jobs.
- Many employers are concerned about the high rates of penalty rates on Sundays in a group of industries where incipient demand is strong on weekends, most notably the hospitality, entertainment, retail, restaurants and cafes (HERRC) industries.
- Sunday penalty rates for permanent employees are between 1.5 and 2 times the wage rate paid on a weekday. For example, a level one retail employee (the lowest skill level) earns \$18.99 per hour during normal working hours, but \$37.98 per hour on a Sunday.
- Penalty rates are a longstanding feature of the Australian workplace relations system, although their reach and levels have varied over time, between occupations, and across industries. These variations suggest that their levels are an art borne of history, precedent, compromise, and the lack of a coherent overarching set of principles. This is no different from many other features of awards.
- There were two main historical reasons for regulating weekend penalty rates. They were intended to act as a deterrent against asocial working times (the deterrence argument) and to compensate employees for working at inconvenient times when they were required to work (the compensation argument).
- They arose at a time when married women and students were hardly in the workplace, when Sunday work often also involved long hours, and when Sundays had a privileged role as a day for rest and religious observance.
- However, the economic environment and community attitudes that provided the original basis for penalty rates have changed. It is entirely consistent with the historical conduct of the industrial regulator to take as seriously a shift in community norms that is incidentally favourable to employers, as it has shifts that, in the past, have favoured employees.
- The various industrial regulators have accepted that the original basis for Sunday penalty rates have changed.
  - The regulator, employees, unions and employers have now rejected the deterrence argument.
  - There has been an emerging recognition by tribunals that the 'right' rates are hard to discern, and that the social and economic precepts that provided the original basis for penalty rates are not immutable. Therefore, nor should be the level and role of penalty rates.
  - Recent decisions by the Fair Work Commission have seen reductions in penalty rates for some employees on Sundays.

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There is very little contention about the justification for, or level of, penalty rates for overtime or shift work in any industry (chapter 9). Nor is there much controversy about the desirability of some premium rates for weekend work, even where that does not involve shift or overtime work. The Fair Work Commission (FWC) and its predecessors have justifiably accepted penalty rates as a legitimate and continuing feature of the safety net for all non-standard hours across all industries. Many,<sup>120</sup> but not all, stakeholders argued for the retention of regulated penalty rates.

However, the appropriate *level* for regulated penalty rates for weekend work — particularly on Sundays in a number of discretionary consumer service industries — has become a highly contested and controversial issue. The industries of greatest concern are hospitality, entertainment, retail, restaurants and cafes (HERRC).<sup>121</sup> 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 jobs for, among others, relatively unskilled casual employees and young people (particularly students) needing flexible working arrangements. The provision of discretionary, and therefore demand responsive, services on weekends is less frequent in most other industries, which is a key (but not only) rationale for a focus of concerns on the HERRC industries. It is notable that the FWC is currently also considering appropriate penalty rates in awards, and that their focus almost exactly matches the group of industries that the Productivity Commission has identified as the most relevant.<sup>122</sup>

Accordingly, this and the next five chapters concentrate on daytime penalty rates on weekends in these industries. They also explain why the rationale for, and effects of, penalty rates in these industries is different from many others (such as essential services or industries where rotating rosters are the typical working arrangement).

*For ease of exposition, unless otherwise specified, this and the subsequent five chapters refer to ‘penalty’ rates as the premiums for pay associated with weekend work that is neither overtime nor part of ongoing shift work.*

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120 For example, see the Government of South Australia (sub. 114, p. 10), the Queensland Government (sub. 120, p. 2, 6), Australian National Retailers Association (sub. 216, p. 18), and NSW Young Lawyers (sub. 198, p. 5).

121 The Productivity Commission includes employees in the clubs industry, fast food, hairdressing, and pharmacy industries as part of HERRC (though these all have separate awards). The first two are akin to restaurants and cafes. Hairdressing is often termed as a retail function. Pharmacy is classified as part of the broader retail industry because the employees most affected by changes in penalty rates are pharmacy assistants, whose function is often more similar to retail assistants.

122 These are penalty rates in the Hospitality Industry (General) Award; the Registered and Licensed Clubs Award; the Restaurant Industry Award, the Dry Cleaning and Laundry Industry Award (not covered in this chapter), the Fast Food Industry Award, the General Retail Industry Award, the Hair and Beauty Industry Award, and the Pharmacy Industry Award (FWC AM2014/305 Penalty Rates Case).

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## The structure and fundamental arguments of the chapters

Since it is not possible to explore any problems with weekend penalty rate regulations without understanding their current form, this chapter examines these arrangements, their historical origin and recent developments.

Chapters 11 to 15 set out the principal arguments for preserving, but amending, existing penalty rates in the consumer services industries, but not in other industries. This represents the skeleton of the argument:

- The widespread provision of (discretionary) consumer services on weekends, such as retailing and restaurants, is a more recent feature of Australia's economy (chapter 11). Today, people commonly expect to be able to shop, eat at cafes, and purchase other consumer services on a seven-day basis. These services are seen as vital to lively cities and regional communities. The community attitudes and economic circumstances that underpinned high penalty rates in the HERRC industries — such as the importance of religious observance — have shifted, and yet penalty rate settings have not responded coherently to those changes across awards.
- It remains the case that many (but by no means all) people prefer weekends than weekdays for time off, reflecting the adverse social impacts of working on weekends (chapter 12). High regulated penalty rates on Sundays are premised on the existence of a large divergence in the social impacts of working on Sundays compared with Saturdays. There is little evidence for a substantial divergence. Policy should enable wages that attract people to work on weekends, but are not so high that there is under provision of services and adverse effects on hiring. While in the absence of any regulation, some premiums might be paid to attract people to working on Sundays, there is, nevertheless, a risk that markets might deliver lower than optimal weekend penalty rates. Accordingly, there are arguments for some regulated penalty rates for weekend work.
- It is hard to be precise about the right level of Sunday penalty rates (chapter 13). However, the existing empirical evidence about the impacts of bargaining power would only justify modest premiums for working on Sundays in the HERRC industries. There are other indications that current Sunday penalty rates are out of line with Saturday rates, such as their comparative asocial impacts (chapter 12), the relative rates of return to Sunday working compared with skill acquisition, and the fact that there is an excess demand by employees for Sunday jobs.
- A lower rate of penalty rates for discretionary consumer industries has implications for businesses, consumers, and employees, including those not working currently on weekends (chapter 14). While some parties lose, the overall community-wide gains from reforms are positive. Lower labour costs for discretionary weekend consumer services are likely to stimulate hours worked and employment, particularly on Sundays, and for consumers, to increase the variety and availability of services, and, to some extent, reduce prices. Existing employees working in the HERRC industries on Sundays will typically lose, but by less than many anticipate. The assumption that they necessarily come from low-income households is not substantiated.

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- Chapter 15 synthesises the analysis and discusses the policy options for penalty rates for the relevant industries. This chapter also briefly considers other approaches that would affect how employees and businesses deal with pay arrangements for variations in weekly (daytime) work patterns. This includes penalty rates for public holidays, which involve some distinctive issues (some of which are also addressed in chapter 16). There are few grounds for reducing penalty rates for public holidays for any industry, with this chapter explaining why this is the case. There are also few grounds for lowering penalty rates on Sundays in most other industries, although the workplace regulator should re-examine rates as it assesses awards using the processes set out in chapter 8.

## 10.1 Current arrangements for regulated penalty rates

Notwithstanding popular impressions that regulated penalty rates are ubiquitous, many industry awards do not specify weekend penalty rates. While awards typically involve some penalty for working on weekends, this is often part of overtime or shift arrangements, or incorporated into the average shift wage rate (as in the Maritime Offshore Oil and Gas Award 2010).

The Commission's analysis of awards and the Fair Work Ombudsman's pay guides, supported by comprehensive data supplied by the Department of Employment, shows that more than 60 awards include some provision for non-overtime or shift penalty rates on Saturdays and more than 70 awards provide some (more than trivial) provision for such penalty rates on Sundays. In some awards, these rates only apply to some occupational categories, reflecting the broad coverage of some modern awards. Accordingly, around half of Australia's 122 modern awards have provisions for weekend penalty rates. However, the Department of Employment database shows that only around one quarter of awards provide *universal* eligibility to their covered employees for work on Saturdays or Sundays.<sup>123</sup> Some suggested that changing Sunday penalty rates for the HERRC industries

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<sup>123</sup> The 25 per cent estimate is based on analysis from the Department of Employment (DoE), where the total count of awards with penalty rates is 31 for Saturdays and 30 for Sundays. The algorithm used by DoE excludes some awards that do provide penalty rates, but not to all employees on an equivalent basis. Its count excludes an award from its count under three circumstances. The first is if any category of an award-covered employee is not eligible for a penalty rate, even if many employees would be eligible. The second is where the penalty rates vary by the time of the day on a weekend day. So, in pharmacy, there are four penalty rates for Saturdays depending on the time they apply, and so the DoE database does not code Saturday as having a penalty rate. The third is that ordinary hours vary by the class of worker, or must require agreement by the employer and employee. For example, in some awards, ordinary hours are Monday to Friday for some employee categories, which means that there is no ordinary hour rate for weekend work and, therefore, no penalty rates for such employees (though there is scope for overtime). For other categories of employees in the same award, ordinary hours are from Monday to Sunday, with a penalty rate applying for weekends. Where these two types of ordinary hour definitions coexist in an award, the DoE approach records that there are no weekend penalty rates.

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alone would produce a two-tier system (Steve Walsh, Secretary of Unions Tasmania, trans. p. 135). In fact, Australia already has a *multi-tiered* system.

The principles that underpinned various decisions by workplace relations (WR) regulators have, to some extent, taken account of the usual working patterns of the various industries and occupations covered by various awards. This recognises that in some industries, shift or overtime arrangements are the typical pattern of working on weekends (with the special issues that these working arrangements pose — chapter 9).

The level of penalty rates varies considerably by award, particularly on Saturdays. Some awards also have tiered penalty rates in which there is an initial penalty rate for the first few hours, and a higher one for later hours. For example, work undertaken in the funeral industry on a Saturday is paid at 150 per cent penalty rates for the first three hours worked, and at 200 per cent for subsequent hours. While the data shown in figure 10.1 represent the typical rates by awards, in some awards there are many different penalty rates, depending on the occupation and the tasks of the employee. These complexities can be a significant source of confusion for employees and employers (chapter 15).

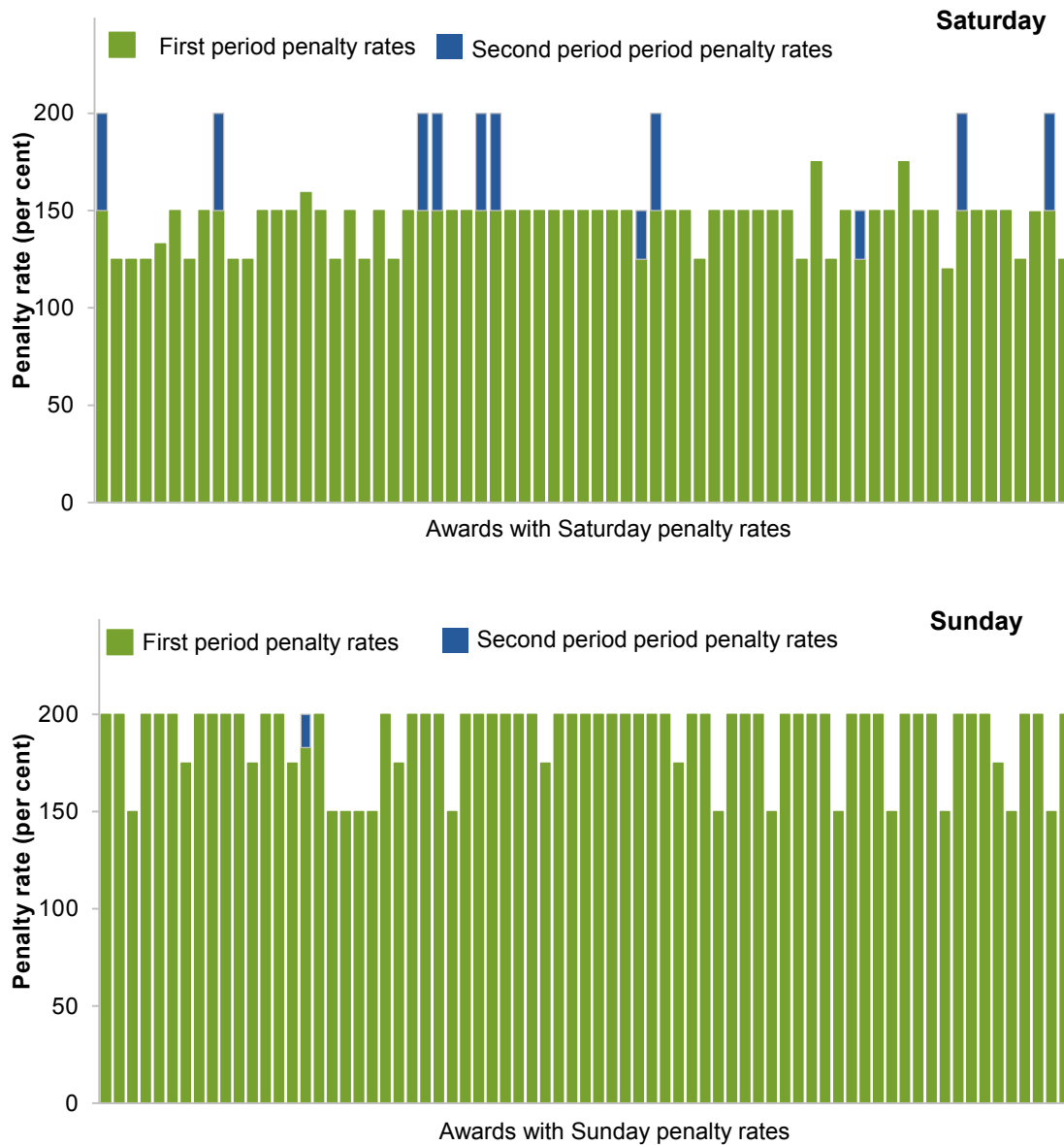
Where penalty rates apply, the most common rates are between 125 per cent and 150 per cent on Saturdays and between 150 per cent and 200 per cent on Sundays.

### Rates in the HERRC industries

There is considerable diversity of penalty rates in the HERRC industries. The rates are often at 125 per cent on Saturdays (table 10.1). However, there are marked inconsistencies for penalty rates on Sundays, and in a few instances, casual penalty rates do not take account of casual loadings (appendix F).

**Figure 10.1 Penalty rates for weekends (permanent employees)**

Rates for 67 awards (Saturday) and 73 awards (Sunday)<sup>a</sup>



<sup>a</sup> Penalty rates relate to additional payments during ordinary hours worked, when those ordinary hours fall on a Saturday or Sunday (and are shown using the third method described earlier). These rates do not include higher rates for overtime (hours in excess of ordinary hours) or shift work, which also attract premium rates of pay. In most awards, the penalty rate is the same regardless of the hours worked on weekends. However, some awards specify stepped rates, where the initial hours on a penalty rate day are paid at a lower rate, with payment rates rising if hours exceed the initial threshold. Where only a very small share of employees covered by an award would qualify for daytime weekend penalty rates, the award is not included above. For example, in the Live Performance Award, only striptease artists qualify for a Saturday penalty rate, and so this award is not recorded as having a Saturday penalty rate.

*Sources:* Information provided by the Department of Employment, Productivity Commission assessment of modern awards and the Fair Work Ombudsman (2015d).



**Table 10.1 Penalty rate arrangements for selected modern awards<sup>a</sup>**

Award applying in 2015	Permanent			Casual			Relative business cost of casual to permanent employee <sup>b</sup>	
	Percentage of permanent base rate			Percentage of permanent base rate			Sat	Sun
	Base rate	Sat	Sun	Base rate	Sat	Sun	Sat	Sun
	%	%	%	%	%	%	%	%
Restaurant Industry	100	125	150	125	150	150 (175) <sup>c</sup>	0	-14.3 (0)
Registered and Licensed Clubs	100	150	175	125	150	175	-14.3	-12.5
General Retail Industry	100	125	200	125	135	200	-10	-11.1
Hospitality Industry (General)	100	125	175	125	150	175	0	-12.5
Amusement Events and Recreation	100	100	150	125	125	175	0	0
Fast Food Industry	100	125	150	125	150	175	0	0
Pharmacy Award <sup>d</sup>	100	125, 150, 200	200	125	150, 175, 225	225	0	0
Hair and Beauty	100	133	200	125	133	200	-15.8	-11.1

<sup>a</sup> With the exception of the last two columns, the values shown are the percentage of the base rate for a permanent employee. Accordingly, the casual base rate is 1.25 times the permanent base rate. <sup>b</sup> The relative business costs of a casual is based on comparing the total labour costs for a business employing a casual worker for a given number of hours compared with a permanent employee (taking into account the extra costs of permanent employees and the casual leave loading). Wherever a weekend penalty rate for a casual is not equal to the sum of the casual loading and the permanent employee's weekend penalty rate, there is a bias in favour of one form of labour. In three of the awards, there is no bias, but in four, casuals do not receive the casual allowance on weekends and therefore there is a bias in favour of the employment of casuals. For example, in the hairdressing award in July 2015, the casual loading is \$4.75 per hour during weekdays so that the weekday rate is \$23.47 for casuals and \$18.99 for permanents. However, on a Saturday, the pay rate is \$25.26 for both types of labour (or a penalty rate of 133 per cent relative to the permanent rate). However, for neutrality of costs, the casual rate would instead be \$30.01 for a Saturday, so the effective casual employee cost is 15.8 per cent lower on a Saturday than permanent employees. <sup>c</sup> Level 1–2 employees receive a penalty rate of 150 per cent on Sundays, while Level 3–6 casual employees receive 175 per cent. <sup>d</sup> There are three penalty rates for Saturday, based on the time of working.

Sources: Restaurant Industry Award 2010; Registered and Licensed Clubs Award 2010; General Retail Award 2010; Hospitality Industry (General) Award 2010; Amusement, Events and Recreation Award 2010; Fast Food Industry Award 2010; Pharmacy Industry Award 2010; Hair and Beauty Industry Award 2010 accessed from the FWO (2015c, 2015d).

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## **There are already flexibilities in paying penalty rates**

While many characterise the treatment of penalty rates in awards as rigid, awards and enterprise agreements have some flexible features that mitigate this.

### **Annualisation**

One of the prime mechanisms for flexibility is that awards allow an employee to agree to be paid an annual salary instead of a weekly or hourly award pay rate, forgoing penalty and overtime rates (referred to as ‘annualised salary arrangements’).<sup>124</sup>

The implicit hourly rate of the salary must be such that the salary paid over a year would be sufficient to cover what the employee would have been entitled to if all their usual award overtime and penalty rates had been paid. For example, in the Restaurant Industry Award, salaried employees must be paid at least 25 per cent above the minimum wage as compensation.

Annualised salary arrangements provide some flexibility and certainty for employees and businesses. Employers currently often design work schedules to avoid weekend penalty rates. A business using an annualised salary can ensure that it can more flexibly allocate employees to weekend work depending on projected demand. Annualisation also reduces any incentives for an employee to reduce productivity during mainstream hours to obtain higher payments through weekend work or overtime (though the prevalence of such conduct is unknown). It is not clear how often these arrangements are used or if there are any obstacles to their take-up. The FWC does not have data indicating how often these arrangements are used, and nor has the Productivity Commission been advised of any obstacles to their take-up.

### **Using labour that does not require penalty rates**

Businesses also can use the labour of the owner manager, unpaid family members or employ subcontractors without any requirement for penalty rates.

The use of subcontractors in the key industries affected by penalty rates is limited because the terms of engagement will usually resemble that of an employee. Businesses in the relevant industries would typically set the hours of work, the manner in which it is undertaken, and provide any equipment, which collectively would be likely to fail the subcontractor test. So, while subcontracting arrangements may remove the need for paying

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<sup>124</sup> Annualisation must pass the BOOT. Arrangements that involve pay increases for workers in exchange for reduced penalty rates must not prejudice other classes of employees (most particularly casuals whose work is more likely to involve weekend work). This issue has arisen for an enterprise agreement formed between the Shop Distributive and Allied Employees’ Association (SDA) and Coles supermarkets.

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penalty rates to an IT consultant providing services to a major retailer on a Sunday, the scope to use them for routine tasks that involve a high degree of employer control (such as checkout services) is unlikely. Indeed, it is notable that subcontracting arrangements are rare in the retail, accommodation, and food services industries (comprising 2 and 1.1 per cent of employed persons respectively in these industries).<sup>125</sup>

Contributing family members (who are not paid) also play a small role in providing labour services (accounting for around 2 per cent of employment in the relevant industries).<sup>126</sup>

The owners of businesses are a more important source of labour, accounting for 8.6 per cent of labour in the retail industry and 9.6 per cent in accommodation and food services. They also play a more prominent role in weekend work (chapter 14 and appendix F). However, there is a limit to their role.

## 10.2 The origin of, and legislative basis for, weekend penalty rates

The modern awards objective of the *Fair Work Act 2009* (Cth) (FW Act) places some emphasis on the premise that weekend work is socially detrimental, as do various conventions of the International Labour Organization (ILO). The notion of Sunday as a desirable day of rest has also been commonly perceived as a labour relations matter in case law in Canada, the United Kingdom and the United States, as well as Australia (Law Reform Committee of South Australia 1987).

The history of the Australian penalty rate provisions, their logic and their role in preserving arrangements is important in understanding current laws and their interpretation by the workplace relations tribunal. They provide evidence about how industrial courts and tribunals have taken account of changing community expectations — a matter that has a significant bearing on this inquiry.

Regulated penalty rates for weekend work have been a longstanding feature of Australian industrial relations regulations. They arose as part of a broader objective to increase the scope for working people to engage in life beyond work and physical recuperation (Chapman 2010). They arose when long weekly hours were customary. For instance, standard full-time hours before overtime were 46 hours a week for both males and females in 1921 (Vamplew 1987). Weekend penalty rates, shorter standard working hours and overtime rates all originated from a similar social goal (though their incorporation in regulations occurred at different times and with varying scope).

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<sup>125</sup> This ranks as 17th and 19th among the 19 ANZSIC industries (ABS 2014, *Forms of Employment, Australia*, November 2013, Cat. no. 6359, released 7 May).

<sup>126</sup> Based on unpublished data extracted through TableBuilder from ABS (2015a).

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Penalty rates were intended to act as a deterrent against ‘long or abnormal hours being used by employers’ (the deterrence argument) and to compensate employees for working at inconvenient times where they were required to work (the compensation argument). As an adjunct, penalty rates have historically also been characterised as an incentive for businesses to avoid ‘slack management’ at times when people would reasonably have leisure.<sup>127</sup>

The early and pivotal decision was the decision by Justice Higgins of the Commonwealth Conciliation and Arbitration Commission (CCAC) in 1909 that penalty payments should be made at time and a half of ordinary hourly wages on Sundays, public holidays and for overtime (ACTU, sub. 167, p. 150 and the Australian Nursing and Midwifery Federation, sub. 132 p. 23).<sup>128</sup>

The true position seems to be that extra rate for all Sunday work is given ... because of the grievance of losing Sunday itself – the day for family and social and religious reunions, the day on which one’s friends are free, the day that is most valuable for rest and amenity under our social habits ... (Gas Employees Case (1919) 13 CAR 437 at 469 cited in Phillips 2012).

Subsequently, other decisions by various industrial tribunals extended penalty rates to Saturdays, increased Sunday rates and gave increasing emphasis to the compensation argument (DEEWR 2012b, pp. 4–5).

Sunday penalty rates up to 200 per cent applied in the Victorian retail industry from 1922.<sup>129</sup> In 1947, the CCAC determined that Saturdays should be paid at 1.25 times the ordinary rate under the benchmark Metal Trades Award and increased the Sunday penalty rate to 200 per cent, which widened the application of the Sunday rate (DEEWR 2012b; United Voice 2012b, p. 9). The CCAC noted the dual role of penalty rates in compensation and deterrence, but not in a doctrinaire sense:

... in one sense the use of the term ‘penalty’ as applied to such additional amounts is a misnomer, there is no question of punishment about the matter. But in another sense it expresses accurately enough the operation of the requirement of additional payment as, inter alia, a deterrent against calling upon employees to work in the circumstances in which the additional payment is required to be made. Most, if not all, of such requirements combine the element of compensation with that of deterrence. In some cases the one element predominates; in other cases the other: while yet in other cases there is no marked predominance of either. (CCAC Weekend Penalty Rates Case (1947) 58 CAR 610 cited in ACTU 2012b, p. 7)

In 1949, the CCAC reiterated the role of Sunday penalty rates in compensating for working unsociable hours ([1949] 62 CAR 558).

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<sup>127</sup> *Federated Marine Stewards and Pantrymen’s Association v. the Commonwealth Steamship Owners’ Association and Others*, (1909-10) 4 CAR 61.

<sup>128</sup> *Barrier Branch of Amalgamated Miners Association v Broken Hill Pty Company Ltd* (1909), (3 CAR).

<sup>129</sup> *Shop Distributive and Allied Employees Association v \$2 and Under* (2003), Full Bench of the AIRC PR941526, 17 January.

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These views were not peculiar to the Commonwealth. In 1950, the Industrial Commission of New South Wales enunciated its principle that:

In our opinion, additional rates for weekend work are given to compensate the employee having to work on days which are not regularly working days for all employees in the industry. The aim is to compensate for disturbance of social and family life and the full opportunity of religious observance, and in some cases to discourage employers working employees on non regular working days. Phillips (Re Engine Drivers General (State) Interim Award [1950] AR (NSW) 260 at 267 cited in Phillips 2012).

The increase in trading hours on weekends — an initiative that reflected changing community expectations about the role of weekends — had varying influences on judgments of the tribunal. In a major 1993 case, the Australian Industrial Relations Commission (AIRC) considered that:

While trading patterns, hotel and shop hours legislation and social habits have altered markedly over the last decade or so, the norm remains for evenings, weekends and public holidays to be the times when friends, families and social groupings, however constructed, are able to be together to enjoy social and recreational activities. Social dynamics are such as to mean that as religious observance on Sundays undergoes change so do some other forms of activity by way of supplementation. Shift work and work extending well outside the day time hours which thereby intrude regularly and substantially into such social, recreational or family/friend times and the many aspects of life akin to them, causes, in the long standing view of the Commission, an equivalently substantial deterioration in the amenity of life. It is this that is to be recognised. (AIRC [1993] 541/1993)

A notable aspect of this decision was that while the AIRC acknowledged that the religious observance had declined, it asserted that other equally important social interactions had taken their place.

In a 1999 AIRC decision, Commissioner Hingley ([1999] AIRC Q9229, p. 18) said that a concern of setting lower penalty rates would be that:

... current or future employees with little or no bargaining power may be obliged to work extended evening, Saturday or Sunday hours against their domestic responsibilities or personal convenience as ordinary hours to retain or gain their employment.

This is one of the few explicit acknowledgments by tribunals that the issue of bargaining power was a decisive issue (a question further considered in chapters 12 and 13). Hingley went on to conclude that:

While there is clear evidence of social change in respect of increased consumer desire to shop weekends especially Sundays and shopping becoming a part of contemporary leisure lifestyles, for a variety of reasons it does not follow that retail employees should or do acquiesce in jeopardising their preferred lifestyle. [Indeed] the evidence suggests full-time and regular part-time employees want and need protection from the requirement to work extreme or unsociable hours notwithstanding penalty rate entitlements.

Nevertheless, there has been an emerging recognition by tribunals that the ‘right’ rates are hard to discern and that the social and economic precepts that provided the original basis

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for penalty rates are not immutable and, therefore, nor should be the level and role of penalty rates. For example, Justice Giudice of the AIRC noted in a judgment relating to the retail sector that the lifting of trading hour restrictions to encompass a wider range of retailers was relevant to the desired rates:

There is a further reason why too much weight should not be given to the penalty which attaches to ordinary hours of work on Sundays in exempt shops [those not originally subject to trading hour restrictions] in the parent award. The penalty rate of 100% was fixed at a time when work was not permitted in ordinary hours on Sundays in non-exempt shops [those unable to trade on Sundays on an equivalent basis]. The decision to permit work in ordinary hours on Sunday for all shops is a relevant change in circumstances which should be given due weight. ... proposition that the disability of Sunday work is four times the disability of Saturday work cannot be accepted. For this reason, a penalty of double time is excessive. ([2004] AIRC PR941526)

He reached a parallel conclusion regarding the comparison between Sunday rates and weekday evening rates.

Similarly, the South Australian Industrial Relations Commission in a hearing into an award variation of the South Australian Retail Award concluded:

... that the evidence generally demonstrates a significant social disability associated with Sunday work. In many senses this has not been in dispute. The issue is the level at which it should be compensated, the effect of the 'voluntary' nature of Sunday work in this case and the need to balance the social disability against the other factors. (Retail Industry (South Australia) Award - Variation [2004] SAIRComm 54, 21 October 2004)

## **Deterrence has become an irrelevant argument for penalty rates**

While the early industrial cases emphasised the goal of penalty rates as a deterrent against employers opening at asocial times (Dawkins, Rungie and Sloan 1986, p. 565), this view is now largely seen as dated. The union movement itself has also agreed that deterrence is no longer a relevant motivation for penalty rates (ACTU 2012b, p. 7). Australian governments and the FWC have instead recognised the legitimacy of businesses opening on weekends. For example, in a 2004 AIRC decision, Watson and Raffaelli observed:

In our view, in the context of the reality that retailing in Victoria is a seven-day a week industry, as noted in the January 2003 decision,[44] the Sunday ordinary time penalty in the roping-in award should be directed to the compensation for the disabilities upon employees and should not be directed to deterring the working of Sunday ordinary time hours. ... There appears to be no significant divergence between the parties in the present matter in respect of that approach. (PR 941526 [2003] AIRC 1504).

In its recent assessment of penalty rates in the restaurant industry, the FWC ([2013] FWC 7840) drew on this judgment, reinforcing its application. Notably, the modern awards objective (s. 134 of the FW Act) only refers to a need for remuneration for asocial hours.

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In principle, there might have been downward pressure on penalty rates to reduce the deterrence effects that were once a principal rationale. However, rates have not fallen in response to the shift in the rationale, with the compensation argument still being perceived as a generally sufficient basis for current rates.

Indeed, from a legislative perspective, the scope for the imposition of penalty rates has widened. In 2013, a provision was added to the modern award objective of the FW Act, that specified the need for compensation for working at asocial hours (s. 134 (1)(da)). Section 134 of the FW Act states that:

(1) The Fair Work Commission must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account: ...

(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 ...

The FWC ([2014] FWCFB 1788) has characterised the proper construction of s. 134 (1)(da) as a ‘contentious’ issue among various stakeholders. The question of the desirability of the new provision is discussed in chapter 15, and its importance rests on whether it creates a presumption that penalty rates should apply across all awards.

## **Community expectations and the industrial umpire**

It is too simplistic to characterise the development of Australia’s industrial relations system as just the product of the competing interests of organised labour and employers, as important as this dynamic has been. Community norms — reflected in the political process, the decisions of courts and tribunals, and the perspectives of the various protagonists — have been a major driver of big shifts in the system. Increased standards for employees — for reduced hours, greater recreational and other leave, gender and racial equality, rights on employment termination, amongst others — have gradually emerged — in the main through the decisions of the relevant industrial umpires, rather than statute (table 10.2).

However, the economic environment and community attitudes that provided the original *basis* for penalty rates have changed. It is entirely consistent with the historical conduct of the industrial regulator to take seriously a shift in community norms that is incidentally favourable to employers, as it has shifts that in the past that have favoured employees.

There are a few signs that the industrial umpire is now moving in this direction, as suggested by some of its recent decisions.<sup>130</sup>

**Table 10.2 Industrial relations and social norms<sup>a</sup>**

<i>Benefit</i>	<i>Case or law</i>
The economic needs of employees	The Harvester Case CCAC (1907) 2 CAR 1
Partial recognition of gender equality	Fruit-pickers Case, CCAC (1912) 6 CAR 61
Penalty rates	Gas Employees Case (1919) 13 CAR 437
The 44 hour week	The 44 Hour Week Case, CCAC (1927) 24 CAR 755
One week paid leave	1935 (1936) 36 CAR 738 at 760
2 weeks paid annual leave	1944 (Annual Holidays Act 1944 NSW)
The 40 hour week case	Forty Hour Week Case, CCAC (1947) 59 CAR 581
3 weeks paid annual leave	1963, CCAC 1963 Annual Leave Inquiry
Equal pay for Aboriginal Stockmen	The Cattle Industry Case (1966) 113 CAR 651
Equal pay for equal work for women	The 1969 and 1972 Equal Pay Cases (1969) 127 CAR 1142 and (1972) 147 CAR 172
4 weeks paid annual leave	1974 (general ruling by the Industrial Commission of NSW)
Prohibited racial discrimination	Racial Discrimination Act 1975
Maternity leave	Maternity Leave Case (1979) 218 CAR 120
Redundancy and unfair dismissals	The 1984 Termination, Change and Redundancy Case (1984) 8 IR 34 and (1984) 9 IR 115) and the 1987 Ranger Uranium Case (1987) 163 CLR 656
Adoption leave	(1985) 298 CAR 321
Paternity leave	The Paternity Leave Test Case, AIRC J3596, 26 July 1990
Family Leave	The Family Leave Test Case (1994) 57 IR 121
National public holidays	1994 Public Holidays Test Case 1994, AIRC 1352/94, L4534
Superannuation	1994 Superannuation Test Case (1994) 55 IR 447
Personal/Carers' Leave	1995-96 Personal/Carers' Leave Test Case (1995) 62 IR 48 (1996) 66 IR 138, and (1996) 66 IR 176
Casual conversion to permanency	The 2000 Casual Case, AIRC, M1913 Dec 1572/00 S Print T4991
Parental leave for casuals	2001 Parental Leave for Casuals Case, AIRC, PR904631
Avoidance of unreasonable hours	2002 Working Hours Case, AIRC, PR072002
Severance Pay	2004 Redundancy Case, AIRC, PR032004 and PR062004
Anti-bullying	2014 (s. 789FD of the FW Act 2009)

<sup>a</sup> This is not intended to be comprehensive or to list only Commonwealth cases.

Sources: AIRC (2006), Australian Parliamentary Library (2015), Hamilton (2012), and the Sir Richard Kirby Archives, Kirby (1976, 2004).

<sup>130</sup> Some conflate community expectations based on opinion surveys of whether penalty rates should be paid or not with the changes in community and consumer preferences for commercial activities on weekends that *underpin* penalty rates. In the former context, it is easy to elicit different answers to the desirability of penalty rates for people, depending on the context of the questions and on whether it has been made clear to them the consequences of their choices in terms of costs or access to services. Community and employee preferences can be better examined by looking at their actual choices over time (chapter 11).



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## Recent changes to weekend penalty rates are revealing

The shift to modern awards in 2010 harmonised several state-based awards (excluding those in Western Australia) and collapsed many specific awards into ones with wider industry coverage. In turn, this led to significant changes in some penalty rates, although transitional arrangements meant that these changes were made over several years. The net impact on labour costs is not easily established because modern awards not only changed penalty rates, but also other costs (PC 2011a, pp. 334–336).

The variations in penalty rates between and within industry and state awards prior to award modernisation illustrates that a significant degree of subjectivity underpinned the earlier determination of penalty rates by state and industry.<sup>131</sup> This is exemplified by some striking differences over time and between the jurisdictions in various fast food industry awards (table 10.3):

- Prior to the modern award, for example, there was no difference in the penalty rates for permanent employees on Saturdays and Sundays in south-east Queensland (for employees covered by the Fast Food Industry Award South Eastern Division 2003) and, indeed, no difference in casual rates regardless of the day of the week worked. Yet the same award as applied to the rest of Queensland involved higher penalty rates for all employees and provided casual workers with weekend rates higher than usual hours of working on Mondays to Fridays. Unfortunately, there was no analysis of the impacts of these variations on employment or business outcomes.
- Different jurisdictions can treat casual workers quite differently. In the 2003 South East Queensland award, the pay rate for casuals did not vary by the day of the week — so the premium wage on Sundays was zero (or an effective penalty rate of 100 per cent).<sup>132</sup> In South Australia, the casual wage rate for working on a Sunday was twice that of a weekday (an effective penalty rate of 200 per cent)
- Rates could vary by whether work was undertaken before or after noon.
- Award modernisation sometimes led to decreased penalty rates (as in South Australia and the Northern Territory). If nothing else, this suggests that regulatory changes do not necessarily have to embed the highest conditions prevailing at the time of the reforms.

The existing differences between awards covering similar employees (as in table 10.1), and the historical differences in awards covering identical employees (table 10.3), shows that

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<sup>131</sup> While penalty rates are described in different ways, this report uses the most common nomenclature, which is 100 times the pay rate on a weekend relative to the pay rate on a weekday. That is, the penalty wage rate is calculated as the percentage of the base wage rate for a permanent employee.

<sup>132</sup> The effective penalty rate for a casual is the ratio of the relevant casual weekend wage rate to the casual weekday rate (times 100). Standard penalty rates are typically expressed as the ratio of the casual wage rate on a weekend compared with the weekday wage rate of a permanent employee (AHA 2015). There is nothing wrong per se with such a definition so long as it is understood that the casual penalty rate is inclusive of the casual loading.

the various industrial regulators have not given meticulous consideration of the social and economic impacts of the selected rates.

Penalty rate determination by the FWC and its predecessors is an art borne of history, precedent, compromise, and the lack of a coherent overarching set of principles. This is no different from many other features of awards. The FWC has already advocated a more coherent framework for considering some of the major features of awards (chapter 8).

**Table 10.3 Fast food awards over the years**

	<i>Casual loading</i>	<i>Saturday penalty rate (permanent)</i>	<i>Saturday [penalty rate (casual)</i>	<i>Sunday penalty rate (permanent)</i>	<i>Sunday penalty rate (casual)</i>
	%	%	%	%	%
Fast Food Industry Award 2010 (The current award)	25	125	150	150	175
Modern Award Shop Employees (State) Award NSW	15	125	115 plus a fixed \$ loading	150	150
National Fast Food Retail Award 2000 VIC	25	125	150	175	175
Fast Food Industry Award - State (Excluding South-East QLD 2003) <sup>a</sup>	25	150	175	150	175
Fast Food Industry Award - South Eastern Division 2003 (QLD)	23	125	123	125	123
QLD Retail Take-Away Food Award - South-Eastern Division 2003	23	150	173	150	173
Delicatessens, Canteens, Unlicensed Cafes and Restaurants etc. Award SA	20	125 up to midday; 150 after midday	145 up to midday; 170 after midday	200	220
Fast Food Outlets Award 1990 WA <sup>b</sup>	25	..	..	..	..
Restaurant Keepers Award TAS	25	125	150	175	175
Liquor and Allied Industries Catering, Cafe, Restaurant, etc. (Australian Capital Territory) Award 1998	25	125	150	175	175
Hotels Motels Wine Saloons Catering Accommodation Clubs and Casino Employees (Northern Territory) Award 2002	25	150	175	175-200 subject to duties	200

<sup>a</sup> For full time workers. No explicit specification for part time workers. <sup>b</sup> There is no specification of standard penalty rates. Overtime rates may apply. These are 150% for FT/PT employees on Saturdays until 12 noon, and 200% for FT/PT employees after 12 noon on Saturdays and any time Sunday. Casual employees receive an additional 25 percentage points on these loadings.

Sources: Various awards obtained from the Fair Work Ombudsman (2015c) and DEEWR (2012b, pp. 17–19).

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## There has been recent downward pressure on penalty rates in one key industry

As part of the transitional two year review of modern awards, the FWC recently examined the issue of penalty rates (amongst other conditions) for restaurant workers following an application for a variation to the Restaurant Industry Award 2010 from the Restaurant and Caterers Association and other business groups.

Business groups proposed that penalty rates should only apply for the sixth and seventh consecutive day of work — similar to systems in place in some OECD countries. The implication would be that any person working five days or less per week, regardless of when those days fell, would receive ordinary time pay rates. As an alternative, the proponents also advocated equalisation of Saturday and Sunday penalty rates of 125 per cent for non-casuals and 150 per cent for casuals ([2013] FWC 7840).

The FWC initially dismissed both proposals. It noted that the ‘disabilities’ associated with working weekends and evenings remained, and that this had not changed since the making of the award. The FWC also noted that such a change would have a significant negative effect on the relative living standards of those affected.

However, on appeal, the majority of the FWC full bench reduced penalty rates for the least skilled workers — level 1 and level 2 casual workers.<sup>133</sup> It held that the combination of the casual loading and weekend penalty rates overcompensated inexperienced and transient employees, and that the high rate at the time was ‘more than is required to attract them to work on that day’ (para 138 of the judgment). The FWC changed the award so that Sunday penalty rates for level 1 and level 2 casual workers were reduced from 175 per cent to 150 per cent of the ordinary rate, effectively eliminating the casual loading for Sunday work. The FWC stated that this reduction in penalty rates would be less likely to affect long-term career restaurant workers, who are generally not employed at lower levels.

In reaching its judgment, the FWC still maintained that there was a special disability associated with working on Sundays, and that reducing penalty rates for all classifications would not have significant positive employment effects. In that respect, the decision was not a qualitative departure from previous award decisions or their inherent logic — which embody some fundamental contradictions. Nevertheless, the decision showed a preparedness to move penalty rates down if the circumstances — as the FWC saw them — justified that.

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<sup>133</sup> See [2014] FWCFB 1996. The minority judgment considered Sunday penalty rates were too high for any employees in the industry.



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# 11 The shift to a seven day consumer economy

## Key points

- There has been growing demand for consumer services over weekends.
  - For some parts of the economy, Sunday is becoming the new Saturday.
  - Over the three decades from the early 1980s, the share of weekly retail trade on Sundays increased from 4.3 per cent to 12.3 per cent, reaching a share close to that of some weekdays.
  - For one large supermarket chain, Sunday trading now exceeds several weekdays.
  - Foot traffic on Sundays in major shopping centres throughout Australia grew by more than double the rate of any other day of the week from 2009 to 2014.
- All the evidence shows that weekend employment is far more important in the hospitality, entertainment, retail, restaurant and cafe (HERRC) industries.
  - For example, one dataset suggested that the prevalence of weekend working in each of the retail, accommodation and food, recreation and art, and personal services industries, was around double or more than other industries.
  - The likelihood of people *only* working on weekends can be as much ten times higher in the HERRC industries than in other industries (depending on the relevant HERRC industry).
- The greater prominence of weekend trading is not a sudden phenomenon, but has reflected a multitude of social and economic trends, including:
  - rapidly rising female participation rates, especially among married women, which has necessitated increased access to services outside the normal working week
  - the lifting of many of the most restrictive shopping hour regulations
  - the decline in religious observance. In 1911, only 4 in every 1000 people professed no religion. By 2011, this had grown to 220 per 1000, or a more than a fifty-fold increase.
  - rising household incomes, which has stimulated demand for discretionary consumer services, such as restaurant meals
  - a trend towards shopping as a recreational pursuit in its own right and the role of shopping centres as community hubs.
- Various disruptive technologies — such as automation and the online provision of consumer goods and services — are likely to affect the demand for weekend workers if their wage rates are too high.

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## 11.1 More demand on weekends for discretionary consumer services

For many years, the community did not accept weekend work where seven day operations were neither essential for the community nor required to avoid large costs. Several developments over the past 30 years have changed this historical pattern.

There has been a growing demand for the supply of HERRC services over the weekend. It is precisely in these industries where penalty rates are a controversial issue. In such industries, the customer is buying convenience and variety as much as the good itself, and cost increases frustrate the extent to which those consumer preferences can be met by businesses.

Indeed, even as far back as 1980, the Confederation of Australian Industry argued that there were ‘discernible social trends towards greater flexibility in life patterns generally, and working patterns in particular’ (CAI 1980, p. 13). As noted in chapter 10, such changing trends have also influenced the thinking of the various industrial relations tribunals, and have led to the rejection of the deterrence rationale for penalty rates, and on a few occasions, the reduction of Sunday penalty rates. Nevertheless, the industrial relations system has not sufficiently caught up with this shift in consumer expectations and social norms about the importance of access to discretionary consumer services, a point made by a variety of participants in this inquiry.<sup>134</sup>

In 1992, women used to spend 50 per cent more time buying goods and services on each weekday than each weekend day. The latest data (for 2006) suggest that gap has vanished, and in the case of men, weekend days are more important for this activity than in the past.

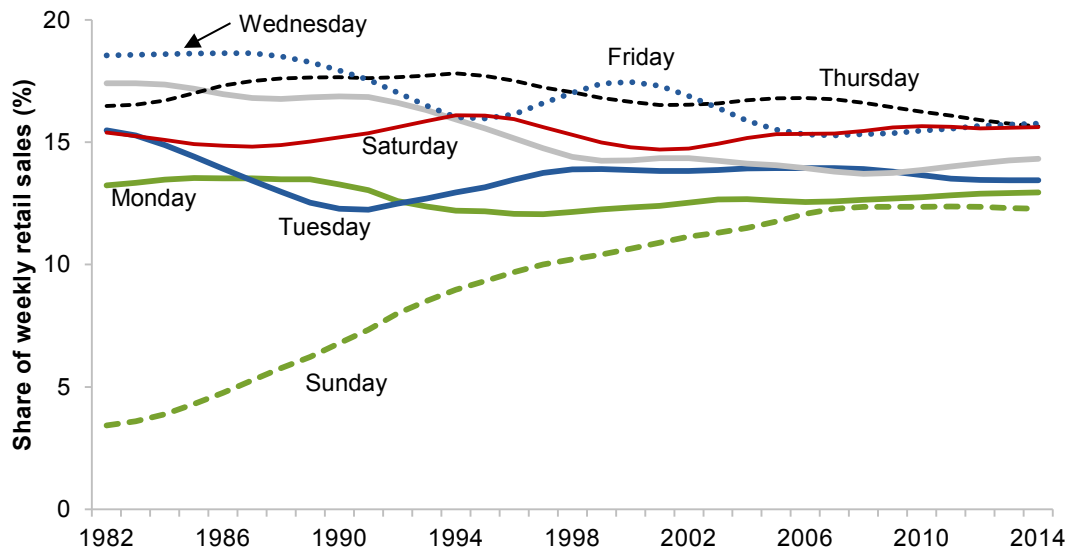
In retailing generally, Sundays have gone from a relatively small share of weekly sales to a share closer to other days (figure 11.1). Sunday trading for some retail outlets accounts for up to 25 per cent of revenue (ACRS 2012). Moreover, there is some evidence that people are making more frequent trips to supermarkets and taking advantage of their longer trading hours.

Information from a major credit card provider indicated that in 2014, the average daily transaction rate is now largely the same for weekdays and weekends. The share was very similar to that applying in 2012, consistent with the last few years of data in the ABS retail trends data above. Longer term transaction data were not available.

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<sup>134</sup> For example, the Busselton Chamber of Commerce and Industry (sub. 65, p. 2) and VECCI (sub. 79, p. 19).

Figure 11.1 **Retailing trends by the weekday**  
Share of weekly retail sales, 1982 to 2014<sup>a</sup>



<sup>a</sup> Based on estimating trading days effects on ABS monthly retail data.

Source: Unpublished data provided by the ABS and based on Campbell and Chen (2015).

In major shopping centres, foot traffic *growth* for Sundays has been far stronger than any other day (figure 11.2). Other evidence also suggests that where trading hour restrictions do not apply, the number and value of supermarket shopping trips on Saturdays is more important than any other day.

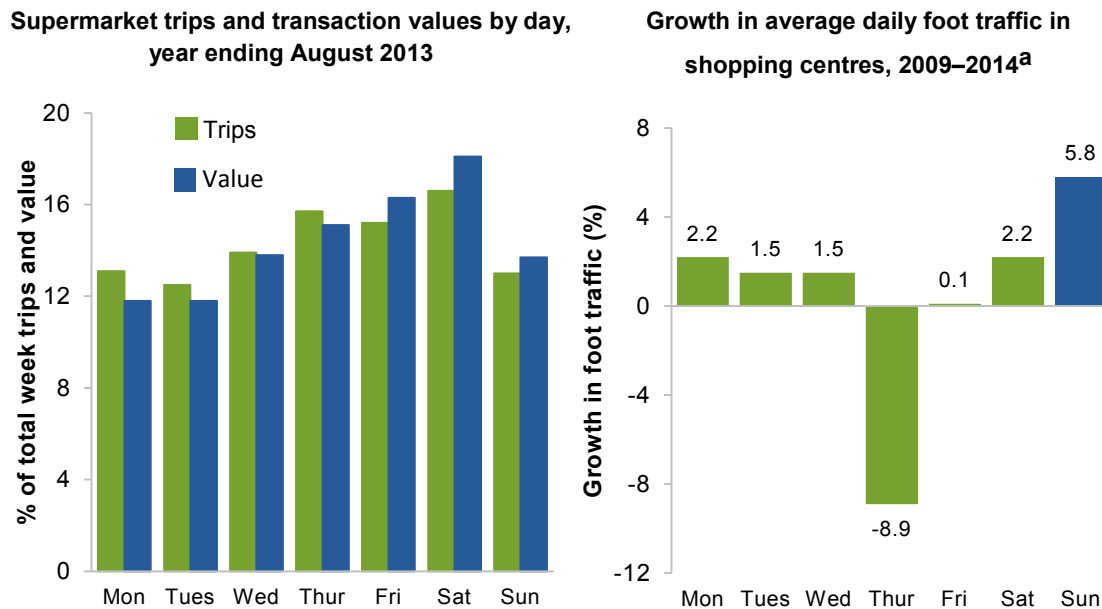
Data from Coles supermarkets in Victoria also suggest trading is highest on Saturdays, but show Sunday trading exceeds some weekdays (ERA 2014). Survey data for 2013 suggest that Sunday was increasingly becoming the ‘new Saturday’ for trips to the supermarket, with 18 per cent of Australians making Sundays their primary shopping day (KPMG, Quantum and Woolworths 2013). Restaurant and Catering Australia (sub. DR359, p. 14) indicated that for high-end restaurants, Sundays were the third busiest day by patronage, after Saturday and Friday. It said that average expenditures in high-end restaurants were \$51 compared with \$59 on a Saturday and \$56 on a Friday. It cited survey data that consumers see little differentiation between dining on Saturdays and Sundays, and that international visitors also expect seven day access to such services (*ibid*, p. 15).

Some participants noted that there was an incipient demand for Sunday trading that was only partly revealed in present statistics. The crux of the matter is that some jurisdictions continue to impose trading hour restrictions for earlier times on Sundays:

In addition to the general customer shift and demand towards Sundays noted above, our analysis of occasional ‘extended’ trading hours in certain jurisdictions highlights that there is also demand for earlier trading hours. As an example, while Sunday trading is limited for larger

retailers to 11am-5pm in Adelaide and Perth, these hours can be extended during the Christmas period. In this regard, the SA Government announced on 13 November 2014 that extra trading hours had been granted across Adelaide “to provide greater flexibility for shoppers in the lead up to Christmas”. This enabled a 9am opening time instead of the normal 11am opening for the following five Sundays: 30 November, 7 December, 14 December, 21 December and 28 December. We have analysed SA data from our members, and the snapshot (see below) highlights that an average 13% of daily customer foot traffic was from the ‘extended’ 9am-11am period. Demand during this earlier timeframe amounts to thousands of consumers across the five Sundays, who obviously found this earlier period convenient to visit shopping centres and do their shopping. (Shopping Centre Council of Australia, sub. DR342, pp. 1–2).

Figure 11.2 Growth and significance of shopping by weekdays



<sup>a</sup> The Shopping Centre Council of Australia obtained six years of data (between 2009 and 2014) pertaining to centre foot traffic for ‘stabilised’ centres, that is those that are unaffected by development from the beginning to the end of the analysis period, across most states. Further, data were used from centres that were already subject to seven day trade and therefore could be considered ‘super stable’ centres. Using 2009 as the ‘baseline’ for the analysis, the change in foot traffic was then calculated over the following five years. The data relate to shopping centres owned by one major shopping centre provider. The results exclude Western Australia, where Sunday trading has only been permitted since 2012, and also exclude the ACT, Tasmania and the Northern Territory either because they did not have stabilised centres, or the dataset was not sufficiently reliable.

Sources: Data from Aztec (2014) and information provided by the Shopping Centre Council of Australia (sub. DR342, p. 1) for supermarkets and shopping centres respectively.

The above data relate to the time taken for transactions, but ignores browsing for goods and services, and the time taken to consume some services (for instance, in eating lunch or going to a gym compared with the time taken in paying for such services). While there is no information about such demand patterns over time, there are official figures for one year (2006) by the day of the week. These show that the time spent by the average



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consumer in commercial enterprises is around one hour a day during weekdays, nearly two hours on Saturdays and 1.25 hours on Sundays.<sup>135</sup> Unfortunately, there is no contemporary matching data, but the data on sales and foot traffic shown above strongly suggest that time spent in commercial enterprises on weekends will have increased further in the subsequent nine years.

While online provision of some services (see below) has allowed some businesses to reduce their physical labour presence on weekends when labour costs are high, this is not true for all:

A particular issue for the Hardware, Building and Garden Supplies sub-category is that many customers prefer to make their purchases at a bricks and mortar store, as opposed to online. Indeed, 73 per cent of all hardware customers make every purchase in store, as opposed to the industry average of just 61 per cent. Further, 40 per cent of hardware customers do all of their product research in store, as opposed to 37 per cent for all other industries. Therefore, unlike other sectors of the retail industry, where consumers are spreading the research and purchasing experience across a multitude of channels, Hardware, Building and Garden Supplies, continues to be a labour intensive sub-category, with a proportionately high level of customer interaction, at all stages of the sales process. Based on this evidence, hardware stores have a customer that has a preference to shop at non-traditional hours, but also highly values the personal experience and customer support, of researching, and purchasing their products in store. This presents a unique challenge for hardware stores in the digital age, as they are not capable of maximising the efficiency and productivity gains from omni-channel shopping because customers in this category still prefer purchasing directly from a bricks and mortar retail. (Hardware Federation of Australia, sub. DR316, p. 7)

## 11.2 More workers on weekends

Growing consumer demand on weekends has been mirrored by increased overall employment at this time (appendix F). The HERRC industries that are the focus of this chapter have developed different employment patterns because of these shifting patterns of consumer demand. Unlike many other goods and services, many HERRC services must be delivered at the time of consumption and in person, such as eating a meal or going to a live musical performance. And convenience services — such as much of retail — are defined as ones that must be available at a time that suits the particular circumstances of a consumer. Accordingly, employment in the HERRC industries is much more strongly focused on weekends than most other industries (figure 11.3 and tables 11.1 and 11.2).<sup>136</sup> Not only does a greater share of their workforces work on weekends, but a non-trivial share of the workforce only works on weekends. The latter distinguishes them from industries — like health and mining — where weekend work is common, but is usually allied to working at routine times on weekdays too.

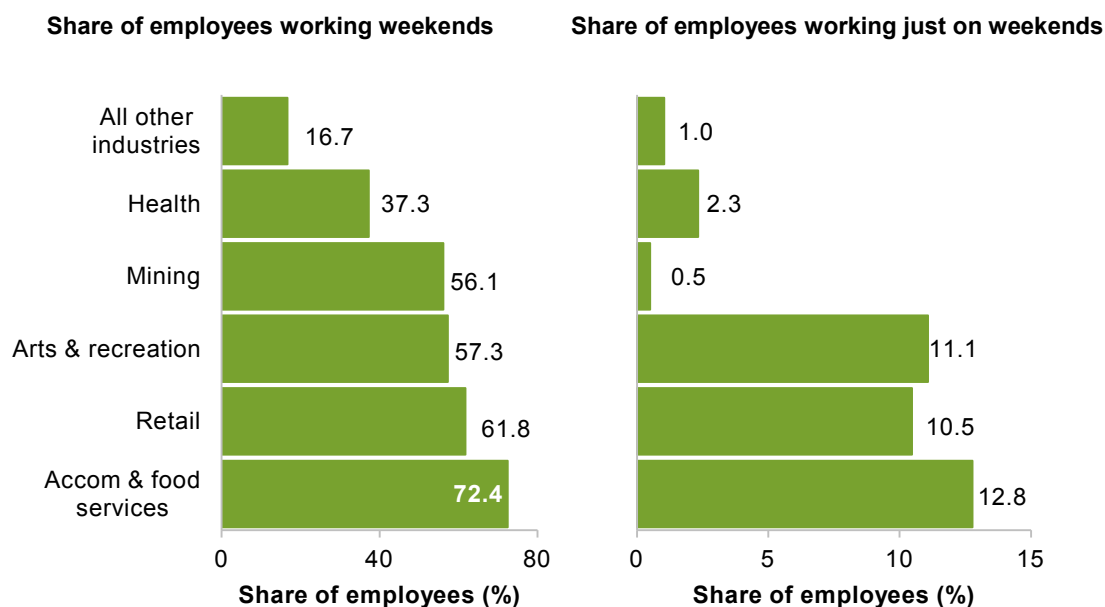
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<sup>135</sup> This is based on the 2006 ABS *Time Use Survey* and covers the time spent by people in ‘commercial or service areas’, establishments for ‘leisure, culture or sport’, and ‘eating and drinking locales’.

<sup>136</sup> The two different surveys show marked variations in the extent to which employees work *only* on weekends (but are very similar in terms of people working weekends).

**Figure 11.3 The importance of weekend work by industry**

Ratio of workers employed on weekends compared with weekdays, 2013<sup>a</sup>



<sup>a</sup> The data relate to one month of an employee's working time arrangements. Working weekends includes people working weekends only and people working weekends and weekdays. Industry groups are based on ANZSIC 2 digit codes.

Source: Analysis of wave 13 of HILDA.

**Table 11.1 An alternative viewpoint on weekend work in the HERRC industries**

Share of employees working on weekends<sup>a</sup>

Industry	Weekdays only	Weekends only	Both weekends and weekdays
	%	%	%
Retail	46.9	5.4	47.7
Accommodation & food	29.8	5.6	64.6
Arts & recreation	43.5	7.2	49.3
Rental & personal services	58.5	2.1	39.4
All other	78.2	0.6	21.2

<sup>a</sup> The retail industry is defined as the sum of the motor vehicle, parts and fuel retailing, food retailing, other retailing and retail trade nfd (based on ABS industry codes). The accommodation and food industry is defined as the sum of accommodation, food and beverage services, and accommodation and food services nfd. The arts and recreation industry is defined as the sum of heritage and arts activities, sports, recreation and gambling activities, and arts and recreation services nfd. The rental and personal services industry is defined as the sum of rental, hiring, and real estate services; and personal and other services. All other comprises all other industry groups.

Source: Analysis of unpublished data from the ABS 2008 *Forms of Employment* CURF.

**Table 11.2 Who works when?**Share of employees working on given days by industry, 2008<sup>a</sup>

<i>Industry</i>	<i>Saturday</i>	<i>Sunday</i>	<i>Monday</i>	<i>Tuesday</i>	<i>Wednesday</i>	<i>Thursday</i>	<i>Friday</i>	<i>Varies</i>
	%	%	%	%	%	%	%	%
<b>ABS Forms of Employment Survey 2008</b>								
Retail	29.4	15.3	57.3	57.4	57.5	61.2	58.6	20.1
Accomm & food	37.7	27.1	37.3	42.7	46.5	49.2	52.8	28.8
Arts & recreation	23.9	14.2	53.1	54.2	54.7	54.8	53.4	28.6
Rental & personal services	27.8	10.7	67.8	71.5	75.8	77.4	71.9	12.0
All other	10.1	5.8	81.2	82.2	82.2	82.2	79.9	12.3
<b>ABS Time Use Survey 2006</b>								
All HERRC industries	43.1	27.9	58.1	61.1	63.2	67.5	67.1	na
Other industries	22.7	12.2	72.5	85.2	88.5	87.9	82.7	na

<sup>a</sup> The industry groups are defined as above. The ABS Time Use Survey will pick up people who sometimes work weekends because this captured under 'varies' in the Forms of Employment Survey.

Sources: Analysis of unpublished data from the 2008 ABS *Forms of Employment* and 2006 *Time Use CURFs*.

The share of employees working on Sundays (either just that day or, more usually, in combination with other days of the week) is also relatively high for the HERRC industries (table 11.2). Indeed more than 25 per cent of employees in the accommodation, food and beverages industry work on Sundays, a rate that is more than four times higher than that in non-HERRC industries.

A significant long-run shift in the labour market — as described in chapter 2 — is the growing rate of employment of people while they are studying. The contribution of students as a source of labour diverges by industry and by type of working arrangement. The expansion of the HERRC industries associated with relaxed trading hour restrictions and greater consumer preferences for these services has created a new labour market for flexible labour, which is ideally suited to students wanting part-time employment, especially during weekends (table 11.3) and to people with child-caring responsibilities during weekdays. Over 90 per cent of employees who only work on weekends in the accommodation and food services industry are students. The Australian Industry Group cited survey evidence about one segment of this industry, the fast food industry, which showed that 67.4 per cent of employees in this industry (working at any time of the week) identified as full-time students (AiG, sub. DR346, pp. 39–40). Many of these were still at school, as suggested by their age profile. 24.8 per cent were aged 15 years old, 54.5 per cent were 16 years or younger and 81.6 per cent were younger than 20 years.

The labour market represented by these types of employment arrangements is entirely different from the one in which penalty rates were first forged (when most jobs were male, full-time and when people did not generally work and study).

**Table 11.3 Role of students as suppliers of labour on weekends**

By industry, 2013<sup>a</sup>

	<i>Both weekends and weekdays</i>	<i>Only weekdays</i>	<i>Only weekends</i>
	%	%	%
Accommodation & food services	43.5	34.6	92.5
Retail	32.6	15.3	88.8
Arts & recreational services	19.9	24.6	50.9
Mining	6.5	14.7	0.0
Health	18.8	16.0	30.7
Other industries	14.2	11.4	61.4
Total	23.6	13.2	76.0

<sup>a</sup> The shares are of the totals for a given industry and type of working arrangement. For example, 92.5 per cent of employees who worked only on weekends in the accommodation and food services industry were part or full-time students.

Source: HILDA wave 13, 2013.

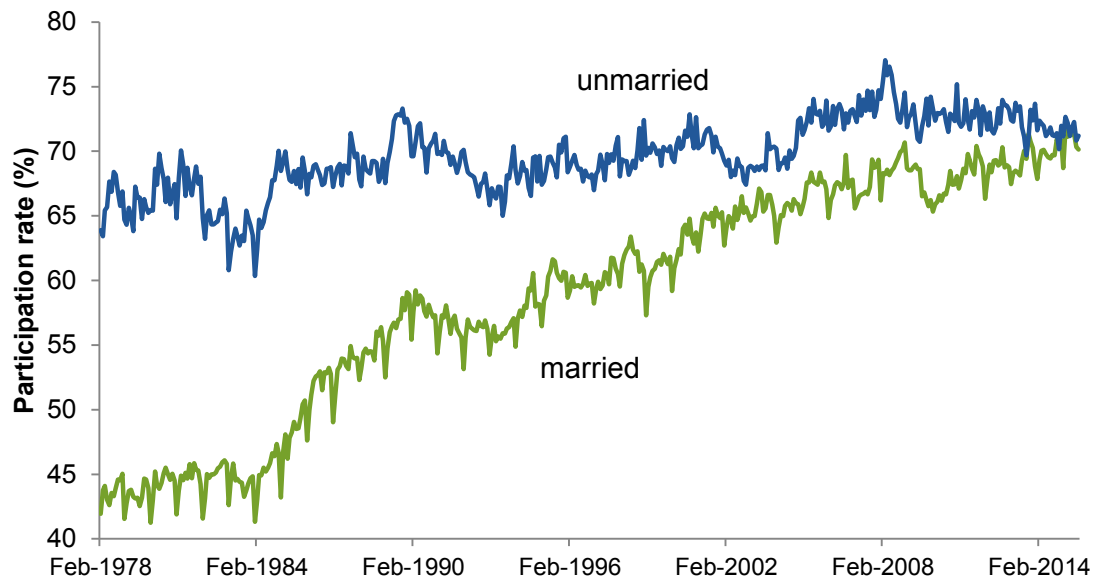
## 11.3 Many interrelated factors lie behind these changing patterns

*Female workforce participation* rates have increased steeply over the past decades (chapter 2), particularly for married females (figure 11.4). That is a continuation of a trend that has grown in impetus over a century. In 1921, females contributed less than one fifth of the workforce, it was close to half by 2015.<sup>137</sup> This is testimony to a massive change in labour markets that has not been fully recognised in modern workplace relations, a point made to this inquiry (Work and Family Policy Roundtable and Women and Work Research Group, sub. 130, p. 8). Women have long been the dominant purchasers of food and other weekly necessities. Their growing participation in the workforce has meant that families have needed other times to perform these domestic tasks.

In turn, this has provided greater *scope* for men to perform tasks that were once almost universally performed by women. Nevertheless, men have increased their time engaged in household errands (of which a prime component is shopping). This may have been partly caused by changing gender roles, but also by the capacity for them to also shop at times that do not clash with typical work times (Wilkins 2014, p. 99ff). Moreover, as norms about female workforce participation have changed, it has made it easier for businesses to find labour for weekend work.

<sup>137</sup> Based on ABS 2015, *Labour Force, Australia, Detailed*, table 3, Cat. no. 6291.0.55.001 and Withers, Endres and Perry (1985).

Figure 11.4 Participation rates by women aged 25-34 years



Source: ABS 2015, *Labour Force, Australia, Detailed*, Cat. no. 6291.0.55.001, released 17 September.

More generally, *social norms* about shopping times have shifted. Shopping has become a recreational pursuit in its own right for families and friends, while shopping centres are places for social interaction more generally. In one survey, 39 per cent of people nominated the local shopping centre as the most important gathering place in their community, compared with 11 per cent for the local community centre, 16 per cent for a community park or sports ground and 19 per cent for a local club or hotel (McCrinkle et al. 2014). Many commercial services are inherently social in character — such as having a meal or a drink with others. Consequently, the increase in the number of businesses open on weekends has its own social spillovers. The availability of entertainment, restaurant and cafe services on weekends and evenings produces lively social places and liveable cities (ACRS 2012).

In addition to the changing role of women and work, a likely contributor to these changing social mores has been a steady *reduction in religious observance*. The number of people reporting no religion in Australia has markedly increased over the past hundred years. In 1911, only 0.4 per cent of the Australian population chose the option ‘no religion’ on their Census form. This rose to 7 per cent in 1971, 15 per cent in 2001, and 22 per cent by 2011, or just under 4.8 million Australians (ABS 2013c). The trend was particularly strong for younger people, who contribute disproportionately to labour supply on weekends. Moreover, other religions for which Sunday is not a day of worship are becoming increasingly prevalent in Australia. Of those people who profess Christian belief, only one in seven actually attended church regularly in 2013, so religious belief and particular observance of it at a given time and place are different things. The average time spent by

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people on religious activities on weekends — whether communally or otherwise — fell by more than 25 per cent from 1992 to 2006 (ABS 2008a).

The changing prevalence of religious beliefs and the times when people seek to express their convictions communally is not just important because it has affected what people want to do on weekends. It is also relevant because industrial relations tribunals have given this issue considerable weight in their decisions to limit business activity on days of religious importance (particularly Sundays), or to require higher levels of wages as compensation for forgone religious observance (see below).

Changing norms about the acceptability of buying goods and services on weekends have both led to, and been further encouraged by, the softening of trading hour restrictions. Currently, all states but Western Australia, South Australia and Queensland have deregulated weekend trading hours. Trading hour restrictions have been progressively relaxed in states that still limit weekend trading (Harper et al. 2015, p. 156ff; PC 2014d). There is a continued impetus for further deregulation, which will further encourage the supply of HERRC services on weekends (chapter 15).

*Growing incomes* have also spurred the demand for discretionary services that complement people's leisure — particularly accommodation, recreational and cultural services.<sup>138</sup> Research from the HILDA survey shows that:

... time spent on household errands has increased over the period, rising by an average of 0.8 of an hour per week for both males and females. This increase primarily occurred between 2002 and 2006, with little change between 2006 and 2011. The increase may reflect an increase in the time spent on (discretionary) shopping, in turn deriving from the growth in household incomes over the period ... (Wilkins 2014, p. 100)

These various social and economic trends have also influenced, to some degree, the decision making of industrial relations regulators (chapter 10). The Productivity Commission is not aware of any major stakeholder that regards weekend trading as inherently undesirable. Indeed, by having penalty rates, the current Australian industrial relations system creates incentives to work at asocial times.

## **11.4 Technological change may disrupt employment with high labour costs likely to accelerate this**

Technological change also has several implications for service provision, which is one reason why a workplace relations (WR) framework must take into account emerging

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<sup>138</sup> The trend in current price value of accommodation services has exceeded the trend in total household consumption by around 0.5 per cent per annum. The comparable figure for recreational and cultural services is 1.6 per cent per year (ABS 2014, *Australian System of National Accounts, 2013-14*, Cat. no. 5204, table 42, released 31 October).

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trends, and not overemphasise the past. As noted by the Shop, Distributive and Allied Employees Association (SDA) there are:

... vast changes in technology which have and continue to have a detrimental effect on employment numbers. The Retail Industry is at the forefront of new technology. The latest is self-service checkouts. This greatly reduces the need of staff to work registers. Instead one Supervisor can look after 12 registers at once. Adoption of technology will continue to see a reduction in actual hours worked and number of employees engaged. (sub. DR306, p 5)

Another illustration is that some older forms of content, notably DVDs, are now increasingly dispensed from vending machines.

There are potentially equally disruptive changes to the provision of basic food services:

A further consideration is how automation in the cafe and restaurant sector is likely to impact employment prospects and service cultures in Australia. In the USA, fast food chains are rapidly replacing order staff with self-service kiosks, a trend that originated in Japan in the last decade. As robots acquire cognitive skills, food preparation is likely to be transformed. On-demand milk frothers and sensitive coffee dosers are appearing in airport lounges and will likely spread to cafés, reducing the need for baristas. ... If the cost pressure on labour remains, the incentive to invest in human capital will decrease even for small businesses. (Restaurants and Catering Australia, sub. DR359, p. 15).

The most sweeping change, however, does not involve physical provision of goods and services. *Online provision* is playing a much more important role for some goods and services:

- Even if the service is provided virtually, the growth of online provision of consumer goods and services — which are available 24/7 from throughout Australia and globally — will reinforce weekend consumer activity.
- Online provision creates further competitive pressures on bricks and mortar stores. Those that cannot open on weekends due to costs or trading hour restrictions will increasingly lose demand to virtual shops that are open all the time. Accordingly, failures to address regulatory impediments may shift demand from a physical shop to a warehouse (Busselton Chamber of Commerce and Industry, sub. 65, p. 2; the Australian Small Business Commissioner, sub. DR366, p. 7). Already, the online provision of music, books and video has strongly challenged old models of providing content to people.
- Successful operation of online stores in Australia providing global services requires a 24/7 workforce as the purchasers may be in quite different time zones to Australia.
- There are also complementarities between online supply and opening hours of some bricks and mortar stores. Department stores and supermarkets are offering ‘click and collect’ for their own products. There have also been other innovative collaborations between the online and bricks and mortar worlds, as in the partnership between Woolworths/BigW and eBay, which involves the former offering a parcel pickup service for the latter (Sadauskas 2015). An effective service requires staff and attractive opening hours for consumers. This may particularly apply to smaller retailers wanting to offer similar innovative services.





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## 12 The social effects of weekend work

### Key points

- Saturdays and Sundays remain a focal point for community and family interactions, with Mondays to Fridays still the dominant pattern of working.
- On average, people typically prefer not to work on weekends because of forgone recreational and social activities. Many people say they would need a premium wage to encourage them to work on Sundays.
- However, some people prefer to work on weekends because of study commitments, commuting is easier, flexibility around life commitments, or simply because they like weekend trade. Many people say that weekend working has modest or no adverse social effects.
  - For example, 75 per cent of Sunday employees say that they never, rarely or only sometimes experience reduced time with friends and families (almost the same as Saturday employees).
- There are no systematic differences between the asocial impacts of working on Saturdays and Sundays. There is no impact on self-reported wellbeing of working on either day. Comparatively, evening work seems to have worse impacts on various measures of work life balance and wellbeing.
- There is no persuasive evidence that working on Sundays has adverse health effects (unlike the evidence about long hours and night work).
- Sunday is not special anymore. By itself, the existence of adverse social effects of Sunday work does not justify *regulated* penalty rates. Businesses that face staff shortages on Sundays will always have some incentive to pay more to attract staff.
- The main justification for a regulated penalty rate is the presence of some unequal bargaining power — the pervasive concern in workplace relations policy.

### 12.1 The seven day economy has some adverse social impacts

As noted above, the quid pro quo to growing consumer demand on weekends is the requirement that someone must supply the labour to provide these services at these times. A longstanding claim is that working outside the ‘normal’ Monday to Friday routine has adverse effects on employees, their families and the wider community, and given that, justifies a premium wage rate on weekends and other asocial times (box 12.1). The policy-relevant question is the extent to which such working time patterns have adverse effects, how these arise, which periods have the worst effects, who they most affect, and whether the wages people receive provides sufficient compensation.

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**Box 12.1 Many participants pointed to the adverse effects of asocial working times**

Arguments put by employers to abolish penalty rates are based on spurious economic claims; accepting these claims would undermine established and cherished societal norms about the importance of compensation for time missed with family and friends. In this sense penalty rates are more than an economic tool, they are a reflection of the values of the Australian community. (United Voice 2012b, p. 30)

The very fabric of our society is held together by engaging with friends, family and the wider community and these times frequently occur in the evenings, on weekends and on public holidays. For those who work during these times, regardless of whether or not they have elected or been required to, they are deserving of recompense for missing out on valued and valuable social times, especially when they are amongst the lowest paid workers in the country. (SDA 2012, p. 3)

The principle underlying penalty rates concerns the need to compensate workers for the disabilities associated with work in unsociable hours. (Australian Catholic Council for Employment Relations, sub. DR335, p. 16)

It is fair and reasonable that Additional Payments are mandatory to compensate workers for the inherent anti-social, family 'unfriendly' and sometimes exhausting and unhealthy nature of these arrangements. (Legal Aid NSW, sub. 197, p. 9)

While the incidence of work at unsocial times has grown in recent years, a 24/7 working hours pattern is far from the general experience in the labour market. Work on weekends, nights and outside 8-6pm on week days is not the dominant pattern (Skinner and Pocock 2014). As a result common social time - which is critical to family life, community events, sport, cultural activities - remains important to most Australians. Penalty rates reflect the premium that citizens place upon weekend, night and evening time. (The Work and Family Policy Roundtable & The Women + Work Research Group, sub. 130, p. 11)

*Bar Manager:* I have been working Sundays for over 11 years — in that time I have missed literally hundreds of family events -soccer games, weddings, birthday parties, weekends away. I struggle to keep up friendships as most people meet up on weekends. Generally, I just miss out on hanging out with my wife and children. (extract based on a small sample survey from the UNSW Kingsford legal Centre, sub. DR278, p. 2)

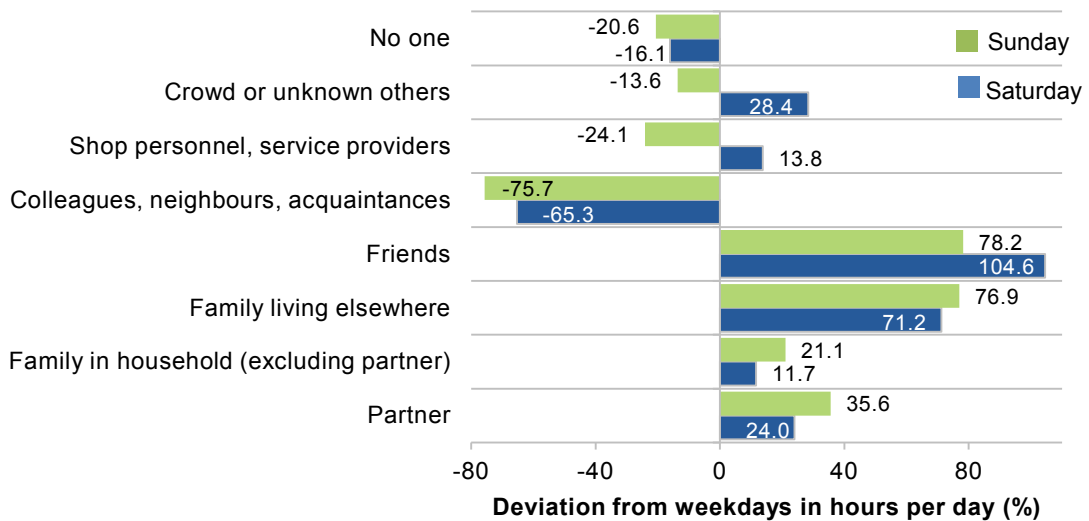
*Fast food worker:* I am 15 and all of my friends meet up on Sundays — I miss out on that. Also, my family do stuff together on Sundays and I can't join in. For instance, my cousin is getting married next weekend at the Central Coast and I can't go. (*ibid*, p. 2)

*Entertainment industry worker:* I feel I often miss out on friends & family members' birthdays, baby showers, christenings & events. My partner works some weekends also so often we get only one day a month or every 2nd month to spend together. This does strain our relationship. (*ibid*, p. 3)

Saturdays and Sundays remain a focal point for community and family interactions (figure 12.1 and 12.2), with Mondays to Fridays still the dominant pattern of working. Various institutional arrangements that support working are geared to a five-day working week, such as the availability of schooling and formal childcare services, and the regularity of public transport. Similarly, opportunities for certain leisure activities are oriented to weekends (and sometimes evenings), such as football games. As most partnered people enjoy each other's company, they are likely to coordinate their choice of working days. In effect, the timing and extent of the leisure of one person in a family is a complement to other family member's leisure choices (Alesina, Glaeser and Sacerdote 2006, p. 47).

**Figure 12.1 Who do people spend time with?**

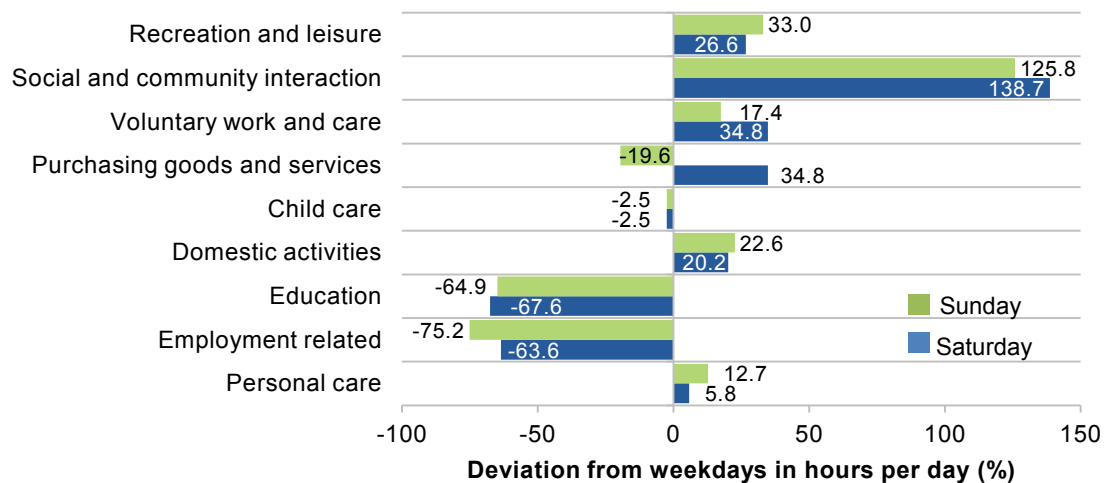
Deviation of hours per day on weekends from the average weekday (%)



Source: ABS 2008, *How Australians Use Their Time, 2006*, Cat. no. 4153.0, February.

**Figure 12.2 What do people do with their time?**

Deviation of hours per day on weekends from the average weekday (%)



Source: ABS 2008, *How Australians Use Their Time, 2006*, Cat. no. 4153.0, February.

However, there is relatively little difference in the degree to which people engage in social activities between Saturdays and Sundays (compared with weekdays). There is some difference in the types of engagements, but the largest deviation in social activities between weekends and weekdays — ‘social and community interaction’ — is actually higher on Saturdays.

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These are aggregate data and mask differences in the activities of different household types (for example, singles compared with couples). Moreover, the data in figures 12.1 and 12.2 also relate to the time use of all people, not those who work on weekends. In most cases, more disaggregated data show no differences in time forgone on social activities (with families or friends) on Saturdays and Sundays. For instance, a couple without children gives up around 4 minutes per hour with their family for every hour of weekend work regardless of the day of work. The comparable figure for a single is 7 minutes per hour of weekend work. Sundays involve bigger social costs for couples with children. They give up an additional 6 and 5 minutes on time per hour of work on Sundays with a spouse and children respectively — a relatively small difference between the two days (Craig and Brown 2014).

In many respects, it appears from the various data above that from an aggregate social perspective, Sundays do not occupy a distinctive social niche. Not only has religious observance, a previously important aspect of Sundays, declined significantly (chapter 11),<sup>139</sup> but broadly the degree of social interactions do not appear to be markedly different.

Moreover, while there is unquestionably a social disability associated with working on weekends, an open question is the extent to which weekend workers sometimes adopt strategies to reduce the asocial impacts of working (which would not be revealed in figures 12.1 and 12.2). For example, people working on a weekend may:

- increase some social activity during weekdays, which would weaken the asocial impacts of weekends. This is true for some types of activities for some types of households, but overall, most social interaction lost from working on a weekend is not recouped through weekday interactions. However, data from the Longitudinal Study of Australian Children on time spent with young children paint a complex story, with full recoupment of time displaced by weekend work by mothers of young children, but no recoupment for older children or men generally (Baxter 2009, 2010)
- give up non-social activities (such as housework). There is reasonably good evidence of this (Bitman 2005; Craig and Brown 2014). As an illustration, for every hour of work, a couple without children gave up 18 minutes of leisure with their partner.

A particular concern raised by some is the degree to which weekend work displaces sport and physical recreation. The participation rate in sport and physical recreation was highest for those whose work commitments (regardless of the time of the week working) allowed them to also meet other family and community responsibilities. Participation in sport and physical recreation was 84.1 per cent where work did allow people to meet such responsibilities compared with 75.5 per cent where work did not (ABS 2012, pp. 34–35). However, the number of people for whom work did not allow for family/community responsibilities *and* who did not participate in sport and physical recreation was around 130 000 in 2010 (or 1.2 per cent of employed people). At least some of the 130 000 people

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<sup>139</sup> On the former score, only 4 per cent of people ruling out working on a Sunday said that religious observance was the cause (ACRS 2012, p. 43).

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would not work on weekends and some weekend workers would not be employees. Accordingly, the number of weekend workers in this position must be small.

## 12.2 More direct evidence

The most prominent Australian evidence on the impact of weekend work is from the Australian Work and Life index (AWALI), a survey based instrument developed by the University of South Australia with funding from Safework SA and the Australian Research Council (Skinner and Pocock 2014). The index is based on responses to five (overlapping) areas where work may affect social life:

- the frequency that work interferes with responsibilities or activities outside work
- the frequency that work restricts time with family or friends
- the frequency that work affects workers' ability to develop or maintain connections and friendships in their local community
- satisfaction with overall work life 'balance'
- the frequency of feeling rushed or pressed for time.

These five items are summed to arrive at an overall work life index scaled from 0 (lowest work life interference) to 100 (highest work life interference). There are potentially some problems in using an unweighted sum of these five measures. It is not clear that each has the same impact on work-life quality.<sup>140</sup> Nevertheless, it has face validity and is less subjective than anecdote and conjecture. It also provides more recent evidence than the time-use survey.

High scores found for people working weekends suggest poorer work life outcomes (Skinner and Pocock 2014, pp. 10, 28).<sup>141</sup> The raw scores were seen by some as patently indicating that Sunday work had adverse effects (National Foundation for Australian Women, sub. DR288, p. 5).

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<sup>140</sup> Also, unlike many psychometric tests, there is no gold standard measure of work life quality that can assess the validity of the instrument.

<sup>141</sup> The AWALI scores were: 52.5 for people working regularly on Saturdays and Sundays, 51.4 for regular Sundays (but not regular Saturdays), 43.8 for regular Saturdays (but not regular Sundays), and 38.9 for people who do not work on regular Saturdays or Sundays. Differences in ordinal scores, like those produced by the AWALI survey, can be difficult to interpret. For example, is a difference of 5 points small or large in terms of its effects on wellbeing? One way of assessing this is to consider the difference between two working situations that, *prima facie*, are likely to involve a material change in people's work life balance, and then to use this as a benchmark when interpreting other working conditions. One such benchmark is the difference between part-time work (low expected interference with home life) and very long hours of work (high expected impacts on work-life balance). The AWALI score between working part-time (<34 hours a week) and long full time hours (48+ hours a week) is 18 percentage points. In comparison, the difference in AWALI scores between working on Saturdays and Sundays during normal hours and working weekdays at normal hours is nearly 14 percentage points, suggesting that the effects of weekends on work-life balance are significant.

However, the data can support a more sophisticated analysis.

First, these results are averages (box 12.2). In fact, most people do not experience major problems in their work life interactions regardless of their working arrangements (table in box 12.2). The partial exception is the experience of being rushed for time, which appears to be relatively frequent for all working arrangements.

### Box 12.2 What holds for many does not hold for all

While the overall evidence suggests that people prefer weekends for leisure not work, it is important to recognise that individual preferences vary and that some people do not find weekend work as problematic as others (see table below).

Indeed, as shown in figure 12.6, some prefer weekend work because of other responsibilities. It is notable that young people (aged 18-24 years) and singles with no children are disproportionately represented in weekend work (Daly 2014, p. 9). This is consistent with the greater likelihood that they are students, and do not have family responsibilities on weekends (as discussed in chapter 11). The fact that most people take account of their own personal circumstances when choosing a job should reduce the social impacts of asocial working hours, in that those who find it most problematic would be less likely to seek weekend jobs.

Furthermore, social engagement with colleagues and customers can be a positive aspect of working, and may even substitute for other types of social engagement. This appears to hold for even lower paid and relatively unskilled jobs (Watson 2011, p. 34). Of course, this is not true for all people and jobs (Holly Whittenbury, sub. DR263, p. 3).

The income from jobs may also increase the quality of out of work social interactions (for example, by allowing people to own and run a car or to go on holidays).

#### Share of people who never, rarely or only sometimes experience adverse outcomes by type of working arrangement<sup>a</sup>

Type of impact	Not regularly working weekends or evenings	Regularly working at asocial times		
		Saturday	Sunday	Evening
	%	%	%	%
Work interferes with responsibilities or activities outside work	86	83.3	75.2	72.9
Reduces time with family and friends	83.1	78.4	74.7	70.1
Reduces ability to develop or maintain connections and friendships in the community	88.6	85.9	81.1	75.6
Feels rushed or pressed for time	50.6	46.5	53.3	44.3
Adversely affects life balance	86	83.4	84.3	79.7

<sup>a</sup> These estimates were obtained from an econometric analysis of the frequency of adverse impacts using ordered logistic analysis (as described further in figure 12.3).

Source: Productivity Commission analysis of the AWALI database provided by the Centre for Work + Life at the University of South Australia.

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Supporting evidence from a population omnibus survey conducted by an industry association also suggested that 59 per cent of the general population believe there is no difference between working either weekend day. 33 per cent stated that Sunday was a more inconvenient work day than Saturday, while the remainder chose Saturday as the most inconvenient work day (Restaurant and Catering Australia, sub. DR359, p. 16). While subjective, as in many other surveys in this area, the results are not inconsistent with some of those in the AWALI survey and ABS time use data.

Second, work-life impacts result from a range of factors, and not only working time arrangements. For instance, total hours of work have a large impact (and Skinner and Pocock partially adjusted their results for this).

There are several approaches to address these issues, which avoid the possible misinterpretation of the data when simple comparisons are made. The Productivity Commission modelled the aggregate AWALI using a Poisson count model (the appropriate regression method for data of this kind) controlling for industry, single status, gender, age, hours worked, and the presence of young children.

As expected, working asocial hours had both a statistically and economically adverse effect on work-life quality using this approach. Nevertheless, the differences between days are highly instructive. The result was minimal difference between Saturday and Sunday, but a higher dissatisfaction with working regularly on evenings. There was around a 7, 10 and 22 per cent increase respectively above the norm (not working regularly at any time on weekends). Moreover, not only is the difference between regular Saturday and Sunday work small, the variations in the effects between people working regularly at these times are so great that the small difference has no statistical significance. The most distinctive result is that for both genders, adverse evening effects are much larger and are statistically significantly different from both Saturdays and Sundays.

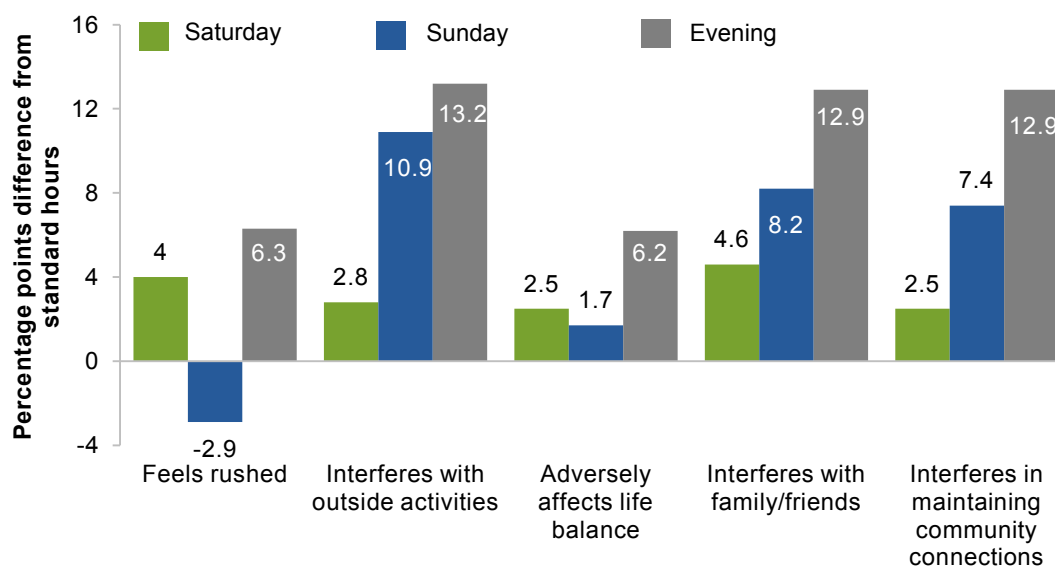
Third, gender differences have been emphasised in the debate over penalty rates, with female participation much higher in some of the affected industries. However, gender differences in work-life stresses — an important issue — are general in nature and affect women in a wide variety of working arrangements. The *difference* in the outcomes of working on Sundays and Saturdays is much the same for men and women.

Reductions in stresses for women should cover all working times, not just weekends. As one inquiry participant told us, the stresses on women from having to pick up children from childcare or school, while simultaneously facing employer expectations of a continued presence at work, is predominantly a weekday issue. She pointed out that there were no expectations that those stresses should be compensated through penalty rates from 3 pm to 6 pm on Mondays to Fridays.

Reductions in work-life stresses for women are likely to also involve cultural shifts in society that lead to greater involvement of men in domestic duties and childcare. They are not a predominantly ‘Sunday’ issue.

Fourth, examination of the separate dimensions of work-life quality that constitute the AWALI show a similar, if more nuanced picture. For three of the five dimensions of AWALI, regular evening work had bigger adverse impacts than Sunday work, which in turn had larger adverse impacts than regular Saturday work (figure 12.3). However, for two of the measures ('feeling rushed', and 'work life' balance), regular Sunday work had less impacts than regular Saturday work. Moreover, across all of these dimensions, the differences were not statistically different between regular Sunday and Saturday work.

**Figure 12.3 Degree to which employees 'often or almost always' experience impacts from work**  
Outcomes relative to standard hours<sup>a</sup>



<sup>a</sup> These results are estimates from an ordered logit of the various measures of work impacts against a series of independent variables, including whether a person works mostly (often or almost always) on Saturdays, on Sundays or on evenings. Other regressors included gender, age and whether an employee had young children. Each of the dependent variables were based on a Likert scale of never, rarely, sometimes, often or almost always (or in life balance terms, a satisfaction measure from very satisfied to not at all satisfied). The logit regression was used to estimate the likelihood that an employee was often or almost always experiencing some impact if they worked at a non-standard time compared with a standard time (Mondays to Fridays). For example, there was around a 4 percentage point difference between the share of people feeling often or almost always rushed for time if they worked on a Saturday (but not a Sunday or evening) compared with those working at standard times.

Source: Productivity Commission analysis of the AWALI database provided by the Centre for Work + Life at the University of South Australia.

Finally, the Commission also explored whether regular work at asocial times had effects on overall wellbeing — a possibly better summary measure of social impacts than AWALI (box 12.3). The results found no substantive difference in outcomes for people working regular Saturdays and Sundays, but again there was evidence that evening work produced worse outcomes than at other times. As in the analysis above, there were no substantive differences in the impacts of weekend work on males and females.



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The overall evidence points to adverse social impacts of frequent weekend and evening work compared with weekdays. However, the various strands of evidence do not sustain a rigorous argument that regular *Sunday* work has especially adverse social impacts compared with other periods of working at asocial times, or that these impacts are notably worse for women than men.

### **Box 12.3      The effects of asocial working times on wellbeing**

There is a large and complex literature that attempts to directly measure the impacts of people's life experiences and characteristics on their wellbeing (for example, Deaton and Stone 2013; O'Donnell et al. 2014; Steptoe, Deaton and Stone 2015). While evaluating this literature is not straightforward, it has the advantage of summarising the net effects of asocial working hours, rather than just simply looking at a particular dimension of wellbeing, such as being 'rushed'.

Using the AWALI dataset, the Productivity Commission estimated people's subjective level of 'happiness' (scaled from low=0 to high=10) as a function of the intensity of working on evenings, Saturdays and Sundays (and several other control variables, such as age, single status, hours worked and the presence of young children). The differences in the effects of any working intensity on Saturdays and Sundays on the distribution of happiness scores in the population were insignificant in economic and statistical terms.

For people almost always working on Sundays, more than 85 per cent of people report happiness levels of between 7 and 10. The share of people reporting a scale of 7 was virtually the same for Sunday versus other working times (22.2 per cent for people working almost always on a Sunday versus 21.5 per cent for people who did not work evenings or weekends at all). The comparable figures for happiness scales of eight, nine and ten were (40.6, 40.9 per cent), (17.7, 18.6 per cent) and (6.6, 7.0 per cent) respectively — all trivial differences. There were more marked impacts of frequent evening work on wellbeing, consistent with other evidence.

There were negligible differences in effects of work at asocial times for males and females when the samples were split by gender.

It might be that these results could be expected if penalty rate payments for people working at asocial times served their purpose of compensating for the disutility of such working times. However, the same ordered logit estimated for people who do not receive penalty rates gave nearly identical results, suggesting this is not true.

*Source:* Productivity Commission calculations based on ordered logit analysis of AWALI unit record data.

## **12.3 Despite claims, the seven day economy does not harm health or the community**

Some inquiry participants argued that working on weekends has negative impacts on physical and psychological health (United Voice DR354, p. 12). This argument would be more pertinent if the proposed change in policy related to elimination of penalty rates.

Moreover, while there are adverse effects of certain patterns of work, the most compelling evidence relates to rotating shift work, night work and long hours, regardless of the day of

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the week (chapter 9). Notably, in the hospitality, entertainment, retail, restaurant and cafe industries (HERRC), working times are lower than most industries. When scrutinised carefully, other arguments for higher Sunday penalty rates based on community and health grounds are not compelling.

## Community effects

Some are concerned that weekend working might have effects on the community's social fabric that are quite distinct from those applying to the families of employees.

For instance, the effects of aggregate uncoordinated decisions by many individuals to work on weekends might mean that local community activities dependent on widespread involvement (for example, fetes, community celebrations, amateur games, and volunteering) would be affected. Such communal activities have broader benefits for the social capital of the community.

Social capital has many potential social and economic benefits (PC 2003a), yet no individual can sustain it by themselves. As Putnam has put it: 'In the absence of coordination and credible mutual commitment, however, everyone defects, ruefully but rationally, confirming one another's melancholy expectations' (Putnam 1993).

The argument for penalty rates in this instance is that they act to 'tax' activities inimical to community activities. However, working on Sundays does not appear to displace such activities any more than Saturdays, and the concept of 'detering' weekend work is no longer seen as a legitimate goal.

Moreover, as the custom for a common set of rest days erodes, people are likely to find other ways in which they can share activities and create community networks. Such evolution has occurred in the past. In the mid-20<sup>th</sup> century, a common attitude was that female employment eroded the community, but this is not a contemporary social norm. For many Australians, it is hard to depict Sunday as having a *community* status different from Saturdays.

## Health effects

While most commonly raised for shift, overtime and night work, some international researchers are also concerned that working non-standard hours in daytime hours on weekends (particularly Sundays) raises mental wellbeing and other health issues (Costa et al. 2004; Lee et al. 2014; Nachreiner et al. 2010; Wirtz, Nachreiner and Rolfes 2011; Wirtz et al. 2008).

This European-centred research is considerably less compelling than research on shift and overtime work. It provides little information about the industries of primary interest in this inquiry. There are concerns about selection biases and confounding factors in this

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literature. As an illustration, there was no effect of working on Sundays in industries with generally high and medium risks of accidents, once confounding variables were taken into account (Wirtz, Nachreiner and Rolfes 2011, pp. 365–66).

Also, the countries that are the focus of such research tend to have less normalised patterns of weekend working in consumer services than Australia (where it is a socially acceptable form of employment). Germany for example, has very strict rules about working on Sundays. Few employers, employees or consumers in Australia would advocate a return to Sundays as a highly restricted working day.

Australian evidence on the health effects of weekend work is practically non-existent. Research on one aspect of positive mental health (the concept of ‘flourishing’) found that weekend work — especially on Sundays — had a negative effect on men, but no effect on women (Skinner and Pocock 2014, p. 48). The debate in Australia centres on the degree to which employees should be compensated for working on weekends and on their capacity to opt out of weekend work where it is unreasonable.

## **12.4 Willingness to work on weekends provides an indicator**

A further indicator of the special value of weekends is that people say that they would be less willing to work on weekends without some premium on standard weekly wage rates, although as outlined further below and in chapter 13, a decisive question is whether these premium rates need to be regulated or set by the market. Most unions, employers and employees agree that high wage rates attract workers to weekend and evening work.

United Voice cited employees’ perspectives that exemplified this concern:

It would make me rethink working in hospitality. The reason why I get those penalty rates is because I’m missing out on time with my family and friends and I would question why I would bother (2012b, p. 14)

Without penalty rates, I would have to change career completely, get out of the industry. I couldn’t make ends meet without penalty rates (*ibid* p. 18)

Some submitters to this inquiry made a similar observation about their own workplaces:

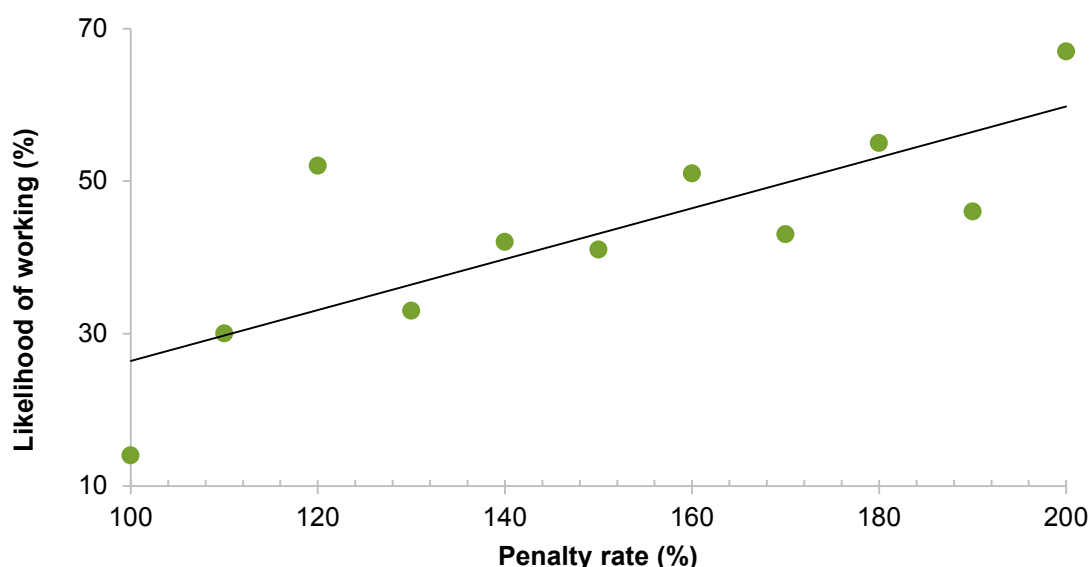
I can say with certainty, that in my workplace, no more staff within our kitchen would be employed on a Sunday if there was a further pay reduction. Our kitchen functions efficiently and no more staff are required or would be employed if the business was to reduce penalty rates to 150%. (Holly Whittenbury, sub. DR263, p. 2)

The evidence from the AWALI survey also implies that many people would not work on weekends if there were no premium rate for doing so (Daly 2014, pp. 14–17). Only 37.5 per cent of people who often or always worked Sundays (but not Saturdays) said that they would work on a Sunday without penalty rates. If employees’ subjective judgments

about their response to the withdrawal of Sunday penalty rates were correct, then given that penalty rates for Sundays are typically between 175 and 200 per cent, a very rough estimate could suggest that on average for every 10 per cent increase in wage rates, there is around a 14 per cent increase in the supply of people willing to work on a Sunday.<sup>142</sup>

This is a very high level of responsiveness of labour supply to wages compared with the usual results (Bargain, Orsini and Peichl 2012). The contrast may reflect the fact that if people do not get high wages on weekends, they would prefer to work weekdays. In that case, it is possible to reconcile a low labour supply elasticity for yearly labour supply with high elasticities for supply on Sundays.

Figure 12.4 **The willingness to work on Sundays depends on penalty rates<sup>a</sup>**



<sup>a</sup> The data are based on a survey of retail shop floor staff, regardless of the days they work during the week. They were asked whether they would be highly willing to work at penalty rates between 100 (no penalty rates) and 200 (double time), in ten percentage point increments. When the relationship between the likelihood of working is estimated in log form, the implied elasticity is 1.43. This means that a 10 per cent increase in the penalty rate increases the likelihood of someone working on a Sunday by around 14.3 per cent. The elasticity does not count the labour supply responsiveness of people outside the retail sector (probably upwardly biasing the estimate), but also does not account for the likelihood that hours as well as employment responds to wages (which counteracts the preceding bias).

Source: ACRS (2012, p. 48).

<sup>142</sup> This means that, under double time rates, labour supply (in employment terms) would be 2.67 times the level that would apply if Sunday wages were paid at ordinary time rates (that is, 100/37.5). Assuming a constant elasticity labour supply function (the usual assumption), this implies that the estimated uncompensated wage elasticity is  $\log\{37.5/100\}/\log\{100/200\}=1.4$ . Since it could also be expected that higher wage rates would elicit more hours for those who are already working, the implied own wage hour elasticity must be higher than 1.4.

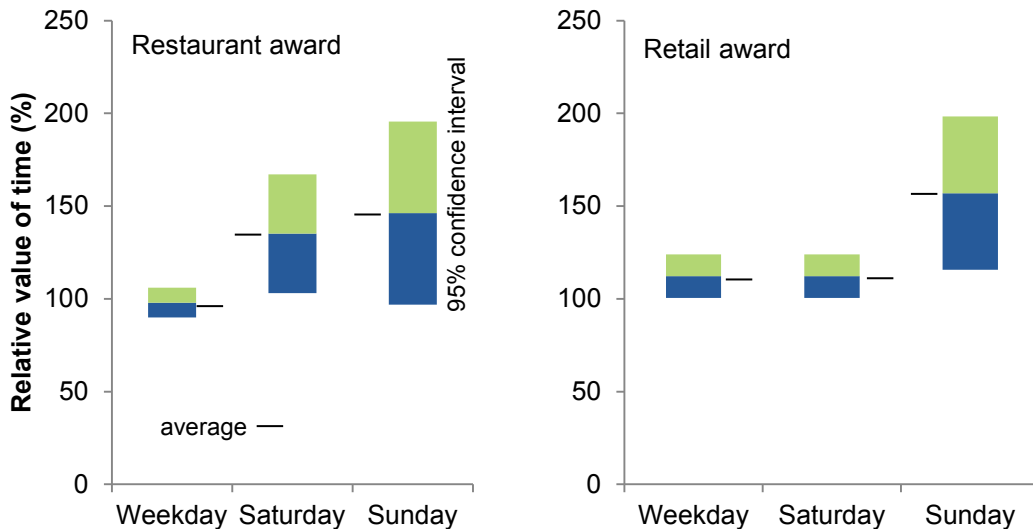
Another survey (with all the same caveats about subjectivity) invited retail floor employees to assess whether they would work at different penalty rates. It found a nearly identical degree of responsiveness in Sunday labour supply to penalty rates as the AWALI results (figure 12.4). It implied that penalty rate of 125 per cent would encourage only around 35 per cent of current retail employees to work on Sundays.

However, while the surveys provide credible evidence of a labour supply response, quantitative estimates of labour supply based on subjective assessments need to be treated very cautiously.

Other (more) rigorous research on the value of different hours of the day to people also suggests that the average dollar value of Sunday work varies by the award and is higher, at least in the retail sector than Saturdays (figure 12.5). The results suggested that restaurant and retail employees have different time preferences, notwithstanding that they share many traits as employees (such as age and earnings).

**Figure 12.5 The relative value of weekend work**

Value of time as a percentage of the current normal hourly pay rate<sup>a</sup>



<sup>a</sup> For example, the data suggest that the average dollar value for employees working under the Restaurant Award of giving up an hour of leisure on a Saturday is about 35 per cent higher than the current normal wage rate. The comparable figure for a Sunday is about 50 per cent. In this instance, there is a great deal of imprecision, so that the averages cannot be distinguished from each other statistically. For the Retail Award, only Sundays appear to be valued more than weekdays. These results have been critiqued by Altman (2015) as providing conservative estimates of the effects of weekend work, but Rose (2015a) has provided a robust defence.

Sources: Rose (2015a, 2015b) and Altman (2015).

Overall, these results provide credible qualitative evidence that people's choice of working on weekends responds to changes in wage rates, which reinforces the view that they do value their time at home during the weekends compared with time at work. However, the

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variations in outcomes do not robustly indicate that Sundays require different rates, and the quantitative estimates of labour supply responses to wage rates are inconsistent.

## **Labour markets are not just about labour supply**

Overall, the evidence that many people generally prefer not to work on weekends is uncontroversial. The question is then how labour markets could be expected to respond to this, and the appropriate role of regulation.

Some draw the conclusion from results like those above that reductions in regulated penalty rates would lead to undersupply of labour (for example, United Voice, sub. 224, p. 10; Vintage Reds ACT, sub. 163, p. 8; Health Services Union, sub. 203, p. 5; Queensland Government, sub. 120, p. 7). For example, United Voice noted that there were already shortages in the hospitality and restaurant industry, and that:

If this compensation [penalty rates] were to be removed, and these jobs were devalued as a result, employers would find their labour shortage problems would only increase. (United Voice 2012b, p. 18)

A glaring deficiency in arguments of this kind is that they ignore that regulated penalty rates do not set the market price for labour on Sundays. Regulated penalty rates are floors not ceilings. Yet much of the debate presumes that they are both.

Bargaining imbalances aside (an important issue addressed later) it is not clear why an employer would not respond to any enduring labour shortages by increasing weekend rates if the regulated penalty rate was not sufficient to attract adequate labour supply, a point made by several employers (for example, the Australian Retailers Association, sub. 217, p. 9). Empirical evidence suggests that persistent skill shortages trigger wage rises (for example, Mavromaras, Oguzoglu and Webster 2007). Businesses sometimes report that wages that are too high cause skill shortages, but by this they mean that the business cannot afford to employ the skilled worker (a demand effect), not that the labour supply itself is inherently insufficient (Healy, Mavromaras and Sloane 2012).

The critical point is that both labour demand and supply are important in considering the outcomes associated with some people's aversion to working on Sundays:

- On the labour supply side, would-be employees weigh up their decisions about the nature of jobs — their wages and conditions, the occupation, the hours worked, career prospects, the timing and location of work and the employer — against the impacts on their private social lives. The labour supply curve shown in figure 12.4 and the views of people about the advantages and disadvantages of working on weekends (figure 12.6) demonstrate that people balance the returns from working against the costs of doing so.
- On the labour demand side, employers would be willing to pay a wage premium to the extent that failing to do so would lead to labour shortages and that the profits of weekend trading justified these higher costs.

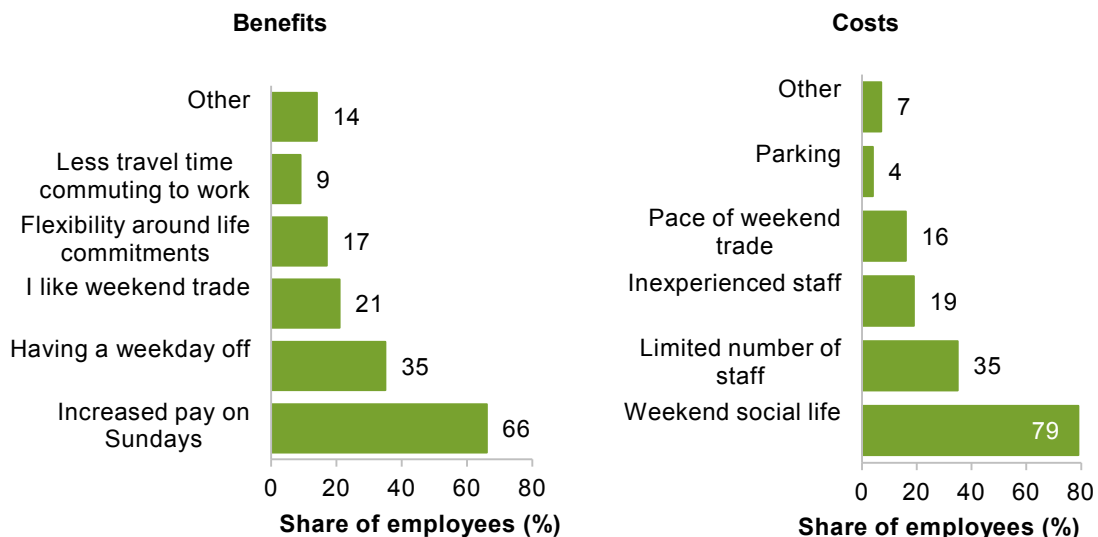
Accordingly, unregulated markets may partially compensate employees for the private social impacts of weekend working without regulated penalty rates because many people have choices about the nature and timing of their employment and employers need people to supply their labour at such times. This would be most likely for higher-skilled employees (and the New Zealand evidence, where there are no regulated rates, appears to substantiate this — chapter 13).

Some qualitative evidence also suggests that if there were no regulated Sunday penalty rates at all, some businesses would have to pay above award weekday rates to attract employees. A small sample survey of Western Australian employers revealed that 37 per cent believed they would need to pay some premium to attract employees for weekend work, although 55 per cent did not (chapter 14).

Moreover, the earlier measures of labour supply responsiveness are based on responses from existing employers, and do not take into account the degree to which people discouraged from job search might respond if wage rates were lower, and employers were able to offer more vacancies. Notably, weekend penalty rates are infrequent in the HERRC industries in New Zealand, where there are no regulated rates (chapter 13).

**Figure 12.6 Employees understand many of the tradeoffs of working on Sundays**

National survey of the retail industry, 2012



Source: ACRS (2012).

Accordingly, the undisputed fact that some people may want additional compensation on weekends than weekdays does not, by itself, require regulated wage floors. A well operating labour market would not need a regulator to set penalty rates to address the social disabilities associated with work — wages would adjust to achieve that outcome.

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However, labour markets do not always operate well or deliver what the community more broadly expects. It is primarily this fact, not the social disability associated with weekend work per se, that needs emphasis in understanding how penalty rates might be set. There are several reasons why unregulated labour markets might incompletely compensate people for the loss of social amenity on weekends.

### **Unequal bargaining power**

The existence of some bargaining imbalances between individual employees and employers is a defining premise of any workplace relations system. Absent a countervailing force exerted by regulations or (proportionate) collective bargaining by employees, many accept that wages and conditions would be inefficiently and inequitably low (chapter 1 and appendix H).

While these bargaining imbalances may be explained in several ways, in modern labour economics, the theory of ‘dynamic monopsony’ is one useful construct for understanding that wage suppression may still occur in businesses facing strong competition. (This model is not the simple ‘company town’ model of labour markets, whose unrealism and rarity is sometimes used as a straw man to dismiss out of hand more sophisticated versions of firm behaviour.) While dynamic monopsony is far from undisputed, and is unlikely to be an adequate model in all circumstances, its real insight is that real world labour markets with frictions can sometimes generate a sufficient degree of employer market power to warrant some regulatory action to avoid such wage suppression.

The implication of unequal bargaining power is that efficient wage rates need to be above the usual market rate. Labour supply functions are different on weekends than weekdays given the preferences of people to not work on weekends. Accordingly, the regulator would need to ensure that regulated rates in weekends exceeded those on weekdays.<sup>143</sup>

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<sup>143</sup> This is subject to the caveat that the regulator does not set excessively high award rates for weekdays.



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## 13 The level of weekend penalty rates

### Key points

- The strongest argument for a regulated penalty rate on Sundays is that employers still have more bargaining power than individual employees, and would be able to secure labour at a level that did not fully compensate people for the asocial impacts of such working arrangements.
- The degree to which this is true is uncertain. The available empirical evidence suggests that bargaining imbalances are likely to be modest in the hospitality, entertainment, retail, restaurant and cafe (HERRC) industries.
- Employees working on Sundays in these industries face fewer difficulties getting another job and are more willing to leave their jobs than other employees working in other industries or only working on weekdays. For example:
  - Only 4 per cent of employees working on Sundays in the accommodation and food services industries say that they would have a poor chance (less than a 20 per cent) of getting a similar job if they lost their job.
  - In comparison, in the non-HERRC industries, nearly one in five employees working on either a weekend or a weekday thought they would have a poor chance of getting an equivalent job.
- The existing empirical evidence about the impacts of bargaining power would only justify modest premiums for working on Sundays in the HERRC industries.
- There are other indications that current Sunday penalty rates are out of line with Saturday rates:
  - The asocial impacts are similar to Saturdays (as noted in the previous chapter)
  - The return to working on a Sunday far exceeds the return to the acquisition of skills associated with tertiary training
  - There is evidence that there is an excess demand for jobs on Sundays.

The strongest economic argument for regulating penalty rates on weekends, rather than letting markets determine the rate, is that employers would tend to use their greater bargaining strength to set weekend pay rates that were lower than the efficient level (chapter 12). Few have recognised the importance of this issue, with the AIRC<sup>144</sup> and WGroup (sub. 130, p. 12) being exceptions.

The extent to which businesses in the HERRC industries possess significant enduring bargaining power in respect of their employees is hard to discern empirically. In particular,

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144 [1999] AIRC Q9229.

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the degree of bargaining imbalance is not readily tested in a market where wage regulations are already ubiquitous. Some are sceptical of any bargaining power, at least in the restaurant industry, suggesting that this reflects high levels of competition between suppliers. Lewis (2014, p. 21) for instance, notes that the industry has great flexibility in employment ‘which implies a great deal of scope for employees to choose the hours and days they want to supply the labour.’

However, the flexibility in the hours *desired* by employers does not translate to the flexibility of employees to choose their hours of work. In the accommodation and food services industries only around 30 per cent of employees had some say in the starting and finishing times of their jobs (a degree of control that was close to the bottom of all industries).<sup>145</sup> While not separately available at the industry level, young people have much less control than others (18.5 per cent). While often needing more flexibility than men, women had only marginally greater control over time of work (31.9 compared with 29.6 per cent in the accommodation and food services industries). Individual bargaining without a regulated floor would reduce access to penalty rates.

Bargaining imbalances may be exacerbated by the fact that many jobs in the HERRC industries bundle week and weekend days together into a required rostering pattern. An employee’s capacity to reject working on a weekend is reduced if that also amounts to relinquishing the job altogether. There is some anecdotal evidence for this proposition. For example, in detailed qualitative research by RMIT University:

After the pay, a common response, especially from young people who were not studying, from experienced employees and from older workers was about lack of choice or other options, mainly because weekend work was a requirement of their employment. When asked about the main reason they worked on weekends some people talked about ‘the roster’ (Charlesworth and Macdonald 2015, p. 16)

Variations in minimum wages in the United States have enabled some empirical assessment of the degree of bargaining power and wage suppression for fast food outlets and restaurants (Addison, Blackburn and Cotti 2012; Card and Krueger 1994; Dube, Lester and Reich 2010; Ropponen 2011; Schmitt 2013). The results are contested strongly by several economists, but nevertheless provide some support for the notion that even businesses operating in highly competitive industries may still have *some* power to suppress wages where regulation does not limit this.<sup>146</sup>

A possible additional factor may be that the countervailing bargaining power of unions is relatively low in the relevant industries, particularly for accommodation and food services.

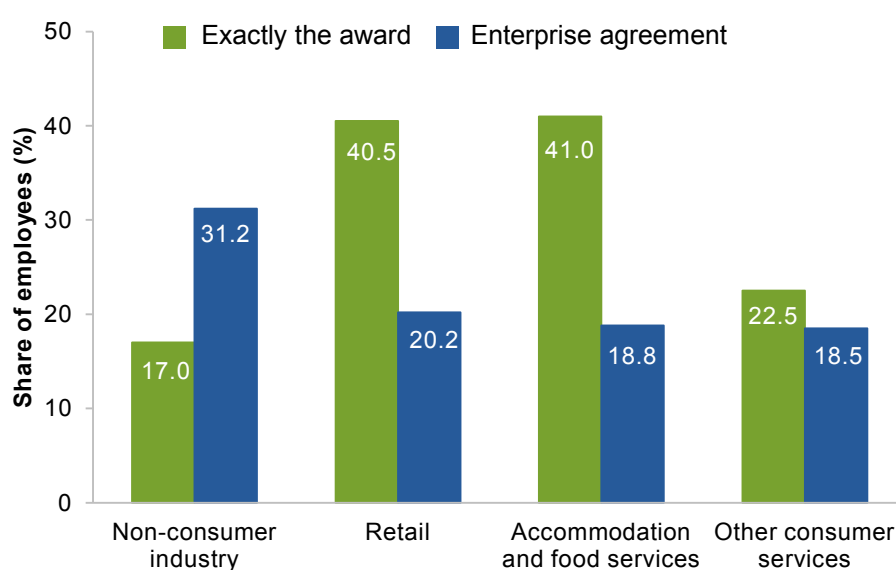
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<sup>145</sup> ABS 2013, *Working Time Arrangements, Australia, November 2012*, Cat. no. 6342, table 5, 3 May.

<sup>146</sup> The United States evidence that even fast food outlets might have material bargaining power does not necessarily imply that raising (lowering) existing Australian regulated penalty rates would stimulate (lower) employment. To the extent that regulated minimum penalty rates have overshot the level required to compensate for unequal bargaining power, lowering regulated penalty rates would initially increase employment.

Union penetration in the latter industry is only 4.6 per cent, less than a third of the average rate in non-HERRC industries (table 15.1 in chapter 15). Associated with this, collective agreements are less frequent, and the share of people receiving wages set exactly by the award more so. For instance, in 2012, collective agreements covered 18.8 per cent of employees working weekends in accommodation and food services, compared with 31.2 per cent for non-consumer industries (figure 13.1).<sup>147</sup> The comparable figures for people paid exactly at the award were 41 and 17 per cent.

Figure 13.1 **Award and enterprise agreements**  
HERRC and other industries, 2012<sup>a</sup>



<sup>a</sup> The data are indicative as employees are not always aware of how their pay and conditions are set.  
Source: HILDA wave 12, 2012.

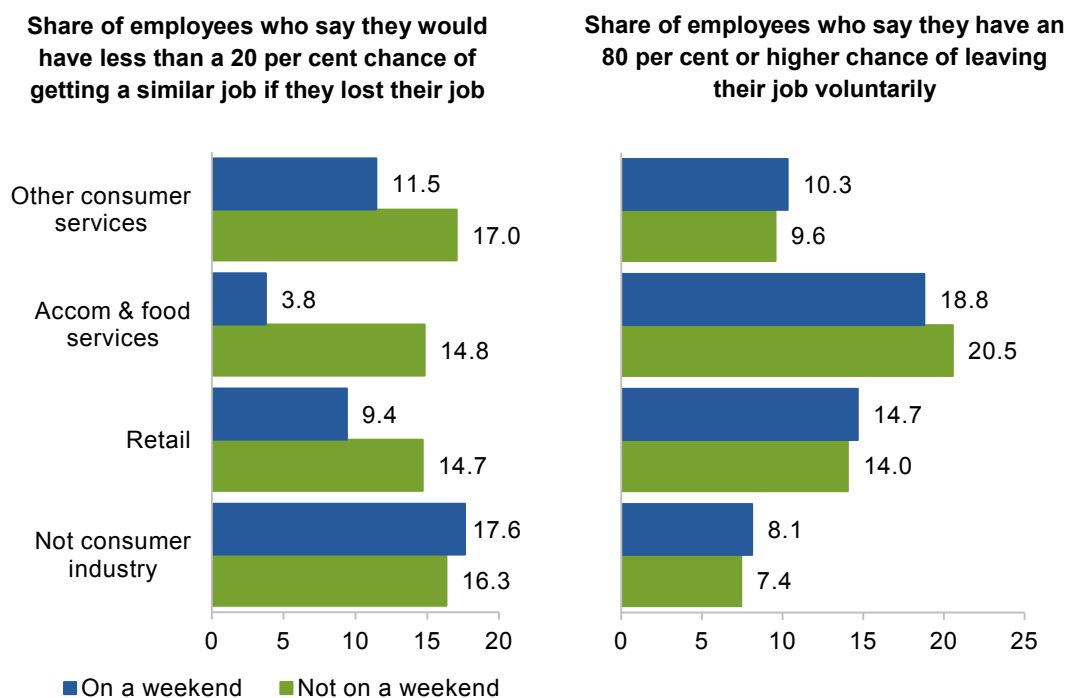
Nevertheless, even if employers in the HERRC industries could exercise some bargaining power in the absence of regulated rates, other evidence suggests that the extent of this power is likely to be modest.

This is because the long run search costs and other frictions appear to be lower in the HERRC industries.<sup>148</sup> The empirical evidence shows that, compared with other industries, employees have much less difficulty finding an equivalent job if they lose their current one (figure 13.2). Likewise, they are also much more willing to leave their job voluntarily. Job optimism and mobility are reasonable direct tests of the severity of bargaining imbalances.

<sup>147</sup> Based on HILDA wave 12 data.

<sup>148</sup> However, even in these industries, wage offers by competing providers are often not posted (raising search costs), and many aspects of a job that are important to a prospective employee remain unknown (for example, the nature of the workplace environment), which favours inertia.

**Figure 13.2 Weekend employees in the HERRC industries face fewer difficulties getting another job and are more willing to leave their jobs<sup>a</sup>**



<sup>a</sup> The HILDA survey asked for the likely probability of getting another, equally well paid, job in the next 12 months if they lost their current one. It also asked people for the probability that they would voluntarily leave their jobs over the next 12 months. The data relate to people who work on weekdays but not weekends and those who work on weekends (and who may also work on weekdays).

Source: HILDA (wave 12).

Even the relatively low rate of unionisation is not proof that employers are likely to wield significant bargaining power.<sup>149</sup> It is notable that in New Zealand, where there are no statutory requirements for weekend penalty rates, premiums are rarely included in collective enterprise agreements in the HERRC industries, whereas penalty rates are more frequently negotiated between parties in other collective enterprise agreements, typically in higher-skilled industries (table 13.1).

Several features of the jobs and the relevant workforce explain the likely lower level of labour market frictions. The jobs often involve relatively low skills with well-defined tasks, as shown by low average wages, the greater share of inexperienced workers and the higher prevalence of casual jobs. This suggests that skills are more readily portable across firms. The workforce is younger and has low average tenures, so that mobility is higher

<sup>149</sup> In addition, the low rates of union membership in restaurant services may reflect the paucity of the ‘rents’ that collective labour can extract through bargaining, lowering the motivation for unionisation.

(table 15.1 in chapter 15). The relevant markets are often densely populated with many prospective employers.

**Table 13.1 Penalty rates in New Zealand**

Penalty rates in New Zealand Collective Enterprise Agreements, 2014

Day of weekend	Share of agreements					2nd period rate <sup>b</sup>
	No penalty rate	Penalty rate below 150%	Penalty rate 150%	Penalty rate above 150%	Other <sup>a</sup>	
	%	%	%	%	%	%
<b>Saturdays</b>						
All private sector	60	3	30	5	2	15
Food retailing	95	0	5	0	0	1
Other retailing & wholesale trade	97	0	2	0	0	1
Accommodation & food services	99	0	0	0	1	0
<b>Sundays</b>						
All private sector	58	3	17	20	2	3
Food retailing	95	0	2.5	1	0	1
Other retailing & wholesale trade	97	0	0	2	1	1
Accommodation & food services	99	0	0	0	1	0

<sup>a</sup> This includes arrangements where premiums are paid in dollars rather than as percentage increases in ordinary rates, or where only certain levels of employees obtain premiums. <sup>b</sup> In some cases, a higher premium rate is paid after a certain number of hours in an earlier period. Penalty rates above 150 per cent are usually at 200 per cent.

Source: Centre for Labour, Employment and Work, Victoria Business School, University of Wellington.

While the empirical evidence on the degree of bargaining imbalances in the HERRC industries is incomplete, a regulated penalty rate commensurate with the commonly applied Saturday 125 per cent rate for permanent employees of HERRC services seems far more plausible than higher rates (box 13.1). The present Sunday rates for these industries seem to be much less clearly justified either on economic grounds or according to community norms compared with other working times (figure 13.3 for the hospitality industry). Rates for Sundays (usually around 175 per cent) appear at odds with rates for times that are also important for social activities (evenings), and to an even greater degree for times that pose clearly demonstrated health risks (night shifts and rotating shifts). Evening/afternoon shift penalty rates can be as low as 10 per cent and night shift loadings as low as 15 per cent. While public holidays are often paid at 250 per cent — seemingly much higher than Sunday penalty rates — permanent employees are paid their full wage if they do not work on a public holiday (100 per cent in effect). Paying 250 per cent amounts to an effective penalty rate of 150 per cent (that is, 250 less 100 per cent) — actually lower than the typical Sunday rate. Sundays overall appear to be extreme in their relative compensation.

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### Box 13.1 Putting a value on bargaining power

The wage elasticity of labour supply is the degree to which people are willing to provide their labour to a *given* business at different wages. The lower or higher the elasticity, the more or less bargaining power the business has. The features of the HERRC services described in the main text suggest that the long-run estimates of the wage elasticity of labour supply for the average firm in these industries would tend to be towards the higher end of those found in the international empirical research (for example, Ashenfelter, Farber and Ransom 2010; Depew and Sørensen 2013). Under certain bargaining models, a supply elasticity ( $\varepsilon$ ) of 5 to 10 (which are at the higher end of the estimates) implies that that an efficient wage rate would be 20 to 10 per cent higher than the counterfactual market outcome respectively, noting that the efficient wage is equal to  $(1+\varepsilon)/\varepsilon$  times the unregulated wage rate. The higher the elasticity, the closer the market is to one that is workably competitive.

The economically efficient outcome for weekend wages depends on the regulator's choice of *weekday* rates, and the wage setting behaviour of the business under (unobserved) counterfactual regulatory regimes for weekend and weekdays.

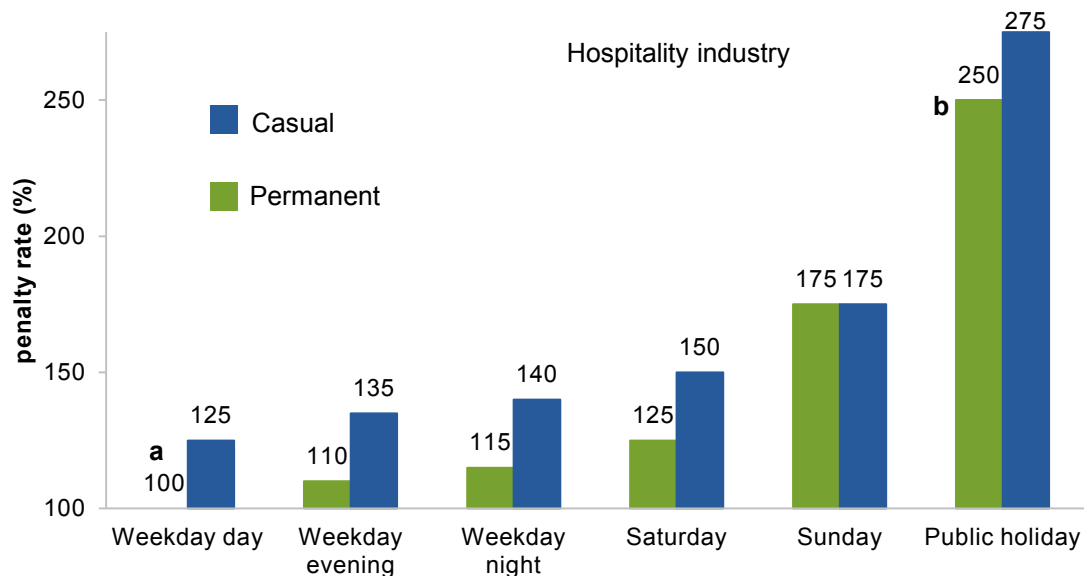
As an illustration, if  $\varepsilon$  is the same for weekend and weekday work, the regulator makes the efficient award wage rate decision for weekdays, firms exploit their bargaining power, and a business would have paid a 25 weekend premium over the unregulated weekday rate without any regulatory requirement to do so, then the 'optimal' penalty rate would be 125 per cent for  $\varepsilon=5$ . This is because if  $\varepsilon=5$ , the optimal penalty rate is 1.2 times the unregulated weekend wage rate divided by the regulated weekday rate. Under the above assumptions, the ratio of the unregulated weekend wage rate to the regulated weekday rate is 125/120 so that the optimal penalty rate is  $1.2 \times 125/120 \times 100 = 125$  per cent.

In other circumstances, the optimal penalty rate can be more or less than this. For example, if the regulator sets the award rate for weekday work at too high a level, then the efficient penalty rate would be lower than above. Indeed, if the regulator overshoots too much on weekday rates, the efficient weekend penalty rate could be zero.

Given the available empirical evidence, it would be hard to maintain anything like current penalty rates for the relevant industries based on bargaining power imbalances. In that case, the justification for high rates would have to rest on some other criterion.

There are other surprising anomalies, particularly in relation to Sunday penalty rates. Under the present award, an inexperienced level 1 pharmacy assistant with no or few qualifications will often receive higher wage rates than a pharmacist. For example, an assistant who worked ordinary hours on a Sunday is paid more than 50 per cent higher than the usual weekly rate for a pharmacist. It implies that the rate of return in wages from working outside normal hours is often far greater than the return to skill (figure 13.4). Pharmacists must complete four years of a university degree course, serve a one year internship, and pass registration tests to qualify to serve the public unsupervised. They must also undertake ongoing professional development. A pharmacy assistant has no equivalent training. The return to a pharmacist from such educational qualifications is 31 per cent. In contrast, the return from working on a Sunday is 100 per cent compared with a standard working time.

Figure 13.3 Penalty rates by day and time of the week



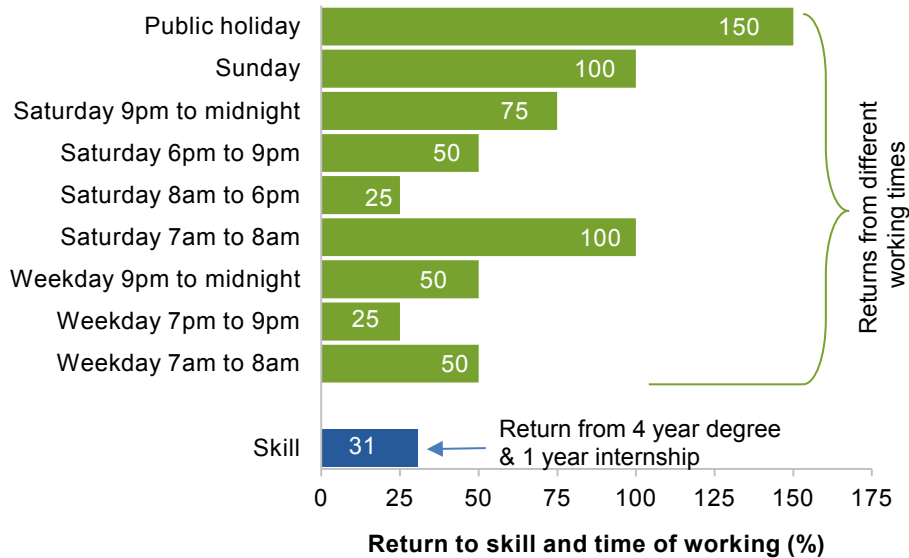
**a** The rates are relative to the weekday rate for permanent employees. The rate of 125 per cent for a casual worker on a weekday is the casual loading. As discussed in appendix F, the treatment of the loading in casual penalty rates is important for understanding relative incentives to employ permanent versus casual employees. **b** The effective penalty rate for public holidays is the amount extra that a business would have to pay for someone who works on a public holiday. Permanent full-time employees are entitled to a day's pay even if they do not work on a public holiday. Accordingly, a notional 'penalty' rate of 250 per cent (the award rate for permanent full-time employees on public holidays) actually provides an effective rate of pay for working of 1.5 times the ordinary salary (150 per cent), since the employee would have been paid their full daily wage even had they not worked on the given day. Casual employees do not typically receive public holiday pay when absent from work. In that case, their effective penalty rate is 250 per cent plus a 25 per cent casual loading (or 275 per cent). Part-time employees (not shown in the chart) who do not work routinely on a public holiday also do not receive a day's pay if they do not work on the public holiday, and so their effective penalty rate is 250 per cent (as they do not receive a casual loading).

Source: Hospitality Industry (General) Award 2010.

The Shop, Distributive and Allied Employees Association (SDA) observed that pharmacists working on weekends also receive penalty rates, so that the relativities between pharmacists and pharmacy assistants did not change on a weekend. This is true, but misses the point. It remains the fact that the rate of return to working on weekends for a relatively low-skilled employee is much higher than the return to prolonged tertiary education and professional training. (This issue also arises in considering relative wage levels more generally — and is discussed in chapter 14.)

**Figure 13.4 The returns from skill and different working times**

Pharmacy industry<sup>a</sup>



<sup>a</sup> A pharmacist must complete 4 years in a university degree course, serve a one year internship to qualify to serve the public unsupervised, pass registration tests and undertake ongoing training. A pharmacy assistant is not statutorily obliged to have any training. The additional standard wage rate for a pharmacist is 31 per cent higher than an untrained assistant. In contrast, the return from working a Sunday over a normal day is 100 per cent.

Source: Pharmacy Industry Award 2010.

Finally, the social disabilities associated with weekend work — for which there *is* sound evidence (chapter 12) — does not strongly support the large gap between penalty rates on Saturdays and Sundays. This finding is reinforced by the apparent excess demand for Sunday jobs in the fast food industry, which suggests that the penalty rate overcompensates for the asocial costs of working at this time (table 13.2). Penalty rates in this industry are relatively low compared with some other HERRC industries, so that excess demand might be expected to be greater in those.

The above considerations suggest that regulated minimum Sunday rates should be equal (or very close) to Saturday rates. While this represents a shift from the current award settings for the relevant industries, there have been occasions when the regulated Saturday and Sunday rates have been aligned, as in some previous Queensland and Western Australian Awards (FWCFB 2014, p. 102). Parity of regulated rates is a simple and easily followed rule. In a fanciful world of perfect regulators, penalty rates would change as skill shortages and demand shocks occurred. However, regulators must choose something reasonable and practical, and though guaranteed to be wrong, this is likely to be better than no regulation.



**Table 13.2 Views of employers about ease of obtaining employees on Sundays**

Survey of operators in the fast food industry<sup>a</sup>

<i>Response</i>	<i>Share responding in each category</i>
	<b>%<sup>b</sup></b>
It is difficult to get enough people to work on a Sunday to meet staffing needs	14.1
It is difficult to get enough people to work for as long as I need them on a Sunday	11.1
It is easy to get enough people to work on a Sunday	67.4
It is easy to get enough people to work for as long as I need them on a Sunday	30.4
More employees than I need ask to work additional Sundays	23.0
Employees request to work additional hours (or longer shifts) on Sundays	14.8
Other	3.0

<sup>a</sup> The sample size was 221 <sup>b</sup> Employers could nominate more than one response, so the total percentages exceed 100.

Source: AiG submission to the FWC regarding penalty rates (No. AM2014/305).



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# 14 The impacts of changing weekend penalty rates

## Key points

- Consumers (including tourists) would be major beneficiaries from reform of penalty rates in the hospitality, entertainment, retailing, restaurant and cafe (HERRC) industries. With lower Sunday penalty rates, consumers would gain access to more services for longer hours and with higher staffing ratios. Sunday surcharges would be likely to disappear, and average prices for consumer services throughout the week would be likely to be a little lower.
- As an indication of the value of convenience, few would wish to go back to an era when most commercial operations were closed on Sundays. Existing high Sunday penalty rates do not have the same effects as those that arose out of now dated social conventions and trading hour restrictions, but they still have significant adverse impacts.
- Just as the imposition of higher penalty rates on Sundays have no long-run effects on profitability, similarly their reduction will also have no long-run impacts. Competition in the HERRC industries is high — as suggested by the high rates of entry and exits, and the absence of any long-run shifts in profitability ratios. The short-run profits of existing businesses from reduced Sunday penalty rates will be competed away as businesses increased staffing ratios and reduce prices, and as new entrants add new variety to consumer options.
- Total hours worked by employees in the HERRC industries are likely to increase substantially on Sundays, as is the headcount of employees. The economywide employment effects will be less than this because some of the additional hours worked and employment on Sundays will draw on labour used on other days of the week or in other industries. Business owners are likely to reduce their very long working hours.
- Nevertheless, those jobless (either unemployed or not in the labour force) suited to the Sunday labour market should be particularly responsive to the opportunities presented by greater demand for labour on that day. Since joblessness is particularly adverse for people's wellbeing, any employment gains for this group would be particularly important. Stimulation of entry-level jobs can also give longer-term benefits for young people in integrating them into the labour market by building skills and experience.
- Lower Sunday penalty rates will reduce the labour income of *existing* employees in the HERRC industries. However:
  - only the minority of HERRC employees work only on weekends, which reduces the importance of lower wage rates on Sundays
  - the reduction in wage rates for casual employees is less than for permanent employees because of existing anomalies in the interaction of casual loadings and premium rates for Sunday work
  - the net effect would be lower given offsets through the tax and transfer system
  - many HERRC employees do not come from low paid households. Many are in households with two other income earners.
- Some people will be made much worse off if Sunday penalty rates fall. However, high Sunday penalty rates are not the best or fairest way of assisting people on low incomes. This is the primary role of Australia's tax and transfer system.
- The usual assumption of proceedings before the Fair Work Commission has been a requirement to prove that lowering penalty rates would have desirable impacts on consumers and employment. The onus of proof should be reversed so that proponents of the current high rates would have to demonstrate why what amounts to very high labour taxes are justified on Sundays.

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## 14.1 Impacts on consumers

Much emphasis is given to the employment effects of penalty rate changes. As discussed below, while they will be positive and beneficial, they are emphatically not the only, or most important, basis for reform.

As in so many other microeconomic reforms — such as policies concerning import barriers, competition laws, public infrastructure, and health — the long-run beneficiaries are mainly consumers. Their interests have been often mislaid in the discussions about penalty rates. This is easy to do because while the accumulated benefits for millions of consumers are large, each individual consumer gains only a modest benefit, and therefore often do not pressure for policy change.

Under reform, consumers would have access to many services for periods when these were previously unavailable. They would receive better services due to potentially higher staffing ratios, and would obtain more differentiated services. These may sound like small gains, but to give an illustration of the benefits of greater convenience and variety, suppose that historical trading hour restrictions had stayed in place, and that retail trading was not permitted on weekday evenings, Saturday afternoons or Sundays. That would not only have adversely affected the capacity for labour supply by students, people caring for children during weekdays and others during the only time they were available for work, but it would have represented a huge loss in access to services by consumers. It would have also acted to inefficiently constrain the size of the tourism sector.

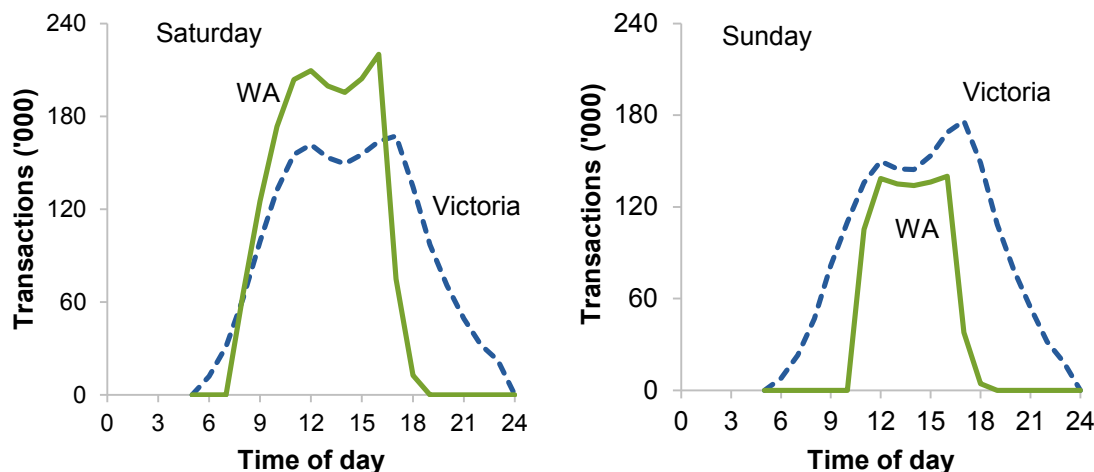
The value of consumer convenience is apparent by comparing transaction numbers and timing in jurisdictions with and without trading hour restrictions. It is notable that weekend trading hour restrictions in supermarkets not only confine transactions to a shorter period, but also reduce the aggregate number of weekend transactions (figure 14.1). Lowering penalty rates would have effects that partly mimic the relaxation of such restrictions.

While the changes associated with reduced penalty rates for Sundays will not be as great as those associated with relaxed trading hour restrictions, they are nevertheless likely to be large because of their effects on opening hours and staffing ratios. The changes are likely to also have other consumer and community benefits similar to deregulated shopping hour restrictions, such as more liveable cities, greater numbers of outlets, stronger competition, lower prices and less congestion (Kay and Morris 1987; Moorhouse 2008; PC 2011a, 2014d; Reddy 2012).

A comparison of opening times of restaurants in New Zealand (where penalty rates are not regulated) and Australia (where penalty rates are regulated) shows that Sunday trading is more frequent in New Zealand, and that the average available hours of restaurant services is higher, in some cases, by a substantial degree (table 14.1). The results are only indicative as other factors may partly explain the patterns.

Figure 14.1 **Longer weekend opening hours boost total transactions**

Victoria and Western Australia, 2012–2013<sup>a</sup>



<sup>a</sup> Average daily Coles' supermarket transactions. A transaction represents the purchase of any basket of goods that generates a receipt.

Source: Economic Regulation Authority (WA) (2014, pp. 285–286).

Table 14.1 **Opening hours of restaurants in Australia and New Zealand**  
July 2015<sup>a</sup>

	<i>Sydney</i>	<i>Melbourne</i>	<i>Brisbane</i>	<i>Canberra</i>	<i>Auckland</i>	<i>Wellington</i>	<i>Australia</i>	<i>New Zealand</i>
Open all week (%)	49.2	63.8	51.3	48.0	70.4	65.3	55.0	69.8
Open on Sunday (%)	68.8	69.3	76.7	67.6	77.2	73.5	70.6	76.9
Open on Monday (%)	71.4	89.9	68.3	71.6	87.3	84.2	77.7	87.0
Average hours open per Sunday (hours) <sup>b</sup>	5.8	6.7	6.9	5.5	7.2	7.1	6.3	7.2

<sup>a</sup> Based on a sample of outlets first listed in the tripadvisor listings of restaurants in the respective cities (undertaken in mid July 2015). Where opening hours were not disclosed, a web search was undertaken to find the opening hours. The sample size was 192 outlets for all cities bar Canberra and Wellington, which had sample sizes of 102 each. The Australian and New Zealand figures are the weighted average of the relevant cities, using city population shares as the weights. <sup>b</sup> Average hours open is an overall measure of hours of services available, including outlets that do not open. It is the single best measure of the availability of cafe and restaurant services on Sundays.

Source: PC data collection and data on city population from the ABS and Statistics New Zealand.

Several stakeholders questioned the implications of these results, but their objections are not decisive (Quiggan, sub. DR266; Bray, sub. DR261; box 14.1).

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### Box 14.1      **Unpacking the New Zealand and Australian results**

Several participants questioned the significance of the comparison of New Zealand and Australian opening hours:

Bray (sub. DR261, p. 18) notes that there are significant variations in Sunday (and Monday) opening hours between Australian capital cities, which cannot be due to different penalty rates as these apply nationally. This must therefore reflect sampling errors in the limited survey results or differences in patterns of consumption (due to culture, climate or other factors). These errors must also affect comparisons between Australian and New Zealand cities, and so the contrasting results between the two countries cannot solely be attributed to penalty rate differences. (In any case, it is apparent that for Brisbane, the Sunday opening rate is more than Wellington.)

Quiggin notes (sub. DR266 p. 2) that Monday trading is more frequent in New Zealand than in Australia and by a degree that is more substantial than the difference between Sunday trading. All other things being equal, it would be expected that the prevalence of Monday trading would be much the same in the two countries since there are no penalty rates on that day in either country. However, there are likely to be other factors at play that may explain the pattern, and in particular, the important role served by employers as suppliers of labour in many restaurants. Australian proprietors have around twice the propensity to work on weekends in food and beverages services (FBS) than other industries, and a much reduced likelihood of working on weekdays, especially ones early in the week. The share of employers working from Saturday to Friday in the FBS industry are 67, 49, 63, 66, 67, 69 and 72 per cent respectively, whereas the comparable figures for all industries are 35, 18, 78, 79, 79, 79 and 78 per cent (based on Commission calculations on the ABS *Forms of Employment* 2008 CURF — the FOE).

This is consistent with the combined effects of a greater level of demand for restaurant and café services on weekends, the impact of penalty rates on the costs of employees on weekends, and the capacity for the often small enterprises in this industry to substitute between employers and employees as sources of labour. To the extent that employers would like some leisure, then they may close their businesses during the early days in the week, and especially Mondays, which is often a less important trading day.

This is borne out by evidence showing that an employer (or employee) who works on a Sunday in the FBS industry is much less likely to work on Mondays compared with people in other industries. Around one in five employers in the FBS who work on Saturdays and/or Sundays do not work on Mondays (compared with only around one in 20 in all other industries). The likelihood that an employee working on a Saturday and/or Sunday does not work on a Monday is around two thirds for the FBS industry and 30 per cent for employees in other industries. The comparable behaviour of proprietors in New Zealand is unknown, so this is only indicative counter evidence.

A further factor is that relative weekday/weekend wage rates are not the only determinant of opening hours. There are no award wages in New Zealand and so the cost of low-skill labour in the restaurant industry may encourage a greater likelihood of all week trading, including on Mondays (as is apparent in the New Zealand data). Taken together, the observations by Bray and Quiggin are well made, but do not (without further evidence) invalidate the results in table 14.1.

The aggregate results still point to substantial differences in average Sunday opening rates in the two countries, which remain consistent with the dampening effects of penalty rates

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on weekend operations. To the extent that the differences reflect penalty rates, the results also imply employment effects in the relevant industries on Sundays. The comparison does not take account of any changes in staffing ratios, which may magnify the effect. The workplace regulator could examine this issue further by undertaking analysis using a better sampling frame and larger samples across more geographical locations, and encompassing a wider range of HERRC services to better assess overall effects (though this will still not capture any staffing ratio impacts).

### **Cost and price effects**

In the case of many HERRC services, a complicating factor in estimating the consumer benefits (and employment effects) associated with lower business costs on Sundays is that only some goods and services change their prices by the day of the week. Cafes and restaurants sometimes vary prices by imposing weekend surcharges, although the degree to which they do so is unknown and may not be transparent.<sup>150</sup>

However, in most instances, the prices of goods and services do not typically vary by the day of the week or time of the day. A shirt in a department store costs the same on Mondays and Sundays, as does a burger, a prescription from a pharmacy, or a box of cereal. The overall cost reductions associated with lower Sunday penalty rates (and any additional competitive pressures from entry of new businesses) in the HERRC industries are also likely to slightly lower average prices across the whole week, with further consumer benefits beyond that associated with convenience. Accordingly, even people who do shop on weekends are likely to benefit from penalty rate reductions on Sundays.

There would be potential productivity improvements from reform as the fixed costs of running a business would be spread over greater opening times and demand.<sup>151</sup> In 2006-07, such costs were around 16 per cent of total expenses for the restaurant and cafe industry (the most recent data). Better capital utilisation would put further downward pressure on average unit costs and prices. Moreover, the lower labour costs associated with reduced penalty rates may permit the payment of targeted incentive based payments that motivate staff and enhance productivity (Contact Centres Australia Pty Ltd, sub. 240, p. 2). All these effects will benefit consumers.

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<sup>150</sup> This was more difficult for such businesses prior to legislation in mid-2013 that exempted restaurants and cafés from the single pricing requirement in Australian Consumer Law. A business was previously obliged to provide separate menus when a weekend surcharge was applied. While accommodation providers also often charge more for weekends, this is usually a form of peak pricing to reflect that demand would otherwise exceed capacity.

<sup>151</sup> For example, leasing, rental costs, franchising fees, repairs, insurance premiums, software, and depreciation.

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## 14.2 Effects on business profitability

Some suggest that reduced penalty rates will not benefit consumers (or employment) because they will be reflected as higher profits. However, in looking at this issue it is important to distinguish between short-run and long-run impacts.

Any changes in the cost of any inputs — up or down — must have at least short-term impacts on the profitability of the relevant businesses as they do not usually instantaneously alter their input mix, drop prices or adapt in other ways. So the imposition of higher penalty rates resulting from award modernisation in some industries and jurisdictions would have had short-term adverse effects on profitability, while the reduction of penalty rates, as recommended in this inquiry, would also provide short-term additional profits to businesses. The duration of these profitability effects will depend on the specific circumstances of the market.

Many stakeholders identified significant effects of penalty rates on profitability (with positive effects from lower rates and adverse effects from higher ones), often with the implication that these effects would be enduring:

We support [that Sunday penalty rate could be lowered to the level of the Saturday penalty rate] as it would ... improve small business profitability. (Australian Small Business Commissioner, sub. DR366, p. 7)

Employers agitating for this change should be able to provide details ... to support their view that reductions in Sunday penalty rates will increase employment rather than merely increasing profitability. (United Voice, sub. DR354, p. 10)

It is trite to suggest that the Bill [to lower penalty rates] will do anything other than increase the profit margins of small businesses at the expense of low-paid, working Australians. (ACTU submission to *Fair Work Amendment (Small Business – Penalty Rates Exemption) Bill 2012*, 27 September 2012)

All this [lowered penalty rates] will do will give bigger profits to business owners. ... Many businesses that are currently affected by penalty rates are already highly profitable. Employees will be the ones that suffer, as business owners won't pass the extra profits onto workers. (Mitchell cited in Richards 2015)

However, long run profitability is unlikely to be affected by penalty rate levels. Effects on profits are not enduring at the industry level because two processes tend to restore normal levels of profitability. Higher rates of return on capital attract entry in industries, such as those in the HERRC, that do not face substantial business entry and exit costs. (Exit and entry rates are high in most industries, and especially so in restaurants, catering, takeaways and cafes — figure 14.2 and table 14.2.) This spreads existing customers among a larger number of businesses, and tends to lower returns.

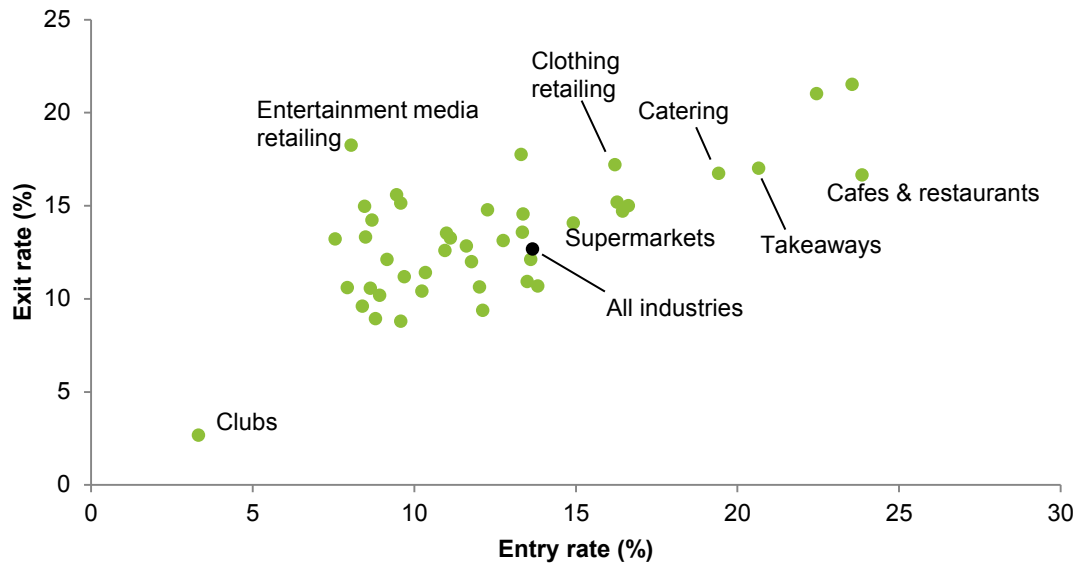
Equally, in a workably competitive market (as is clearly the case in the HERRC industries), existing businesses facing competition tend to lower average prices or increase the quality of the product to consumers by opening longer, increasing staff-to-customer ratios, or employing better qualified staff. Their business strategy will depend on market conditions. But, whether it is through price or quality effects, increased profits are



ultimately transferred to consumers. The converse process applies when a regulatory shock adversely affects profits, with the failure of some businesses and the adaptation by others (such as by opening for reduced hours on Sundays).

**Figure 14.2 Entry and exit rates in hospitality, retailing, restaurants and cafes**

June 2013 to June 2014<sup>a</sup>



<sup>a</sup> The exit rate is the number of exits over the following year from the stock of firms in June 2013. The data are at the subdivision level and, apart from 'All industries', only cover businesses in the HERRC industries.

Source: ABS 2015, *Counts of Australian Businesses, including Entries and Exits, Jun 2010 to Jun 2014*, Cat. no. 8165.0, 8 April.

**Table 14.2 Exit rate over four years in selected industries**

June 2010 to June 2014<sup>a</sup>

Industry	Exit rate (%)
Motor Vehicle and Motor Vehicle Parts Retailing	33.4
Fuel Retailing	34.1
Food Retailing	43.6
Other Store-Based Retailing	41.2
Non-Store Retailing and Retail Commission-Based Buying and/or Selling	60.2
Accommodation	33.5
Food and Beverage Services	48.3
All industries in the economy	38.3

<sup>a</sup> 100 minus the survival rate.

Source: ABS 2015, *Counts of Australian Businesses, including Entries and Exits, Jun 2010 to Jun 2014*, Cat. no. 8165.0, 8 April.

Long-run profitability of an industry is determined by the interaction of market competition, innovation and risk, and not by wage rates, a point also noted by the Fair Work Commission (FWCFB 2014 para 27). There is little evidence to suggest that measures of profits have any particular trend reflecting penalty rates (table 14.3).

**Table 14.3 Profits and losses in selected industries**  
2006-07 to 2013-14<sup>a</sup>

	2006-07	2007-08	2008-09	2009-10	2010-11	2011-12	2012-13	2013-14
	<b>Index of profit margin (2006-07=100)</b>							
	Index	Index	Index	Index	Index	Index	Index	Index
Total retail trade	100.0	91.4	93.7	98.3	98.8	95.1	94.3	97.6
Accommodation	100.0	80.5	126.3	102.3	72.3	111.8	105.0	91.7
Food and beverage services	100.0	64.7	98.7	125.2	98.6	102.8	103.5	102.8
Total arts and recreation services	100.0	104.5	106.9	117.1	102.5	100.3	99.8	98.4
All industries	100.0	93.9	85.7	95.6	103.5	100.6	87.6	90.1
	<b>Share of enterprises making a loss</b>							
	%	%	%	%	%	%	%	%
Total retail trade	20.7	26.2	24.9	28.4	30.9	27.6	26.2	24.3
Accommodation	26.4	26.0	25.3	23.8	..	19.4	19.4	19.6
Food and beverage services	22.5	33.2	34.8	30.7	..	23.4	22.9	25.6
Total arts and recreation services	29.9	27.6	28.2	30.6	34.6	19.3	20.2	24.7
All industries	23.5	23.7	24.8	25.4	25.4	21.4	20.8	20.0

<sup>a</sup> Profit margins (operating profits as a share of revenue) vary from industry to industry because they have varying levels of capital. For example, an industry may have a high profit margin because it is a capital intensive industry, though its return on capital may be equivalent to another business with a lower profit margin. Accordingly, normalising the initial profit margin to 100 provides a better way of comparing the measures over time.

Source: ABS (various issues), *Australian Industry*, Cat. no. 8155.0.

Oddly, some of the key proponents of the view that lower penalty rates would merely increase profitability tend to repudiate that higher penalty rates lead to sustained losses (for example, as in the expert testimony to the Fair Work Commission (FWC) of Professor Mitchell ([2014] FWCFB 1996, p. 13), despite the fact that the same processes make neither a likely outcome. This is an important issue, which the FWC should consider as part of its current review of penalty rates.

Moreover, arguments that the FWC should lower regulated penalty rates because some businesses are unviable at those rates is not a compelling basis for such a change in its own right. In any industry, there is a share of businesses that are making losses or are close to doing so. Lowering wages may provide temporary respite, but competition will always lead to a tail of underperforming businesses (as ABS data on profitability across a

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multitude of industries attest).<sup>152</sup> Of course, business exits are costly in both human and resource terms (since there are transitional impacts), but these are only relevant in policy terms where the regulatory impost is not justified.

Others advance a different mechanism, suggesting that lower penalty rates actually decrease long-run profits (or that their increase would have the opposite effect):

A reduction in penalty rates runs into a national impact of billions of dollars less of expenditure on penalties, and the spin offs for national income. These effects are even stronger because many of those on penalty rates at awards spend all their income. This would have downward effect on consumption expenditure on goods and services, employment and profits. (Unions WA, sub. DR351, p. 8)

Textbook models that predict employment will grow if wages are cut have no evidential basis. Employment is driven by the strength of spending. Wage cuts reduce income and undermine spending (Mitchell in Lewis and Mitchell 2014, p. 2)

With less money in their pockets to spend, cuts to low-paid workers take home wages will result in businesses taking the second round of hits, usually small businesses in regional and rural areas who can least afford it. (Australian Services Union, sub. DR283, p. 6)

A McKell Institute report (Equity Economics and UMR Strategic Research 2015) on the effects of penalty rate reductions in rural areas applies the same premise to regions, suggesting that lower penalty rates would be harmful to activity in the regions.

Such apparent effects on economic activity ignore multiple automatic feedbacks in the economy, including adjustments in prices and demand, and movements of resources between industries and regions. To the extent that an economy is failing to use its available resources due to inadequate aggregate demand, then macroeconomic policies are the most effective option, not selective wage regulations. Such reasoning also invites the question of why further benefits would not be realised by increasing penalty rates by even more.

### 14.3 Effects on employment

There are strongly held views about the employment effects of penalty rates. Industry submissions to this inquiry (and to the FWC and other inquiries)<sup>153</sup> have generally claimed significant employment effects, while employees and unions have questioned this, or even claimed perverse outcomes (box 14.2). Indicative of the same tensions, the full bench of the FWC was equally divided in its view.

The following material covers some of these issues in detail, but the bottom line is that there are likely be some positive employment impacts, though less than those sometimes claimed by the proponents of reduced penalty rates. However, the benefits from reducing

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<sup>152</sup> ABS (various issues), *Australian Industry*, Cat. no. 8155.0.

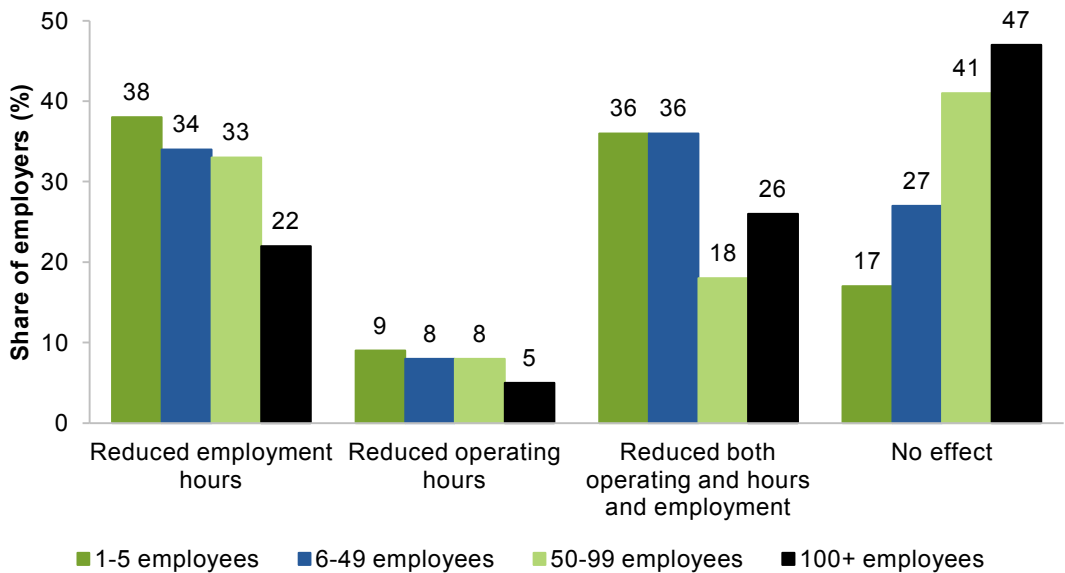
<sup>153</sup> For example, a Senate inquiry into a penalty rate exemption for small businesses (EEWRLC 2013).

penalty rates only partially rest on their employment effects, and so the prominence given to this in the policy debate misses the more important impacts on consumers and by giving greater choice to some employees about when they can work (section 14.1). Many of the major reforms made over the last three decreases had their largest impacts on the efficient use of resources, not on expanding employment in any given sector.

### Evidence from business surveys

There is also some indicative survey evidence of the impacts of penalty rates on employment in the HERRC industries (for example, figure 14.3, and tables 14.4 and 14.5).

**Figure 14.3 Employment effects of penalty rates**  
Sample of Queensland businesses<sup>a</sup>



<sup>a</sup> The survey asked employers to rate the importance of penalty rates on employment and operating hours. Few other business stakeholders quantified the employment impacts of penalty rates, but instead provided subjective measures of concern about them.

Source: Chamber of Commerce and Industry QLD (sub. 150, p. 27).

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## Box 14.2 Participants' views on employment effects

### Big effects:

Although operating days and hours is a decision to be made by the business owner and is based on a range of factors, it is disappointing to think that Australia is in a situation where business turnover and employment opportunities are reduced due to penalty rates. This is not advantageous for employment levels, productivity or the economy. (Office of the Australian Small Business Commissioner, sub. 119, p. 7)

Penalty rates can be a deterrent to employment, particularly when combined with rules around minimum engagement of employees. In the pig breeding and raising industry ... on a Sunday, the combined effect of these provisions for one hour's work is equivalent to \$100 per hour. This is disproportionate to the inconvenience to the employee and a significant disincentive to employment. As the dairy example provided earlier shows, many farmers choose to undertake this work themselves because they cannot justify the cost. Ultimately, this dampens productivity by causing fatigue among farm owners and stifling job creation. (National Farmers' Federation, sub. 223, p. 15-16)

... employers have legitimate concerns that some aspects of the current system, for example penalty rates, excessively inflate labour costs and discourage job creation. In the present economic climate, it is particularly important that minimum and award rates of pay do not unduly constrain the ability of employers to retain staff or hire new employees. (Western Australian Government, sub. 229, p. 1)

44 per cent of [surveyed Queensland] businesses noted that they have decreased or substantially decreased the number of full time staff. Taken together, the results suggest that rising labour cost loadings are affecting business decisions about staffing hours and negatively impacting employment. (Chamber of Commerce and Industry Queensland, sub. 150, p. 25)

There is a concern that in a climate where many small to medium Clubs are struggling financially, that unsustainable penalty rates will have the effect of these employees suffering a reduction in hours or no employment all together. (Clubs Australia Industrial, sub. 60, p. 12)

On many occasions, we would have liked to give staff members the weekend work that they desire, but are instead unable to offer them ANY work on these days because we can't afford the overtime pay rate. This is a lose-lose for both the business and the employee. (Steven and Michelle Finger, sub. 142, p. 2)

### Limited or no effects:

I'd like to see evidence presented (of which a great deal exists) that finally puts an end to the furphy that reducing minimum wages or cutting penalty rates will solve business' 'problems'. Better management will solve business' problems. I'd also like to see an end to lazy blaming of the legislation for poor workplace relations — workplace relations don't rely on law, they rely on people knowing their jobs, working together, and behaving respectfully. (Respondent to survey of 813 members by Australian Human Resources Institute, sub. 46, p. 26)

... employers have provided limited evidence that penalty rates have had the negative effects claimed, such as causing them to employ fewer workers on a Sunday. In FWC's 2013 penalty rates decision, the Commission noted the 'significant evidentiary gap in the cases put [by employers]'. (Employment Law Centre of WA, sub. 89, p. 15)

There is no reliable evidence or economic analysis that removing penalty rates will boost employment and job creation in cases put before the FWC to date. Further, minimum wage earners and their families who rely on penalty rates to make ends meet would be disproportionately affected by reductions. (Catholic Commission for Employment Relations, sub. 99, p. 2)

As with the minimum wage, the argument for the abolition of penalty rates assumes that allowing lower rates of pay would mean that employers could employ more people to work more hours – thus resulting in a win for everyone. However, the Society disagrees with this argument for a number of reasons. Firstly, it places value on employment at the cost of all else, including an adequate standard of living. ... Secondly, the argument that deregulation of incomes will lead to better outcomes assumes that dissatisfied employees will be able to get more hours, or move on to better paid work elsewhere. However, in the current employment market, with rising unemployment and one job for every thirteen jobseekers, this seems highly unlikely ... Thirdly, the argument assumes that lowering pay will increase employment. As the Issues Paper points out, the reality is far more complicated, and in fact the reverse relationship might hold. In any case, the cost to individuals who are already struggling must be weighed, as well as the risk that increased business income would not be used to employ more staff but for other purposes. (St Vincent de Paul Society, sub. 78, p. 4)

**Table 14.4 Perceived impacts of penalty rates on small business**

Indicators from a small sample of Western Australian employers<sup>a</sup>

<i>Type of impact</i>	<i>Share of employers</i>
	%
Premium needed to attract employees on weekends if penalty rates completely removed?	
Yes	37
No	55
Any negative impact of penalty rates on hiring?	55
Any negative impact of penalty rates on weekend trading	61
Strategies used to address penalty rates	
Modified opening hours	22
Rostered staff who had least impact	25
Owner worked weekends/public holidays	40

<sup>a</sup> As acknowledged by the Western Australian Government (sub. 229, p. 8), the sample size was small, saying that: 'Despite the limited number of responses as a consequence of the time limitations required to ensure inclusion of the results in this submission, the responses are still insightful.'

Source: Western Australian Government (sub. 229).

**Table 14.5 Business views about the employment impacts of setting Sunday rates at Saturday rates**

Queensland HERRC businesses, 2015<sup>a</sup>

<i>Type of impact</i>	<i>Units</i>	<i>Effect</i>
Businesses open on Sundays	Share (%)	70
If not open, would you open if Sunday rates were equal to Saturdays	Share saying yes (%)	80
If the business was open on Sunday, and Sunday rates were set at the Sunday rate, would you:		
open for longer?	Share saying yes (%)	45
If yes, by how many hours?	Average	3.8
If yes, by how many hours?	Median	3
increase existing staffing while open?	Share saying yes (%)	60
increase share of permanent staff?	Share saying yes (%)	45
hire additional employees?	Share saying yes (%)	50
If yes, by how many people?	Average	5.2
If yes, by how many people?	Median	2
leave opening hours on other days the same?	Share saying yes (%)	90
increase opening hours on other days?	Share saying yes (%)	10
decrease opening hours on other days?	Share saying yes (%)	0

<sup>a</sup> The overall sample size is small, and so the results should be seen as only indicative. A much larger survey would be required to secure reliable results.

Source: CCIQ and QTIC (sub. DR311).

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Drawing on the results of a survey of local businesses, the Launceston Chamber of Commerce (sub. 124) estimated that employment in the retail and accommodation/hospitality sectors in their region would increase by 943 full time equivalents (or a 9 per cent increase) if penalty rates were ‘either significantly reduced or abolished’.

Another Australia-wide survey of 1000 restaurant and cafe services claimed that reduced weekend penalty rates would significantly increase employment and hours worked (Jetty Research 2015). For example, around half of the surveyed businesses said that they would increase employment on Sundays/public holidays (by an average of about three employees) and around 40 per cent indicated that they would open for longer. Of the 10 per cent of restaurants that do not currently open on Sundays and/or public holidays, 70 per cent said that this was because of penalty rates or an inability to trade profitably. Across the 1000 employers, the average predicted increase in staffing was 1600 employees and 2100 extra hours of opening. The study projected increases in employment of nearly 40 000 employees.

However, a major deficiency in this study is that it asked for employers’ views about the impacts of a reduction in penalty rates, but did not specify the actual magnitude of that reduction. Accordingly, the answers given would reflect different judgments by respondents on the magnitude of the hypothetical change. It may be that some would have considered that the reduction was from 150 to 125 per cent (the Sunday and Saturday penalty rates respectively for the relevant industries), but others may have made different surmises, such as from 150 to 100 per cent. This affects the meaningfulness of the results, and suggests that the results are likely to overstate any real impacts.

All of the business surveys cited above would fail the (overly) stringent tests of reliability proposed by Bartley (2015), an expert witness for the Shop, Distributive and Allied Employees Association (SDA). However, all surveys bar those from the Australian Bureau of Statistics would be likely to fail that test, including the AWALI and AWIRs surveys. Given the limitations in surveys of this kind, the numbers should be treated as suggestive more than definitive.<sup>154</sup> But they should not be disregarded. Evidence is always imperfect, and few conclusions about anything in the social sciences could be reached if only those

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<sup>154</sup> As an indication of the subjective nature of the answers, in contrast to the relatively high frequency of businesses identifying no effect from penalty rates shown in figure 14.3, an ACCI (2013a, p. 6) survey indicated that only around 10 per cent of businesses had no concern with penalty rates (and 45 per cent said that it was a major concern). A survey by the Australian Human Resources Institute (sub. 46, p. 17) indicated that 50 per cent of respondents considered that rates ‘required less regulation and realignment to today’s economy’ (a potentially leading question).

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studies that met the full set of conditions set by Bartley were given any weight.<sup>155</sup> Moreover, as discussed in section 14.5, one of the most ignored issues in this area is the onus of proof. Placing the onus on ‘proving’ that penalty rate reductions are beneficial and then pointing to any deficits in the methods used or deficiencies in data in support of change makes the task of repudiation an easy one.

## **The economics of employment responses**

The employment issues are far more nuanced than captured by the often partisan and diverging claims of the various parties, though businesses more often indicate better the variety of pathways that can affect the different dimensions of employment.

### **Employment effects for existing and new businesses**

Most business surveys of the employment impacts of lower penalty rates relate only to existing businesses, yet new businesses prompted to enter because of higher short-term profits will also increase employment. It may be that business surveys of employment effects still provide reasonable indicative evidence of the overall employment impacts in the HERRC industries on Sundays, but merely fail to realise those gains are partly distributed to other businesses. There is no empirical evidence on the importance of this effect, except to note that entry rates are very high in many of the relevant industries. (At the technical level, there may also be ‘general equilibrium effects’ because lowering regulations on penalty rates is likely not only to result in a medium-run shift in the demand for HERRC products for a given demand function, but to shift that demand function outwards, creating second round stimulating impacts on the overall level of required labour. The same process occurs if minimum wages have a binding effect on employment.)

### **Employment versus hours worked on Sundays**

Given hiring costs, it is typically easier for businesses to increase the hours of work of existing employees than to hire new ones. In much of the literature on the aggregate employment effects of changes in wages, the effects are larger for hours than employment, as in appendix C and Leigh (2003). The Chamber of Commerce and Industry Queensland and Queensland Tourism Industry Council survey — while only based on a small sample — suggested that the businesses concerned would increase existing staffing levels at times

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<sup>155</sup> For example, no regression would ever meet the strict assumptions she applies for ‘reliable’ regressions. The real question is the seriousness of any departure from the unrealistic benchmark, and what can be done about it. Some empirical analysis is poor, but failure to meet the benchmark is far from sufficient to dam research findings. In fact, in technical terms, the parameters in ordinary least squares are unbiased and weakly consistent even with non-constant variance of the errors. The problem is inference (commonly addressed through the use of White’s heteroscedasticity consistent standard errors or, in some cases, bootstrapping).



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when they were already open (table 14.5). This remains an employment effect, just not one characterised as ‘new’ employment.

### Substitution between days of the week

Demand for goods and services on any given weekday are partial substitutes for goods and services on other days. Consumers who are now able to shop or dine out on a Sunday may do so less on other days. Accordingly, there will be some displacement of demand and, in turn, employment in the industry from one day to another. ‘One day’ models that ignore this substitution effects will produce erroneous aggregate employment effects (Borland 2015; cf. Lewis 2014). That said, substitution is not perfect, as suggested by the outcomes from shopping hour deregulation, which indicates that there is increased overall demand from the greater convenience associated with longer opening hours (section 14.1).

There are also gains for employees even if all they do is simply switch days of the week. Many employees value flexibility in their working hours, and existing Sunday penalty rates are likely to price some people willing to work on that day out of the market. That may force them to work at a time less convenient to them. As noted by some employers:

Some staff actually are happy to work on a Saturday morning if they can have an afternoon or morning off during the week. It seems ridiculous to have to pay extra wages to open Saturday morning when it suits some staff to work then anyway. (Western Australian Government, sub. 229, p. 30)

Indeed, many employees are attracted to this [the hardware industry] segment of the retail industry because of their ability to work on Sundays. These people can include students, parents juggling child-minding responsibilities, those aspiring to managerial duties, and those seeking a second job to help with their finances. In many cases, these people are being denied opportunities because of the penalty rates associated with this work. (Hardware Federation of Australia, sub. DR316, p. 8)

The CCIQ and QTIC survey suggested that most businesses would not change the opening hours at other times of the week, and some suggested that they would open longer (table 14.5). However, businesses’ intended short-run supply intentions can vary from their responses once consumer demand patterns have changed. From the consumer perspective, there must be some substitution in demand between different times, and so lower staffing on other days seems likely.<sup>156</sup> Over time, an overall small net increase in activity could be expected across the full week.

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<sup>156</sup> However, there is a distinction between the days that a business is open, and the amount of trading activity and employment on any given day. As discussed in box 14.1 and further below, the mix of employees and business owners may also vary by the day of the week.

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## People will be partly drawn from other industries

Some people who would be able to obtain additional hours of work or a job on Sundays in the HERRC industries may have relinquished work in other industries that offered them less preferred conditions or times of operation. This is a standard outcome whenever there is a regulatory shock that expands one industry. It is similar to the effect that occurs when people move from one other day in the week to a Sunday within the HERRC industries, but involves movements from outside the HERRC industries. This is an efficient outcome and beneficial to the moving employees.

## The labour mix may change

It appears that sometimes penalty rates encourage business owners to employ casual and younger employees on weekends to reduce labour costs, noting that the Sunday penalty rate treatment of casuals can also sometimes favour their employment on weekends over permanent employees (appendix F). There is a view by some, including employees, that lower-cost ‘inexperienced staff’ are employed on Sundays (figure 12.6 in chapter 12). Lowering overall labour costs may encourage businesses to increase the share of permanent staff and some suggested that they would do so (table 14.5).

## Employment of proprietors and employees

Labour on Sundays is disproportionately provided by business owners and sometimes their family members across all industries, with this being especially prominent for the HERRC industries (appendix F and box 14.1). Several stakeholders noted that working proprietors and family members were often the only resort for weekend work.<sup>157</sup> Such people currently work much longer hours than other employees and more commonly on weekends. For example, a survey of 350 members by the Australian Newsagents Federation found that over 92 per cent of the proprietors worked every Saturday, and 87 per cent worked regularly on Sundays of those newsagents that were open (sub. 218, p. 10).

It can be expected that some businesses will rely less on business owners, and more on employees for weekend operating. As discussed in box 14.1, having been freed from the requirement to work on weekends, some business owners may contribute their labour at other times of the week. Either way, from an economic view, some of the hours of work provided by business owners may be reduced (quite desirably from their perspective), but this partly limits the total employment increases associated with reduced Sunday penalty rates in the relevant industries.

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<sup>157</sup> For example, Andrew Steers (sub. 5, p. 1), Western Australian Government (sub. 229, p. 26), and the South Australian Wine Industry and Winemakers’ Federation of Australia (DR352, p. 40)

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## How responsive is the demand for labour in the HERRC industries?

As noted in a recent landmark decision by the FWC on penalty rates (FWCFB 2014), the responsiveness of labour demand to changes in wage rates is a decisive issue for employment responses in the relevant industries.

The size of the wage change from lowering Sunday penalty rates to Saturday rates suggests a strong labour demand response at least on Sundays (table 14.6). For example, a reduction in the Sunday penalty rate of 175 per cent to the Saturday rate of 150 per cent in the restaurant industry for casual level 3 employees and above would imply a reduction in wage rates of just above 14 per cent. In the case of the retail industry, parity of the Sunday rate with the Saturday rate would imply a wage rate reduction of around 33 per cent were the new regulated penalty rate to bind.

It is possible that the actual wage reduction will be less than this if employers had to provide Sunday premiums above the Saturday rates to attract sufficient quality staff, noting that regulated penalty rates set a floor not a ceiling on wage rates. However, given the New Zealand experience for penalty rates (chapter 13) and the views of businesses (table 14.4), it seems likely that wage rates would still fall significantly. The views from unions and individual employees about the income distribution impacts of reduced regulated penalty rates are also consistent with this.

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**Table 14.6 Impacts on direct business employment costs of changes to Sunday penalty rates**

Various industries, 2015<sup>a</sup>

<i>Industry</i>	<i>Permanent employees</i>	<i>Casual employees</i>
	<i>%</i>	<i>%</i>
Restaurant Industry	-14.3	-14.3
Registered and Licensed Clubs	-12.5	-14.3
General Retail Industry	-33.3	-32.5
Hospitality Industry (General)	-25.0	-14.3
Amusement Events and Recreation	-31.7	-28.6
Fast Food Industry	-14.3	-14.3
Pharmacy Award	-33.3	-33.3
Hair and Beauty	-29.8	-33.5

<sup>a</sup> Direct business costs for permanent employees takes account of any leave loading and leave entitlements. Note that no leave loading is available under the Amusement Events and Recreation award. In several of the awards there are multiple penalty rates on some weekend days. In the case of retail pharmacy, the usual Saturday penalty rates of 125 and 150 per cent for permanent and casual employees respectively have been used. In the restaurant industry, the penalty rate on Sundays relates to level 3 to 6 employees.

*Source:* Various awards from the FWO (2015c, 2015d).

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The degree to which such large wage rate changes affect employment, how quickly, for whom, when and where, is not easy to estimate. The broad empirical evidence suggests that, with the exception of youth wages, a 10 per cent decrease in wage rates could increase the *economywide* demand for labour (on both a headcount and hours basis) by around 5 per cent (appendix C).<sup>158</sup>

However, these economywide estimates may not be a good guide to the labour demand responses for Sunday labour in the HERRC industries (Borland 2015, p. 5):

- The type of labour is different from the average (the jobs tend to be more often entry-level, lower-skill jobs)
- The wage elasticity of demand for HERRC jobs on *Sundays* is likely to be higher than many others because owner-managers and family members can readily substitute for employees and because, increasingly, there are alternative less labour-intensive methods for meeting customer's needs (as through automation — chapter 11).
- The economywide employment responses to wage shocks relate to all days of the week, which are different from shocks just affecting one day.

Consumer demand also appears to be relatively responsive for some critical segments of the HERRC industry, noting that labour demand is a 'derived' demand and depends on consumer responses to lower prices or other positive attributes of a good.<sup>159</sup> An elasticity of -1 would imply that a 10 per cent increase in the price of fast foods would decrease overall demand for fast food by 10 per cent. Less is known about the responsiveness of shopping at physical retail outlets to prices (rather than to the specific goods they provide) or to access to entertainment in physical venues rather than remotely at home. It appears likely that consumer demand elasticities for brick and mortar services are rising with the advent of substitutes that were not previously available.

On the other hand, as discussed in section 14.1, the prices on Sundays of many services in the HERRC industries will not fall to reflect the changes in labour costs on that day, but will be spread throughout the week (though Sunday surcharges for restaurant meals will likely vanish). Accordingly, price reductions will not have many effects on demand on Sundays. Nevertheless, consumers value greater convenience in accessing services on Sundays, which represents a decrease in the quality-adjusted price of services.

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<sup>158</sup> This does not contradict the existing evidence that small changes to the minimum wage around their current levels have modest employment effects. That is to be expected given that the changes are small, that one of the prime goals of the expert group setting the minimum wage is to avoid any significant adverse employment effects, and that there are differences between aggregate demand elasticities and those for a subgroup.

<sup>159</sup> For example, studies have found demand elasticities of -2.5 and -0.9 for fast food (Jekanowski, Binkley and Eales 2001; Okrent and Kumcu 2014) and -5.4 and -0.8 for inexpensive restaurants and expensive restaurants respectively (Jekanowski, Binkley and Eales 2001). A more recent survey of the literature suggested elasticities of demand for the café, restaurant and catering services industry of between -0.9 and -3.8 (Lewis 2014).

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Accordingly, businesses that opened on Sundays or extended their trading hours could expect increased custom.

Given the characteristics of the demand for HERRC goods and services, and the high labour shares in these industries (chapter 11 and table 15.1 in chapter 15), it seems very likely that there would be considerable growth in hours worked and, to a lesser extent, employment *on Sundays* from lowering penalty rates on these days. If a labour demand elasticity for Sunday of -0.6 (a hypothetical, but probably conservative estimate) were to apply, the anticipated increase in hours from say a 33 per cent reduction in wage rates would be around 27 per cent.<sup>160</sup> The change would also be likely to reduce the trend towards capital substitution in the relevant industries (noting that the scope for automation and self-service is rising). A shift in total hours of this magnitude would take the form of greater hours for existing staff and hiring of new employees. The mix is unclear and would depend on the characteristics of labour supply and demand for would-be employees and existing employees in each sub-market.

The Productivity Commission's judgment that there would be a significant Sunday employment effect is at odds with the majority of the full bench of the FWC, who concluded that penalty rates 'have some effect, but not a significant effect, on employment on Sundays' (FWCFB 2014 para 139).<sup>161</sup> The relevant members cited uncertainty over labour demand elasticities and a view that minimum wage decisions had not had obvious employment effects. Both of the latter contentions are correct, but neither have much implication for the labour demand changes that could be expected when wage changes are large. The difficulty of identifying employment effects associated with the *small* real wage changes in annual wage reviews has no real relevance to real wage shocks of a completely different order of magnitude.

To put this in context, the real minimum wage (based on deflating by producer prices) increased by around 13 per cent over the nearly 40 year period from September 1978 to July 2015.<sup>162</sup> The wage shock represented by a *one-off* change in penalty rates from Sunday rates to Saturday rates is many times greater than that.

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<sup>160</sup> Based on a constant elasticity model of demand, with the log proportional change in demand for labour being equal to  $\varepsilon \Delta \ln(135/200)$  where  $\varepsilon$  is the demand elasticity (of -0.6 in this case). Borland (2015, p. 11) notes that the *market* premium for wages on weekends after reform may be higher than the *floor* set by regulation. In this calculation, it is assumed that the market clears at a premium rate of 135 per cent, rather than at the regulated floor of 125 per cent. (If the floor was binding, the demand effects would be around 33 per cent.) In his analysis of the impacts of changes to penalty rates, Lewis (2014) assumes a much higher degree of responsiveness, even to the degree that he regards it as possible that a 1 per cent increase in wage rates would reduce hours worked by 3 per cent (a labour demand elasticity of -3). This implies a very substantial (and, in the Productivity Commission's view, unrealistic) increase in weekend employment.

<sup>161</sup> If this were true, it would raise the question about why the FWC had not proposed *increases* in penalty rates. Were there only small employment consequences, then higher penalty rates would increase the earnings of the low paid.

<sup>162</sup> Based on data from Bray (2013b), wage reviews from the Fair Work Commission and GDP deflators from the ABS *National Accounts* (Cat. no. 5206.0).

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The *aggregate* effects on overall employment cannot be readily estimated given the competing effects of substitution between employment at different days in the same industry, substitution between business owners and employees, substitution effects with other industries, and consumer demand increases reflecting some price reduction across all days. The hierarchy of effects suggests that the increase in employment and hours worked in the HERRC industries on Sundays would be greater than the overall gains in the HERRC industries and the economy as a whole, though estimating the extent of this is not possible without more elaborate analysis.

That said, economywide employment increases are highly probable because some people are only available for Sunday work or have a strong preference for it over other days. Those jobless (either unemployed or not in the labour force) suited to this niche part of the labour market will be particularly responsive to the opportunities presented by greater demand for labour on that day. Since joblessness is particularly adverse for people's wellbeing, any employment gains for this group would be particularly important. Stimulation of entry-level jobs can also provide longer-term benefits for young people in integrating them into the labour market by building skills and experience.

Weekend employment also offers opportunities for skill development for some employees who, by virtue of their other studies, are not available on weekdays. For example, one employer noted that it wanted to provide employment for pharmacy students, but that penalty rates discouraged this (Master Grocers Australia and Liquor Retailers Australia, sub. 246, p. 12).

## **14.4 Impacts on the earnings of existing employees**

The degree to which the labour earnings change for people currently employed on Sundays depends on the:

- new regulated Sunday penalty rate for each relevant award
- extent to which some negotiated weekend wages might lie above a new lower penalty rate for Sundays. Even in New Zealand and the United States, where there are no legislated penalty rates for weekend work at all, they are still prevalent in some enterprise agreements
- timing of new enterprise agreements, as any penalty rates in existing agreements would continue to apply
- relative proportion of an employee's time spent working on Sundays
- extent to which lower wage rates induced greater demand for labour on Sundays. One labour economist has suggested that some existing employees might actually earn greater incomes on Sundays (Lewis 2014, p. 22), although that requires that the proportional increase in the hours of work they obtain would be sufficient to offset the proportional decline in wage rates. In any case, the models of the kind used by Lewis and others to assess the labour demand effects of wage changes do not distinguish

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between hours worked by current employees, hours worked by new employees, and headcount employment (and could not do so unless disaggregated data were available).

The Productivity Commission considers that it is improbable that, as a group, *existing* workers' hours on Sundays would rise sufficiently to offset the income effects of penalty rate reductions. As noted in chapter 12, many existing employees say they would actually give up working on that day with lower penalty rates (though that effect is also likely to be exaggerated).

In general, most existing employees would probably face reduced earnings, although new employees would receive additional income. Nevertheless, the adverse effects on existing employees would still be moderated to some extent by the availability of more hours of work, and potentially ones that suit their circumstances better. While as a group, employees more often want to work fewer hours, data from the AWALI survey showed that the share of employees preferring to work longer was significantly higher for people working on weekends than on regular days.<sup>163</sup>

### **The distributional effects of lower Sunday penalty rates**

Given the above results, the FWC, many employees and unions rightly identified the adverse effects of reductions in penalty rates on the earnings of low paid employees, whose welfare is a prominent goal of the Modern Award Objective (box 14.3).

Some argued that the Productivity Commission should analyse the distributional effects in more detail (St Vincent de Paul Society National Council, sub. DR280, p. 3), and the Commission has done so.

The prominence of the distributional concerns was a key motivation for the FWC's decision to preserve Sunday penalty rates for most employees in the restaurant industry. The FWC observed that:

The operating premise must be, therefore, that the full grant of the alternative application would reduce the take home pay of a large proportion of those employees covered by the Restaurant Award who already work on Sundays, and the extent of the reduction may be as high as approximately 17% for weekly employees and 14% for casual employees. Given that the modern awards objective requires the establishment of 'a fair and relevant safety net', taking into account among other things 'relative living standards and the needs of the low paid', any countervailing considerations concerning increased employment opportunities or productivity or other benefits to business would have to be clearly identified and demonstrated in order for the alternative application to be seriously entertained. (FWCFB 2014 para 295)

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<sup>163</sup> The effect was most pronounced for Saturdays, but also applied to Sunday employees.

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### Box 14.3      **Concerns about the income effects of lower penalty rates**

The QCU is also concerned with the plight of those workers for whom penalty rates are not a luxury, but rather allow them to make ends meet (rent, bills, food, etc.). An estimated 34.6% of employees in receipt of penalty rates rely upon them to meet their household expenses. (Daly as cited by Queensland Council of Unions, sub. 73, p. 3)

Many United Voice members are in insecure work arrangements and a large proportion rely on penalty rates to make ends meet and to compensate them for missing time off with family and friends on weekends, evenings and holidays. (United Voice, sub. 224, p. 2)

... a reduction in penalty rates would have detrimental and disproportionate impacts on female workers in these industries. (Textile Clothing and Footwear Union of Australia, sub. 214, p. 44)

... any suggestion of the removal of penalty rates for casuals and award based employees ... would have a significant impact on employees in retail, hospitality and nursing, which tend to be industries in which a large number of women work. (Women's Legal Services, NSW sub. 234, p. 1)

A reduction in penalty rates may disproportionately affect women who are award reliant, who are often employed in the hospitality, retail and community and disability care industries and who juggle their hours around family responsibilities and work hours where childcare is available via their partners or family. Quality affordable childcare is difficult to access on weekends so many women rely on family. (Working Women's Centres, sub. 242, p 13)

... those who rely on penalty rates to meet their household expenditure are far more likely to have any of the following characteristics: be single parents; women; in receipt of a household income less than \$30 000; not living in cities; be labourers; and be on contracts ... What this makes clear is that it is those Australians already doing it toughest who are relying on penalty rates to get by. Single parents, families living on less than the minimum wage, rural and regional Australians, and people in lower paid professions are the most financially vulnerable to the removal of penalty rates. This creates a very strong presumption that penalty rates should remain untouched. (St Vincent de Paul, sub. 78, pp. 3–4) (The submitter reiterated its concerns in a subsequent submission, sub. DR280, p. 5.)

Penalty rates supplement base wage rates and they are an important component of the income of award reliant workers. Many of these workers are the lower paid and use the opportunity to work for penalty rates to top up their wages to a reasonable level. (SA Government sub. 114, p. 10)

Workers in the hospitality, entertainment, retail, restaurants and café industries are already low paid in comparison to other industries. These workers are often vulnerable young people, students and low skilled workers in unstable employment. Many workers Legal Aid NSW advises and represents tell us that Sunday penalty rates are vital to help them achieve a reasonable take home pay. (Legal Aid NSW, sub. DR364, p. 7)

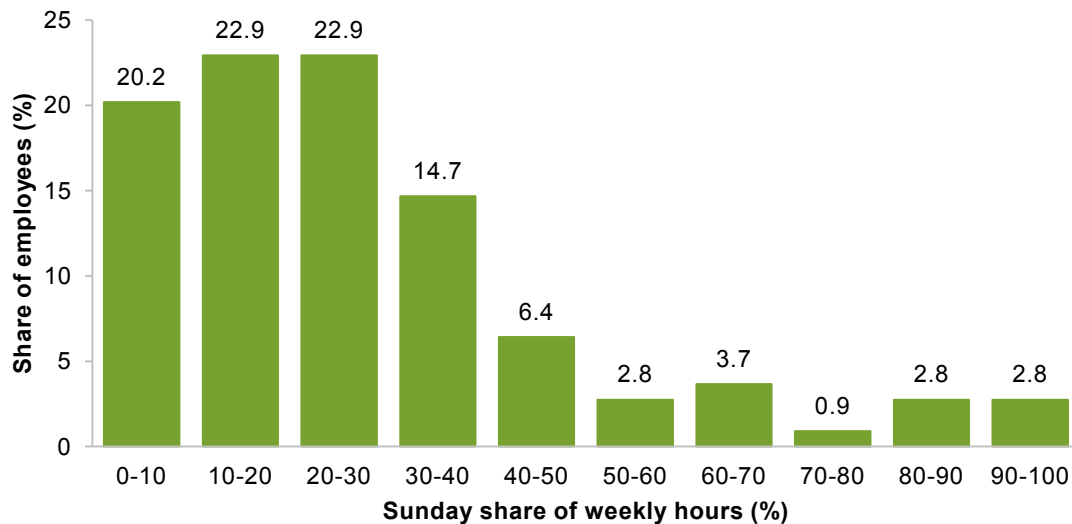
Even if we presuppose that lower wages will mean lower prices and employers will not pocket the savings from paying their employees less, the lowest paid will have their incomes reduced. The inequity in this type of exchange is staggering. Again those who can least afford it will lose out. (Queensland Nurses' Union, sub. DR309, p. 12)

A reduction in penalty rates would likely have a disproportionate effect on women and rural and regional workers, who are more likely to rely on penalty rates to meet their household expenses. (Employment Law Centre of Western Australia, sub. DR350, pp. 37–38)

A further slashing of my Sunday pay, one of the very few ways for me to accrue extra money to compensate for previous reductions and the irregular and unreliable nature of work within the hospitality industry (which is a significant factor in itself), would be disheartening and place me (and others within the industry) under more financial strain. It begs the question 'how hard does one have to work in order to not just make ends meet, but also to get ahead in life and improve one's opportunities?' (Holly Whittenbury, sub. DR263, p. 1)



Figure 14.4 The importance of Sunday work for HERRC employees<sup>a</sup>



<sup>a</sup> The data only relate to employees who work at least some time on Sundays.

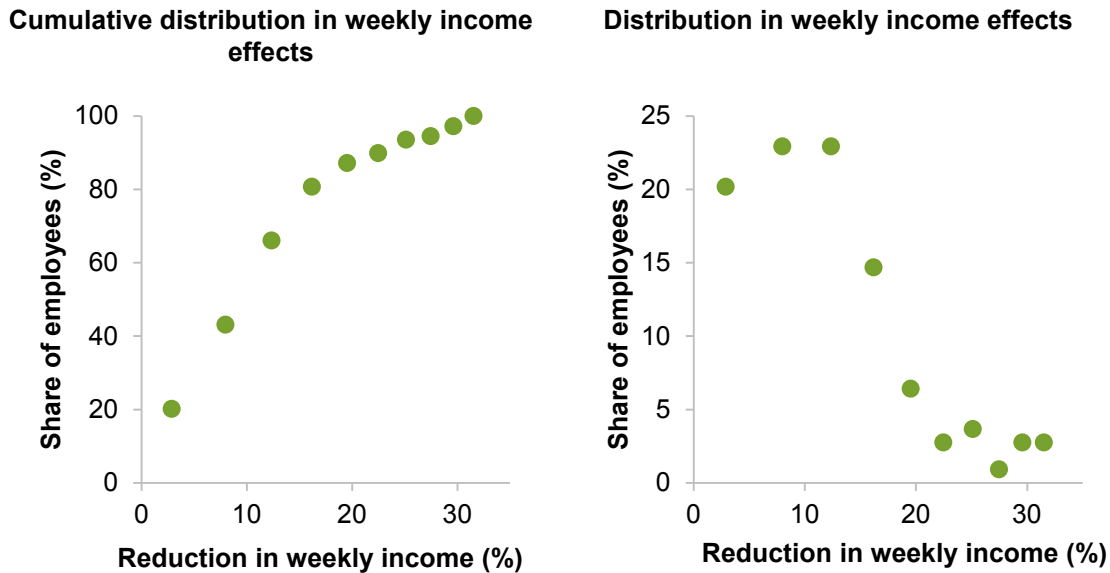
Source: ABS Time Use Survey CURF 2006.

For some other HERRC industries where Sunday penalty rates are higher — most notably, retailing — the income effects would likely be larger for employees working predominantly on weekends. Even so, only a minority of employees work only on weekends (chapter 11). Moreover, indicative analysis suggests that for around 65 per cent of HERRC employees, Sundays account for less than 30 per cent of time worked (figure 14.4). Only a very small share (2.8 per cent) have close to exclusive reliance on Sunday work. Most employees in the HERRC industries would have gross weekly income reductions of less than 10 per cent (figure 14.5). The net effect would be lower given offsets through increased social security benefits and reduced taxes.

The analysis in figure 14.5 takes no account of the impacts of changes to penalty rates for casual versus permanent employees in the HERRC industries (given data limitations). Other data show that casual employees working on Sundays tend to work fewer other days and, all things being equal, reduced penalty rates would more adversely affect them (figure 14.6). However, not all things are equal because the reductions in wage rates are not always the same for casuals. This is most stark for casuals in the hospitality industry, where adoption of parity for Saturday and Sunday rates reduces wage rates by 14.3 per cent compared with 25 per cent for permanent employees (table 14.6). Moreover, the Productivity Commission has recommended that the FWC closely examine the extent to which the currently lower effective penalty rates for casuals are justified (chapter 15 and appendix F). Were the FWC to increase casual rates on Saturdays for some awards by the amount required to remove the disparity in their treatment (appendix F), this would further reduce any income effects of the Productivity Commission's recommended reform of Saturday and Sunday rates.

Figure 14.5 **How much would penalty rate changes affect income?**

Indicative measures for the HERRC industries<sup>a</sup>



<sup>a</sup> Indicative measures were obtained as  $s(p1 - p0)/(1 - s + sp0)$  where  $s$  is the Sunday share of weekly hours,  $p1$  is the penalty rate after policy change and  $p0$  is the penalty rate before policy change (both divided by 100). In producing the estimates it is assumed that the share of weekly hours is the midpoint of the ranges shown in the previous chart. For instance, for the 20.2 per cent of employees having 0-10 per cent of their hours worked on Sundays, all are assumed to work 5 per cent of their hours on that day. The average Sunday rate is assumed to be 185 per cent before the reform (an averaged result based on the mixture of different non-casual penalty rates for Sundays for the relevant awards) and 125 per cent afterwards (which is the predominant rate for non-casual employees under the relevant awards). It is assumed that people work the same hours before and after the reform (so that they are 'day after' results). The results are not affected by pay rates or hours worked, since the only relevant factors explaining the percentage changes in income are the shares of weekly hours worked on Sundays and the relative penalty rates. Several sensitivity tests were undertaken for different assumptions about average penalty rates in the HERRC industries before and after reform, but these made little difference to the results. The results assume no casuals. Had they been included, the income effects would be smaller because the percentage reduction in penalty rates is less. For example, the Commission's recommendation would have no effect on incomes of level 1 and 2 restaurant industry casual workers (since they have the same Saturday and Sunday penalty rates).

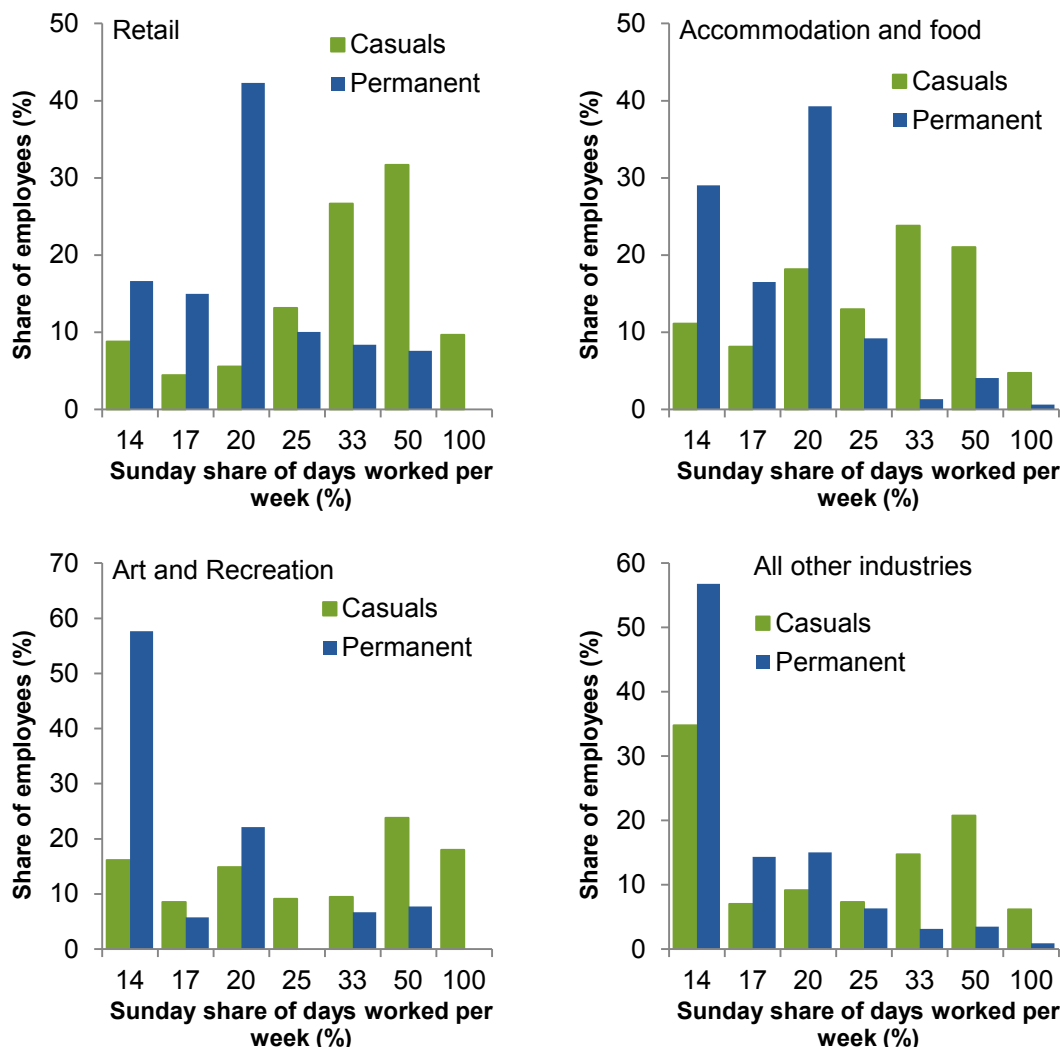
Source: Productivity Commission calculations based on the ABS *Time Use Survey CURF* (2006).

There are further considerations in making assessments of the ultimate income distributional effects of lower Sunday penalty rates and their relevance to penalty rate determination.

First, incomes would increase for those who do not currently have a job or for those whose preferred hours of weekend work are significantly below their current hours. This group may also benefit from improved lifetime participation in the labour market.

Figure 14.6 **Sunday work is more important for casual employees**

Sunday as a share of total days worked<sup>a</sup>



<sup>a</sup> Only relates to people working on Sundays. Casual status was determined by the respondent.

Source: ABS, Forms of Employment CURF 2008.

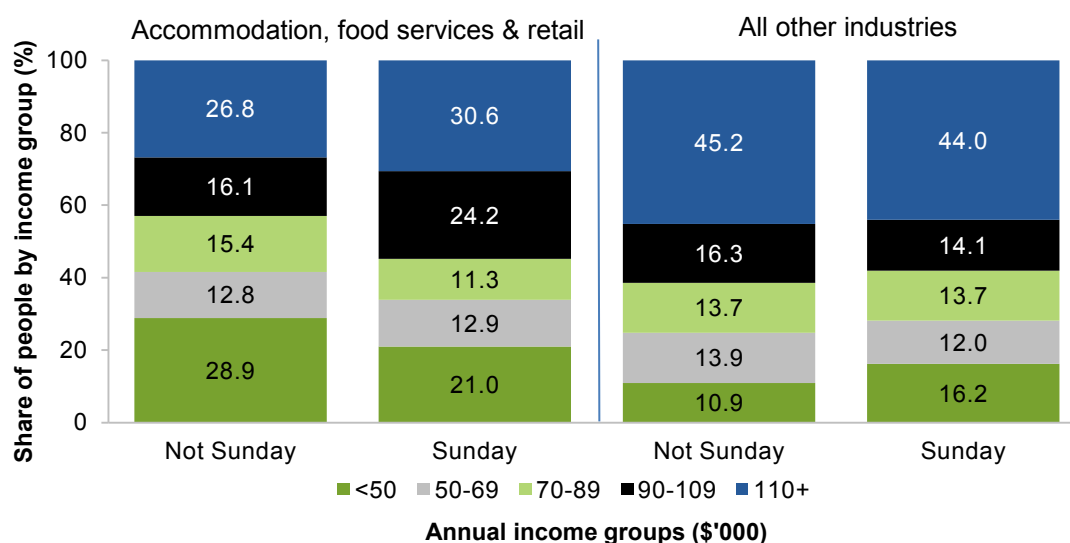
Second, regulated penalty rates apply to standard award rates. If an employee is on an above award wage rate, the employer is only required to pay them at the Sunday wage stipulated by the award. Accordingly, lowering Sunday penalty rates would have reduced impacts on the earnings of above-award employees (unless the practice of an employer was to apply the current Sunday premium rate to any above award standard wage).

Third, the adverse income effects may be partially offset by automatically increased transfers through the tax and transfer system for some households.

Fourth, households, not individuals, are the usual target for distributional policies. People earning penalty rates are spread across the household income distribution range. For

example, 47 per cent of people working often or nearly always on weekends in the accommodation, food services and retailing industries are in households earning more than \$90 000 a year, very close to the share applying to people in these industry groups who do not work on weekends. Results for people working often or nearly always on Sundays are less reliable because of lower survey samples, but show qualitatively similar results (figure 14.7).

**Figure 14.7 Household earnings of Sunday employees**  
2014<sup>a</sup>



<sup>a</sup> A Sunday worker is someone who often or almost always works on Sundays. Sample sizes are small for Sunday workers, so the results are less reliable than those who work on other days.

Source: Derived from the AWALI survey.

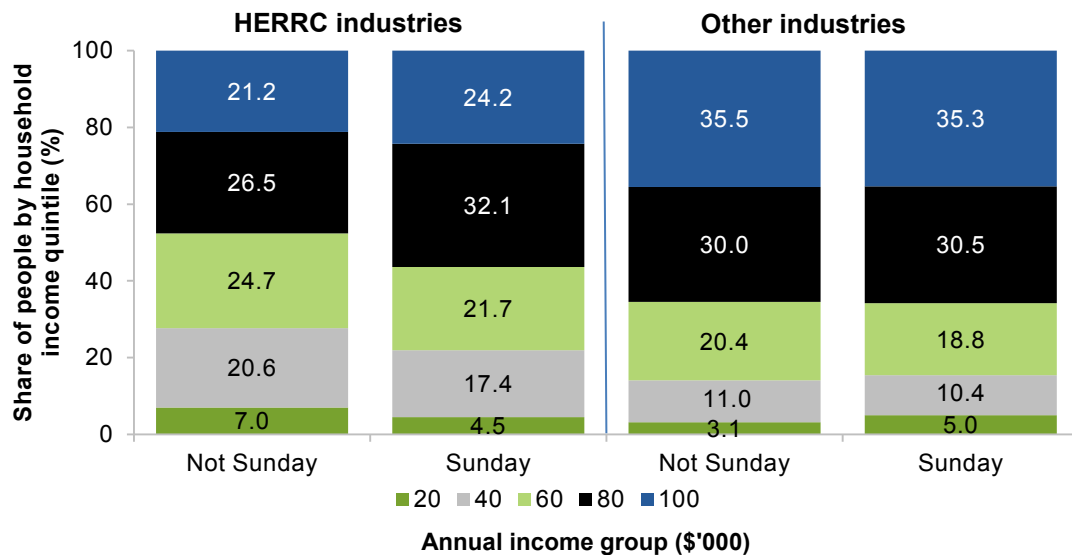
Other data based on equivalised household income (which takes account of household size and composition) suggest that people working in the HERRC industries are more likely to have lower income than others, as many have noted. Nevertheless, it remains that the majority of households in the HERRC industries have incomes above the 40<sup>th</sup> percentile, regardless of whether they work on Sundays (figure 14.8). Moreover, the evidence suggests that lowering penalty rates for Sunday workers in the HERRC industry would more closely align their income distribution with households where a person worked in the HERRC industry, but not on Sundays. Perhaps reflective of the importance of young people working in their parents' households, there is also a higher likelihood that HERRC employees are in households with three or more earners (including the relevant HERRC employee) (table 14.7).

Fifth, some employees receiving penalty rates only engage in the relevant consumer services industry in the earlier years of their working lives and may have high lifetime expected incomes. For example, this would often be true for people undertaking tertiary

studies. That said, while some will have high lifetime incomes, many may face financial problems while studying (SDA, sub. DR306, p. 15).

Figure 14.8 **Household income distribution for Sunday employees**

Based on quintiles and equivalised income<sup>a</sup>



<sup>a</sup> Equivalised income takes account of the number of members in a household. The different quintiles are 20 (the share of people with in the lowest 20 per cent of equivalised household income) up to 100 (the share of people with in the highest 20 per cent of equivalised household income).

Source: ABS Time Use Survey 2006 CURF.

Table 14.7 **Number of earners in Sunday-working households**

Share of employees in each category

	HERRC industries		Non HERRC industries	
	Not Sunday employee	Sunday employee	Not Sunday employee	Sunday employee
	%	%	%	%
One income earner	9.3	9.0	14.2	19.0
Two income earners	46.0	39.8	57.2	49.4
Three income earners	25.9	27.9	16.8	19.6
Four income earners	14.6	17.1	9.4	10.4
Five income earners	3.1	5.6	1.9	1.6
Six income earners	1.0	0.0	0.4	0.0
Eight or more income earners	0.2	0.5	0.1	0.0

Source: ABS Time Use Survey CURF 2006.

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Finally, relative wage *rates* are an important metric in their own right when considering appropriate levels of wage dispersion. Looking at the average incomes of people working in the relevant industries can be misleading unless it takes into account the number of hours worked. Employees tend to work fewer hours in the HERRC industries, which is one explanator for their low average earnings. Few would suggest that a measure of income dispersion should not take account of factors such as the duration of work, the experience of a person or their skills (and indeed the FWC took account of skills when adjusting penalty rates in the restaurant industry for level 1 and 2 employees). Wage rates for anyone are an outcome based on their skills, experience, health, motivation, work effort, the demand and supply conditions in their industry, and working time arrangements, among other factors. As shown in chapter 13, the regulated return from working on a Sunday can far exceed the acquisition of major skills.

More generally, wage equations estimated by the Productivity Commission (Forbes, Barker and Turner 2010) suggest that:

- a university degree adds about 46 per cent to average hourly wage rates compared with a pre-year 12 qualification
- 20 years of experience adds 25 per cent compared with a person with one year of experience
- being 45 years old or more adds around 15 per cent to wage rates compared with someone aged 15-24 years old.

In comparison, the penalty rate on a Sunday adds 50-100 per cent to an average weekly wage rate. From that perspective, the degree of wage dispersion associated with Sunday penalty rates appears quite out of kilter with other factors that justify such dispersion.

An associated issue is how to take into account the ‘relative living standards of the low paid’, a prominent criterion in both the modern awards and minimum wage objectives. This criterion has been given considerable weight by the FWC in examining changes to awards, including penalty rates. However, there is a tension between the role of this criterion, on the one hand, in assessing minimum wages, and on the other, in setting award wages that are well above those. The minimum wage rate is intended to set a benchmark necessary for an adequate standard of living, and so it is not clear why the needs of the low paid could justify wage rates that are often double or more than the minimum wage rate.

Nonetheless, there is little question that for some employees in adverse circumstances, working on weekends at higher wages avoids some extreme consequences (say foreclosure on the family home, the loss of custody of a child or simply very low household incomes). The Productivity Commission has taken a close interest in submissions from people facing problems like these. The apparent alternative of finding a different job is a very hard and daunting prospect even in positive economic times. For instance, Kingsford Legal Centre (sub. DR278, pp. 2–3) cited the views of several employees about whether they would look for other work to supplement their income were Sunday penalty rates to be reduced:

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I would try, but I don't think I would find one - Not much point as a young person cause there aren't a lot of different types of work for us beyond retail and that are the industries you are going to cut the penalty rates for.

I would try, but I am in my 50s, my job prospects are very limited.

I would try to get other work, but I don't think it is likely I would be able to find other work.

High penalty rates appear to be a solution to these problems. However, this overlooks other dimensions associated with addressing the needs of the lowpaid.

In part, the likely stimulation of employment opportunities in the HERRC industries would provide a partial mechanism for supplementing income. Moreover, as emphasised throughout this report, it is easy to overlook people whose income is low because they do not have jobs at all. The regulation of wage rates should take into account the net benefit for those seeking work as well as those in work, and the ability to meet consumer needs.

More generally, the employment system is not necessarily the best mechanism for addressing truly adverse personal circumstances. The social security system has expanded significantly since penalty rates were introduced and additional social support choices are now available (such as increased family payments and income-tested concessions for some public services). Tailored solutions can be more readily designed (or are already available) via Commonwealth and state programs government.

## 14.5 The burden of proof

The question of where the burden of proof should lie when considering the effects of penalty rates has received little attention, and might appear to be an academic distraction. In fact, it is fundamental when evaluating evidence about penalty rates put to the FWC.

The Modern Award Objective reinforces the value of the status quo, with its reference to stability. Consistent with this, 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. For example, the FWC has emphasised to parties in the four yearly award review that if they want to change the status quo, they need to demonstrate this with evidence:

The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. ... [W]here a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation. ... In the Review the Commission will proceed on the basis that *prima facie* the modern award being reviewed achieved the modern awards objective at the time that it was made. ([2014] FWCFB 1788, paras 23 and 24, 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues)

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All evidence is subject to statistical and other errors, and this leads to uncertainty about its relevance. Parties opposed to change inevitably focus on defects in evidence on the benefits of change — and in likelihood will find some, because robust evidence about the effects of something that has not happened (lower penalty rates) is hard to find. Moreover, it can be *expected* that partisan advocates for lower penalty rates will provide evidence that is incomplete, biased or flawed, that exaggerates impacts, and that omits counter evidence and caveats. They leave themselves open to easy repudiation, though the invalidity of some arguments for a claim does not invalidate that claim.

In the current four year award review, several economists (Borland 2015; Quiggin 2015) gave expert testimony for United Voice about the flaws in the arguments and evidence put by another economist (Lewis 2014) engaged by employer interests. Borland and Quiggin correctly identified several deficiencies in Lewis’s evidence for policy change, and indeed so does the Productivity Commission in this chapter.

Similarly, others providing expert testimony for the relevant unions indicated that statistical tests showed that penalty rates did not affect employment using conventional significance tests (for example, Yu 2015). Such tests make it easy conclude that existing penalty rates have no statistically ‘significant’ effects on employment (or any other relevant variable), because such tests are focused on avoiding a false positive (deciding that high penalty rates adversely affect employment when they do not). However, setting a high standard for avoiding a false positive increases the likelihood of a false negative (deciding that high penalty rates have no effect on employment, when they do). Whether that standard is desirable depends on the consequences of errors — a much overlooked issue (McCloskey 1985). For instance, fire alarms often generate false alarms (false positives), but most people would be concerned to avoid failure of an alarm to detect a real fire (a false negative). There is no *prima facie* reason to give primacy to a burden of proof in favour of the regulatory status quo.

Ideally, the burden of proof should take account of the risks of being wrong (for example, for consumer convenience and jobs) and would also take into account priors about the economic impacts of price regulations. The conservative assessment of material variations is premised on the view that the modern award modernisation process was evidence-based and coherent, when that is far from clear.

In this context, it is notable that Australia is atypical among its peers in its regulation of weekend penalty rates. Accordingly, a key question is whether, given our understanding about the impacts of price regulations generally, policymakers should require a reasonable standard of evidence in *favour* of existing regulated penalty rates to maintain them at their current rate in the relevant industries.

This is not to say that the analysis of researchers such as Yu (2015), Quiggin (2015) and Borland (2015) is wrong. It is useful to identify gaps and deficiencies in evidence about the impacts of a policy change because policymakers want to understand the likely outcomes of reform. For example, Yu’s results suggest that *large* aggregate employment effects in the relevant industries from penalty rate changes are unlikely. However, gaps and other



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weaknesses in evidence on the benefits of reduced regulated rates does not substantiate that rates should be maintained at their current level. Notably, neither Borland nor Quiggan have argued that high penalty rates are justified by evidence.

Another challenge for those who argue for high penalty rates is why their current level should not be higher. If, for example, regulated penalty rates have no impacts on employment or consumer amenity, and only assist the low paid, then arguably penalty rates should be much higher. Submitters to this inquiry and to the FWC have not argued for higher penalty rates, although given their reasoning in defence of the status quo, it is unclear why they have not done so.

In summary, existing penalty rates appear to be granted the same innocence as parties accused of a crime. A presumption of innocence always make the prosecutor's task challenging, and fair enough too, if the costs of a wrongful conviction are high. It is not clear that regulated penalty rates appropriately belong in this category, though the strictures of the Modern Award Objectives appear to place them there ([2014] FWCFB 1788). As it stands, the capacity for the current four yearly review to make penalty rate variations is somewhat restricted, although there is still reasonable evidence that there would be gains from changing arrangements.

If the FWC does not make substantial changes as part of the current review, penalty rates should be re-examined as part of the 'hotspot' review processes discussed in chapter 8, and with a change in the burden of proof. Given the predictions of conventional economics, in any such review processes, the workplace relations regulator should give more weight in its decision-making to a requirement for more evidence that penalty rates are *not* injurious, than to evidence requiring demonstration that lower rates would be beneficial.

There should be no illusion that a regulator can set a 'correct' penalty rate for any given industry, because that rate would depend on the characteristics of the job, employer and employee, and on macroeconomic conditions. Settling for a given rate simply reflects the lack of information to support any kind of exact rates and the transaction costs of continually adjusting regulated rates. This means, however, that any regulated penalty rate will be precisely wrong. In contrast, markets continually do adapt wage rates, and so where the industrial regulator sets an incorrectly high regulated penalty rate, they eliminate many of the benefits of such market variations. While the Productivity Commission is not proposing a shift to market rates (having assessed that some market power exists even in the HERRC industries), this is an additional factor suggesting that it may be appropriate to err on the side of lower rates than higher ones.

The above observations are not minor methodological quibbles, but a central issue for setting penalty rates and the way in which the workplace regulator should use evidence to underpin its decisions.



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# 15 Policies for weekend penalty rates

## Key points

- Some levels of regulated penalty rates are justified for weekend work. The desirable level needs to balance their role in adequately compensating people for working at asocial times and the costs such penalty rates impose on consumers and employment. That balance depends on the nature of the relevant industries.
- There is now strong demand at any time of the week for discretionary consumer services — the hospitality, entertainment, retail, restaurants and cafe (HERRC) industries (including fast food). In particular, social trends and community norms have shifted so that the historically distinctive role of Sundays as a time when people did not shop or engage in other consumer-oriented activities has changed. Sundays now resemble Saturdays. These changes have undermined the original basis for regulated penalty rates in these industries.
- In light of these changing preferences, existing penalty rates for Sundays now reduce consumer convenience and product diversity in a way that would not have occurred when penalty rates were first introduced. They also mean that unemployment and underemployment are higher. Trading hours are likely to be lower and capital underutilised.
- The wage regulator should set Sunday penalty rates that are not part of overtime or shift work at the higher of 125 per cent and the existing Saturday award rate for permanent employees in the HERRC industries.
- In some awards, penalty rates for casual employees fail to take into account the casual loading, which distorts the relative wage cost of casuals over permanent employees on weekends (and particularly Sundays). The wage regulator should reassess casual penalty rates on weekends, with the goal of delivering full cost neutrality between permanent and casual rates on weekends, unless clearly adverse outcomes can be demonstrated. This would imply that casual penalty rates on weekends would be the sum of the casual loading and the penalty rates applying to permanent employees.
- There are grounds for greater consistency (short of uniformity) between penalty rates across the HERRC industries.
- Remnant anti-competitive shopping hour restrictions act to reinforce the current adverse effects of high penalty rates for Sundays. They should be lifted Australia-wide.
- There is no case for common penalty rates across all industries. The Commission is not recommending a reduction in the Sunday penalty rates beyond HERRC. 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 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.
- As part of the new award determination process, the wage regulator should undertake research and seek input from employers and employees to assess whether there are grounds for changes to penalty rates in any other industries. This should only be a medium-term priority.

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## 15.1 The key policy reform

There is good justification for some weekend penalty rates — the issue is the ‘right’ levels. Making a judgment on those levels should take into account the objectives of, and contemporary rationale for, the existing arrangements and evidence about their effects. A coherent assessment of the levels should consider their broader employment and community-wide effects, and not just the impacts of reductions on those who are the current beneficiaries of such rates.

It is easy to overlook the widely dispersed small gains to consumers and the benefits for those seeking employment from reform in this area (as in incremental technological changes) and to concentrate on the smaller group bearing the adjustment costs. Governments should not stand in the way of technological change to maintain outdated jobs (telephonists) or have terms and conditions that are out of step with the times. Whole sectors have, and are, adjusting with massive technological change (for example, media). Social change can be just as transformational. Finally, the intent of the modern award system is to provide a safety net. The rates for Sundays appear to extend far beyond that ‘safety net’ role.

The evidence in previous chapters suggests that the penalty rates for a Sunday in the hospitality, entertainment, retail, restaurant and cafe (HERRC) industries are excessive when assessed against their stated purpose and other premium rates for work that have adverse impacts on people’s social lives, such as Saturdays and evenings. There is now strong demand for discretionary consumer services at any time of the week. In particular, social trends and community norms have shifted so that the historically distinctive role of Sundays as a time when people did not shop or engage in other consumer-oriented activities has changed. These changes have undermined the original basis for regulated penalty rates in these industries.

In light of these changing preferences, existing penalty rates for Sundays now reduce consumer convenience and product diversity in a way that would not have occurred when penalty rates were first introduced. They also mean that unemployment and underemployment is higher. Trading hours are likely to be lower and capital underutilised.

Despite the similar characteristics of these industries, the mere variety of contemporary Sunday penalty rates and the variable treatment of casual employees among them is testimony to the expediency underpinning current arrangements.

It is also not the case that disturbing the current arrangements represents the dismantling of long-enduring arrangements. Some rates in some jurisdictions were lower not so long ago, only to be raised with award modernisation. Even now, around one half of awards do not have penalty rates for Sundays. The Fair Work Commission (FWC) has already recognised that penalty rates for some employees are too high in one of the key HERRC industries (as in lower skill level 1 and 2 employees in the restaurant industry). One of the old justifications for them — deterrence of work on weekends — has vanished as a legitimate

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basis for their existence. They do not serve well in alleviating poverty. Claims that they have no adverse effects on employment or community amenity are not convincing, and begs the question of why they should not be doubled again.

Nevertheless, a particular concern in making any changes to penalty rates is that there will be significant income effects for some people (chapter 14). That suggests an adjustment process so that people can seek other jobs, increase their training and make other labour market choices. An extended transition that involves staggered small changes to Sunday rates would replicate some of the uncertainties and compliance costs associated with award modernisation. Moreover, it would reduce the scope for new employment, increased hours of work for existing employees, workload relief for owners, and the benefits from permanent/casual substitution. A preferred approach would be to give advance notice of a change so that employers and employees can review their circumstances, and then introduce the change in a single step.

Part of this notice period will arise naturally from the workload associated with the FWC's broader suite of award assessment (chapter 8). It appears unlikely that any decision could be practically implemented before early 2017. If an adjustment period of a year was added, this would provide more than two years before changes were made.

### **More consistency in rates between the HERRC industries is warranted**

Notwithstanding award modernisation, there appears to be many inconsistencies in penalty rate settings. Wide disparities in rates persist in industries with similar structural characteristics and employee skill levels (table 10.1 in chapter 10). For example, casual penalty rates are 150, 175, 200 and 225 per cent for Sunday work in the restaurant, hospitality, retail and pharmacy industries respectively. Various participants noted these inconsistencies across the HERRC industries and more generally (for example, BCA, sub. 173, p. 48; COSBOA, sub. 115, p. 5).

Differences in rates create compliance costs and uncertainty for employers and employees. Even though the transitional arrangements associated with award modernisation are now complete, the compliance costs associated with penalty rates appear to be significant. The Fair Work Ombudsman (2014a, p. 23) noted that:

In our experience, there are three main areas where employees and employers often encounter difficulty in applying awards, these are: interpreting coverage provisions, especially where more than one award may apply; calculating rates of pay, especially overtime and penalty rates; understanding the interaction with the National Employment Standards.

It was evident in the Commission's consultations that even the most sophisticated stakeholders did not know how to calculate the penalty rates that should apply in certain circumstances. In this context, there should be some bias towards simplicity.

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## There may be grounds for some casual ‘penalty’ rates to rise on Saturdays

The representation of casual weekend penalty rates in awards can be confusing because they are often described as inclusive of casual loadings, despite the significant difference between a casual loading (which applies at any time of the week) and a premium for asocial times of working.<sup>164</sup> The conflation of the casual loading and the premium rate for weekend work can hide the anomalous treatment of weekend rates for casuals in some awards. In principle, a wage system should not favour the employment of a person with identical competencies over another, yet this occurs in some awards for weekend work.

The crux of the issue is that casual employees receive the casual loading to take account of forgone entitlements, such as leave and leave loadings. For example, a level 1 retail assistant is paid \$18.99 per hour if employed permanently and \$23.74 per hour if employed as a casual (or 25 per cent more). While it may seem that the cost to the business of a casual is \$4.75 more per hour, the permanent employee receives other entitlements that are at least as great as this. The casual loading of \$4.75 ensures that when all employee benefits are included, the full costs of employing a casual and a permanent employee are the same. This neutrality of treatment occurs for work at ordinary hours, but it does not do so for weekend employment in some awards. For example, in the retail award, the same level of permanent employee working on a Saturday receives \$23.74 and the corresponding casual employee \$25.64, or now only a \$1.90 difference.

For neutrality of treatment, the casual loading should be *added* to the penalty rate of a permanent employee when calculating the premium rate of pay over the basic wage rate for weekend work. This would make an employer indifferent, at the margin, between hiring a permanent employee over a casual employee. It would also be consistent with the desirability of ‘equal pay for equal’ work. Only one of the three different methods in use in awards for calculating penalty rates provides such neutral incentives for employing casuals (appendix F).

Achieving neutrality would require that penalty rates for casual employees would rise on Saturdays for some awards (as in the Retail Award). Neutrality would expressly not require that casual rates fall, as some participants erroneously supposed (Employment Law Centre of Western Australia, sub. DR350, p. 38). Some of the support by employer groups for neutrality is likely to have reflected a similar misunderstanding.

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<sup>164</sup> Several participants criticised the Productivity Commission’s description of penalty rates for casuals when these included the casual loading (for example, Bray, sub. DR261, p. 18 and the Electrical Trades Union of Australia, sub. DR300, p. 6), but misunderstood that this is the customary way in which the Fair Work Commission describes casual penalty rates. The Productivity Commission has adopted the Fair Work Commission’s terminology to avoid confusion for those familiar with awards. As an illustration, the Restaurant Award describes casual penalty rates as inclusive of the casual loading. Awards are written this way so that employers know what they should pay employees in dollar terms at any time of the week, but it can lead to confused discussions about what constitutes the effective penalty rate for casual employees.

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The neutral treatment of casual penalty rates would diminish or, in some cases, eliminate the impact of income effects of the Productivity Commission's other penalty rate reforms affecting casual employees.

### Take care in changing casual penalty rates

However, a major proviso is that the current regulated pay levels set for casual employees are 'rough and ready' and may not take into account the generally lower average skills and experience of those employees. Were this to be true, achieving parity in the employer costs of employing casuals compared with permanent employees might only have the appearance of 'equal pay for equal' work and would disadvantage the employment of casuals. That would be unfortunate given that casual jobs are an important vehicle for gaining entry to the labour market for the disadvantaged, the young, and those needing flexible working arrangements. In that context, the wage regulator should make the presumption that casual penalty rates should fully take account of the casual loading, but should not adopt that principle without closely considering its impacts on such workers.

Regardless, the lack of neutrality predominantly occurs for Sundays rather than Saturdays (table 10.1 in chapter 10), so setting Sunday rates at Saturday rates would more often create neutral incentives for choosing between permanent and casuals employees anyway.

#### RECOMMENDATION 15.1

The Fair Work Commission should, as part of its current award review process:

- set Sunday penalty rates that are not part of overtime or shift work at the higher of 125 per cent and the existing Saturday award rate for permanent employees in the hospitality, entertainment, retail, restaurant and cafe industries
- set weekend penalty rates to achieve greater consistency between the above industries, but without the expectation of a single rate across all of them
- investigate whether weekend penalty rates for casuals in these industries should be set so that casual penalty rates on weekends would be the sum of the casual loading and the revised penalty rates applying to permanent employees, with the principle being that there should be a clear rationale for departing from this.

There should be one year's notice before these changes are made.

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## 15.2 Some other reforms would complement penalty rate changes

### Changing the modern awards objective

The modern awards objective in the *Fair Work Act 2009* (Cth) (FW Act) has an extensive list of considerations that the FWC must weigh up when making its decisions. In 2013, the need for compensation for working at asocial hours (s. 134 (1)(da) of the FW Act) became a new item in that long list. The Productivity Commission has recommended modernisation of the modern award objective so that it is more likely to increase the overall wellbeing of the Australian community (chapter 8). However, in the event that this change is not promptly made as part of the legislative package proposed by the Productivity Commission (chapter 34), then the question arises about the role of s. 134 (1)(da) of the FW Act.

In its submission to the four yearly award process, the Australian Government interpreted the section in relatively broad terms, with the implication that the FWC would not be obliged to include penalty rates in any award that did not already have them, and that the FWC would have the latitude to determine:

... whether the additional remuneration and the hours and/or days in which it is provided in modern awards are appropriate in a particular industry. (Australian Government 2014b para 3.6)

Nevertheless, in practice, it seems that the FWC has not slavishly adhered to the ‘need’ to provide additional remuneration for working at asocial times, since it has not rushed to incorporate penalty rates into the multitude of awards that do not include them. However, the FWC (FWCFB 2014 para 295) has interpreted its freedom as partial, noting that the modern award objective ‘requires additional remuneration for working on weekends’.<sup>165</sup> It would be quite damaging if over the longer run, the FWC felt the need to more widely insert requirements for weekend penalty rates into awards, even in circumstances where the context of other industries did not require that. For example, awards can provide compensation through average wage rates, rather than through special time-dependent wage rates.

If the Modern Awards Objective is not simplified more broadly in line with the Productivity Commission’s recommendation (chapter 8), then the FW Act should be amended so that it is clear that the wage regulator (the FWC or preferably the recommended Workplace Standards Commission) would not be obliged to incorporate weekend penalty rates into all awards, taking account of the fact that awards should be seen as a package of benefits.

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<sup>165</sup> On the other hand, in a decision relating to overtime, the FWC (FWCFB 2015b para. 172) observed that ‘s. 134(1)(da) of the FW Act does not amount to a statutory directive that modern awards must provide additional remuneration for employees working overtime’.



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#### RECOMMENDATION 15.2

In the event that the Australian Government does not modify the modern awards objective in line with recommendation 8.3, it should amend the *Fair Work Act 2009* (Cth) to clarify that in its award decisions, the wage regulator would not be obliged to provide additional remuneration for weekend work, though it would retain the discretion to do so if warranted by industry circumstances.

### Individual flexibility arrangements

All modern awards include (or are deemed to include) a flexibility clause that allows employees to make agreements with employers that vary the conditions of the award (or enterprise agreement).

In principle, individual flexibility arrangements (IFAs) could allow an employee to relinquish penalty rates in exchange for other benefits so long as the exchange met the better off overall test (BOOT) (or a no-disadvantage test after implementation of recommendation 22.2). Flexible working hours and penalty rate changes figure prominently in the relatively few IFAs that have been formed. For example, employees reported that nearly 60 per cent of IFAs related to arrangements for when work was performed (especially important for females) and around one in five to penalty rates (O'Neill 2012b, p. 69). Employers had similar views (*ibid* pp. 61–62 and p. 66).

There are several obstacles to the wider use of IFAs, including the manner of their negotiation, the BOOT, the duration of agreements, the degree to which they are genuinely flexible, and their lack of awareness (chapter 22). In the latter case, it is notable that awareness is particularly low for younger employees, who are overrepresented in the HERRC industries (O'Neill 2012b, pp. 31–32). The reforms recommended in chapter 22 to IFAs and the creation of enterprise contracts (chapter 23) will remedy many of these deficiencies, and should address, on the one hand, some employees' preferences for working times suited to them and, on the other, some employers' frustrations with rigid arrangements for penalty rates. A win-win option may be available to some.

Enterprise agreements also currently permit variations to award conditions so long as the majority of employees support the agreements and that the variations meet the BOOT. Shifting to a no-disadvantage test would further promote the creation of agreements allowing tradeoffs between penalty rates and other employee benefits.

### Time off in lieu

Time off in lieu (TOIL) provisions for overtime are common in awards, but are not universal, with 83 of the 122 modern awards providing such provisions (FWCFB 2015b

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para. 199).<sup>166</sup> TOIL arrangements depend on the nature and timing of work, with 59 of the 83 awards providing one hour off for each hour of work ('time for time'). The remaining 24 awards provide time off equal to the time worked overtime multiplied by the overtime penalty rate. Many awards also allow for TOIL for public holidays.

However, there do not appear to be provisions for TOIL instead of penalty rates *for weekend work* (as compared with overtime) for any of the HERRC industries.

Overall, the diversity of arrangements for TOIL highlights inconsistencies of awards and the desirability of the assessment process set out in chapter 8. The FWC (FWCFB 2015a) has approved the wider use of TOIL arrangements for overtime across most awards on a 'time for time' basis, but not as substitutes for weekend penalty rates.

### **The role of preferred hours clauses**

Outside of IFAs, enterprise agreements may include clauses that enable an employee to nominate (with employer consent) preferred hours of work because they suit the employee's circumstances. Where these hours fall on a Saturday or Sunday, the employee would not be paid penalty rates. These are referred to as 'preferred hours' clauses, although some use this term in reference to any arrangement in which an employee can decide to work different or additional hours without attracting penalty or overtime rates (which would therefore include some IFA and TOIL arrangements). This chapter uses the more narrow description of such clauses in enterprise agreements.

While some agreements have included such clauses,<sup>167</sup> the current practice of the FWC is to reject agreements that incorporate them (Cameron 2012). The concern is that such clauses may erode employee benefits and thus fail the BOOT. Preferred hours clauses may still be permitted in exceptional circumstances (requiring that a public interest test be passed). However, under current arrangements, preferred hours clauses provide negligible scope for employers and employees to trade off higher wage rates at some times for a preferred roster.

Nor do they generally provide the scope for employees to obtain additional hours of work during particular seasonal peaks, while giving up penalty rates or other premium rates of pay for these transitory periods. There has been one notable exception — a potato farm with a peak picking period (the Black Crow agreement).<sup>168</sup> However, the approval by the FWC was based on a rarely applied 'public interest' test, and dismissed the principle that

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<sup>166</sup> Amongst the key HERRC industries, TOIL in these circumstances is available in the Restaurant Industry Award, the Fast Food Award, the General Retail Industry Award and the Pharmacy Award. There are no provisions for TOIL for overtime in the Hospitality Industry (General) Award.

<sup>167</sup> The *Milbag Pty Ltd T/A Eagle Boys Pizza Adamstown & Eagle Boys Pizza Belmont* enterprise agreement (AG2009/23877) was seen as a landmark agreement that included a preferred hours clause.

<sup>168</sup> *Black Crow Organics Enterprise Agreement 2009* [2010] FWAA 5060.

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obtaining additional hours of work in exchange for less benefits could pass the BOOT (Cameron 2012, pp. 50–51). Fonterra Australia (a dairy producer) has called for more general flexibility in being able to match working hours with seasonal supply cycles without the need for penalty rates — a capacity that already applies in New Zealand (Lynch 2014). (However, penalty rates are not regulated in New Zealand at all, so it is not clear whether the comparison is a valid one.)

One lateral approach to a preferred hours clause would be for a permanent employee to forgo any penalty rates for their preferred hours even if these fell on a weekend, but to receive penalty rate payments where an employer requested them to work at a time not preferred by the employee (an idea floated in the draft report). This would amount to choosing their own ‘unsociable hours’.

This could provide employers with some flexibility, but also create a strong incentive for them not to deviate from an employee’s preferred hours. Unlike present arrangements, this would recognise that times deemed asocial by some, are quite social for others. This arrangement could mean that a penalty rate might apply to any day of the week, depending on the preferences of employees. Some employer associations and employee representatives could see benefits in such an approach:

The NFF considers that preferred hours arrangements can be adopted in a way that promotes greater workplace flexibility and with appropriate safeguards. Employers and employees need to be able to tailor working arrangements that suit them if they are to find the most productive ways of working. The [Fair Work] Commission has traditionally taken a very dim view of the arrangements because of the potential for them to be misused to the detriment of the employee. In our view, there is no reason why appropriate safeguards cannot be adopted to facilitate preferred hours arrangements so that they can be made when it is a win-win for both parties. (NFF, sub. DR302, p. 21)

NWWCs can see that this may have positive outcomes for women with caring responsibilities but would need to be carefully managed and monitored. (National Working Women’s Centres, sub. DR345, p. 11)

However, while an employee’s consent to a preferred hours clause would be voluntary, there is a risk that they would still lose significantly were a preferred hours option included in enterprise agreements (or awards, in a manner similar to TOIL arrangements). The problem arises principally for casual employees on flexible rosters in industries (such as the HERRC industries) where peak demand is on weekends, and where employers face few problems in meeting weekday demand. Many such casual employees prefer weekend work because no other time is available due to full-time study, caring responsibilities, or multiple job holding. Accordingly, weekends are their preferred hours by default. An employer has two avenues to encourage casuals to ‘lock-in’ their preferred hours through a preferred hours arrangement. First, it can reduce the hours of work on weekends for an employee who has not agreed to the adoption of a preferred hours agreement. Second, it could set (or merely indicate that it might sometimes set) roster times that are at the times that are very inconvenient to the employee. Neither requires explicit coercion — but merely the awareness by an employee that the employer will tend to do this for people who

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have not expressly nominated weekends as their preferred time. The relevant employees are also often young and vulnerable, and therefore open to more manipulation than others in the workplace. The fact that some casuals can only work hours on weekends also does not obviate that working at this time may have adverse social costs for them. The essential problem in the above circumstances is that the employer could have readily accommodated the employee's need to work at certain times without a preferred hours arrangement. Accordingly, for some classes of employees and industries (particularly the HERRC industries), preferred hours clauses could risk eliminating penalty rates altogether, despite the merit of some additional payment on weekends (chapter 13).

There could be circumstances where preferred hours could genuinely provide win-win options for employees and employers, but unlike other flexible working time arrangements, such as TOIL and annualisation, it is hard to envisage simple ways of precluding the misuse of a more expansive form of preferred hours clause in enterprise agreements and awards.

Nevertheless, the concept of preferred hours remains a useful one, and should not be entirely abandoned. Enterprise agreements and contracts could permit some types of such arrangements, while maintaining employee protections. Chapter 23 cites a hypothetical example of a group of employees in a hot climate who would prefer to commence work at an earlier time to reduce the time working in hot conditions, giving up a loading on earlier morning starts in exchange for better quality working conditions. IFAs also offer some scope for flexible working times and could, in principle, include the imposition of penalties on employers that requested them to work at the employee's non-preferred time. However, any reasonable arrangement would have to pass a no-disadvantage test (Cameron 2012).

## **Remnant shopping hour restrictions**

The Productivity Commission in various other reports (PC 2011a, 2014d), the Harper Review (Harper et al. 2015), the Shopping Centre Council of Australia (sub. DR342, p. 2), and Restaurant and Catering Australia (sub. DR359) have recommended that remnant anti-competitive shopping hour restrictions be lifted in Australia. The Australian Government has recently urged states to implement the recommendation of the Harper Review (Australian Government 2015b, p. 12). As in the case of the 'deterrence argument' for penalty rates, these restrictions are anachronistic and reinforce the adverse effects of penalty rates on employment. Lifting these restrictions would enhance the employment and consumer benefits associated with penalty rate reforms.

### **RECOMMENDATION 15.3**

The South Australian, Western Australian and Queensland Governments should remove anti-competitive remnant shopping hour restrictions.

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## 15.3 Holiday pay

Many employers also argued that penalty rates for public holidays are too high. For example, the Australian Chamber of Commerce and Industry (ACCI) considered:

... that there is a case for penalty rate reform beyond revising the rates applicable on Sundays and noted ... [that] particularly problematic for service sector businesses is the application of excessive penalty rates on public holidays when there is an expectation of trade. A minimum payment at the rate of double time and a half for people working in service sectors which are expected to trade on public holidays does not distinguish these industries from those that do not ordinarily trade on public holidays. The needs of businesses outside of the industries identified in the draft recommendation that trade and are expected to trade during non-standard working times should also be the target of penalty rate reform. (sub. DR330, p. 62)

However, by definition, genuine public holidays are intended to serve a special community role and, as such, there are strong grounds to limit the expectation that they are for working. In that sense, the original concept of deterrence continues to have relevance.

Current penalty rates for public holidays are typically 250 per cent, although a select few offer more.<sup>169</sup> To put holiday pay rates in perspective, a penalty rate for a permanent employee who would normally work on a public holiday would have to be at least 200 per cent to ensure that the employee was not working at a discount over a typical working day. Adding a further charge to provide deterrence would lead to penalty rates commensurate with the rates that are typical in awards.

Australia is not exceptional in relation to holiday pay. In New Zealand, where the workplace relations system is much less regulated than Australia, minimum holiday penalty rates have long been specified by statute (under the *Holidays Act 2003*). The typical arrangement is a penalty rate of 1.5 times ordinary pay, plus a later day off in lieu at ordinary pay (or equivalent to a penalty rate of 250 per cent in Australian terms). Some enterprise agreements offer more.

Current penalty rate arrangements for public holidays do not need to change, except where they relate to the additional days of leave that State and Territory Governments may announce in the future.

### RECOMMENDATION 15.4

The Fair Work Commission should not reduce penalty rates for existing public holidays.

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<sup>169</sup> For example, the rate is 300 per cent in the Black Coal Mining Industry Award and the Oil Refining and Manufacturing Award. In some instances, the 300 per cent rate only applies to specific holidays (Christmas day and Good Friday), as in the Waste Management Award and the Road Transport and Distribution Award. In one award, the Stevedoring Industry Award, the rate is 350 per cent (or an effective rate of 250 per cent). The latter is not for ordinary daytime hours, but for the night shift component of a double header, and therefore constitutes a special case.

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## 15.4 Other industries

Many stakeholders — employees, unions, academics, community organisations and some employers and their representatives — questioned the justification of any ‘special’ treatment of the HERRC industries (boxes 15.1 and 15. 2).

In fact, there are good reasons to take different approaches to different industries. The grounds for lowering Sunday penalty rates in any given industry depend on the adverse consequences flowing from high penalty rates. As shown in chapters 10 to 14 and in table 15.1, the HERRC industries have some distinctive features in their business environments, labour markets and the nature of their employees, which need to be considered when assessing the outcomes of different penalty rates. These are industries where penalty rates appear most likely to have adverse outcomes for employment, consumer convenience, and to some extent, prices. They are also industries where the role played by penalty rates in frustrating consumer convenience has increased as other barriers have fallen (most particularly, trading hour restrictions) and as community preferences for consumer services on weekends have grown. With those changing preferences and norms, the original basis for high regulated penalty rates in these industries has disappeared. Maintaining them comes at a considerable cost.

In contrast, in some other industries, the community-wide costs of high penalty rates are likely to be low for several reasons — and, accordingly, so too would be the dividends of any changes to those rates. A targeted approach is consistent with the ‘hotspots’ approach to award reform recommended in chapter 8. It is also compatible with the approach that the FWC has increasingly been adopting when assessing award provisions, as demonstrated by its current review into penalty rates in a similar group of industries.

The prime basis for an immediate focus on the HERRC rather than other industries is that the costs that penalty rates impose on consumers and employment depend on the varying cost structures, characteristics of demand, and the nature of their employees across different industries.

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**Box 15.1 Many employees, unions and community organisations argued that special treatment of the HERRC industries was unjustified**

The proposal to introduce lower Sunday penalty rates for particular classes of workers (who are largely low-paid workers) is contrary to principle and to the fair and equitable treatment of workers. The disabilities are the same and different levels of compensation should not apply. (ACCER, sub. DR335, p. 16)

... the focus on some limited sectors of the economy is not justified. The draft report explains that there is a trend to a seven day consumer economy- why did the draft report not take a wider approach? It would appear that the productivity commission is responding and making recommendations based on a particular industry rather than looking a national approach to address this matter. (Electrical Trades Union of Australia, sub. DR300, p. 7)

The decision to pick on the most defenceless, to remove their penalty rates, has rightly been criticised as creating industrial apartheid. Moreover, any suggestion that the removal of penalty rates is in anyway relevant to skill levels defies logic. The base rate upon which the penalties are applied, varies according to skill, whereas the disadvantage to the employee of working unsociable hours is the same, regardless of skill levels. (Queensland Council of Unions DR305, p. 10)

It is worth noting that in proposing a two tiered approach to penalty rates, the Productivity Commission is effectively saying that some people's weekends are more important than someone else's. (Australian Services Union, sub. DR283, p. 6)

The elitism of the Productivity Commission is unjust and horribly insulting. You are arguing that retail and hospitality workers do not deserve Sunday penalty rates because we are less educated, have completed less training. You are arguing that we should not be equal under the law. You are arguing for inequality. (Giuretis, sub. DR256, p. 1)

Additionally, removing Sunday rates only in certain industries creates a two-tiered system. We note that workers in the hospitality, entertainment, retail, restaurant and café industries are in lower paid work than many other professions. Workers in these professions are often unable to secure alternative employment. (Kingsford Legal Centre, sub. DR278, p. 4)

I could, however, find no explanation given for why the Sunday rates of hospitality and retail workers should be cut while Sunday penalty rates in other industries should remain as they are. I suspect that the unstated reason is that retail and hospitality workers tend to have a low level of power in the workplace and the economy in general. We are highly casualised and easily replaceable and therefore 'easy pickings'. I do not believe that the family and social time of a worker in one industry is any more or less valuable than that of someone in another industry. Shopping and enjoying restaurants on Sunday may be desirable but it is not necessary. (Scott, sub. DR259, p. 1)

Regardless of their attitudes to weekend shopping and recreation, all Australians expect access to emergency services on a 24-7-365 basis. Yet the report does not suggest the removal of penalty rates for these services. (Quiggin, sub. DR266, p. 2)

However it is a peculiarly political – rather than economic, moral or social – rationale that led the PC to create two classes of workers ('emergency' and non-emergency). The idea that consumption of services is a 'need' on weekends is a modern invention. Emergency services have always been a 24/7 societal 'need'. If emergency workers require special dispensation or encouragement, that should be bundled in their base rates and conditions, rather than erecting a rule that treats certain days/times as sacrosanct for one group of waged employees and not another. (Orr, sub. DR264, p. 2)

The focus on just some limited sectors of the economy 'selected consumer services' is not justified. If there is a trend to a seven day consumer economy, which is the justification given in the draft report, why isn't a much wider focus being taken? (Bray, sub. DR261, p. 19)

... we are concerned about the proposal to retain current penalty rates in some industries but not others. This could give rise to a situation where the work at unsociable hours of some workers is intrinsically more valuable than the work of others. This approach ignores the dignity of work performed by all workers who give up their weekends and family life to serve others, and hope to earn a fair living wage by doing so. (Legal Aid NSW, sub. DR364, p. 7)

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**Box 15.2      Some employers also considered the focus on the HERRC industries was too narrow**

With regard to Draft Recommendation 14.1 however the AFGC questions why the scope is limited to the hospitality and retail sectors given that the supply chain required to support the food retail and hospitality sectors is also subject to rising demand and cost pressures in responding to shifting consumer preferences. In the AFGC's view, a change to bring Sunday penalty rates into line with Saturday penalty rates should be applied through the whole food and grocery sector. The increasing efficiency of supply chains, under 'just in time' principles, combined with the consumer trend towards shorter shelf life and chilled product, mean that suppliers to food retailers and food service are having to match the work patterns of the consumer-facing retail and hospitality sectors, and should therefore be treated the same under IR regulation. (Australian Food and Grocery Council, sub. DR279, p. 2)

The need for change is most clearly evident in the case of the hospitality, entertainment, retail, restaurants and café industries. However, it is not an issue limited solely to this group. We therefore support the Commission's conclusions that the FWC also needs to consider the issue of weekend penalty rates across other industries to ensure that they remain relevant. We would expect that there will be little call to move away from existing structures within a number of industries. However, there are clear examples of some industries in which there is a demand for more flexible service delivery, which is hampered by current penalty rate structures. (Chamber of Commerce and Industry of Western Australia, sub. DR323, p. 13)

However, the Business Council does not believe this [penalty rate reform for the HERRC industries] is an enduring reform proposal, as it does not provide room for similar changes in other industries. (Business Council of Australia, sub. DR337, p. 20)

However, the focus in the Draft Report on traditional services industries including hospitality, entertainment, retailing, restaurant and cafe industries (referred to as HERRC industries in the Draft Report) fails to recognise the wine industry's seven day operations providing a tourism and food and wine experience in the Cellar Doors located in rural and regional Australia and the impact of excessive Sunday penalty rates on the industry. ... Apart from traditional wine tasting and wine sales, cellar doors are increasingly providing a number of other services and products to attract visitors, including tutored tastings, tours of cellars and production facilities, tasting plates, degustation, coffee and tea, merchandise, functions and lunches. Given that most domestic visitors are only able to visit cellar doors during their weekends or public holidays, cellar doors must be open and available on Saturdays and Sundays and Public Holidays. A national wine industry survey conducted in January 2015 demonstrated that over 75% of all respondents trade seven days a week. While wineries are aware of the potential benefits of operating cellar doors, in reality during weekends and public holidays the employment costs are prohibitive. This has resulted in a reduction in trading hours of cellar doors, owner operators working weekends and public holidays rather than employed staff and wineries coordinating their opening hours by taking turns operating on weekends and public holidays. (South Australian Wine Industry Association and the Winemakers' Federation of Australia, sub. DR352, pp. 40)

The Australian economy, like all economies, is evolving. In times past there was very little commercial activity undertaken on weekends. That is no longer the case, with many employees in many industries being required to work Saturdays and Sundays. It follows that there seems nothing inherently logical in identifying those industries that the Productivity Commission has nominated for alignment as between Saturday and Sunday rates, and not others. Toll suggests that all weekend and public holiday penalties be set at 1.5 times the ordinary hourly rate of pay, for all industries. (Toll Holdings, sub. DR312, p. 21)



**Table 15.1 Characteristics of the key industries**

	<i>Retail</i>	<i>Accommodation &amp; food services</i>	<i>Arts and recreation services</i>	<i>All other industries</i>
Number of non-managerial employees, 2014 ('000) (and share of total employment %) <sup>a</sup>	1 081.6 (15.2)	697.3 (9.8)	158.2 (2.2)	7 122.8
Share of non-managerial employees on award, 2014 (%) (and rank) <sup>a</sup>	29.6 (3 <sup>rd</sup> )	45.4 (1 <sup>st</sup> )	23.2 (6 <sup>th</sup> )	16.5
Share of employees not on adult rate, 2014 (%) (and rank) <sup>a</sup>	17.6 (2 <sup>nd</sup> )	25.1 (1 <sup>st</sup> )	7.2 (5 <sup>th</sup> )	3.5
Share of employees aged under 25 years, 2014 (%) (and rank) <sup>a</sup>	36.4 (2 <sup>nd</sup> )	45.1 (1 <sup>st</sup> )	26.2 (3 <sup>rd</sup> )	10.4
Average weekly hours paid for award non-managerial employees, 2014 value (and rank) <sup>a</sup>	24.5 (14 <sup>th</sup> )	22.7 (16 <sup>th</sup> )	18.2 (18 <sup>th</sup> )	32.4
Average weekly non-managerial cash earnings, 2014 (\$) (and rank) <sup>a</sup>	\$554 (15 <sup>th</sup> )	\$518 (17 <sup>th</sup> )	\$427 (18 <sup>th</sup> )	\$1 149
Average hourly cash earnings, 2014 (\$) (and rank) <sup>a</sup>	\$24.90 (17 <sup>th</sup> )	\$23.10 (18 <sup>th</sup> )	\$31.20 (15 <sup>th</sup> )	\$35.50
Small business share of employment (%) (and rank) in 2012-13 <sup>b</sup>	36.1 (9 <sup>th</sup> )	45.5 (6 <sup>th</sup> )	38.2 (8 <sup>th</sup> )	43.7
Union membership rate 2013 (%) <sup>c</sup>	13.9 (9 <sup>th</sup> )	4.6 (15 <sup>th</sup> )	10.4 (11 <sup>th</sup> )	18.5
Responsiveness of operating profit to 10% wage increase, 2012-13 (% change) (and rank) <sup>d</sup>	-20.6 (11 <sup>th</sup> )	-26.8 (5 <sup>th</sup> )	-15.7 (15 <sup>th</sup> )	-8.0
Share of income from the general public directly (%) (and rank), 2012-13 <sup>e</sup>	78.2 (2 <sup>nd</sup> )	86.6 (1 <sup>st</sup> )	74.0 (5 <sup>th</sup> )	<45
Part time share of employees 2013 (%) (and rank) <sup>f</sup>	53.2 (2 <sup>nd</sup> )	63.3 (1 <sup>st</sup> )	46.5 (4 <sup>th</sup> )	24.7
Casual share of employees 2013 (%) (and rank) <sup>f</sup>	40.2 (4 <sup>th</sup> )	64.6 (1 <sup>st</sup> )	41.6 (3 <sup>rd</sup> )	17.0
Share of employed with business for less than 12 months (%) (and rank), 2013 <sup>g</sup>	21.7 (3 <sup>rd</sup> )	31.6 (1 <sup>st</sup> )	19.8 (7 <sup>th</sup> )	16.6

<sup>a</sup> Based on EEH, May 2014. The rank is from high to low out of 19 industries. <sup>b</sup> Based on AI, 2012-13. Small business are businesses employing less than 20 employees. The rank is from high to low out of 18 selected industries. <sup>c</sup> EEBTUM August 2013. The rank is from high to low out of 19 industries. <sup>d</sup> Based on AI and calculated as the percentage change in the operating profit before tax of a 5 per cent increase in the costs to businesses of wages, salaries and superannuation contributions. A higher rank means a larger degree of sensitivity of profits to wage increases. The rank is out of 18 selected (private sector) industries. <sup>e</sup> Based on SCAB for 2012-13 for 17 industries. <sup>f</sup> Based on FE November 2013. The rank is out of 19 industries. <sup>g</sup> Based on LM for all employed (including managers and self-employed) working in February 2013. The rank is out of 19 industries.

Sources: AI= ABS 2014, *Australian Industry 2012-13*, Cat. no. 8155.0, released 28 May 2014; EEBTUM = ABS 2014, *Employee Earnings, Benefits and Trade Union Membership, Australia*, Cat. no. 6310.0, released 4 June 2014; EEH = ABS 2015, *Employee Earnings and Hours, Australia*, May 2014, Cat. no. 6306.0; SCAB = ABS 2014, *Selected Characteristics of Australian Business, 2012-13*, Cat. no. 8167.0 released 18 September 2014; FE = ABS 2014, *Forms of Employment, Australia*, November 2013, Cat. no. 6359.0, released 7 May 2014; LM = ABS 2013, *Labour Mobility, Australia*, February 2013, Cat. no. 6209.0, released 21 August 2013.

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## The differing nature of demand across different industries

### The difference between discretionary and involuntary demand

Sunday work has been an enduring necessity for some parts of the economy because failure to provide the relevant goods and services would be either excessively costly or unacceptable to the community. Hospital and ambulance services, aged and disability care services, policing, and fire services *must* be provided on weekends as the use of those services is not a choice in any real sense.<sup>170</sup> For example, a person does not choose to be injured on a weekend, but must still receive assistance. Cows must be milked. Glass furnaces cannot be closed down (they crack and must be re-built). Power lines must be repaired if they are broken. Accordingly, the goal of ‘deterrence’ that applied to some weekend work has never been relevant to some activities. Given the often involuntary nature of demand for essential services, higher penalty rates have few adverse effects on customers.

### Demand responses to penalty rates are lower in non-HERRC industries

Most people still work only on weekdays (appendix F). As a consequence, whatever services are supplied on Sundays must make very little differences to overall costs, and therefore also to demand. A low rate of Sunday work (and indeed, often associated with this, low rates of Saturday work) in a given industry reflects that:

- for some services (such as teaching), the customary patterns of demand are concentrated on Monday to Friday
- employees sometimes have sufficient market power to avoid supplying services on Sundays unless they wish to, or there is an emergency (for example, dentists)
- the provision of a service by one occupation requires other associated occupations to also be at work (for example, office managers and other administrative staff). Given the social cost of working on Sundays, both parties have an interest in isolating service provision to weekdays
- demand and supply do not have to be aligned on a day by day basis because of inventory management. (In contrast, in a café, a cup of coffee on a Sunday must be made and consumed at much the same time.) Some industries can use technology to meet weekend peak demands without much additional labour (for example, the services provided by utilities and automated services, such as ATMs and online account management). Consequently, many businesses outside the HERRC industries have a

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<sup>170</sup> A further factor in the case of many such services is that the Commonwealth industrial regulator has no decision-making power for various important awards, most particularly essential services provided by some state governments. Were the industrial regulator to set a penalty rate for an employee who is part of the national system at a lower rate than a comparable employee in the state system, this would create market pressures for equalisation of national market based rates to the state rate anyway.

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capacity to shift their output to times when wage costs are lower (weekdays), and that suits the lifestyle preferences of their employees.

Moreover, for some other industries where Sunday work is involved, demand will be unresponsive to penalty rates because the labour share of costs are lower, and so the impacts of any given premium on total costs and profits are also lower. As noted in table 15.1, a 10 per cent increase in wages outside the HERRC industries reduces average profits by around 8 percentage points. In contrast, the comparable figure for accommodation and food services and retailing is 27 and 21 per cent respectively. Where a good or service is a non-tradeable input into the production of other goods and services, then the impact of any Sunday penalty rate on the costs of the final good is even lower (all other things being equal).

HERRC businesses typically set prices that smooth cost variations across the week (chapter 14) instead of setting prices that reflect the different costs at a given time. Consequently, a simple indicator of the likely repercussions of penalty rates on total costs is the share of employees working on weekdays versus weekends. A negligible share of employees work on weekends alone outside the HERRC industries, and even the prevalence of joint weekend/weekday work is much less likely (figure 11.3 and table 11.1 in chapter 11). A similar gap is apparent for separate patterns of work on Saturdays and Sundays (table 11.2 in chapter 11).

The latter data — when combined with assumptions about hours worked and the coverage of penalty rates, among other factors — provide an indicative measure of the relative impacts of penalty rates on labour costs across different industries (figure 15.1). In considering these data, the focus should not be on the actual estimates for each industry, as this is likely to be biased upwards, but on their *relative* magnitudes. These show that the cost pressures posed by penalty rates are much smaller outside the HERRC industries. The estimates assume that weekend workers in non-HERRC industries actually receive weekend penalty rates. In fact, many do not (as they are not set in awards) and, as a result, the relative disparities in cost pressures between HERRC and non-HERRC industries will be larger than those shown.

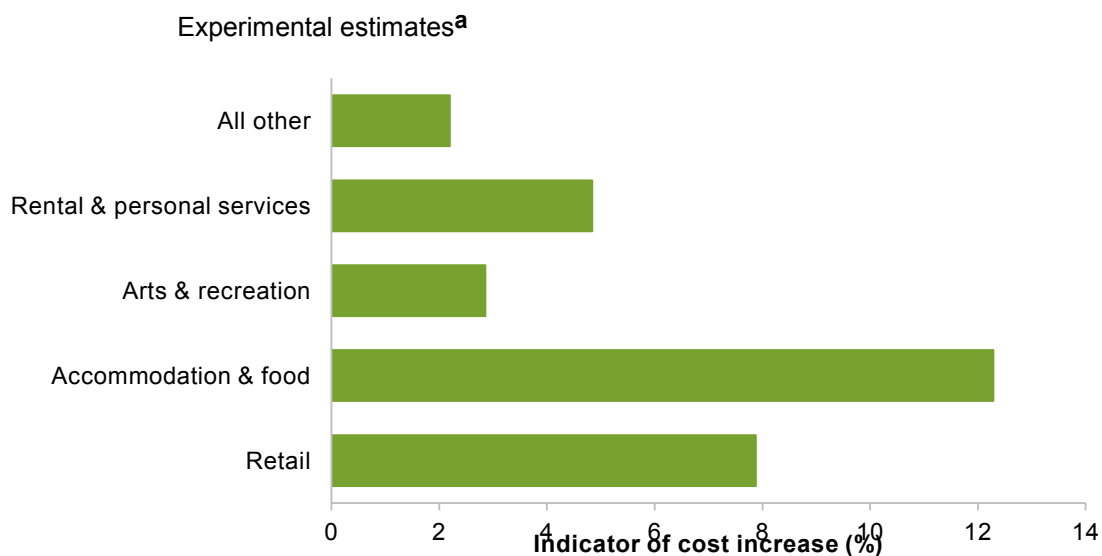
### **Few adverse employment effects**

It is also unlikely that in many non-HERRC industries there would be any economywide employment consequences of existing high penalty rates.

- If demand for the services is not very responsive to labour costs then neither can be employment.
- The employees concerned are often relatively skilled and would have the attributes that would allow them to obtain jobs elsewhere, even if it was not in the same industry.
- In some such industries — especially those requiring specialist skills — attracting employees to Sunday work is likely to require penalty rates anyway, or higher average

weekly wages where the customary pattern of work includes regular weekends as part of a fortnightly cycle of work. Notably, the share of weekend work that takes the form of rotating shifts (which typically involves a shift that rotates through the week from week to week) is much higher outside the consumer industries (table 15.2). Such types of work are particularly common in essential services — notably, hospitals, residential care services, and public order and safety. An additional issue for such rotating shifts is that, regardless of market wage outcomes, there are also persuasive arguments for steeper premiums because of the health impacts of such work (chapter 9). The requirement to pay penalty rates or a compensating fortnightly wage premium in the non-HERRC industries is accentuated by the higher level of enterprise bargaining in many of such industries (figure 15.2 and figure 13.1 in chapter 13). Notably, in New Zealand, awards do not specify penalty rates, but they still occur in some non-HERRC industries. Accordingly, penalty rates are less likely to be binding, and hence lowering the regulated rate cannot have significant impacts on actual wages or employment.

**Figure 15.1 An indicator of the impact of penalty rates on annual labour costs**

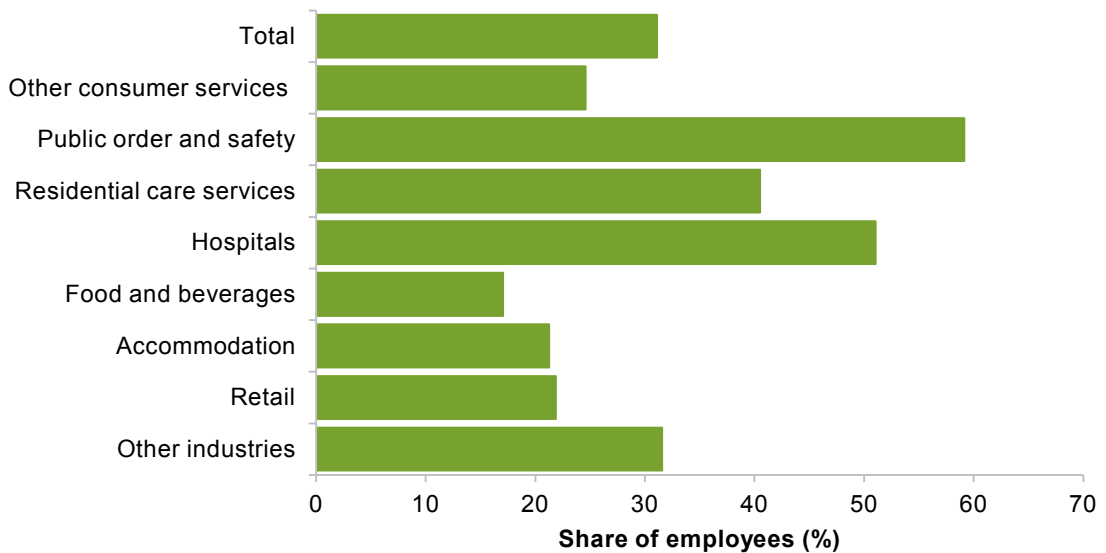


<sup>a</sup> The industries are as defined above. The estimates should be seen as indicating a rough order of magnitude because they require several underlying assumptions. These are that the number of hours worked by the average employee in any given industry is the same each day of the week, that all weekend employees are able to receive penalty rates, that the age structure of employees stays fixed over the week, that the penalty rates for retailing are 125 and 200 per cent for Saturdays and Sundays respectively, with comparable rates of 125 and 175 for accommodation and food services; 100 and 150 for arts and recreation; 125 and 200 for rental and personal services, and 125 and 200 for all other services. All estimates will overstate the actual cost effect because hours worked are likely to be less on weekends and more junior workers will be employed on weekends. The estimate for all other industries is likely to be most seriously overstated because so many of the awards covering these industries have no penalty rates. Accordingly, the ratio of the effects on the HERRC industries and other industries — an indicator of their relative responsiveness to penalty rates — is likely to be much higher than suggested in this chart.

Source: Analysis of unpublished data from the ABS 2008 *Forms of Employment CURF*.

**Figure 15.2 Penetration of enterprise agreements**

Selected industries



Source: HILDA wave 12.

**Table 15.2 Employees undertaking night and rotating shifts**

Selected industries

	<i>Rotating shift</i>	<i>Regular night</i>
	%	%
Retail	12.3	2.5
Accommodation	18.5	4.9
Food and beverages	15.4	7.5
Hospitals	35.1	6.4
Residential care services	20.1	17.3
Public order and safety	37.6	8.4
Other consumer services	9.8	1.0
Other industries	4.5	1.2
Total	8.7	2.5

<sup>a</sup> A rotating shift is one that changes from days to evenings to nights over a given time period.

Source: HILDA wave 12.

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## **The bottom line on non-HERRC industries**

In many industries outside the HERRC industries, penalty rates do not exist or the pattern of weekend working tends to favour rotating rosters where they are justified. Where they do exist, they will often make little difference to the market outcomes for wages, demand and employment because of the nature of the relevant labour markets, bargaining arrangements and working time patterns. Effective policy initiatives aim to make a difference to outcomes, and should be prioritised accordingly. Given their trading circumstances, it is not an accident that the HERRC industries have been most active in seeking regulatory change — this is not ‘special pleading’ (as suggested by Bray, sub. DR261, p. 19).

Between these two poles lie a range of industries where the case may, or may not, be strong enough to seek change equivalent to that proposed for the HERRC industries. The uptake of wage averaging and the tradeoffs available under enterprise bargaining may also be a source of achieving more flexible working time arrangements in other industries. If not, then based on the improved practices and experience with conducting the award assessments recommended in chapter 8, the wages regulator should undertake research and seek proposals from other industries in the medium term, and assess whether a similar case can be made for changes to penalty rates.

But the case for change in HERRC is very clear.

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## F Penalty rates

This appendix provides supporting material on penalty rates — mainly of a statistical nature — for chapters 10 to 15.

It is structured as follows:

- Section F.1 explains some of the terminology used for describing weekend penalty rates.
- Section F.2 examines the prevalence of weekend working (including differences in the importance of Saturday versus Sunday employment) across the economy.
- During standard non-weekend hours, casual employees are typically given a loading (typically 25 per cent) on the wage rates applying to permanent employees. However, depending on the award, there is considerable variability in the treatment of loadings for casual workers for weekend work. Section F.3 examines this issue, and mathematically derives an approach that provides neutral incentives for employing casuals over permanent employees on weekends (with the policy implications discussed in chapter 15).

### F.1 Some terminology

While notionally simple to understand, the terminology describing weekend penalty rates is sometimes confusing. Different parties express penalty rates in different ways. Penalty rates are referred to variously as:

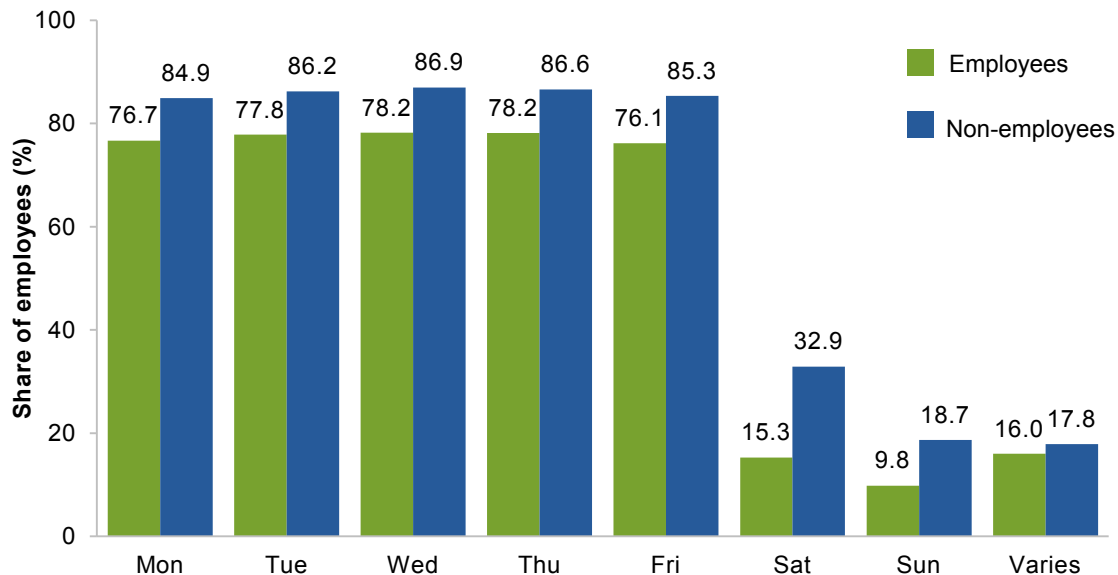
- (a) a multiple of hours worked. So ‘time and a half’ means that an employee working one hour on a weekend would be paid as if they had worked 1.5 hours at the base wage rate (for example, as in the Storage Services and Wholesale Award 2010, p. 25)
- (b) a percentage loading on the base wage. For example, time and a half would mean a loading of 50 per cent (as in the Fast Food Industry Award 2010, p. 23). The Fair Work Ombudsman as referred to penalty loadings as penalty rates (FWO 2015p)
- (c) the percentage of the base hourly rate (or an index relative to the normal rate times 100). So time and a half would be referred to as a penalty rate of 150 per cent (as in the Funerals Award 2010, p. 25).

Since (b) and (c) can both be referred to as penalty rates, it is important in any analysis to use the same nomenclature. Because of its more common usage, the Productivity Commission uses (c). In this case, with a base wage of \$20 per hour and a penalty rate of 150 per cent, the base wage would be \$30 per hour.

## F.2 Prevalence of employment on weekends: the current facts

While Monday to Friday still remain the predominant working days for Australian employees (figure F.1),<sup>186</sup> around three million, or one third of, employees work on the weekend, mostly on just one of these days, in a given week. A negligible share of employees worked only on weekends (table F.1). Of employees who work outside the conventional Monday to Friday routine, Saturday is the most prevalent working day. Only around one in ten people worked on a Sunday, mostly in combination with some weekdays. These estimates relate to a given week, but over longer periods of time, a much greater share of people work on weekends (box F.1).

Figure F.1 **Patterns of work by the day**  
Share of the employed working on given days (%)



Source: ABS 2014, *Forms of Employment, Australia, November 2013*, Cat. No. 6359.0, released 7 May.

<sup>186</sup> While not as rigorous as the ABS Time Use survey, other more recent survey data suggest similar prevalence rates of weekend work (Skinner and Pocock 2014, p. 28).



**Table F.1 Who works on weekends?**

November 2013<sup>a</sup>

<i>Period working</i>	<i>Employees</i>	<i>Independent contractors</i>	<i>Other business operators</i>
	<i>Share of group in each working time arrangement</i>		
	%	%	%
Worked Monday to Friday only	54.8	44.5	35.3
Worked between 1 and 4 days weekdays only	13.4	11.6	9.4
People who only worked weekends	1.6	0.4	0.7
People who worked 5 weekdays and 1-2 weekend days	8.3	22.6	35.2
People who worked 4 or less weekdays and 1-2 weekend days	21.9	20.9	19.4
<b>Total</b>	<b>100.0</b>	<b>100.0</b>	<b>100.0</b>
Worked Saturday	15.3	25.3	40.3
Worked Sundays	9.8	12.7	24.4

<sup>a</sup> The data relate to the nature of working in a reference week.

Source: Unpublished data provided by the ABS 2014, *Forms of Employment, Australia, November 2013*, Cat. No. 6359.0, released 7 May 2014.

**Box F.1 How many people *really* work on weekends?**

The ABS data about people's weekend working arrangements are based on their working patterns during a particular reference week. A person answering that they worked on a weekend may have only done so for that week, and for no other times of the year, while someone who usually works on a weekend may not have done so in the reference week. Accordingly, the ABS estimates of working arrangements provide a point prevalence estimate. This is likely to significantly understate the prevalence of weekend working over a longer period, such as over the last few months or year.

Some surveys do not use the ABS 'reference week' approach, and will accordingly provide a different perspective on the prevalence of weekend work. For example, the Longitudinal Study of Australian Children asks employed parents of young children about their *usual* working patterns. Based on the 2004 wave of LSAC, around 24 per cent of fathers of children aged 4-5 years worked every week on weekends (20 per cent of mothers), but many worked on weekends more irregularly. Only 28 per cent of fathers and 46 per cent of mothers never worked on weekends (Baxter 2009, p. 16). This is a special group of employees, but if anything, it would be expected that they would tend to have a lower inherent likelihood of working on weekends. In that case, weekend working prevalence rates may be higher for the average employee.

The share of total hours worked outside standard times is also much lower than the share of people working outside non-standard times (Venn 2003). This indicates that average hours of weekend employees are less than the average for employees generally. Given that many employees working on weekends rely on income from work on weekdays, any percentage

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change in penalty rates does not have an equivalent proportional effect on people's incomes.

A significant number of people who work on weekends are not relevant to a discussion of penalty rates for weekend day work because they are salaried, work on weekends as part of rotating or other shift arrangements, are independent contractors or business operators. These individuals are not eligible for penalty rates.

- In 2013, around one million business operators<sup>187</sup> and independent contractors worked on weekends (and like employees, typically on other days of the week too). These do not receive penalty rates for weekend work.
- In 2012, around 16 per cent of all employees worked on rotating, regular or irregular shifts.<sup>188</sup> While dated, other information suggests that around 70 per cent of people on such shifts worked them partly on weekends.<sup>189</sup> Accordingly, the relevant share of employees covered by standard weekend day penalty rates is even lower than suggested by table F.1 (and subject to statistical uncertainties suggests that the share of employees who are eligible to weekend penalty rates might be around 20 per cent).<sup>190</sup>

## **New Zealand as a comparison**

New Zealand industrial laws no longer prescribe penalty rates for weekend work, although collective enterprise agreements and some individual contracts include them. However, these are not very common (McLaughlin and Rasmussen 1998). The Productivity Commission has not recommended emulation of the New Zealand approach, but the differences between the countries' labour markets may provide some clues about the effects of different pay arrangements. Some data — presented in chapter 14 — suggest that Sunday restaurant opening is more frequent in New Zealand than Australia, although that information has limitations (as discussed in the chapter).

There is also some comparative evidence concerning weekend work by the employed. In New Zealand, 50.6 per cent of the workforce (including the self-employed and business owners) worked on weekends, while the comparative figure for Australia who 'usually' worked on weekends was 34.2 per cent. The two figures are affected by different survey

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187 These are owner-managers of incorporated and unincorporated enterprises.

188 ABS 2013, *Working Time Arrangements, Australia, November 2012*, Cat. No. 6342.0, released 3 May.

189 ABS 2010, *Shift Workers, Australian Labour Market Statistics*, October 2010, Cat. No. 6105.0.

190 31.8 per cent of employees worked at least partly on a weekend, which would include shift workers who were employed on weekends. The share of employees who are shift workers employed on weekends is around 0.7 x 16 per cent, which is 11.2 per cent. Accordingly, a rough estimate of the number of employees working weekends excluding shift workers is around 20 per cent of employees.

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methodologies, with the gap between them likely to be smaller if a ‘like with like’ comparison was possible.<sup>191</sup>

## Trends

While variations in survey methodologies make it difficult to determine precise trends over long periods, there is good evidence that weekend work has become more important. Over the last two decades, the weekend employment share across the economy appears to have grown by around 5 percentage points — a significant shift in working patterns (figure F.2). It appears that part-time employment has been an important feature of this increase, since other information on how Australians spend their time shows no change in the relative significance of *working hours* supplied on weekends. Between 1992 and 2006, the share of total weekly hours worked on weekdays was respectively for females, 90.5 and 89.9 per cent, and for males 89.1 per cent and 88.7 per cent.<sup>192</sup>

These data tend to miss some important trends operating at the industry level. Although there are limited ABS data at the industry level on working time arrangements, chapter 11 indicates that real retail sales have increased substantially over the long run. Other evidence also suggests that weekend trading in the retail sector has increased in importance (PC 2011a).

There has been progressive liberalisation of Sunday trading. Victoria completely deregulated in 1996, as did the Australian Capital Territory in 1997, but other jurisdictions have been slower to make changes. However, the (sometimes partial) deregulation that occurred in South Australia (2003), Queensland (2004), New South Wales (2008) and Western Australia (2012) must have increased the number of employees working in the Australian retail sector on Sundays. This observation is supported by the difference between spending patterns in jurisdictions with no trading hour restrictions and ones that had preserved such restrictions (chapter 14).

## Trends of weekend work for different employment types

The working patterns of various employment types also provide a different perspective on the determinants of working on weekends. Contractors and business operators do not receive penalty rates and are free to supply their labour at any time, and so penalty rates cannot influence their pattern of working. The odds of working on weekends for other

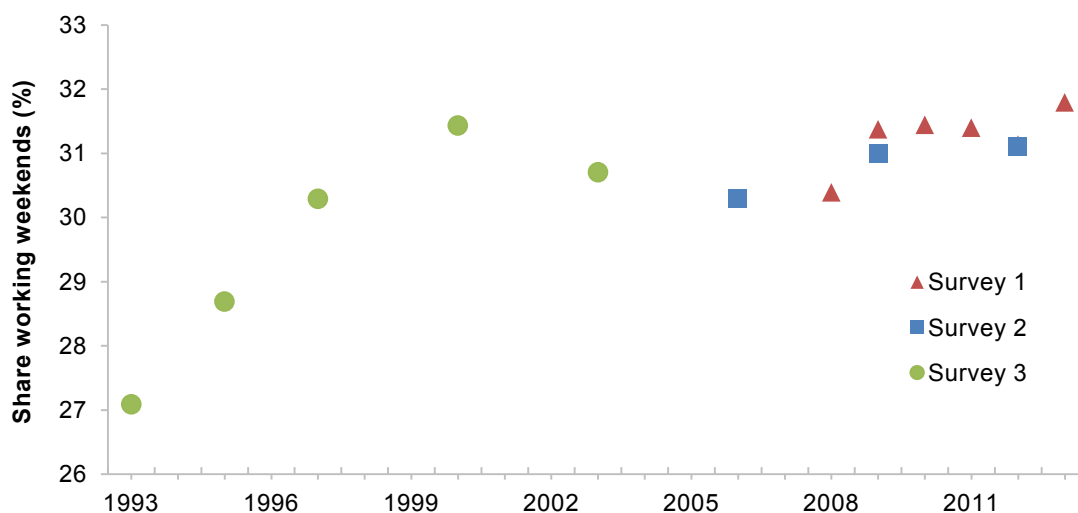
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<sup>191</sup> Data are from the ABS 2014, *Forms of Employment, Australia*, November 2013, and Statistics New Zealand, 2013, *Survey of Working Life*: December 2012 quarter. The Australia survey is based on data collected during a reference week, but relates to usual working patterns, and so can relate to a longer period. The New Zealand data relate to a month’s experience of working arrangements. Accordingly, a New Zealander who worked just once in a month on a weekend, but does not usually follow this working pattern will be recorded as a weekend worker, while an Australian would not be.

<sup>192</sup> Calculated from ABS 2008, *How Australians Use Their Time, 2006*, Cat. No. 4153.0, table 2.

business operators is 2.7 times higher than employees, while the odds of weekend work for independent contractors are 1.7 times higher than employees (table F.1).

**Figure F.2 Patterns of working weekends over time**  
1993 to 2013, employees only<sup>a</sup>



<sup>a</sup> While substantially overlapping, the surveys employ different definitions for employees and jobs, which should be noted. Survey 1 is the ABS Forms of Employment survey and only covers people employed as wage and salary earners under a contract of service (an employment contract). The data relate to people categorised as such employees in their main job, but includes periods of work in all their jobs if they are multiple jobholders. Survey 2 is the Working Time Arrangements survey (WTA), and includes owner managers of incorporated enterprises as 'employees'. As for survey 1, the data cover people working in single and multiple jobs. Survey 3 is the Working Arrangements survey, the predecessor to the WTA, and uses the same definition of employees, but only relates to periods of work in the employee's main job.

Sources: ABS *Forms of Employment* (Cat. No. 6359) and *Working (Time) Arrangements*, Cat. No. 6342.

In part, this will reflect the capacity for contractors and business operators to work flexibly and to increase their income by working more hours, but it may also reflect that penalty rates discourage the engagement of employees on weekends. Several participants in this inquiry considered that business operators had poor life balance because they could not afford to employ other workers on weekends). Since 2008, the share of independent contractors and business operators working on weekends has generally increased slightly, although Sunday working actually fell for independent contractors (figure F.3).

Another, more stark trend is the relative growth rates in the numbers of people working on Saturdays versus Sundays (figure F.4). This reveals that there has been a strong growth in working on Sundays by employees in particular. Indeed, the growth in employees working on Sundays was around double that of employees working on Saturdays or more generally. As in the case of consumer demand, there has been a striking shift to Sunday work.

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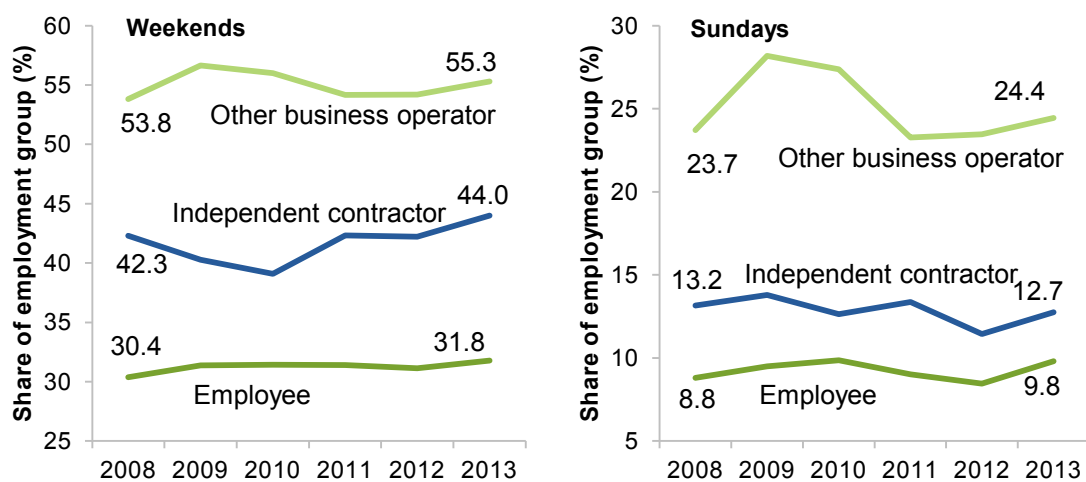
### F.3 Penalty rates for casual employees

There are more complex (non-semantic) issues about the interaction of penalty rates and casual loadings, which can have significant effects on the earnings of casual workers on weekends and on the incentives of employers when making choices about who to roster at different times.

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Figure F.3 **Contributions to weekend work by employment type**

Share of weekend work, 2008–2013<sup>a</sup>



<sup>a</sup> In some cases, people said that their days of work varied, in which case they could not be identified as usually working on Sundays, and are therefore excluded from the calculations for Sundays.

Source: ABS, *Forms of Employment*, Cat. No. 6359.0.

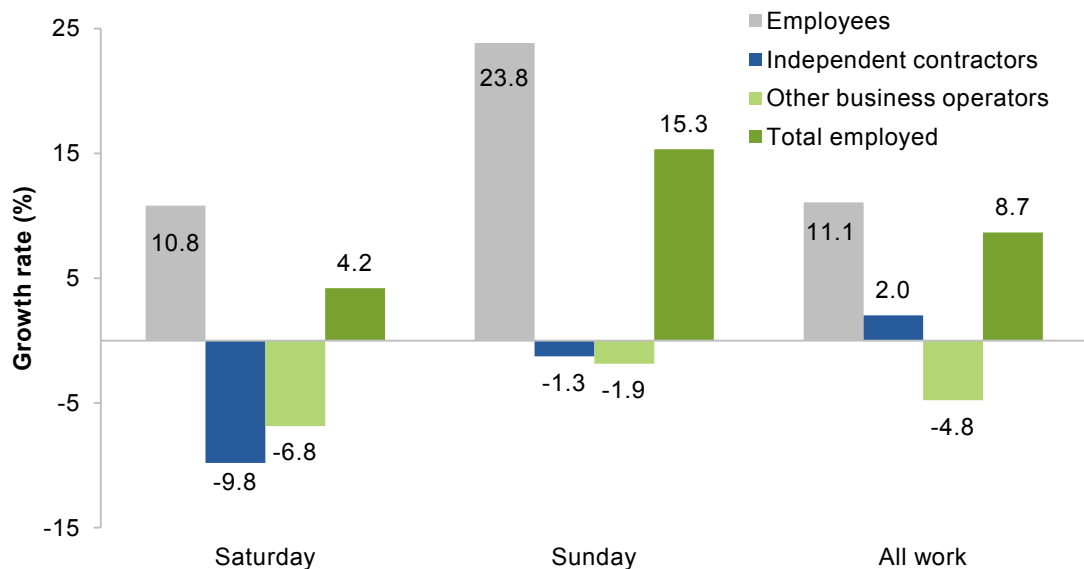
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Casual loadings for standard hours of work vary between awards, and have also changed considerably over time. Historically, there has been no coherent framework for casual loadings. At times, they have simply been a benefit paid in some recognition of employment uncertainty (Graham, sub. 117, p. 4; Campbell and Brosnan 2005). The factors that might reasonably be included in casual loadings have depended on the industrial tribunal considering the matter (including industrial relations tribunals). The most common casual loading is now 25 per cent.

#### Three methods for calculating penalty rates for casuals

There are three basic models for calculating penalty rates for casuals, and these involve the different treatment of the casual loading. The different methods can lead to substantial variations in the final weekend wage rate, and diverging relative employment costs for casuals compared with permanent employees.

**Figure F.4 Relative growth in Saturday and Sunday work**  
Percentage change in numbers employed (2008 to 2013)<sup>a</sup>



<sup>a</sup> In some cases, people said that their days of work varied, in which case they could not be identified as usually working on Sundays, and are therefore excluded from the calculations for Sundays.

Source: ABS, *Forms of Employment*, Cat. No. 6359.0.

The default approach in awards is to calculate the penalty wage rate as:

$$\text{Penalty wage} = \text{Base wage} \times (\text{Casual loading} + \text{Penalty rate}) / 100$$

where the penalty rate is based on the definition given in (c) in section F.1, while the casual loading is expressed as the percentage increase in the base wage. Accordingly, with a penalty rate of 150 per cent, a casual loading of 25 per cent and a base wage of \$20 per hour, the penalty wage would be \$35 per hour.

Other awards specify their casual loading as ‘all purpose’, in which case the penalty rate applies to the casual rate, not to the base rate (for example, as for a casual mining industry services employee covered by the Mining Industry Award 2010). In this case, the penalty wage is:

$$\text{Penalty wage} = \text{Base wage} \times (1 + \text{Casual loading} / 100) \times \text{Penalty rate} / 100$$

Accordingly, with the same base and premium rates as in the previous example, the penalty wage would be \$37.50 per hour, which reflects the compounding effects of the different rates. To obtain the same result as in method 1, the penalty rate would have to have been 162.5 per cent.

Finally, in some awards, the weekend penalty rate (on the base rate) is the same for casual and permanent workers. For example, in the Hair and Beauty Industry Award 2010, the

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penalty rate is 133 per cent of the basic non-casual wage for Saturdays regardless of whether the employee is a casual or not. A casual employee usually receiving a 25 per cent loading on weekdays would receive 33 per cent more than the non-casual basic rate. Were the default approach used, the implied penalty rate would be 8 per cent.

The three methods can have important impacts. For example, with a base wage of \$20, a casual loading of 25 per cent and a Saturday penalty rate of 50 per cent, then depending on the method, the Saturday rate is one of \$30, \$35 or \$37.50 per hour. Therefore, comparisons across awards that rely only on the various standalone rates can miss important differences in wage outcomes. These have potentially significant effects on the choices of employees and employers (and on the equitable treatment of casuals). For example, there are incentives in some industries — such as hairdressing — to employ casual employees on weekends to reduce wage costs.

This raises the question of whether one of the three methods is preferred to the others, a matter also posed by Graham (sub. 117). He suggests three possible objectives in determining the appropriate casual rate:

- equitable treatment with permanent employees
- discouragement of casualisation (suggesting that the ultimate cost of employing a casual to an employer should be higher than that of a permanent employee)
- a method that is easily managed by employers.

The first could also be restated as the rate that makes an employer indifferent between hiring a casual and a permanent employee. In general, if an employer was only obliged to pay the same hourly rate for a casual employee with the same skill classification as a permanent employee, then their total labour costs would be lower because:

- they would not be obliged to pay wages for any recreational or personal leave (and nor would any leave loading be applied where an award included that as a provision for permanent employees)
- redundancy payments would not be paid if the employee was dismissed
- the costs associated with termination notice would be avoided
- there would be greater freedom to change rostering
- it is easier to terminate their employment because more tests under the *Fair Work Act 2009* (Cth) must be met (for example, in relation to tenure and the regularity of employment).<sup>193</sup>

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<sup>193</sup> Graham notes that casuals forgo training and are less likely to be promoted. While casuals might prefer to have more training or better career prospects, employers are also aware that the rate of return on training for a person who has a higher likelihood of leaving is lower than for most permanent employees. Accordingly, the lower costs of training is less clearly characterised as saved expenditure.

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The main contributors to casual loadings are forgone recreational and personal leave entitlements.

### What is the cost-neutral casual penalty rate?

If the underlying objective of regulated casual loadings and penalty rates is to avoid distortions in the market for casuals and permanent employees or (equivalently) to serve the ‘equal pay for equal work’ principle (the equity goal proposed by Graham in sub. 117), then casuals should receive the cash *equivalent* to benefits for permanent employees. *This is subject to the proviso that their patterns of work and skill levels are identical.*

To make the calculations easier, but still illustrating the essential points, suppose that the only penalty rate was for weekend work. The total cost of a permanent employee for a given number of weekend and weekday hours can be calculated as:

$$C_p = h_1 w_1 (1 + \phi / 100 + \lambda / 100) + h_2 w_1 (\beta + \phi + \lambda) / 100$$

where:

- $h_1$  is hours worked during weekdays, while  $h_2$  is hours during weekends
- $w_1$  is the standard hourly wage
- $\phi w_1 / 100$  is the implicit value of the benefits earned by permanent employees and not paid to casuals (such as standard paid personal and recreational leave, but excluding the value of any leave loadings)
- $\lambda w_1 / 100$  is the value of any leave loading for leave entitlements. The rationale for leave loadings is that were a person at work, for certain industries, they would have earned penalty rates on some of the days they worked. The (typical) 17.5 per cent loading added to the annual leave is intended to compensate for this. It spreads the value of penalty rates on weekends across all annual leave entitlements regardless of the times of the week that gave rise to those entitlements. A conceptually more sound model would apply a (higher) leave loading for hours on weekends, and no such loading for entitlements accruing on weekdays. However, the latter approach would be more complex, and so an averaging formula is used where weekend (or in other circumstances, shift) work is a customary feature of permanent employees’ working patterns. In any case, leave loadings are now often seen as simply another entitlement, regardless of the actual weekend/shift patterns of employees in an enterprise (Kelly, Plowman and Watson 2002)
- $\beta$  is the percentage penalty rate (based on the definition given in (c) in section F.1). For example, double time would be defined as a penalty rate of 200 per cent.

For casuals, the wage cost is:

$$C_c = h_1 w_1 (1 + \eta / 100) + h_2 w_1 \varepsilon / 100$$



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where  $\varepsilon$  is the percentage casual penalty rate and  $\eta$  is the percentage casual loading. Typically,  $\eta$  is set at 25 per cent, but it could be anything that the regulator settled on, and will depend on the basis on which it determines the loading. Historically, this was a matter of substantial contention (Queensland Industrial Relations Commission 2001).

If the efficient and equitable outcome is that  $C_c = C_p$  then this implies that the penalty rate that achieves that is:

$$\varepsilon = h_1 / h_2 (\lambda + \phi - \eta) + (\lambda + \phi + \beta)$$

If the casual loading is equivalent to  $(\lambda + \phi)$ , then the casual penalty rate is:

$$\varepsilon = (\text{casual rating} + \text{penalty rate})$$

which gives a casual wage on a weekend as *Penalty wage* = *Base wage*  $\times$  (*Casual loading* + *Penalty rate*) / 100, which is the default method described earlier. Graham (trans., p. 878) recognises that some awards in HERRC fall short of the penalty rate that would achieve neutrality using this approach, but is unconvinced that the above formulation is the right one. However, neither of the other two methods would achieve parity of the effective wages of casuals versus permanent employees.

The validity of the result above depends on calculating the casual loading consistent with the forgone benefits of permanent work. This may not always occur (a point made by Graham, sub. 117 and Shomos, Turner and Will 2013, p. 13). On the one hand, since many permanent employees do not use all of their personal leave entitlements (and these cannot be reimbursed on employment termination), the imputed value to casual employees of the permanent employees' entitlement to personal leave should use its actuarial value, not the maximum entitlement. On the other hand, the casual loading might not adequately reflect the leave loading available to permanent employees, thereby favouring the employment of casuals. However, in this respect, accounting for leave loadings is generally now recognised as an aspect in calculating casual loadings (AIRC 2003).

The implication of this analysis is that unless there are flaws in the calculation of casual loadings or that casual employees at a given classification level are less skilled than their permanent counterparts, the default method for calculating casual penalty rates is the optimal approach. This means the standard casual loading should be added to the penalty rate applying to a permanent employee, which does not occur for all awards in the HERRC industries.