

# Ai GROUP SUBMISSION

## **Inquiry into Penalty Rates and Fair Pay**

Victorian Legislative Assembly Committee-  
Penalty Rates and Fair Pay Select  
Committee

**May 2017**

## **About Australian Industry Group**

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

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## 1. Introduction

The Australian Industry Group (**Ai Group**) refers to the appointment of the Penalty Rates and Fair Pay Select Committee (**Committee**) by the Victorian Legislative Assembly and its inquiry into Penalty Rates and Fair Pay (**Inquiry**).

The Committee was appointed to inquire and report on the economic and social impact and cost of a Fair Work Commission Full Bench decision, the *Penalty Rates Decision* [2017] FWCFB 1001 (**Penalty Rates Decision**), on Victorian workers covered by six modern awards in the hospitality, retail and fast food industries.

Ai Group represented fast food industry employers in the case seeking variations to the Sunday penalty rate for employees under the *Fast Food Industry Award 2010*. Our case was well researched, detailed and ultimately persuaded the Fair Work Commission of its merits.

The Penalty Rates Decision is a robust decision, determined by a five-member Full Bench of the Fair Work Commission, presided over by the President of the Commission, His Honour Justice Iain Ross. The Penalty Rates Decision was reached after more than two years of proceedings, 39 hearing days, 143 witnesses and 5,900 submissions. The decision itself comprised of more than 500 pages of reasoning.

Some have expressed opposition to the Penalty Rates Decision, but this opposition is often ideological, unjustified, and short on facts.

This submission addresses a number of key facts about the Penalty Rates Decision.

## 2. A modest reduction in the Sunday penalty rate – not abolition

The Penalty Rates Decision has simply reduced the Sunday penalty rate in some awards to reflect our 24/7 services economy. Sunday penalty rates are not being abolished.

Under the *Fast Food Industry Award 2010*, the Sunday weekend penalty rates for level 1 fast food workers will be aligned with the Saturday penalty rate of 125 per cent for permanent employees and 150 per cent for casuals. This is a relatively modest reduction from 150 per cent and 175 per cent respectively. Even higher penalties will apply to fast food employees classified at levels 2 and 3. The public holiday penalty rate will be adjusted to 225 per cent for permanent employees and 250 per cent for casuals — a similar modest reduction.

Furthermore, the Sunday penalty rates will be phased in over at least two annual increments and possibly more, beginning on July 1 this year. The incremental adjustment in Sunday penalty rates will occur on the same day that employees will receive a minimum-wage increase through the Fair Work Commission's Annual Wage Review.

### 3. Emergency and essential services workers will not be subject to a reduction in penalty rates

The Penalty Rates Decision concerns only award covered employees working in the fast food (level 1 employees only), retail and hospitality industries to reflect the nature of the 24/7 services economy.

The Fair Work Commission carefully considered some unique features of these industries and made it very clear that such features do not exist for emergency and essential services workers, like nurses or firefighters. For example, the Penalty Rates Decision carefully distinguishes the *Hospitality and Retail sectors* from other sectors and notes the findings of the Productivity Commission’s Review into Australia’s Workplace Relations Framework:

*“[81] Given the distinguishing characteristics of the Hospitality and Retail sectors, the decisions we have made in respect of the Hospitality and Retail Awards provide no warrant for the variation of penalty rates in other modern awards. Each case must be determined on its merits. We note the views expressed in the PC Final Report in this regard:*

*‘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.’*

(Emphasis added, references omitted)

We also provide the following extract from the Penalty Rates Decision citing the Productivity Commission’s views regarding the distinguishing features of the *Hospitality and Retail sectors*:

*[319] It is important to appreciate that the Productivity Commission’s recommendations in respect of the reduction of Sunday penalty rates are confined to the HERRC industries. In particular the PC Final Report states:*

*‘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.’*

[320] *The arguments advanced in the PC Final Report in support of the reduction of Sunday penalty rates in the HERRC industries fall into three broad categories:*

- *the asocial impacts of Sunday work are similar to working on Saturdays;*
- *consumer benefits; and*
- *employment effects.”*

(Emphasis added, references omitted)

Given the extent to which the Fair Work Commission and the Productivity Commission (both independent bodies) have differentiated the ‘hospitality and retail awards’ and the hospitality, retail and fast food industries from other awards/industries, any ‘flow on’ beyond these awards/industries based on the evidence and findings in the Penalty Rates Decision is highly unlikely.

Ai Group is representing the Hair & Beauty Australia Industry Australia in the Fair Work Commission’s review of the Sunday penalty rate in the *Hair and Beauty Industry Award 2010*. The *Hair and Beauty Industry Award 2010* is grouped as a *retail award* by the Fair Work Commission and the Productivity Commission considers it to be part of the **HERRC** (hospitality, entertainment, retail, restaurants and cafes) industries. This review is yet to commence.

## **4. Work preferences of fast food industry employees**

The characteristics of the workforce in the fast food industry are very different to those of workers in other industries. This was borne out by the evidence presented to the Fair Work Commission and cited in the Penalty Rates Decision.

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

The Fair Work Commission accepted the evidence that a large proportion of fast food workers prefer to work at nights and on weekends rather than during regular business hours, and that many prefer to work on Sundays rather than Saturdays. This preference is driven by personal factors such as availability rather than by penalty rates.

The preference to work on Sundays as opposed to other days of the week points to the fact that working Sundays, for many employees, does not present a significant disutility for the employee that would warrant a different penalty rate than the rate for working Saturdays.

In the course of considering the ‘disutility of working on Sundays’, the Fair Work Commission also considered the historical purpose of penalty rates in deterring employers from scheduling work on certain days, like Sundays:

*[39] Having regard to more recent authority, the terms of the modern awards objective, and the scheme of the FW Act, we have concluded that deterrence is no longer a relevant consideration in the setting of weekend and public holiday penalty rates. We accept that the imposition of a penalty rate may have the effect of deterring employers from scheduling work at specified times or on certain days, but that is a consequence of the imposition of an additional payment for working at such times or on such days, it is not the objective of those additional payments. Compensating employees for the disutility associated with working on weekends and public holidays is a primary consideration in the setting of weekend and public holiday penalty rates.*

The Fair Work Commission held that ‘deterrence’ was no longer an appropriate consideration for setting weekend penalty rates. This finding is important as it acknowledges that businesses now operate in a 24/7 economy, particularly those in industries that have peak hours outside of ordinary working times, such as the fast food industry. The peak business times in the fast food industry are very different to those in most other industries. Weekends and evenings are peak times. Regular business hours have little relevance to the industry.

## **5. Sunday penalty rates significantly increased after the commencement of modern awards**

Up to the time when modern awards were introduced in 2010, many of the awards that applied in the fast food industry did not contain any weekend penalty rates. During the making of modern awards, Ai Group was very vocal in arguing, on behalf of the fast food industry, that the large penalty rate costs that were imposed on fast food businesses (because of the award modernisation process) were not fair. Some businesses went from not being required to provide a Sunday penalty to being required to provide a Sunday penalty rate of 150 per cent (for full-time and part-time employees) or 175 per cent (for casual employees).

## **6. The prevalence of enterprise agreements**

A large proportion of fast food workers are covered by enterprise agreements and therefore the Penalty Rates Decision does not immediately apply to these employees.

## **7. The Penalty Rates Decision is supported by the findings of the Productivity Commission**

It is important to recognise that the Penalty Rates Decision followed the Productivity Commission's Inquiry in Australia's Workplace Relations Framework. The Inquiry carefully considered the issue of weekend penalty rates in the HERRC industries and concluded that the Sunday penalty rate in these industries was unjustified and should be aligned to reflect the Saturday penalty rate; the same conclusion reached by the Fair Work Commission in the Penalty Rates Decision.

## **8. The Fair Work Commission is independent of parliament**

For more than 100 years, the Fair Work Commission and its predecessors have been responsible for setting and adjusting penalty rates in awards, independent of government.

The arguments in support of Parliament having a greater role in setting penalty rates do not stand the most cursory of scrutiny. There are many workplace relations laws that need to be reformed by Parliament to create a more productive, flexible and fair workplace relations system, but giving politicians a greater role in setting penalty rates has no merit.

Politicians, not surprisingly, are influenced by political factors. Too often decisions of political parties are not evidence-based but rather driven by what is purported to be popular at the time. It is without contention that the Fair Work Commission made the Penalty Rates Decision based on an overwhelming amount of evidence, and there were some employer claims which were not granted, because the claims were not made out.

Importantly, a significant amount of evidence before the Fair Work Commission concerned the economic factors surrounding a 25 per cent reduction in the Sunday penalty rate for the workers in the relevant industries. Based on this evidence, the Fair Work Commission found that the current penalty rates regime in these industries was neither fair, nor relevant for employers, nor did it meet Australia's future economic needs.

Notably, the Fair Work Commission identified the likelihood that the Penalty Rates Decision would open-up capacity in workplaces to offer more hours to existing staff, and to employ more staff.

## **9. Conclusion**

Ai Group urges the Committee to conclude that:

- The Fair Work Commission's Penalty Rates Decision will have significant beneficial effects on Victorian businesses, employees and the economy; and
- It is not appropriate that the Decision be disturbed by the Parliament.



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