Federal Opposition Submission to the

Fair Work Commission's

Four yearly review of modern awards – Penalty Rates

"Transition"

(AM2014/305)

24 March 2017

Contents

1. Introduction

1.1.1. It is the Federal Labor Opposition's (the Opposition) submission that the decision of the Fair Work Commission (the Commission) to cut penalty rates, and therefore the take-home pay of workers in the Retail, Hospitality, Pharmacy and Fast Food modern awards should be set aside.

1.1. The Opposition remains opposed to any cuts to penalty rates

1.1.2. The Opposition's concern is for up to 700,000 people who rely on Sunday and public holiday penalty rates and will be directly hit by this decision; for the workers under other awards where penalty rates are or will be under review; and for all the other Australian workers who, through choice or circumstance, gain employment in industries where they are required to sacrifice time with family and friends to work on weekends and public holidays.

1.1.3. The Commission's decision does not give appropriate weight to the direct impact on workers of cutting penalty rates and reducing their take-home pay.

1.1.4. Reflecting the important role that penalty rates play in ensuring that modern awards provide a minimum safety net of terms and conditions, the Opposition took the unprecedented step of making a submission to the four yearly review of modern awards. That submission, dated 21 March 2016, set out in detail the legislative, economic and social basis of our opposition to cuts to penalty rates.

1.1.5. The Commission's decision of 22 February 2017 reinforces our central concern, as set out in our previous submission, that

> changes to penalty rates will represent significant changes to the total earnings and income of workers in hospitality and retail industries that have a higher prevalence of casualisation, and accordingly impact on fairness across our society and the performance of the Australian economy.[1]

[1] Federal Opposition Submission to the Fair Work Commission's Review of Modern Awards – Penalty Rates, 21 March 2016 at [4]

1.1.6. Cuts to penalty rates will hurt low-income earners who are the least able to absorb a cut to take-home pay. As the Commission has concluded, the proposed cuts to penalty rates are

> likely to reduce the earnings of those employees and have a negative effect on their relative living standards and on their capacity to meet their needs.[2]

1.1.7. In our previous submission, we noted that

> …in the context of current economic circumstances and in the interests of supporting inclusive and fair growth, any changes to the modern awards should not cut the take-home pay of affected workers.[3]

This argument is even stronger in March 2017 than it was a year ago.

1.1.8. We note that submissions were made to the Commission opposing cuts to penalty rates by the Premier of Queensland[4], the Minister for Workplace Safety and Industrial Relations in the ACT Government[5], the Victorian Government[6], the Deputy Premier and Minister for Industrial Relations in the South Australian Government[7], the Leader of the Opposition (as he then was) and now Premier of Western Australia,[8] as well as the Leaders of the Opposition in New South Wales[9] and Tasmania[10].

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[2] *Four yearly review of modern awards – Penalty Rates* (Matter AM2014/305) [2017] FWCFB 1001, at [1998]. Hereafter referred to as FWC Decision.
[3] FWC Decision at [18]
[4] Submission to the Fair Work Commission's Four Yearly Review of Modern Awards – Penalty Rates, 29 September 2016
[5] Submission to the Fair Work Commission's Four Yearly Review of Modern Awards – Penalty Rates, 21 March 2016
[6] Submission to the Fair Work Commission's Four Yearly Review of Modern Awards – Penalty Rates, 11 March 2016
[7] Submission to the Fair Work Commission's Four Yearly Review of Modern Awards – Penalty Rates, 22 August 2016
[8] Submission to the Fair Work Commission's Four Yearly Review of Modern Awards – Penalty Rates, 17 August 2016
[9] Submission to the Fair Work Commission's Four Yearly Review of Modern Awards – Penalty Rates, 30 August 2016
[10] Submission to the Fair Work Commission's Four Yearly Review of Modern Awards – Penalty Rates, 23 August 2016

1.2. A transition period will not protect take-home pay

1.2.1. The Commission has called for submissions in response to its provisional views regarding a transition period.

1.2.2. The Opposition submits that there is no transitional process or period that could be devised which would:

- ever restore the real wage rates for all current employees under the relevant award;
- protect the take-home pay of all current employees who are employed either under the relevant awards or an agreement which relies on the penalty rates in the awards;
- protect the take-home pay of all future employees covered by the relevant awards;
- prevent these cuts to penalty rates from being used by employers in future bargaining to reduce workers' take-home pay; and
- ensure that modern awards are a guaranteed minimum safety net of take-home pay.

1.2.3. In 2013, the Gillard Government amended the modern awards objective to ensure that the Commission, in varying modern awards, must take into account the need to provide additional remuneration for employees working outside normal hours, such as employees working overtime or on weekends.[11] At the time, the Minister for Workplace Relations, Bill Shorten, said

> Our bill makes it clear that this Labor government believes in the value and utility of penalty rates…[12]

[11] Bill Shorten (Minister for Employment and Workplace Relations), Fair Work Amendment Bill 2013, Second Reading Speech, 21 March 2013

[12] Bill Shorten (Minister for Employment and Workplace Relations), Fair Work Amendment Bill 2013, Summing Up Speech, 6 June 2013

1.2.4. It was never contemplated that the legislation would allow variations of modern awards to result in a reduction of the safety net. While we respect the independence of the Commission, any variation of a modern award which results in the reduction of take-home pay is unacceptable and inconsistent with the intention of the Parliament.

1.2.5. The Opposition calls on the Commission to set aside its initial decision in recognition that it is unable to address 'the adverse impact of a reduction in Sunday penalty rates on the earnings of [hospitality, fast food, retail, pharmacy] workers who work on Sundays' through 'consideration of the transitional arrangements associated with any such reduction'.[13]

1.2.6. If the Commission fails to do so, the only way to protect the take-home pay of workers under modern awards is for this decision not to take effect, and for the Commonwealth Parliament to support the Opposition's bill which will amend the *Fair Work Act* (2009) to change the legal context in which the Commission operates. The Opposition's bill would make it abundantly clear that the Commission may not vary a modern award in a way that would, or would be likely to, result in a cut in real terms to the take-home pay of an employee or prospective employee covered by an award.

[13] FWC Decision at [824], [1359], [1661], [1830]

2. Consequences of the decision for workers

2.1.1. The cuts proposed by the Commission will reduce the take-home pay for some of the lowest paid and most vulnerable workers. People will have to work longer hours for less pay. The cuts will disproportionately hit women. The impact of the cuts will flow through hospitality, retail, fast food, pharmacy and many more industries. People will experience real hardship.

2.1. Cuts to the take-home pay of vulnerable workers

2.1.2. One of the striking features of the Commission's decision to cut penalty rates is that it will impact those people who are the least able to absorb a cut to their take-home pay.

2.1.3. People who are employed in the hospitality and retail sectors are more likely to be award reliant and to be part-time and casual workers.[14] They are also more likely to be employed by a business for a shorter duration.[15]

2.1.4. The Commission found that a substantial proportion of workers affected by this decision are low paid, earning less than two-thirds of median full-time wages.[16] Retail, hospitality and food services have 'the largest proportion of low paid workers in Australia'.[17] In particular the Commission accepted that:

- Hospitality employees 'earn just enough to cover their weekly living expenses. Saving money is difficult. Unexpected expenses such as school trips, illness, or repairs, can produce considerable financial stress';[18]
- Fast food employees are 'more likely to reside in a lower income households [sic] and are more likely to experience financial difficulties';[19] and

[14] FWC Decision at [743], [1464]
[15] Almost 3 in 10 workers in the Hospitality sector had been with their current employer/business for '1–2 years', while almost 1 in 3 workers had been with their employer/business for less than 12 months. FWC Decision at [2017], [724]. Almost one-quarter of workers in the Retail sector had been with their current employer/business for '1–2 years', while around one in five workers had been with their current employer/business for less than 12 months. FWC Decision at [1443]
[16] FWC Decision at [817], [1356], [1656], [1826]
[17] FWC Decision at [1455]
[18] FWC Decision at [819]

- Retail employees' households 'face greater difficulties in raising emergency funds [and] their financial resources are more limited'.[20]

2.1.5. The Commission also determined that although employees might be able to work more for the same money 'somewhat ameliorat[ing] the reduction in income', most employees would see their wages cut, as it was 'improbable' that there would be a compensating increase in hours available.[21] Further, the Commission found that cuts to penalty rates could result in

> "winners" and "losers"… [with] some existing employees receiving additional hours; others may experience no change in their hours or may be offered less hours.[22]

2.1.6. The Commission concluded that

> … a reduction in Sunday penalty rates will have an adverse impact on the earnings of [hospitality, fast food, retail, and pharmacy] employees who usually work on a Sunday.[23]

2.1.7. We agree with the Commission's findings and observations about the hardship which the proposed cuts to penalty rates will impose on employees who work on public holidays and Sundays, in particular that,

> …. the variation of a modern award which has the effect of reducing the earnings of low-paid employees will have a negative impact on their relative living standards and on their capacity to meet their needs.[24]

2.2. Work more hours for a pay cut

2.2.1. Under these proposed cuts to penalty rates, the most that low paid and financially vulnerable workers can hope for is to work the same hours for less

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[19] FWC Decision at [1356]
[20] FWC Decision at [1656]
[21] FWC Decision at [822], [1659], [1828]
[22] FWC Decision at [818], [1357], [1657], [1827] Note: this submission assumes the Commission accepts the impact on retail and pharmacy workers. Even though the references appear in the relevant sections for those workers, they refer throughout to hospitality workers. This appears to be a 'cut and paste' error.
[23] *loc cit*
[24] FWC Decision at [173]

money or to work more hours for the same money. The Opposition agrees with the Commission in rejecting the unrealistic suggestion of the Productivity Commission that employees may 'seek other jobs, increase their training and make other labour market adjustments'.[25]

2.2.2. Moreover, working more hours will not overcome the loss of income from cuts to penalty rates. As both the Commission and the Productivity Commission have concluded, it is 'improbable that, as a group, existing workers' hours on Sundays would rise sufficiently to offset the income effects of the penalty rate reduction'.[26]

2.2.3. It is of great concern to the Opposition that, as discussed in 2.1.5 above, the expectation that people will work longer hours for the same money is seen as a solution to a wage cut, rather than a wage cut in its own right.

2.3. Cuts to penalty rates hit women harder than men

2.3.1. The Commission found that employees in the hospitality, retail, fast food and pharmacy industries were more likely to be women than in all industries.[27] In particular women comprise:

- 57 per cent of hospitality workers;[28]
- 57 per cent of take away food workers;[29]
- 62 per cent of retail workers;[30] and
- 85 per cent of pharmaceutical, cosmetic and toiletry goods retailing employees.[31]

[25] FWC Decision at [2021]
[27] FWC Decision at [84]
[27] FWC Decision at [743], [1464]
[28] FWC Decision Table 34, p. 169
[29] FWC Decision Table 44, p. 280
[30] FWC Decision Table 67, p. 339
[31] FWC Decision Table 70, p. 391

2.3.2. More women than men work in hospitality and retail, they are more likely to be on awards, they are more likely to work part-time, and they already earn less than men do.[32]

2.3.3. It is not only the number of women who are in receipt of penalty rates which confirms the disproportionate impact on women, it is also the number of women who rely on penalty rates. Across all industries, almost 40 per cent of women report relying on penalty rates for household expenses, compared to only just over 30 per cent of men.[33]

2.3.4. The Opposition joins with the Centre for Future Work (CFW) in concluding that

> (t)he premium pay they (women) receive on Sundays helps to partly offset the economic burden associated with precarious work. The Fair Work Commission's decision will impose a particular burden on women workers, who can least afford it.[34]

2.3.5. The Commission, in rejecting submissions that cuts to penalty rates will disproportionality impact women, noted that:

- '[t]here is no evidence before us which shows the number of retail workers who usually work on Sundays, by gender';[35] and
- 'no data has been presented which shows the number of hospitality workers who usually work on Sundays, by gender.'[36]

2.3.6. The Commission ultimately concluded in respect of each award that 'any reduction in Sunday penalty rates would apply equally to men and women workers'.[37] However, the Commission did concede that

[32] Wright, S. and Buchanan, J., *Research Report 6/2013 Award Reliance*, December 2013, p. 54
[33] 39.3 per cent to 31.5 per cent. Centre for Work + Life, Australian Work and Life Index (AWALI)
[34] Centre for Future Work, Fact Sheet: Women's Wages and the Penalty Rates Cut, 8 March 2017
[35] FWC Decision at [211]
[36] FWC Decision at [209]
[37] FWC Decision at [862], [1380], [1682], [1853]

> … if it was shown that a reduction in penalty rates did disproportionately affect female workers then it is likely to have an adverse impact on the gender pay gap.[38]

More women work on Sundays

2.3.7. The Opposition's submission is that there is ample available data and analysis to support a finding that women in the hospitality and retail sectors will be disproportionately hit by cuts to penalty rates.

2.3.8. Data contained in the 2015 Australian Bureau of Statistics (ABS) labour force supplementary survey shows that, for the food and accommodation industry and the retail industry, women are more likely than men to work on Sundays. In fact, women make up 57.0 per cent of the Sunday retail work force and 51.9 per cent of the Sunday accommodation and food services workforce.[39] Women will undoubtedly be hit harder by these proposed cuts to penalty rates than will men.

2.3.9. Three reports were prepared by the Workplace and Economic Research Section of the Commission 'to assist parties with their submissions' including an industry profile of the accommodation and food services industry and an industry profile of the retail trade industry.[40] The ABS data referred to at 2.3.8 above is readily available. It is concerning to the Opposition that the Commission did not have access to this information.

2.3.10. Furthermore, the Opposition notes the comments made by the Secretary of the Department of Employment at Senate Estimates on 2 March 2017 that

> The Fair Work Commission asked all the parties over the two years that they were looking at this, because a number of parties did assert that there would be a disproportionate impact on women, to provide evidence

[38] FWC Decision at [216]
[39] Australian Bureau of Statistics, Characteristics of Employment, Labour Force Supplementary Survey, 2015
[40] FWC Decision at [38]

of it, and the commission ended up concluding that no data had been presented to them that would enable them to answer that question.[41]

2.3.11. It is unclear whether the Minister for Women and the Minister for Employment, Michaelia Cash, was unaware or wilfully blind as to the existence of the aforementioned ABS information, but in either case the Minister has been deficient in failing to ensure that this information was presented to the Commission.

This decision will make the gender pay gap worse

2.3.12. Cutting wages in these highly feminised industries, where a large proportion of women work part time, will increase the gender pay gap in Australia. While the gender pay gap in Australia is 16 per cent[42], when the disproportionate number of women working part-time is taken into account, women earn one third less than men.[43] To claim, as the Department of Employment did, that there is a smaller gender pay gap for award workers within these highly feminised industries[44] and therefore cuts to penalty rates will not exacerbate the gender pay gap is a fundamental misunderstanding of the nature of the gender pay gap. The gender pay gap in Australia is in large part due to precisely this issue: lower wages in highly feminised industries that employ more women.

2.3.13. It is patently clear that, if penalty rates are cut, the gender pay gap in Australia will widen.

2.3.14. The Opposition is committed to reducing the gender pay gap. Cutting penalty rates for women who are already low-paid and financially insecure will have the opposite effect.

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[41] Hansard, Senate Education and Employment Legislation Committee, Estimates, 2 March 2017, p. 129-30

[42] Workplace Gender Equality Agency using the Australian Bureau of Statistics, Average Weekly Earnings, Australia, Nov 2016

[43] Stanford, J., Penalty Rates and the Gender Pay Gap, 8 March 2017, accessed at http://www.futurework.org.au/penalty_rates_and_the_gender_pay_gap

[44] See for example: 'the industry wide gender pay gap in accommodation and food services is 2.4 per cent, in retail is 9.3 per cent.' Hansard, Senate Education and Employment Legislation Committee, Estimates, 2 March 2017, p. 128-129

2.4. Impact on enterprise agreements and collective bargaining

2.4.1. Cuts to penalty rates will directly and immediately impact award reliant workers. As at August 2016 there were 841,300 people employed in the hospitality sector,[45] and 1,194,700 people employed in the retail sector.[46] The very high number of employees in both the accommodation and food services and the retail trade industries who are award reliant (42.7 per cent and 34.5 per cent, respectively)[47] illustrates the potential breadth of the direct impact of the Commission's decision. Any one of these workers may currently rely on penalty rates, or may be rostered on to Sunday and public holiday shifts at any time in their employment.

2.4.2. The impact is much wider than workers who are employed under the award, now and into the future. Many workers are employed under enterprise agreements which set penalty rates as per the award, and as such will also be directly affected by the decision to cut penalty rates.

2.4.3. Further, a significant number of enterprise agreements between major companies and workers in the retail and hospitality industries are beyond their nominal expiry date, or are due to expire within the next three years. The list includes large employers such as Coles, Woolworths, Myer, Officeworks, the Intercontinental hotel Group, Holiday Inn and Crowne Plaza. The Opposition is concerned that, as currently operative enterprise agreements expire or are terminated, employers will attempt to use the cuts to penalty rates as a tool to further reduce wages for workers covered by those enterprise agreements.

2.4.4. We note the Commission's position that

> …a reduction in penalty rates is likely to increase the incentive for employees to bargain, but may also create a disincentive for employers to bargain'.[48]

[45] FWC Decision Table 24, p. 153
[46] FWC Decision Table 57, p. 320
[47] FWC Decision at [170]
[48] FWC Decision at [178]

It is clear that employees will be incentivised to bargain because they have had a reduction in take-home pay under the modern award. However, the proposed cuts will also undermine the ability of workers to negotiate for, for example, higher across the board base rates of pay and other loadings, as part of any future agreement.

2.4.5. Since its inception, enterprise bargaining has provided increases in the base rates of pay for employees in exchange for greater flexibility for employers. Unlike under WorkChoices, enterprise agreements under the *Fair Work Act* (2009) cannot be approved by the Commission unless they leave all employees better offer overall than they would be under the modern award. The modern awards are a safety net. A cut to that safety net, such as this decision to cut penalty rates

> Signals an economy-wide devaluation of Sunday penalty rates, and may serve to undermine employee outcomes in future EBA negotiations.[49]

2.4.6. Further, it may even result in companies that have previously entered into agreements reverting to the award, resulting in cuts to take-home pay for those employees.

2.5. Broader ramifications

2.5.1. As is clear from the Commission's decision, the proposed cuts to Sunday penalty rates are not limited to the Hospitality, Fast Food, Retail and Pharmacy Awards. Of the 122 modern awards, 70 make provision for Sunday penalty rates.[50] The Commission has noted that 'further proposals to alter penalty rates in other modern awards will be dealt with on an award-by-award basis'.[51]

2.5.2. The Commission has flagged a review of Saturday penalty rates in the Clubs and Pharmacy Awards[52] and has also specifically asked for submissions on revoking

[49] McKell Institute, The Impact of the Fair Work Commission's February 23 Sunday Penalty Rates Decision, 25 February 2016, p. 17
[50] Productivity Commission 2015, *Workplace Relations Framework*, Final Report, Canberra, p. 408. Hereafter referred to as PC Report.
[51] FWC Decision at [15]
[52] FWC Decision at [51]

the Clubs Award, given employer parties another opportunity to argue for a cut to penalty rates in the Restaurant Award, and has nominated the Hair and Beauty Award as the next cab off the rank for a review of penalty rates.[53] We oppose the Commission's decision to allow for further hearings on the reduction in penalty rates in those Awards. Allowing the hearing to continue in this way places an additional 323,000 workers in immediate jeopardy of having their penalty rates cut.[54]

2.5.3. The Opposition has consistently raised our concern that cutting penalty rates in the hospitality, retail, fast food and pharmacy industries is the thin edge of the wedge. The Commission's reasoning in deciding upon the proposed cuts to penalty rates has done nothing to ameliorate this concern. In fact, the Commission's action of calling on parties to participate in a review of penalty rates in the hair and beauty industry illustrates that this current decision has wide reaching ramifications.

2.5.4. The proposed penalty rates cuts could also impact other industries.[55] The factors considered by the Commission in this review are not specific to the hospitality, retail, fast food and pharmacy awards. As such, other workers such as nurses, aged care workers, teachers, community, disability workers, cleaners and construction employees are at risk of seeing their penalty rates cut.

2.5.5. Given the widespread support of current members of the Liberal Government for further cuts to penalty rates, including the Prime Minister, the Deputy Leader of the Liberal Party and the current and former Ministers for Employment, it is clear that there will be ongoing pressure for the proposed cuts to be broadened to other modern awards.

2.6. The policy context will make the impact worse

2.6.1. The impact of cutting the take-home pay of low paid, vulnerable workers must be considered against the backdrop of the Government's policy settings, which

[53] See Chapter 12 of the FWC Decision

[54] For the Clubs Award (96,730) see FWC Decision at [938]. For Cafes and Restaurants (143,975) see FWC Decision at [1021]. For Hair and Beauty (84,400) see Hair and Beauty Australia, Submission to the PC Report.

[55] ACTU, Media release, Nurse, teachers and other professionals at risk of penalty rate cuts, 10 March 2017

are threatening living standards, worsening inequality and undermining growth.

2.6.2. Whilst the Commission has not given consideration to these matters, the proposed cuts to penalty rates should be considered in the context in which they are being made.

2.6.3. The Government remains committed to a range of harsh and unfair policy proposals that will have a negative impact on low income Australians, thereby exacerbating the impact of these proposed cuts to penalty rates. This includes changes to Family Tax Benefits, and the freeze on the Medicare Benefits Schedule and increase to the PBS co-payment that will drive up the cost of healthcare. At the same time, the Government continues to pursue a $50 billion tax cut for big business. Inequality is already at a 75-year high.[56] The OECD has made clear that in Australia:

> …inclusiveness has been eroded. The Gini coefficient has been drifting up and households in upper income brackets have benefited disproportionally from Australia's long period of economic growth. Real incomes for the top quintile of households grew by more than 40% between 2004 and 2014 while those for the lowest quintile only grew by about 25% (Figure 3).[57]

2.6.4. Earnings data from the Australian Bureau of Statistics employee earnings and hours survey showed that for the bottom 10 per cent of income earners, the increase in real earnings from 1975 to 2014 was $7,000 or 23 per cent. For the top 10 per cent, the increase in real earnings over the same period was $47,000 or 72 per cent. Earnings have risen three times as fast for the highest paid workers than the lowest paid workers.[58]

2.6.5. It is now widely recognised that inequality is a real danger to our economic growth. Cutting penalty rates will contribute to inequality by further reducing

[56] Leigh, A. (2013) Battlers and Billionaires The Story of Inequality in Australia, Black Inc, Melbourne
[57] OECD, OECD Economic Surveys: Australia, 2017, p. 5
[58] Leigh, A. (2013) Battlers and Billionaires The Story of Inequality in Australia, Black Inc, Melbourne, updated with the latest data

the take-home pay of workers who are already low paid, and will negatively impact on Australia's economic growth.

2.6.6. Wages growth is stagnating at the same time as company profits are at record highs.[59] This cut to penalty rates is just another blow to workers.

[59] Australian Bureau of Statistics: Business Indicators, December 2016 and Wage Price Index, December 2016

3. Consequences of the decision for the economy

3.1. Introduction

3.1.1. The Opposition's submission is that the proposed cuts to penalty rates are not only bad for workers, families and communities; the cuts are bad for the economy. Cutting the take-home pay of the low income Australians is a threat to household consumption, aggregate demand, growth and jobs.

3.1.2. The Commission is required to take into account the likely impact of any award variation on 'employment growth, inflation and the sustainability, performance and competitiveness of the national economy'.[60] As the Commission has noted, this, together with the other elements of the modern award objective 'insofar as they are relevant, must be treated as a matter of significance in the decision making process'.[61]

3.1.3. In respect of each of the awards under consideration, the Commission concluded

> a detailed assessment of the impact of a reduction in Sunday penalty rates [in the awards] on the national economy is not feasible on the basis of the limited material before us.[62]

3.1.4. It is our submission that this is a significant flaw in the Commission's decision.

3.1.5. This is material that ought to have been put to the Commission by the Government. Unfortunately, the Government failed to do so. It is open to infer that this was a deliberate decision taken by a Government that as a matter of ideology supports cuts to wages. It might also be thought that if the Government possessed evidence of a positive impact to the economy from cutting penalty rates, it would have made a submission to that effect.

3.1.6. We note further that the Government has not modelled, and does not intend to model, the economic impact of the Commission's decision to cut penalty rates,

[60] *Fair Work Act* (2009) s134(1)(h)
[61] FWC Decision at [115]
[62] FWC decision at [865], [1386], [1687]

including any impact on jobs. This was confirmed in Senate Estimates, by both the Treasury Department[63] and the Department of Employment and Workplace Relations[64].

3.1.7. In our previous submission we noted that, '…in the context of current economic circumstances… any changes to the modern awards should not cut the take-home pay of affected workers'.[65] The current economic climate makes the case against cutting penalty rates even stronger in March 2017 than it was in March 2016. Over the past year, we have seen growing signs of economic weakness and poorer outcomes for Australian workers. Since our submission 12 months ago:

- the Government has downgraded its forecasts for employment growth and wages growth;[66]
- employment growth has halved and remains well below trend;[67]
- full-time jobs have declined by 23,000, with job creation dominated by part-time work;[68]
- underemployment remains at near-record highs at 1.1 million; and[69]
- wages growth has fallen to new record lows at 1.9 per cent.[70]

3.2. Threat to household consumption, aggregate demand and growth

3.2.1. In the last twelve months, GDP growth has slowed and remains well below trend. The outlook for household consumption – which is strongly driven by income and wealth and household expectations about this – has become a key economic uncertainty.

[63] Hansard, Economic Legislation Committee, 1 March 2017, p. 23
[64] Hansard, Education and Employment Legislation Committee, 2 March 2017, p. 134
[65] Federal Opposition Submission to the Fair Work Commission's Review of Modern Awards – Penalty Rates, 21 March 2016 at [18]
[66] Australian Government, Mid-Year Economic and Fiscal Outlook 2016-17; Australian Government, Budget Paper No. 1, 2016-17
[67] Australian Bureau of Statistics, Labour Force, February 2017
[68] Australian Bureau of Statistics, Labour Force, February 2017
[69] *Loc cit*
[70] Australian Bureau of Statistics, Wage Price Index, December 2016

3.2.2. The Australian economy has experienced a prolonged period of below trend growth, with real GDP growth growing at 2.4 per cent over the year to December 2016. This is weaker than the 2.5 per cent growth recorded in the year to December 2015.

3.2.3. As the RBA has recently highlighted, this below-trend GDP growth is consistent with recent weakness in the labour market and weak growth in household income.[71]

3.2.4. Wages growth has fallen to new record lows, at 1.9 per cent over the year to December 2016. Wages growth has also been slower than expected, with downgrades to forecast wages growth in the 2016-17 Budget and MYEFO[72].

3.2.5. Cuts to penalty rates will, directly and indirectly, further weaken growth in household income.

3.2.6. Household consumption growth has also slowed in the past year, to be 2.6 per cent over the year to December 2016. Slower growth in wages and household income has meant that households have been drawing down on their savings in order to fund consumption. This is reflected in the sharp decline in the household savings ratio, which has fallen by 1 percentage point over the past 12 months, from 6.2 per cent to 5.2 per cent.[73] This suggests that recent growth in consumption may not be sustainable without an improvement in wages growth.

3.2.7. Household consumption represents around 55 per cent of the Australian economy and is therefore a critical driver of growth. However both the RBA and the Government have warned that sustained weakness in household incomes is a key risk to consumption growth and the overall economic outlook.

3.2.8. Economic theory and evidence consistently finds, in a range of contexts, that lower income households consume a greater proportion of their income. As we

[71] Reserve Bank of Australia, Statement on Monetary Policy, February 2017
[72] Australian Government, Mid-Year Economic and Fiscal Outlook 2016-17; Australian Government, Budget Paper No. 1, 2016-17
[73] Australian Bureau of Statistics, National Accounts, December 2016

have already noted, the Commission concluded that a substantial proportion of workers affected by this decision are low paid.[74]

3.2.9. The Commission also accepted that 'a reduction in Sunday penalty rates will have an adverse impact on the earnings of [hospitality, fast food, retail, and pharmacy] employees who usually work on a Sunday'.[75] The Commission found that although some employees may be able to work more for the same money 'somewhat ameliorat[ing] the reduction in income', most employees would see their wages cut, as it was 'improbable' that there would be a compensating increase in hours available.[76]

3.2.10. Parliamentary Budget Office analysis shows that Australian households below the 50th percentile currently already spend more than they earn each week.[77] The Commission described the financial situation of the workers who will be impacted by these proposed cuts to penalty rates thus:

> [m]any of these employees earn just enough to cover weekly living expenses, saving money is difficult and unexpected expenses produce considerable financial distress.[78]

Reducing their take-home pay would therefore be expected to lead to reductions in their spending.

3.2.11. Analysis of patterns in household consumption is consistent with this. For example, Berger Thomson, Chung and McKibbin (2009)[79] analysed changes in Australian households' spending in response to changes in income. Their analysis showed that a $100 increase in income was associated with an $80 to $100 increase in household spending. Given this relationship, it is likely that a

[74] FWC Decision at [817], [1356], [1656], [1826]. The Commission uses a threshold of two-thirds of median full-time wages as a suitable benchmark for identifying what constituted 'low paid'.
[75] FWC Decision at [818], [1357], [1657], [1827]. NB we are assuming the FWC accepts the impact on retail and pharmacy workers. Even though the references appear in the relevant sections for those workers, they refer throughout to hospitality workers.
[76] FWC Decision at [822], [1659], [1828]
[77] Parliamentary Budget Office, Goods and Services Tax: Distributional analysis and indicative reform scenarios, December 2015
[78] FWC Decision at [85]
[79] Berger-Thomson, L., et. al, Estimating marginal propensities to consume in Australia using micro data, Reserve Bank of Australia Research Discussion Paper, November 2009

reduction in income would have an effect on consumption of a similar order of magnitude. That is, every $100 an Australian worker loses in penalty rates would translate into at least $80 to $100 less spending within the Australian economy.

3.2.12. This risk to economic activity from lower incomes comes at a time when the Government and many major economists are warning about the risks to consumption and overall GDP growth, particularly from subdued wages growth.

- according to the 2016-17 Mid-Year Economic and Fiscal Outlook (MYEFO), '…factors such as sustained subdued income growth may result in slower growth in consumer spending'.[80]

- the RBA has said 'Domestic wage pressures remained subdued and household income growth had been low, which, if it were to persist, would have implications for consumption growth and the risks posed by the level of household debt.'[81]

- the IMF recently noted that '…there remain significant risks and uncertainties, notably weaker-than-expected domestic consumption'[82] and 'growth could be slower, as consumption growth could remain lacklustre with continued low wage growth'[83].

- according to ANZ, '…we see any significant acceleration in consumer spending as challenging given ongoing weakness in wage growth and high household debt'.[84]

- according to CBA, 'consumer spending growth is constrained by weak wages growth and the predominance of part over full-time jobs growth'.[85]

[80] Australian Government, Mid-Year Economic and Fiscal Outlook, 2016-17
[81] Reserve Bank of Australia, Minutes of the March 2017 Monetary Policy Meeting of the Reserve Bank Board.
[82] International Monetary Fund, 2016 Article IV report on Australia, February 2017
[83] *Loc cit*
[84] ANZ Live, Australian retail sales - a solid start, 6 March 2017
[85] CBA, Global Markets Research, Retail Trade – January 2017, 6 March 2017

This evidence suggests that cutting penalty rates will only increase the risk of slower consumption and economic growth.

3.2.13. The Commission's decision also creates a broader risk to consumption and growth beyond its direct impact on affected workers in the retail and hospitality sectors. If its decision leads other workers to believe their penalty rates are more likely to be cut, which is a reasonable concern, then this will further undermine consumption and growth. As the RBA recently highlighted, 'households' views about the outlook for the growth of their income and wealth are relevant for the consumption growth forecast… If households believe that their prospects for future income growth have weakened, particularly for those households servicing sizeable debts, then they could choose to save more in the near term and consumption growth could be lower than forecast'.[86]

3.3. Employment

3.3.1. The Australian labour market is considerably weaker than it was 12 months ago. Overall employment growth has slowed markedly, to be only 0.9 per cent over the year to February 2017. This is half the rate of employment growth over the past 20 years and half the growth experienced in the previous year. Current employment growth is also lower than the Government's forecasts in MYEFO. In addition, employment growth has been entirely driven by part-time employment, with 23,000 full-time jobs lost over the past year. The total number of underemployed people rose in February 2017 to the highest ever, with more than 1.1 million Australians wanting more work but not being able to find it (1,114,600). Coupled with the number of unemployed, this means that there are around 1.8 million Australians who are underutilised in the labour force.[87]

3.3.2. By putting consumption growth, demand and growth at risk, the Commission's decision to cut penalty rates is a risk to jobs growth. Demand for goods and services in the hospitality and retail sectors will not be increased by a reduction

[86] Reserve Bank of Australia, Statement on Monetary Policy, February 2017
[87] Australian Bureau of Statistics, Labour Force, February 2017

in wages for workers in these sectors, if anything it will reduce this demand as employees have less disposable income.

3.3.3. In addition to reducing overall demand for jobs, there is a risk that it has a particularly negative impact on full-time employment. According to recent liaison by the RBA, businesses are 'hesitant to employ full-time workers until they see evidence that increased demand for their output is likely to be sustained'.[88]

3.3.4. On 2 March 2017, on ABC radio, the Prime Minister asserted that the Commission has found that cutting penalty rates would 'create tens of thousands of jobs'. This assertion is incorrect and one not even the employers argued in the current Four yearly review. As the Commission noted:

> the Hospitality Employers and the RCI [Restaurants and Catering Industrial] do not advance the bold proposition that cutting penalty rates will increase employment.[89]

3.3.5. We note that, what the Commission actually concluded was that a reduction in penalty rates in the Fast Food Award penalty rates may result in a 'modest' increase in employment,[90] despite 'a paucity of direct evidence from industry participants'.[91]

3.3.6. There is no suggestion that tens of thousands of jobs will be created in the Hospitality, Retail and Pharmacy industries, with the Commission merely concluding that a reduction in penalty rates 'is likely to lead to some additional employment'[92] because of the common evidence, and evidence of employers that:

[88] Reserve Bank of Australia, Statement on Monetary Policy, November 2016
[89] FWC decision at [838]
[90] FWC decision at [1367]
[91] FWC decision at [1362]
[92] FWC decision at [829], [1666]

- owner operators would employ people rather than work themselves;[93] and

- it would increase the level and range of services with consequent increase in employment or hours worked.[94]

3.3.7. The Commission has accepted the Productivity Commission's assessment that 'any potential positive employment effects from a reduction in penalty rates are likely to be reduced due to substitution and other effects'.[95.] For example, if prices are reduced on Sundays as a result of the Commission's decision, then this will simply lead to a substitution from purchasing goods on other days to purchasing goods on Sundays.

3.3.8. The suggestion that a reduction in penalty rates could lead to reduced prices and thereby increased employment is flawed. The evidence base for an increase in employment is not strong, and relies on economic simulation modelling rather than strong empirical evidence.[96] Such modelling assumes the relationship rather than finds it and as such, it should be treated with real caution.

3.3.9. The Commission noted in its decision that employers that provided evidence to the review indicated they did not intend to reduce prices as a result of penalty rates.[97] This indicates that employers could potentially increase their profits rather than increasing employment. This evidence also undermines the aforementioned modelling provided by Professor Lewis that relies on a reduction in prices in order to increase employment.

3.3.10. A realistic result of the proposed cuts to penalty rates is that, rather than reducing prices or employing more staff, employers may retain any savings in wages as profits. Given that company profits are at record highs at the same

[93] FWC decision at [829], [1671]
[94] FWC decision at [829], [854], [1671], [1835]
[95] FWC decision at [68]
[96] FWC decision at [616]-[641]
[97] FWC decision at [632]

time as wages are growing at record lows[98], this would not be an unrealistic result.

3.3.11. In all of the circumstances, the Commission's conclusion that, while there 'may'[99] be some positive employment effects 'it is difficult to quantify the precise effect'[100], is not sufficient justification for inflicting this pay cut on some of the lowest paid and vulnerable workers.

3.3.12. We submit that a proper reading of the Commission's decision indicates that, if there was to be a positive employment effect from the cuts, it would be negligible. This is a position shared by Andrew Laming, MP for Bowman, who has said that 'there will be virtually negligible difference in either jobs created or hours'.[101] Any positive employment effect would be outweighed by the negative effect on the take-home pay of workers.

3.3.13. The argument that cuts to Sunday penalty rates are needed to boost employment on Sundays is not supported by the data. In fact, available data indicates that employment in these industries is driven by factors other than the cost of labour. Since May 2001 the numbers of people employed in Sunday retail and hospitality jobs have been growing faster (43.5 per cent) than total employment in those industries (28.4 per cent).[102]

3.4. Threat to regional economies

3.4.1. Beyond the overall negative economic impacts, there is also evidence that implementation of the Commission's decision would be particularly harmful to regional economies. Modelling by the McKell Institute on the impact of penalty rate cuts for regional communities estimated that a partial abolition of penalty rates in the retail and hospitality sectors, the size of the cut in this decision, would result in workers losing between $370.7 million and $691.5 million a

[98] Australian Bureau of Statistics: Business Indicators, December 2016 and Wage Price Index, December 2016
[99] FWC Decision at [686]
[100] FWC Decision at [684]
[101] The Australian, 8 March 2017
[102] Parliamentary Library analysis of Australian Bureau of Statistics data

year.[103] This would lead to a reduction in spending of between $174.6 million and $343.5 million per year across local economies.[104]

[103] McKell Institute, Who loses when penalty rates are cut? The economic impact of penalty rate cuts in Australia's retail and hospitality industries, August 2015
[104] McKell Institute, Who loses when penalty rates are cut? The economic impact of penalty rate cuts in Australia's retail and hospitality industries, August 2015

4. Any transitional arrangements will leave workers worse off

4.1. Phasing in cuts to penalty rates

4.1.1. The Opposition agrees with the Commission that

> [t]he immediate implementation of all of the variations we propose would inevitably cause some hardship to the employees affected, particularly those who work on Sundays.[105]

4.1.2. Where the Opposition parts with the Commission is the suggestion that the harsh impacts of cuts to penalty rates illustrate the need for 'appropriate transitional arrangements to mitigate such hardship'[106]. What they do illustrate is that the proposed cuts to penalty rates should not be made.

4.1.3. The Opposition submits that there is no transitional process or period that could be devised which would:

- ever restore the real wage rates for all current employees under the relevant award;
- protect the take-home pay of all current employees who are employed either under the relevant awards or an agreement which relies on the penalty rates in the awards;
- protect the take-home pay of all future employees covered by the relevant awards;
- prevent these cuts to penalty rates from being used by employers in future bargaining to reduce workers' take-home pay; and
- ensure that modern awards are a guaranteed minimum safety net of take-home pay.

[105] FWC Decision at [85]
[106] FWC Decision at [85]

4.1.4. The Opposition submits that the unjustified hardship to workers of cutting their take-home pay by reducing penalty rates cannot be mitigated by transitional provisions. As CFW has found

> proposals for "transition" and "adjustment" cannot alter the ultimate regressive effects of the Fair Work Commission's decision.[107]

Any cut to their take-home pay – whatever the amount, in however many increments and over whatever period – would have a real and devastating impact on some of the Australia's lowest paid workers.

4.1.5. As the Commission has acknowledged, and our submission has emphasised, cutting penalty rates will negatively impact on the living standards of low paid workers across the retail and hospitality sectors. It should never be forgotten that, for the people who will bear the brunt of these cuts and who 'earn just enough to cover weekly living expenses, saving money is difficult and unexpected expenses produce considerable financial distress'.[108] While we appreciate that the Commission is concerned to 'mitigate such hardship'[109] as will be caused by the decision, we do not accept that mitigation is achievable.

4.1.6. We note that there is no suggestion from the Commission that any transition period would, or would be intended to, neutralise the effect on workers of cutting their penalty rates. This is because it cannot.

4.1.7. We do not understand the Commission, in proposing that '(t)he reductions in Sunday penalty rates should take place in a series of annual adjustments on 1 July each year (commencing 1 July 2017) to coincide with any increases in modern award minimum wages arising from Annual Wage Review decisions',[110] to be suggesting that penalty rate cuts can be offset by increases to minimum award wages. In the event that any such suggestion is made, we submit that it is a false proposition that the impact of these cuts can be eliminated by bringing them in in increments, to coincide with annual minimum wage increases.

[107] Stanford, J., Centre for Future Work Briefing Note: A "Transition" to Nowhere: On the Impossibility of Avoiding the Social Costs of Reduced Penalty Rates, 23 March 2017, p.1
[108] FWC Decision at [1999]
[109] FWC Decision at [2000], [2021]
[110] FWC Decision at [2021]

4.1.8. Any such approach would inevitably cause a reduction in the take-home pay of people who receive penalty rates, as these workers would in part or in whole, be forgoing the annual minimum wage increase. That is, part or all of the minimum wage increase would be absorbed by the cuts to penalty rates. Furthermore, the real wages of workers would be cut, as a result of CPI increases.

4.1.9. We note the Commission's assertion that

> (t)he needs of the low paid are best addressed by the setting and adjustment of modern award minimum rates of pay (independent of penalty rates). [111]

This is entirely consistent with our position that it is a false proposition that cuts to penalty rates can be somehow offset by increases to the minimum wage, as the minimum wage increase will in part or entirely be absorbed, and this would result in a cut in real terms to a workers take-home pay. We, of course, take the additional position that the negative impact on low paid workers of cutting penalty rates is not justified.

4.1.10. CFW has modelled a range of transition scenarios, using the current General Retail Award. These transition scenarios consider options for implementing the cuts to penalty rates and offsetting any cuts to penalty rates. They do not consider any other allowances, entitlements or rostering arrangements, which are routinely the subject of negotiation in enterprise agreements.

A phased reduction in penalty rates is still a cut to take-home pay

4.1.11. The CFW found that the base wage would have to increase by one-third in order to maintain Sunday pay rates at the current nominal level. Assuming wages continue to grow at the current rate, it would take 17 years – 2034 – until the base rate increases enough to bring Sunday rates back to their current level. Even if it were reasonable to wait 17 years to fully implement the penalty rates cut, this proposal, suggested by the Prime Minister Turnbull,

[111] FWC Decision at [823]

> would impose a 17-year wage freeze on Sunday retail workers… [and] the real purchasing power of retail wages on Sundays would be steadily eroded.[112]

Offsetting increases to the minimum wage cannot compensate for cuts to penalty rates

4.1.12. The second transition proposal considered by the CFW is 'accelerating increases in minimum base wages in affected industries'.[113] An immediate cut to penalty rates of the scale proposed by the Commission 'would require an immediate 33 per cent increase in the underlying base rate'.[114] For a person on the General Retail Award, this would mean an increase in their base rate from $19.44 to $25.92 an hour (for a worker at the lowest rate in the Award), and an increase from $23.79 to $31.72 an hour (for a worker at the highest rate in the Award).[115] It is obvious that such an increase would deliver a significant pay rise to all workers under the award on other days of the week (whilst still cutting real pay for Sunday workers), but it would increase weighted-average retail labour costs over the whole week by over 25 per cent.[116] This does not seem to be a realistic or sensible means of preventing workers from being hurt by the cuts to penalty rates.

4.1.13. The third transition proposal combines the first two proposals, with a five-year transition period, and a boost to the minimum wage. This scenario also leaves both Sunday workers and employers worse off. The former because they would suffer a wage freeze that would reduce real wages, and the latter because overall labour costs would increase.[117]

4.1.14. This analysis reveals the falsity of any suggestion that the annual increase in the minimum wage could somehow compensate or offset the reduction in take-home pay caused by cuts to penalty rates.

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[112] Stanford, J., *op cit*, p. 2-4
[113] Stanford, J., *op cit*, p. 4
[114] Stanford, J., *op cit*, p. 5
[115] *Loc cit*
[116] *Loc cit*
[117] Stanford, J., *op cit*, p. 5-6

4.2. Take-home pay orders

4.2.1. The Commission queried the legislative availability of take-home pay orders. The Opposition's position is that, even were take-home pay orders legislatively available, they provide no answer. There are three fundamental issues with take-home pay orders.

4.2.2. First, they would establish two classes of employees, each paid different rates to work on Sundays and public holidays. This would increase the administrative burden on businesses and be a disincentive for businesses to give shifts to workers who are effectively still receiving full penalty rates via a take-home pay order. This occurred during the WorkChoices period when some workers were on the award rate and others were paid less under Australian Workplace Agreements: weekend shifts were given to the cheaper worker.[118] Thus, existing workers are nonetheless likely to face a cut to their take-home pay from reduced hours. It is also likely to negatively impact

> cohesiveness and effectiveness within the workplace – two workers, with similar qualifications, would receive substantially different pay for doing the same work, side by side'.[119]

4.2.3. Second, the length of time that retail and hospitality workers are employed by one employer is shorter than in other industries.[120] Thus, any take-home pay order is likely to have a limited operational period, as workers shift to other employers. It is simply a short term delay to the take-home pay cut, not a negation of it.

4.2.4. Finally, the burden on individual workers of having to go through the process of applying to the Commission for a take-home pay order, particularly for award reliant workers who are not members of unions, is likely to be prohibitive, and

[118] Australian Government, *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation*, 2012, p. 121
[119] Stanford, J., *op cit*, p. 6
[120] FWC Decision at [724] Workers in the Hospitality sector were more likely to experience a shorter duration of employment with an employer/business than workers across all industries. Chart 21 shows that almost 3 in 10 workers in the Hospitality sector had been with their current employer/business for '1–2 years', while almost 1 in 3 workers had been with their employer/business for less than 12 months.

the compliance burden on small businesses unwieldy. We note that, since their introduction in 2010, only 5 take-home pay orders have been granted (from approximately 140 applications, most of which were made by individuals) and none since 2013.[121]

[121] FWC Decision at [2018]

Federal Opposition Submission to the

Fair Work Commission's

Four yearly review of modern awards – Penalty Rates

Registered and Licensed Clubs Award 2010

(AM2014/305)

24 March 2017

1. The Commission's invitation to submit

1.1. The Fair Work Commission (the Commission) concluded that the employer representatives were not able to establish a 'merit case sufficient to warrant the variation of the Clubs Award'[1].

1.2. The Commission is contemplating two options. Option 1 (preferred by the Commission) is that workers who are currently covered by the Clubs Award be covered by the Hospitality Award. Option 2 is that the employer representatives be provided with a further opportunity to advance their case to cut penalty rates.

1.3. The Commission has invited short submissions setting out the position of interested parties, to be filed by 4.00 pm Friday, 24 March 2017.

1.4. It is the Federal Labor Opposition's (the Opposition) submission that neither Option 1 nor 2 should be pursued. There should be no cut to the penalty rates of up to 96,370 workers covered by the Award.

2. The Opposition remains opposed to any cuts to penalty rates

2.1. Reflecting the important role that penalty rates play in ensuring that modern awards provide a safety net of terms and conditions, the Opposition took the unprecedented step of making a submission to the four yearly review of modern awards. That submission, dated 21 March 2016, set out in detail the legislative, economic and social basis of our opposition to cuts to penalty rates.

2.2. The Commission's decision of 22 February 2017 reinforces our central concern, as set out in our previous submission, that

> changes to penalty rates will represent significant changes to the total earnings and income of workers in hospitality and retail industries that have a higher prevalence of casualisation, and accordingly impact on

[1] *Four yearly review of modern awards – Penalty Rates* (Matter AM2014/305) [2017] FWCFB 1001, at [994]. Hereafter referred to as FWC Decision.

> fairness across our society and the performance of the Australian economy.[2]

2.3. Cuts to penalty rates will hurt low-income earners who are the least able to absorb a cut to take-home pay. As the Commission has concluded, the proposed cuts to penalty rates are

> likely to reduce the earnings of those employees and have a negative effect on their relative living standards and on their capacity to meet their needs.[3]

2.4. Cuts to penalty rates will also disproportionately affect women. In this respect we refer the Commission to the Opposition's submission lodged today which concluded that 'it is patently clear that, if penalty rates are cut, the gender pay gap in Australia will widen'. We note that approximately 54 per cent of workers in the Clubs industry are women.[4]

2.5. In our previous submission, we noted that,

> …in the context of current economic circumstances and in the interests of supporting inclusive and fair growth, any changes to the modern awards should not cut the take-home pay of affected workers.[5]

This argument is even stronger in March 2017 than it was a year ago.

2.6. We also refer the Commission to the Opposition's submission lodged today opposing cuts to penalty rates that reduce take-home pay. The arguments in that submission that cuts to penalty rates will hurt low paid workers and the economy are equally applicable here.

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[2] Federal Opposition Submission to the Fair Work Commission's Four Yearly Review of Modern Awards – Penalty Rates, 21 March 2016, at [4]
[3] FWC Decision at [1998]
[4] FWC Decision at [942]
[5] FWC Decision at [18]

3. The Commission should not cut Saturday and Sunday penalty rates for clubs workers

3.1. Clubs Australia Industrial (CAI) sought cuts to Saturday penalty rates for full-time and part-time workers from 150 per cent to 125 per cent. CAI also sought a cut to Sunday penalty rates for full-time, part-time and casual workers from 175 per cent to 150 per cent.

3.2. Moving all workers from the Registered and Licensed Clubs Award 2010 to the Hospitality Industry (General) Award 2010 would deliver CAI that exact cut to penalty rates. This would leave up to 96,370 workers in registered and licenced clubs up to $3,680 worse off a year.[6]

3.3. In effect this would allow CAI to achieve the same outcome as Option 2 without even having to provide any evidence in support of their position.

3.4. That would be an absurd outcome.

4. The Commission should not provide CAI with a second chance to attempt to cut Saturday and Sunday penalty rates for clubs workers

4.1. The Commission indicated on 12 December 2014 that employer groups had been agitating for this change for some time, and that therefore there were no grounds for delaying the commencement of this case.

> So unless you've got a very good reason, given you've had knowledge for some time and have been agitating for some time for the penalty rate issue as to why it can't be heard for another 13 or 14 months I'm going to propose to bring that forward.[7]

4.2. This review has been conducted over more than two years.

[6] Based on 8 hours work on each of Saturday and Sunday

[7] Justice Ross, Transcript of Proceedings 1051155-1, Four yearly review of modern awards Award stage - Penalty rates issues - AM2014/209 & others at [45]

4.3. The proponents of arbitrarily cutting Sunday penalty rates have 'not established a merit case sufficient to warrant the variation of the Clubs Award'[8] within these time frames. Therefore it is difficult to see what benefit further time would provide.

4.4. The Commission has said that:

> If these were simply *inter partes* proceedings we would dismiss CAI claim. But the claim has been made in the context of the Review and s.156 imposes an obligation on the Commission to review each modern award.[9]

4.5. We disagree that there is anything in the requirement to review each modern award that means CAI must be given a second bite of the cherry.

4.6. In 2013 the Gillard Government amended the modern awards objective to ensure that the Commission, in varying modern awards, must take into account the need to provide additional remuneration for employees working outside normal hours, such as employees working overtime or on weekends.[10] At the time, the Minister for Workplace Relations, Bill Shorten, said

> Our bill makes it clear that this Labor government believes in the value and utility of penalty rates…[11]

4.7. It was never contemplated that the legislation would allow variations of modern awards to result in a reduction of the safety net. While we respect the independence of the Commission, any variation of a modern award which results in the reduction of take-home pay is unacceptable, and inconsistent with the intention of the Parliament.

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[8] FWC Decision at [994]
[9] FWC Decision at [995]
[10] Bill Shorten (Minister for Employment and Workplace Relations), Fair Work Amendment Bill 2013, Second Reading Speech, 21 March 2013
[11] Bill Shorten (Minister for Employment and Workplace Relations), Fair Work Amendment Bill 2013, Summing Up Speech, 6 June 2013

Federal Opposition Submission to the

Fair Work Commission's

Four yearly review of modern awards – Penalty Rates

Hair and Beauty Award 2010

(AM2014/305)

24 March 2017

1.1. The Commission's invitation to submit

1.1.1. The Fair Work Commission (the Commission) has solicited expressions of interest from employer organisations that would assist the Commission to review penalty rates in the Hair and Beauty Industry Award 2010.

1.1.2. The Commission has invited such expressions of interest, to be filed by 4.00 pm Friday, 24 March 2017.

1.1.3. The Commission found that the existing rates for workers in these industries 'raise issues about the level of the Sunday penalty rate and the penalty rates applicable to casual employees'.[1] The Commission also observed that 'the Productivity Commission states that there are grounds for greater consistency… between penalty rates across the HERRC industries'.

1.1.4. In light of this commentary, the Opposition fears that the Commission will make the same reduction to Sunday rates as it did in the General Retail Industry Award. This would mean a cut from 200 per cent to 150 per cent, which would result in a cut of $77 a week for people who work in the Hair and Beauty Industry on Sundays. The Commission's comments also suggest that cuts for casuals that go further than cuts to Sunday penalty rates are also on the cards.

1.1.5. The Opposition is also concerned that the Commission will cut the public holiday rate for hair dressers and beauty therapists. The employer organisations have previously sought that the public holiday rates be reduced from 250 per cent to 200 per cent for full time and part time workers, and reduced to the ordinary rate of pay for casuals.

1.1.6. We note that the AiGroup, representing the Hair and Beauty Australia Industry Association has already responded to the Commission's invitation, and they are seeking a cut to penalty rates for all hair dressers and beauty therapists.

[1] *Four yearly review of modern awards – Penalty Rates* (Matter AM2014/305) [2017] FWCFB 1001, at [2059]. Hereafter referred to as FWC Decision.

1.2. The Opposition remains opposed to any cuts to penalty rates

1.1.7. An estimated 84,400 workers would be affected by a cut to penalty rates in the Hair and Beauty Industry Award 2010. Hairdressers and beauty therapists are amongst the lowest paid trades in Australia.

1.1.8. A cut to penalty rates in the Hair and Beauty Award will hit women harder than men. Employees in the hair and beauty industries are more likely to be women: 86 per cent of hairdressers[2] and 99 per cent of beauty therapists[3]. The Opposition reiterates the point made in our submission on transition that a cut to penalty rates in this highly feminised industry will widen the gender pay gap.

1.1.9. Reflecting the important role that penalty rates play in ensuring that modern awards provide a safety net of terms and conditions, the Opposition took the unprecedented step of making a submission to the four yearly review of modern awards. That submission, dated 21 March 2016, set out in detail the legislative, economic and social basis of our opposition to cuts to penalty rates.

1.1.10. The Commission's decision of 22 February 2017 reinforces our central concern, as set out in our previous submission, that

> changes to penalty rates will represent significant changes to the total earnings and income of workers in hospitality and retail industries that have a higher prevalence of casualisation, and accordingly impact on fairness across our society and the performance of the Australian economy.[4]

1.1.11. Cuts to penalty rates will hurt low-income earners who are the least able to absorb a cut to take-home pay. As the Commission has concluded, the proposed cuts to penalty rates are

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[2] Australian Government, *ANZSCO 3911-11 – Hairdresser*, Department of Employment, September 2015, p.

[3] Australian Bureau of Statistics, *Labour Force, Australia, Detailed - Electronic Delivery,* Jan 2017, data cube: SuperTABLE, cat. no. 6291.0.55.001, viewed 22 March 2017, http://www.abs.gov.au/ausstats/abs@.nsf/mf/6291.0.55.001

[4] Federal Opposition Submission to the Fair Work Commission's Four Yearly Review of Modern Awards – Penalty Rates, 21 March 2016, at [4]

likely to reduce the earnings of those employees and have a negative effect on their relative living standards and on their capacity to meet their needs.[5]

1.1.12. In our previous submission, we noted that, '…in the context of current economic circumstances and in the interests of supporting inclusive and fair growth, any changes to the modern awards should not cut the take-home pay of affected workers'.[6] This argument is even stronger in March 2017 than it was a year ago.

1.1.13. We also refer the Commission to the Opposition's submission lodged today opposing cuts to penalty rates that reduce take-home pay. The arguments in that submission that cuts to penalty rates will hurt low paid workers and the economy are equally applicable here.

[5] FWC Decision at [1998]
[6] FWC Decision at [18]

Leader of the Opposition

Award Modernisation Team
Fair Work Commission

Dear Sir/Madam

Four yearly review of modern awards – penalty rates (AM2014/305) – Restaurant Industry Award

The Commission has invited Restaurant and Catering Industrial (RCI) to indicate whether it wishes to proceed with a claim to cut penalty rates for restaurant and café workers by filing correspondence by 4.00 pm Friday, 24 March 2017.[1]

While the Federal Labor Opposition's (the Opposition) has not been invited to present a view, we nonetheless have one.

It is the Opposition's submission that there should be no cut to the penalty rates of up to 143,975[2] workers covered by the Restaurant Industry Award.

The Commission concluded that the employer representatives were not able to establish a 'merit case sufficient to warrant varying the Sunday penalty rates in this Award'.[3] Nonetheless the Commission is providing a further opportunity to 'seek to establish that the weekend penalty rates in the Restaurant Award do not provide a "fair and relevant minimum safety net"'.[4]

The Commission indicated on 12 December 2014 that employer groups had been agitating for this change for some time, and that therefore there were no grounds for delaying the commencement of this case.[5] The case itself has been conducted over more than two years.

The proponents of arbitrarily cutting Sunday penalty rates have not established a 'merit case sufficient to warrant varying the Sunday penalty rates in this Award'[6] within these time frames. It is difficult to see what benefit further time would provide.

[1] *Four yearly review of modern awards – Penalty Rates* (Matter AM2014/305) [2017] FWCFB 1001, at [2050]. Hereafter referred to as FWC Decision.
[2] FWC Decision at [1021]
[3] FWC Decision, at [2047]
[4] FWC Decision at [2048]
[5] Justice Ross, Transcript of Proceedings 1051155-1, Four yearly review of modern awards Award stage - Penalty rates issues - AM2014/209 & others at [45]
[6] FWC Decision at [2047]

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The Commission has said that:

> if these were simply *inter partes* proceedings we would dismiss the RCI claim. But the claim has been made in the context of the Review and s.156 imposes an obligation on the Commission to review each modern award.[7]

We disagree that there is anything in the requirement to review each modern award that means the RCI must be given a second bite of the cherry.

In 2013 the Gillard government amended the modern awards objective to ensure that the Commission, in varying modern awards, must take into account the need to provide additional remuneration for employees working outside normal hours, such as employees working overtime or on weekends.[8] At the time, the then Minister for Workplace Relations said

> Our bill makes it clear that this Labor government believes in the value and utility of penalty rates…[9]

It was never contemplated that the legislation would allow variations of modern awards to result in a reduction of the safety net. While we respect the independence of the Commission, any variation of a modern award which results in the reduction of take-home pay is unacceptable, and inconsistent with the intention of the Parliament.

We urge you to make no cuts to the penalty rates of Restaurant and Café workers.

Yours sincerely

Bill Shorten
Leader of the Opposition
Shadow Minister for Indigenous Affairs and
Aboriginal and Torres Strait Islanders

Brendan O'Connor
Shadow Minister for Employment and
Workplace Relations

24 March 2017

[7] FWC Decision at [1156]
[8] Bill Shorten (Minister for Employment and Workplace Relations), Fair Work Amendment Bill 2013, Second Reading Speech, 21 March 2013
[9] Bill Shorten (Minister for Employment and Workplace Relations), Fair Work Amendment Bill 2013, Summing Up Speech, 6 June 2013