ACTU Submission to the Senate Inquiry into the *Fair Work Amendment (Small Business – Penalty Rates Exemption) Bill 2012*

27 September 2012

ACTU
Level 6, 365 Queen Street
Melbourne VIC 3000
www.actu.org.au

D No. 60/2012

Contents

About the ACTU **1**

The Working Australia Papers 1

Summary **2**

Introduction **3**

The Bill undermines Fair Work Australia and the *Fair Work Act* **4**

Workers who will be effected by the Bill **6**

The scope of the Bill and modern awards affected 6
Award reliant employees in the Australian workforce 7
Award reliant employees in small business 9

The ongoing importance of penalty rates **12**

Weekend penalty rates 12
Evening work 17

The retail, restaurant and catering industries in the Australian economy **19**

Restaurant and Catering Australia's "Benchmarking Report" 19
There is no evidence that penalty rates are impairing small business 20
'Wages share' in the retail, accommodation and food services industries 21
Growth in the Retail and food services industries 23

The practical effect of the Bill on workers **26**

Public Holidays and other uncertainties **29**

Penalty Payments on Public Holidays 29
Uncertainty relating to coverage 29
Uncertainty relating to wages and rostering arrangements 30

Conclusion **31**

Annexure 1: The traditional and evolving rationale for penalty rates **32**

Weekend Penalty Rates 34
The "24/7 economy" and ordinary hours on Sundays 36

Annexure 2: Estimated reductions in minimum wages under the Bill **41**

The *General Retail Industry Award 2010* 41
The *Restaurant Industry Award 2010* 43
The *Hospitality Industry (General) Award 2010* 44
The *Fast Food Industry Award 2010* 46

About the ACTU

The Australian Council of Trade Unions (ACTU) is the nation's peak body for organised labour, representing Australian workers and their families. Nearly two million workers are members of the 46 unions affiliated to the ACTU.

The Working Australia Papers

The Working Australia Papers are an initiative of the ACTU to give working people a stronger voice in the development of social and economic policy. Previous Working Australia Papers have addressed a broad range of issues, from taxation policy to productivity.

Summary

- The *Fair Work Amendment (Small Business – Penalty Rates Exemption) Bill 2012* (“the Bill”) must be wholly rejected. It is a direct assault on the take home pay of hundreds of thousands of Australia’s lowest paid workers, and its enactment would result in an immediate and significant drop in their living standards;

- The Bill would allow parliament to remove existing safety net wages and entitlements which have been determined by the independent industrial tribunal, Fair Work Australia (“FWA”) following the presentation of merits-based cases by representatives of workers and employers and consideration of all relevant facts and circumstances. The approach of the Bill undermines FWA and is at fundamental odds with the framework for the determination of minimum wages and conditions established by the *Fair Work Act 2009*;

- The fundamental premise of the Bill is ill-conceived and unsupported by evidence. It is trite to suggest that the Bill will do anything other than increase the profit margins of small businesses at the expense of low-paid, working Australians;

- The ACTU estimates that the Bill will significantly reduce the take-home wages of over 500,000 workers in small businesses in the retail and accommodation and food services industries. Almost half of these workers are paid at minimum award rates and rely on penalty rates to make ends meet;

- The Bill targets employees of small businesses (which employ less than 20 full-time equivalent workers). Small businesses disproportionately employ low-paid, award-reliant workers;

- Penalty rates are designed to compensate workers for the effects that working unsocial hours have on health, family and social life. The Bill ignores these reasons – and a large body of legal and social research - which have for decades have underpinned the payment of penalty rates; and

- In additional to evening and weekend penalties, the Bill as it is currently drafted would also have the consequence of removing the entitlement to public holiday penalties for award-reliant workers under affected awards including under the *General Retail Industry Award* and the *Restaurant Industry Award*.

Introduction

The *Fair Work Amendment (Small Business – Penalty Rates Exemption) Bill 2012* ("the Bill") is a direct assault on the take home pay of hundreds of thousands of Australia's lowest paid workers, and its enactment would result in an immediate and significant drop in their living standards.

The Bill seeks to exempt businesses in the retail, restaurant and catering industries which employ less than 20 full-time equivalent employees from the requirement to pay penalty rates to employees who work either less than 10 hours in a 24 hour period, or less than 38 hours in a week.

If passed, the Bill would remove existing wages and entitlements that have been determined by an independent tribunal established by the Parliament for the purpose of determining such matters. The tribunal has set (and is required to periodically review) the wages and entitlements attacked by the Bill, following the presentation of merits-based cases by representatives of workers and employers and consideration of all relevant facts and circumstances. There is no basis for Parliament to override this process for a section of the economy.

The ACTU and its affiliated unions urge the Committee to recommend that the Senate reject the Bill in its entirety on several grounds, including that:

- it is deeply unfair to employees affected, who would see their independently determined minimum conditions removed by the Parliament;
- it is ill-conceived as a matter of public policy given the overall framework of workplace relations law;
- no economic case can or has been made for the proposals;
- there is no sound evidence that the wages and conditions attacked by the Bill are an impediment to the opening or operation of businesses, or (to the extent that some business do not operate on some days or during some hours) that the Bill would change the operating hours of businesses; and
- the scope and effect of the Bill are uncertain.

We would welcome the opportunity to discuss these matters with the Committee at a public hearing.

Tim Lyons Assistant Secretary

The Bill undermines Fair Work Australia and the *Fair Work Act*

The Bill invites parliament to overturn the determinations of the independent industrial tribunal, Fair Work Australia ("FWA"), which set the modern award safety net. In doing so, the Bill undermines the role and independence of the Tribunal and is at fundamental odds with the framework for the determination of minimum wages and conditions established by the *Fair Work Act 2009* ("FW Act").

The powers and functions vested in FWA by the FW Act requires the Tribunal, when it is considering any application to vary a modern award, to undertake an independent assessment of whether the proposed variation is necessary to meet the modern awards objective. The modern awards objective, which is set out in s134 of the FW Act, ensures that modern awards – taken together with the National Employment Standards in the Act – provide a fair and relevant minimum safety net of terms and conditions. Specifically, the modern awards objective requires the Tribunal to consider:

(a) relative living standards and the needs of the low paid; and
(b) the need to encourage collective bargaining; and
(c) the need to promote social inclusion through increased workforce participation; and
(d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
(e) the principle of equal remuneration for work of equal or comparable value; and
(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment and the regulatory burden; and
(g) the need to ensure a simple, east to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and
(h) the likely impact of any exercise of modern award powers on employment growth , inflation and the sustainability, performance and competitiveness of the national economy.

Generally speaking, in performing its functions or exercising powers, the Tribunal is also compelled to take into account equity, good conscience and the merits of a matter, the need to respect the value and diversity of the work force, and the object of the FW Act[1].

By bypassing the powers and responsibilities vested in Fair Work Australia, the Bill undermines the Tribunal; it removes the requirement that any proposed reduction in the safety net be scrutinised by reference to the

---

[1] s578; the object of the Act is set out in s3

balanced set of considerations contained in the modern awards objective; and it is at fundamental odds with the legislative scheme of the FW Act. For these reasons alone, the Bill must be rejected.

Moreover, FWA is currently undertaking a 2-year review of modern awards which is being conducted pursuant to Part 2 of Schedule 5 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*. As part of the current 2-yearly review, FWA has convened a Full Bench to consider 24 separate applications which seek to make variations to penalty rate provisions in 7 modern awards, including awards which would be covered by the Bill. Of those 24 applications, a number seek to remove or reduce penalty rates under various modern awards. Those applications will be heard, consistent with the aims and objects of the FW Act and the modern awards objective. In addition to the 2-yearly review, the *Fair Work Act* 2009 ("FW Act") also requires that modern awards be reviewed every 4 years[2].

Consistent with the scheme of the FW Act, these reviews are the only appropriate forum for considering any reduction in the safety net.

[2] s156

Workers who will be effected by the Bill

Before examining how the Bill will affect working Australians, it is useful to consider the full scope of employees who will be effected by the Bill, and the circumstances of those workers.

The scope of the Bill and modern awards affected

The Bill seeks to preclude modern awards from awarding penalty rates to employees of exempted small businesses, except where employees work either more than 38 hours per week or more than 10 hours during a 24 hour period, in the restaurant and catering industry or the retail industry[3].

It is difficult to estimate the total number of workers who will be affected by the Bill because it is unclear on the face of the Bill how many modern awards would be affected. However it is undoubtedly in the hundreds of thousands.

We assume that the majority of workers intended to be captured by the Bill in the retail industry would be engaged pursuant to the *General Retail Industry Award 2010.* However, it is easily foreseeable that employers will seek to argue that the exemption applies to employees engaged under any number of modern awards which relate to industries which have a retail component including, for example, the *Hair and Beauty Industry Award 2010* and the *Pharmacy Industry Award*.

Similarly, we assume that the majority of workers intended to be captured by the Bill in the restaurant and catering industry would be engaged pursuant to the *Restaurant Industry Award 2010*. However the work of a catering worker or catering assistant could fall within the coverage of the *Restaurant Industry Award*, the *Registered and Licenced Clubs Award 2010*, the *Hospitality Industry (General) Award 2010* or the *Supported Employment Services Award 2010*. It is also unclear whether the Bill is intended to affect workers engaged under the *Fast Food Industry Award 2010*.

To add confusion, the explanatory memorandum to the Bill refers to an intention aimed at "small businesses in the *hospitality* and retail sector"[4]. The modern award system distinguishes between the general hospitality industry and the restaurant industry, and it is subsequently unclear whether the intent of the Bill is to effect workers engaged under various classifications in the *Hospitality Industry (General) Award 2010*.

---

[3] s155A(a)
[4] At 2

Because of these uncertainties, and for the purposes of this submission, we assume that the Bill is intended to cover employees who are engaged in what the Australian Bureau of Statistics ("ABS") describes as the retail trade and the accommodation and food services. Although the Bill does not clearly relate to small accommodation businesses, the large majority of the "accommodation and food services" category covers food services rather than accommodation workers: of the 645,100 employees engaged in the category only 119,900 – or 18.6% - are engaged in accommodation services[5].

The primary source of the data cited in this section of this submission is the Australian Bureau of Statistics' (ABS) *Employee Earnings and Hours* survey ("the EEH survey") [6]. This survey is conducted every two years, with the most recent survey being undertaken in May 2010 and released in January 20117. 'Award-reliant', for the purposes of the EEH survey, means an employee for whom the award sets the main part of their pay. It does not include employees who are paid above the award, whether as part of a collective agreement or an unregistered individual arrangement. 'Award-reliant' and 'award-only' are used interchangeably in this submission.

Award reliant employees in the Australian workforce

The Bill targets some of the lowest-paid, award-reliant workers in Australia. Indeed, the retail and accommodation and food services industries represent the two largest groups of award-reliant employees in the Australian workforce.

The accommodation and food services industry:

- employs 291,200 award-reliant workers, which represents 45.2% of the employees in the industry; and
- accounts for 21.4% of all Australian employees who rely on minimum award rates, which is the largest proportion of all award-reliant employees of any Australian industry.

The retail trade industry:

---

[5] Source: ABS 6306.0

[6] ABS *Survey of Employee Earnings and Hours,* Catalogue number 6306.0, May 2010

[7] The EEH survey is a sample survey of employers in all industries other than agriculture, forestry and fishing. It includes both private and public sector employers. Private households that employ staff, and foreign embassies and consulates are not within the scope of the survey. It is a large survey, with a sample of approximately 9 000 employers, who collectively employ approximately 60 000 employees. '

- employs 204,900 award-reliant workers, which represents 22.3% of the employees in the industry; and
- accounts for 15.1% of all Australian employees who rely on minimum award rates, which is the second largest proportion of award-reliant workers across all industries.

The table below sets out the number of award-reliant employees across Australian industries, the proportion of employees in each industry who are award reliant, and the proportion which each industry represents of the total number of award-reliant Australian workers:

Table 1: Award-reliant employees by industry

Industry		Award-reliant employees in industry (thousands)	Total number of employees in industry (thousands)	Proportion of employees in industry that are award-only (per cent)	Proportion of all award-only employees (per cent)
Accommodation and food services		**291.6**	**645.1**	**45.2%**	**21.4%**
Administrative and support services		161.0	513.2	31.4%	11.8%
Other services		88.2	324.6	27.2%	6.5%
Rental, hiring and real estate services		40.3	176.8	22.8%	3.0%
Retail trade		**204.9**	**918.2**	**22.3%**	**15.1%**
Health care and social assistance		193.6	1132	17.1%	14.2%
Arts and recreation services		24.1	159.4	15.1%	1.8%
Manufacturing		120.8	828	14.6%	8.9%
Wholesale trade		45.9	419.4	10.9%	3.4%
Construction		53.2	532.9	10.0%	3.9%
Transport, postal and warehousing		32.9	410	8.0%	2.4%
Information media and telecommunications		9.2	160.1	5.7%	0.7%
Education and training		43.1	844.2	5.1%	3.2%
Professional, scientific and technical services		26.2	626	4.2%	1.9%
Electricity, gas, water and waste services	*	3.0	97.5	3.1%	0.2%
Financial and insurance services	*	7.9	385.3	2.1%	0.6%
Public administration and safety	*	12.8	658	1.9%	0.9%
Mining	**	2.6	137.2	1.9%	0.2%

Source: ABS 6306.0. * denotes an industry for which the ABS data is somewhat unreliable, as the relative standard error exceeds 25%.
** denotes an industry for which the data are not reliable, as the relative standard error exceeds 50%.

These statistics must be seen in light of the fact that the most common methods of setting pay for employees across all industries are collective agreements (43.4%) and individual arrangements (37.3%). Only 15.2%of the general working population have their wages regulated by the minimum award standard[8].

It follows that workers in the retail and accommodation and food services industries are more likely than most workers to be award-reliant.

Award reliant employees in small business

Award-reliant workers are disproportionately employed by small employers, with almost half working for businesses with less than 20 employees.

Before revealing the relevant ABS data it is important to note that the ABS data which relates to business size is based on the size of a business in terms of the number of employees within that business, and reflects the size of the business in a particular state or territory (and not necessarily the size of the business Australia-wide)[9]. It follows that this data is likely to *underestimate* the number of workers affected by the Bill because the Bill calculates the number of employees using full-time and full-time equivalent employees[10].

There are approximately 2,435,500 employees in Australia working for businesses with under 20 employees. Of that overall number, just over 25% (619,800) are award-reliant[11]. This represents 45.5% - almost half - of all award-reliant workers.

Table 2: Award-reliant employees by employer size

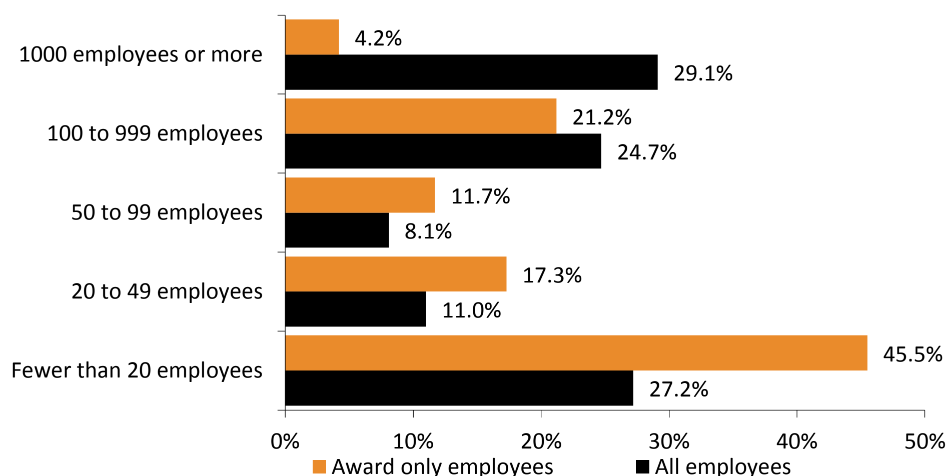
	Number of Employees	
	Award-reliant employees in industry	**Total number of employees (all methods of pay setting[12])**
Under 20 employees	619,800	2,435,500
20 to 49 employees	235,800	985,800
50 to 99 employees	159,400	722,700
100 to 999 employees	289,200	2,215,100
1000 and over employees	57,000	2,608,600
TOTAL	**1,361,200**	**8,967,700**

Source: ABS 6306.0.

[8] ABS *Survey of Employee Earnings and Hours,* Catalogue number 6306.0, May 2010 at 5.
[9] As defined in the ABS glossary associated with ABS 6306.0
[10] s155A(3)
[11] See Table
[12] Includes employees whose wages are set by the award only, by registered and unregistered collective agreements, by registered and unregistered individual arrangements and owners / managers of incorporated enterprises

The graphic below shows the proportion of award-reliant workers employed by reference to the size of their employer. The proportion of all employees who are employed in each cohort is also shown, for the purposes of comparison.

Figure 1: Employees by employer size



Source: ABS 6306.0

Approximately 502,200 - or about 20.62% of those working for businesses with less than 20 employees - are in the retail, accommodation and food services industries. 41.85% of employees in small retail businesses, and 56.28% of employees in small accommodation and food services businesses, rely on minimum award rates.

Table 3: Number of employee in small businesses (less than 20 employees) whose wages are set by award, and by all methods of setting pay

Industry	Number of Employees		
	Award only	All methods of setting pay[13]	Proportion of award-reliant employees in industry (per cent)
Retail	113,500	271,200	41.85%
Accommodation and food services	130,000	231,000	56.28%
TOTAL	**243,500**	**502,200**	

Source: ABS 6306.0

[13] All methods of wage setting include award-only, collective agreements (both registered and unregistered), individual agreements (both registered and unregistered) and owner / managers of incorporated enterprises

Overall, the data demonstrates that employees in small retail and accommodation and food service businesses are disproportionately award-reliant. Under the Bill these workers – some of the lowest paid workers in Australia – will have their take-home pay cut.

The ongoing importance of penalty rates

Having identified that the Bill will affect the wages of hundreds of thousands of low-paid employees, it is useful to consider the reason why penalty rates are part of the modern award safety net.

Annexure 1 to this submission sets out in some detail the historical development of the rationale which underpins penalty rates. A review of early industrial cases shows that historically the rationale for penalty payments applicable to work performed outside normal spans of hours in evenings and at night, on weekends and on public holidays has been twofold: to provide compensation for the inconvenience of working non-standard hours outside 'normal' hours of work, and as a deterrent against employers rostering long, abnormal or anti-social hours.

More recently industrial law has developed the concept of "unsociable" hours of work, or "unsocial" hours of work, which refers to hours of the day or week when most people in the community do not work. The International Labour Organisation (ILO) describes unsocial hours as 'night work, weekend work and long shifts during peak periods'[14]. The underlying idea behind these terms is that there are some times of the week or the day where the majority of Australians spend time with their family friends and engage with their community[15]. Penalty rates compensate workers for the social disability associated with working during these times, and for the difficulty associated with night, evening and weekend work which makes it more difficult for workers to maintain social activities, family rituals and routines that are important to workers' health and wellbeing.

By arbitrarily removing penalties payable to employees of certain small businesses the Bill fails to recognise the significant body of evidence which supports the ongoing importance of weekends in the Australian community, the difficulties associated with working during evenings and late at night, and the concepts of unsociable or unsocial work.

Weekend penalty rates

Under the awards which are likely to be affected by the Bill, penalties are payable for work performed on weekends as follows:

- The General Retail Industry Award provides for:

[14] International Labour Organisation (ILO) (1998) *Impact of Flexible Labour Market Arrangements in the Machinery, Electrical and Electronic Industries*. Report for discussion at the Tripartite Meeting on the Impact of Flexible Labour Market Arrangements in the Machinery, Electrical and Electronic Industries. International Labour Office, Geneva
[15] Bittman, M (2005) 'Sunday Working and Family Time' 59 *Labour & Industry* 16(1) at 59

- a 25% penalty for ordinary hours performed by a permanent worker on a Saturday[16]. Casual work on a Saturday attracts a 10% penalty for work performed on a Saturday between 7am and 6pm), in addition to the usual casual loading[17]; and
- a 100% loading for work performed on Sundays[18].

- The Restaurant Industry Award provides for:

    - a 25% penalty for Saturday work (for permanent employees, and in addition to the usual casual loading for casual employees)[19]; and
    - a 50% penalty for Sunday work (for permanent employees, and in addition to the usual casual loading for casual employees)[20].

- The Hospitality Industry (General) Award provides for:
    - a 25% penalty for Saturday work (for permanent employees, and in addition to the usual casual loading)[21]; and
    - a 75% penalty for Sunday work (for permanent employees and inclusive of the usual casual loading)[22].

- The *Fast Food Industry Award* provides for:
    - a 25% penalty for ordinary hours performed on Saturdays[23]; and
    - a 50% penalty for Sunday work[24].

Under the Bill, these penalties would be removed for employees of small businesses who work less than 38 hours in a week, or less than 10 hours in any day (in addition to penalties payable for evening and late night work and for public holidays).

These penalties are part of the current safety net because social and family activities remain centred on the weekends, in large part because of the lack of available time for socialising during the week for the majority of the population and due to the need for individuals to co-ordinate social and community activities with other

[16] cl29.4(b)
[17] cl13.2
[18] cl29.4(c)
[19] cl34.1
[20] Ibid
[21] cl32.1
[22] Ibid
[23] cl26.5(b)
[24] cl26.5(c)

people's availability. Indeed, research indicates that nearly four times as much time is allocated to socialising on weekends than during the week[25].

Australian Bureau of Statistics ("ABS") Time Use data indicates that the weekend - and Sundays in particular - remain the most important days for social and community interaction for Australians of working age. In 2005 Bittman examined data available from the ABS 1997 *Time Use Survey* (which collected information about the daily activities of adults in randomly selected private dwellings) and the ABS' 1997 *Working Arrangements Australia Survey* (which covered the arrangements of employees). Bittman's comparison on the time-use data available for workers who work on Sundays with other employed, working-age Australians who did not work on Sundays indicates that, for Sunday workers, there is a significant fall in participation in community activities (including volunteering), a large drop in socialising, a big fall in recreational activities, less opportunity to catch-up on domestic work, less sleep-in time and less personal care time[26]. Overall, Bittman concludes that Sunday is the most critical day for families to spend time together, and that both Saturday and Sunday are days of importance social contact with friends, colleagues and neighbours[27].

Moreover, Bittman concludes that - as compared to those who work on weekdays - not only do "Sunday workers miss out on key types of social participation and have less opportunity to balance the demands of work and family", but they "are unable to compensate for the foregone activities by doing them during the week" [28].

Notably, Dr Bittman's research has been accepted as persuasive by both the Australian Industrial Relations Commission ("AIRC") and the South Australian Industrial Commission ("SAIRC") in proceedings where those two bodies were asked to hear applications seeking to vary pre-modern awards in a way which would affect penalties payable under the *Shop, Distributive and Allied Employees Association – Victoria Shops Interim Award 2000* and the *Retail Industry (South Australia) Award* respectively[29]. Those matters, determined in 2003 and 2004, were determined in the context of expanded spreads of hours, late night hours and weekend work, and they related to the same industries that would be affected by the Bill.

In hearing those applications, the AIRC and SAIRC also accepted evidence that shared activities and the active involvement in the lives of other family members are essential to sustaining effective family relationships, that

---

[25] Bittman, M (2005) 'Sunday Working and Family Time' 59 *Labour & Industry* 16(1) at 68
[26] Ibid at 68-69
[27] Ibid at 71
[28] Ibid at 76, 78
[29] In *Shop, Distributive and Allied Employees Association v $2 and Under* (2003) 127 IR 408 and in [2004] SAIRComm 54 respectively

weekends are important in terms of providing time and opportunity for family and community participation, and that most employees prefer not to work on Sundays[30].

When hearing the application to vary the *Retail Industry (South Australia) Award*, the SAIRC also specifically noted certain modern social changes (as opposed to social circumstances in earlier industrial case law) which present challenges for Sunday workers in terms of trying to balance work and family. These include the increased number of women in the workforce (particularly with dependent care responsibilities), the increased number of families in which both partners are in the paid workforce and share parental responsibilities, the increased number of men who want to be active participants in family life and childcare, and the increased number of workers with dependent care responsibilities (e.g. for the care of elderly parents) and whose engagement in family life is dependent on availability at critical times (e.g. parents with weekend access to children).

Social research also continues to indicate that working unsociable hours may detrimentally affect family functioning. Presser, for example, has argued that working non-standard hours, and in particular working night shifts, leads to lower marital satisfaction, a higher likelihood of separation or divorce, and the necessity of overly complex arrangements for childcare[31].

The most recently available data from the ABS on working time arrangements was released in May 2010 based on data collected in the *Working Time Arrangements Survey* conducted throughout Australian in November 2009 as a supplement to the ABS monthly Labour Force Survey. The working time arrangement survey continues to indicate that workers (across all industries) overwhelmingly do not work on Sundays. Of the 8.7 million employees who were single job-holders in November 2009, 15% usually worked on Saturdays and 9% usually worked on Sundays; 71% worked on weekdays only, while 28% worked on both weekdays and weekends. By comparison, there were 548,400 employees who were multiple job-holders in November 2009. Of those, 40% usually worked on Saturdays, 26% usually worked on Sundays, and 42% worked on weekdays only, while 57% worked on both weekdays and weekends[32]. It follows that people who hold more than one job are much more likely to work weekends. It also follows that the needs of workers in the retail, restaurant and catering industries must be seen in the context that the majority of Australians do not work weekends.

The importance of social and family interaction on the weekends should not be underestimated. Indeed, a very recent poll commissioned by one of Australia's largest unions – United Voice – found that even with the

---

[30] E.g. see the accepted evidence of Dr Graham Russell in *Shop, Distributive and Allied Employees Association v $2 and Under* (2003) 127 IR 408 and in [2004] SAIRComm 54

[31] Presser, H (2003) *Working in a 24/7 Economy: Challenges for American Families*, Russell Sage Foundation, New York

[32] By comparison, there were 548,400 employees who were multiple jobholders in November 2009. Of these, 40% usually worked on Saturdays and 26% usually worked on Sundays and 42% worked on weekdays only, while 57% worked on both weekdays and weekends.

deregulation of shopping hours and the expanded daily spread of working hours, there is virtually universal agreement – 97%– that weekends are important times for families. 87% of Australians agree that people who are required to work on weekends as part of their job should receive a higher rate of pay for weekend shifts, and 77% don't agree with the argument that working on the week end is no different to any other day of the week[33].

It is for these reasons that the *Fair Work Act* allows modern awards to include terms which allow for penalty rates to be paid to "employees working unsocial, irregular or unpredictable hours"[34]. It is for these reasons that *all* workers – not just workers who are engaged by businesses which employ more than 20 people – should remain entitled to the benefit of penalty rates. And it is for these reasons that anecdotal evidence about workers being "happy to get more shifts and work an extra day in exchange [for the loss of penalty rates]" – such as was suggested by Senator Xenophon in his second reading speech to the Bill [35] - cannot and should not be persuasive in arguing for the abolition of penalty rates for workers employed by small businesses.

Indeed, Fair Work Australia continues to acknowledge the social disability associated with working outside normal spans of hours and on weekends, and the need to balance the modern award objectives. Most tellingly, during the award modernisation processes, the Restaurant and Catering Industry Association of Australia (R&CA) submitted that penalty payments should be minimal or non-existent during any periods when restaurants normally trade, and sought to reduce or remove penalty payments during those times and specifically on weekends. In response to these submissions, the Full Bench said:

> "The R&CA's approach is directed at substantially reducing or eliminating penalty payments provided for in existing instruments applying to the restaurant industry during times when restaurants are open. That approach ignores the inconvenience and disability associated with work at nights and on weekends – which are the basis for the prevailing provisions in pre-reform awards and NAPSAs. Nor does the R&CA approach take into account the significance of penalty payments in the take-home pay of employees in the restaurant industry. A modern restaurant award based on the penalty rates proposed by the R&CA would give the operational requirements of the restaurant and catering industry primacy over all of the other considerations which the Commission is required to take into

[33] Penalty Rates Study conducted by Galaxy Research, August 2012. The survey was conducted on the Galaxy Telephone Omnibus on the weekend of 3-5 August 2012 and included a sample of 1,042 Australians aged 18 years or older distributed across Australia and applying age, gender and region quotas. Following the completion of interviewing, the data was weighted by age, gender and region to reflect the latest ABS population estimates using the 2011 Census.

[34] s139(1)(e)

[35] An example used by Senator Xenophon in his Second Reading Speech: *Hansard* 16 August 2012 at 24

account, including the needs of the low paid and the weight of regulation. A more balanced approach is required."[36]

Evening work

Under the awards which are likely to be affected by the Bill, penalties are also payable for evening work performed on weekdays:

- the *General Retail Industry Award* awards a 25% penalty payment to permanent employees for ordinary hours worked after 6pm on weekdays (the penalty does not apply to casual workers)[37];

- the *Restaurant Industry Award 2010* provides for additional payment for work done between 10pm and 7am on Monday to Friday[38] (a 10% penalty applies between 10pm and midnight, and a 15% penalty applies between midnight and 7am) [39];

- the *Hospitality Industry (General) Award 2010* provides for penalties payable for work performed between 7pm and 7am (a 10% penalty applies between 7pm and midnight, and a 15% penalty applies between midnight and 7am) [40]; and

- the *Fast Food Industry Award 2010* provides for penalties for evening work performed after 9pm on weekdays (10% between 9pm and midnight and 15% after midnight)[41].

Under the Bill, these penalties would be removed for employees of small businesses who work less than 38 hours in a week, or less than 10 hours in any day (along with weekend penalties and some public holiday penalties)

Night, evening and weekend work make it especially difficult to maintain social activities, family rituals and routines that are important for health and wellbeing.[42] These strains affect the physical and mental health of individuals and their capacity to interact with other people, including their partners and children. There is a substantial body of research which links non-standard working patterns including evening work (as well as rotating shifts and weekend work) with adverse outcomes including sleep deprivation, anxiety, high blood

---

[36] [2009] AIRCFB 865 at [232]
[37] cl29.4(a)
[38] Clause 34.2
[39] Clause 34.2
[40] Clause 32.3
[41] Cl 26.5(a)
[42] Strazdins. L, Clements. M, Korda, R, Broom. D, D'Souza. M (2006) *Unsociable Work? Nonstandard Work Schedules, Family Relations and Children's Wellbeing*, 68 Journal of Marriage and Family, 394-410; Strazdins et al (2004) *Around-the-clock: parent work schedules and children's wellbeing in a 24 h economy, 59* Social Science & Medicine 1517-1527.

pressure, depression, increased alcohol consumption and other risk-taking behaviour, the deterioration of general health and the increased risk of accidents[43].

The relationship between hours of work and adverse outcomes can be complex. It is not the intent of this submission to extensively analyse the well-documented social and physiological effects of non-standard or evening work on employees. We do submit, however, that the penalty payments available under the awards provide modest compensation to workers who work in hours which increase risks to health.

Research also indicates that workers who have a higher degree of autonomy, particularly in relation to the length and scheduling of work hours, are more able to minimise the negative impacts of working hours and can more effectively manage their competing responsibilities.[44] Award-reliant workers in the retail, restaurant and catering industries are unlikely to exercise a high degree of autonomy over their scheduling and – under the Bill – will not be compensated for work performed very late or night or very early in the morning.

The effect of the Bill will be to create force employees of small business to work at times which are generally recognised to pose an increased risk to health, and – again - to sacrifice time with their friends, families and communities in times where the majority of the population are available for social contact, without compensation or recognition.

---

[43] Costa. G, (1996), *The impact of shift and night work on health,* 27(1) Applied Ergonomics, 6-9;

[44] Dorrian. J, Skinner. N, Pisanielo. S (2011) *Work Quality, not just Quantity: Work-Related Predictors of Psychological Distress, Work-Family Interaction and Alcohol Consumption,* Centre for Work + Life, Centre for Sleep Research, University of South Australia.

The retail, restaurant and catering industries in the Australian economy

Not only does the Bill ignore the reasons why penalty rates are imposed, it is also premised on an unsubstantiated claim that reducing the wages of workers will result in more staff being employed, more small businesses operating or expanded trading hours. There is no evidence that this is the case, and there is no economic basis for singling out small businesses in the retail, restaurant and catering industries.

Restaurant and Catering Australia's "Benchmarking Report"

In his second reading speech, Senator Xenophon seeks to set out an economic case for the removal of penalty rates in the retail, restaurant and catering industries. To this end, Senator Xenophon cites "[a] Benchmarking Report by the Restaurant and Catering Australia conducted late last year" as indicating that businesses have reduced their hours as a result of the payment of penalty rates, employed fewer staff because of high labour costs, and indicated an intention to reduce their number of staff if labour costs rose in the next 12 months[45]. Restaurant and Catering Australia is an employer association which represents the interests of employers and owners of restaurants, cafes and caterers.

We are unable to critically examine the "Benchmarking Report" because the report is not publicly available[46]. The ACTU understands that the report is based on an online survey conducted by Restaurant and Catering Australia ("R&CA"), although it is unclear what the sample size was for the survey, or what questions were asked.

The ACTU expresses general caution against reliance on survey data where the methodology of the survey is unable to be critically examined.

In the 2012 minimum wage decision[47], the Minimum Wage Panel of Fair Work Australia expressed this very concern relating to a number of surveys conducted by employer associations, including a survey conducted by the Australian Chamber of Commerce and Industry ("ACCI") - which was based on a group of 56 award-reliant enterprises - which sought to establish that a minimum wage increase would have negative employment effects for some employers in some industries. The Full Bench declined to place reliance on these surveys because the survey respondents were small in number, self-selected and / or not representative of employers generally. The Minimum Wage Panel found that the surveys could not be relied on for any conclusions about

[45] At 24, *Hansard*, Thursday 16 August 2012
[46] The report is available, for a total cost of $400 at http://www.restaurantcater.asn.au/index.php?tgtPage=products&id=product,2.
[47] [2012] FWAFB 5000

aggregate effects either from either an industry or an economy-wide perspective[48]. Notably, Restaurant and Catering Australia relied on the same "benchmarking report" in its submissions to those proceedings, and is likely to be included in the cohort of employer surveys which the Full Bench expressed concern about[49].

The same caution ought to be exercised in this inquiry.

There is no evidence that penalty rates are impairing small business

There is no credible evidence that penalty rates, or the current industrial relations framework, is impairing the performance of small Australian businesses in the retail and hospitality sectors.

Award reliance is higher among small retail businesses than larger retail businesses or non-retail businesses. Any negative effect of industrial arrangements would be expected to manifest itself as more sluggish employment growth in small retail businesses than in others. In fact, the opposite has occurred. Employment in small retail businesses has grown more rapidly in recent years than employment in larger retail businesses, and more rapidly than employment across businesses of all types. ABS data show that employment in small business in the retail trade industry rose by 7.7% between June 2009 and June 2011. Employment in large retail businesses fell over the same period by 1.1%. Total employment in the industries covered by the ABS survey rose by 7.4%.[50]

The fact that employment in small retail businesses has grown faster than large retail employment and employment generally does not support claims that small retail businesses are facing difficulty as a result of penalty rates and modern awards. The retail and hospitality industries have also seen profits remain around their typical level as a proportion of total income, slightly increased in the case of retail trade.

ABS data also shows that pre-tax operating profit in the retail trade industry represented a larger share of total industry income in 2010-11 than in any of the previous four financial years. In the food and beverage services industry sub-division, gross operating profits rose to 8.9% as a proportion of total income rose in 2009-10 (the first year of the *Fair Work Act's* operation), higher than in any other the previous years. These figures are shown below.

Table 5: Pre-tax operating profit as a proportion of total income

---

[48] Ibid at [203]

[49] The R&CA's submissions to the wage review, which refer to the benchmarking report, are able to be read on FWA's webpage relating to the 2012-13 Annual Wage Review: http://www.fwa.gov.au/index.cfm?pagename=wagereview2012&page=subInitial

[50] Calculations based on ABS, *Australian Industry 2010-11,* Cat. no. 8155, Table 2.

	Retail trade	Food and beverage services
2006–07	5.4%	7.7%
2007–08	4.9%	5.0%
2008–09	5.1%	7.5%
2009–10	5.3%	8.9%
2010–11	5.7%	7.0%

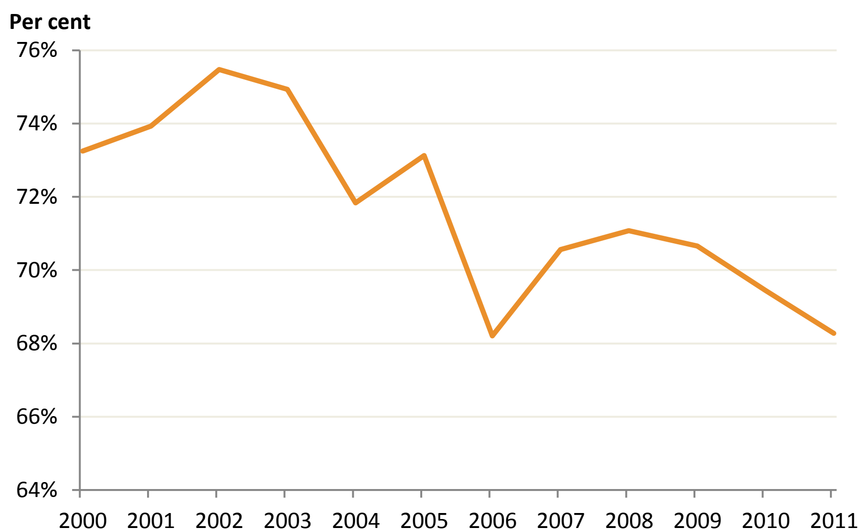
Source: ACTU calculations based on ABS, *Australian Industry 2010-11,* Cat. no. 8155, table 1.

'Wages share' in the retail, accommodation and food services industries

Verifiable ABS data is available, however, which shows the amount of income in each industry that goes to labour (the total compensation of employees) and the amount that goes to the owners of capital (gross operating surplus and gross mixed income).[51] Using the ABS National Accounts data, it is possible to calculate the 'wages share' of income for Australian industries, which is the total compensation of employees as a proportion of total factor income.

In the accommodation and food services industry, the wages share of income has actually fallen in recent years. The figure below shows wages share as a percentage of income:

Figure 2: Wages share of income in the Accommodation & Food Services industry



[51] Total compensation of employees can be thought of as the industry-wide wages bill; it includes wages and salaries, but also superannuation contributions and workers' compensation premiums. The income shares at the industry level add gross mixed income (GMI) to gross operating surplus; GMI is the total income earned by the proprietors of unincorporated businesses, and thus represents a return on their capital as well as a return on their labour..

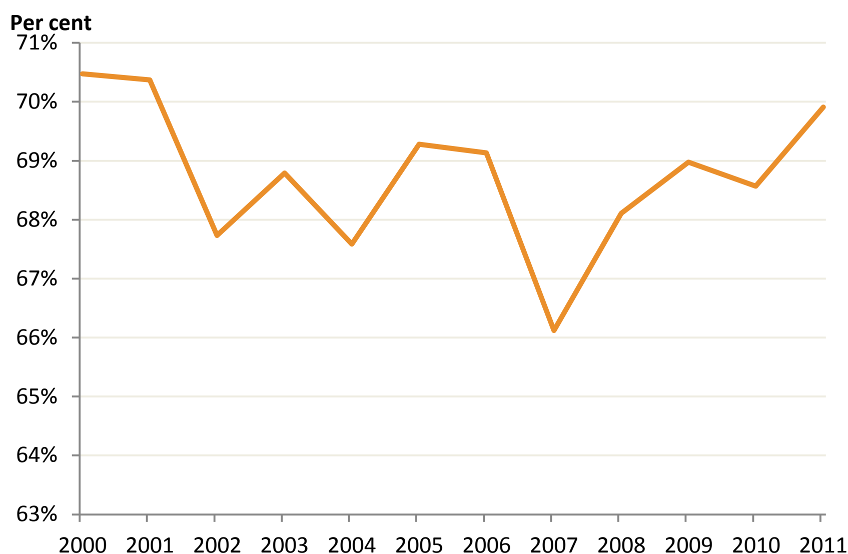
Source: ACTU calculations based on ABS, *Australian System of National Accounts,* Catalogue no. 5204, Table 46.

The data indicates that, in 2010-11, the wages share of income was 68.3%, down from 69.4% in 2009-10 and 70.7% the year before. Indeed, the wages share of income in 2010-11 was close to the lowest ever recorded in the ABS National Accounts (the wages share in this industry reached a peak of 78.6% in 1996-97, however the current share is over 10 percentage points lower than that peak level).

It is in this context that any employer claims relating to prohibitive wages costs must be seen: the total wages share of income in the accommodation and food services industry is actually *declining*.

In the retail trade industry, the wages share of income was 69.9% in the 2010-11 financial year, the latest year for which data are available. This was a slight increase on the previous year (68.6%), but it is below the levels recorded in 1999-2000 (70.5%) and 2000-01 (70.4%).

Figure 3: Wages share of income in the Retail Trade industry



Source: ACTU calculations based on ABS, *Australian System of National Accounts,* Catalogue no. 5204, Table 46.

Overall the data indicates that the wages share of income in the retail trade industry is no higher than it was 10 years ago. Again, it is in this context that any employer complaints relating to wages costs must be seen.

Growth in the Retail and food services industries

It is important that economic data relating to retail and food services is seen in its proper context. Commonly cited industry growth and turnover averages tend to understate the aggregate performance of industry sub-groups where small businesses are more likely to be found, such as cafes, restaurants and takeaway food services and food retailing.

Any analysis of the economic state of the retail and food services industries must also be seen in the context that sub-sectors of the industry which are more likely to contain small businesses (such as cafes and restaurants) have consistently outstripped turnover growth in other industry sub-sectors which are more likely to contain large employers (such as department stores).

The industry-level statistics on growth in retail sales mask considerable divergence between the sub-sectors of the industry. For example, over the five years to July 2012, turnover in department stores fell by 2.4%, while turnover in cafes, restaurants and takeaway food services rose by 32.6%. The levels of turnover in the retail

sub-groups are shown in the table below, along with the rate of growth in turnover for the year to July and over the five years to July:

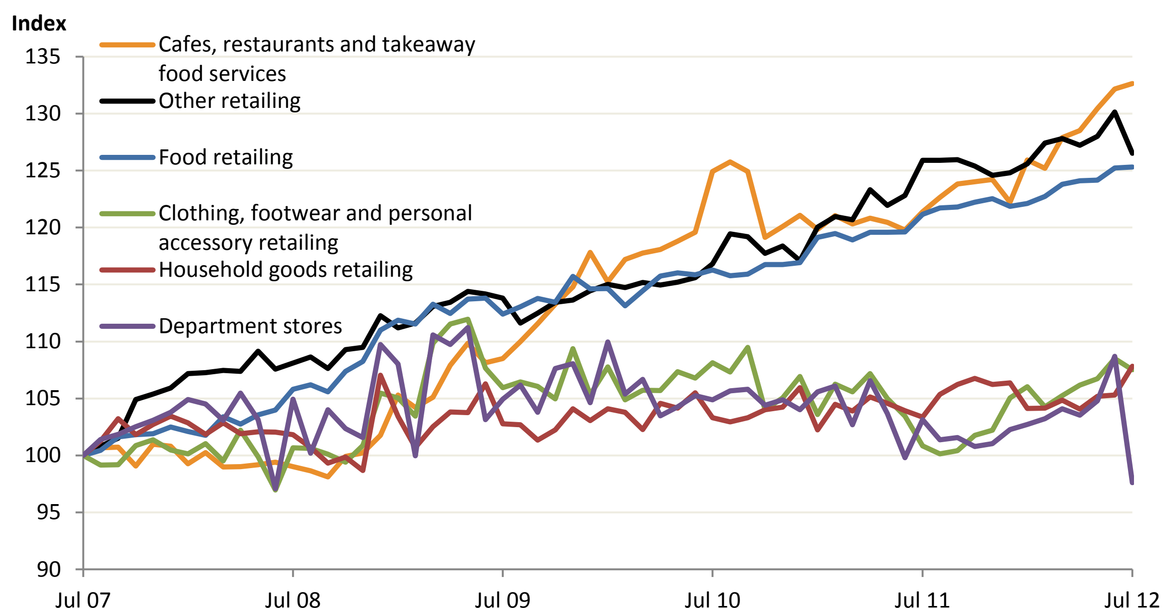
Table 4: Retail turnover by industry groups ($ millions, nominal)

	Food retailing	Household goods retailing	Clothing, footwear and personal accessory retailing	Department stores	Other retailing	Cafes, restaurants and takeaway food services	Total (Industry)
Jul 2007	6945.1	3432.5	1511.4	1470	2397.5	2202.3	17958.8
Jul 2011	8414.9	3548.4	1524.2	1516.2	3018.2	2673	20694.9
Jul 2012	8702.2	3701.3	1625	1434.9	3033.4	2920.9	21417.5
Change - 5 years	25.3%	7.8%	7.5%	-2.4%	26.5%	32.6%	19.3%
Change - year	3.4%	4.3%	6.6%	-5.4%	0.5%	9.3%	3.5%

Source: ABS, *Retail Trade,* July 2012, catalogue number 8501.

The divergence in rates of growth of turnover can also be seen in the graphic below. Over the past several years, turnover in cafes, restaurants and takeaway food services, food retailing and other retailing has consistently outstripped turnover growth in the other industry groups.

Figure 4: Retail turnover by industry groups (Index; July 2007=100)



Source: Calculations based on ABS, *Retail Trade,* July 2012, catalogue number 8501.

Some of the industry sectors that have recorded faster than average turnover growth have a higher density of small businesses. The industry sector that has fared the worst in terms of turnover in recent years, the department stores sector, has a greater density of large businesses. The industry averages therefore

understate the aggregate performance of those industry sub-sectors in which small businesses are more likely to be found, such as cafes, restaurants and takeaway food services, and food retailing.

Overall, ABS data does not support any claim that small businesses in the retail, restaurant and catering industries are suffering to the extent that workers' wages should be reduced, and nor is the ACTU aware of any reliable data which indicates that the viability of small businesses is at particular risk as a result of the existence of penalty rates. Neither anecdotal evidence, nor evidence from unreliable employer surveys, should be used to justify a Bill which will substantially reduce the wages of some of the lowest-paid working Australians.

The practical effect of the Bill on workers

Having established that the Bill will target low-paid workers for arbitrary and unsubstantiated reasons, it is useful to consider exactly how hard these workers will be hit.

The most immediate and obvious effect of the Bill is that, in order to avoid penalty payments, businesses will adjust their rostering arrangements to avoid allowing employees to work shifts of longer than 10 hours, or more than 38 hour per week. Certainly the Bill will mean that all part-time workers in these industries who do any evening or weekend work will have their pay significantly reduced.

More generally, the practical effect of the Bill on workers is that it will substantially reduce the wages of hundreds of thousands of low-paid workers.

Annexure 2 to this submission seeks to estimate how much the lowest paid (level 1) workers under relevant modern awards will lose from their wages if the Bill is enacted, and – as an example – how much workers will lose if they perform six (6) hour shifts on Saturdays or on Sundays[52]. The calculations contained in Annexure 2 indicate that, as an example, if a level 1 worker covered by the Bill works a six (6) hour shift on the weekend, then under the Bill this means:

- if they are engaged under the *General Retail Industry Award* a permanent employee will earn about $26 less on a Saturday, and a casual will earn about $37 less. On Sundays, a permanent (full-time or part-time) employee will earn about $105 less, and a casual will earn about $79 less;
- if they are engaged under the *Restaurant Industry Award*, a permanent or casual employee will earn about $25 less on a Saturday. On a Sunday they will earn about $50 less;
- if they are engaged under the *Hospitality Industry (General) Award* (if the award is caught by the Bill), a permanent (full-time or part-time) employee will earn about $25 less on Saturdays. On Sundays, a permanent employee will earn about $74 less, and a casual will earn about $50 less; and
- if they are engaged under the *Fast Food Industry Award* (if the award is caught by the Bill) workers will earn about $26 less on Saturdays, and about $53 less on Sundays.

[52] The pay rates cited in Annexure 1 are based on the current minimum wage rates (following the 2012 minimum wage case) but do not take into account any transitional phasing which arises as a result of the relevant pre-modern award instruments which may apply to individuals. For this reason, the figures are indicative of the likely losses to employees only.

To award-reliant workers, these sums are hugely significant.

Similarly, the loss of the modest penalties payable for evening work means that workers are not compensated for working night shifts which increase risks to workers' health and which take workers away from their families and communities. Although weekday evening penalties are modest (either 10 or 15%), the loss of these penalties would be also by no means be insignificant to low-paid workers.

To put these sums into perspective, it is instructive to compare the average weekly earnings of full-time workers in the retail, restaurant and catering industries to the average weekly income of Australians overall.

The most recent ABS average weekly earnings data indicates that average weekly earnings for full-time adults (for ordinary time earnings only) for the most recent available quarter (May 2012) was $1,351.20[53].

By comparison, in the retail trade sector the average weekly earnings for full-time adults (for ordinary time earnings) for the May 2012 quarter was $969.30, and in the accommodation and food services sector it was $955.90[54].

The minimum weekly wages for award-reliant workers under the relevant awards for the 2010 – 2011 financial year (which is more directly comparable because the May 2012 figures do not take into account minimum wage increases awarded under the 2012 Minimum Wage Review) are even lower again:

- under the *General Retail Industry Award 2010* the minimum weekly wage ranged from $647.30 to $792.00[55] per week;
- under the *Fast Food Industry Award 2010* the minimum weekly wage ranged from $647.30 to $705.20 per week[56];
- under the *Hospitality Industry (General) Award 2010* and the *Restaurant Industry Award 2010* the minimum weekly wage ranged between $589.30 and $748.80[57].

[53] ABS 6302.0, Table 2 (Average Weekly Earnings, Australia (Dollars) – Seasonally Adjusted
[54] ABS 6302.0, Table 10G (Average Weekly Earnings, Industry, Australia (Dollars) – Original – Persons, Full Time Adult Ordinary Time Earnings
[55] The minimum rates under the General Retail Award following the 2010-2011 Wage Review can be found at http://www.fwa.gov.au/awardsandorders/html/PR509035.htm; the rates under the
[56] The minimum rates under the Fast Food award following the 2010-2011 Wage Review can be found at http://www.fwa.gov.au/awardsandorders/html/PR509034.htm
[57] The minimum rates under the Hospitality Award following the 2010-2011 Wage Review can be found at http://www.fwa.gov.au/awardsandorders/html/PR514972.htm; the rates for the Restaurant Award can be found at: http://www.fwa.gov.au/awardsandorders/html/PR509150.htm.

To workers who are likely to be award-reliant, and whose average weekly earnings are well behind most Australians, any reduction in wages which results from the removal of penalties becomes even more significant.

Public Holidays and other uncertainties

For the reasons stated above, the ACTU strongly submits that the Bill be rejected. However, if consideration is given to the Bill then it must be noted that the Bill goes further than was perhaps intended (by removing the right to public holiday penalties) and contains ambiguities which significantly undermine the right of workers to a clear and unambiguous safety net.

Penalty Payments on Public Holidays

The Statement of Compatibility with Human Rights attached to the Explanatory Memorandum to the Bill indicates that the Bill is not intended to affect the remuneration of employees for public holidays[58]. However, the drafting of the Bill does not differentiate between penalty payments which relate to evening or weekend work, and penalty rates payable for work performed on public holidays. Many modern awards, including *the General Retail Industry Award*, the *Restaurant Industry Award* and the *Hospitality Industry (General) Award 2010* label loadings payable on public holidays as "penalty rates", and the provision of those entitlements in contained in the clauses of the award which deal with penalty rates[59].

The effect of the Bill, therefore, will be to remove penalties payable on public holidays for workers caught by the Bill.

The removal of penalties payable for working on public holidays is unacceptable.

Uncertainty relating to coverage

We have expressed some concern above relating to the full scope of the Bill taking into account the fact that the Bill refers the "retail" and "restaurant and catering" industries only and does not clearly align to – and is not confined to - any particular modern award coverage.

The generality of the Bill invites small employers to artificially widen the applicability of the Bill to extend to workers in unintended industries and workplaces which contain a retail component or hospitality component. This would create significant uncertainty in relation to the proper operation of the Bill, and would foster uncertainty around the application of the award safety net.

---

[58] See the Statement of Compatibility with Human Rights attached to the Explanatory Memorandum to the Bill

[59] E.g. cl 29.4(d) of the *General Retail Industry Award*; cl 34.1 of the *Restaurant Industry Award*; clause 32.2 of the *Hospitality Industry (General) Award 2010*

Uncertainty relating to wages and rostering arrangements

Most workers affected by the Bill are unlikely to have a high degree of control over their own rostering arrangements. One of the effects of the Bill could be that employers would easily be able to alter rosters in a manner which would simply disentitle employees from receiving penalty rates (by ensuring that workers are not rostered to work more than 38 hours in any week or more than 10 hours in any 24 hour period). This is hardly an outcome which is in the social interest. It creates an arbitrary and artificial barrier to working patterns and to rostering arrangements.

It is also possible that, depending on rostering arrangements, employees could be entitled to penalty rates one week and not the next. This would render it more difficult for employees to budget, and could create significant uncertainty relating to an employee's take-home wage.

Conclusion

The ACTU strongly opposes the Bill, which would reduce the pay of hundreds of thousands of Australian workers – the same workers who are some of the most likely to rely on minimum, safety-net wage rates.

The Bill undermines FWA and the FW Act, it ignores the social and legal reasons why penalty rates exist, it fosters uncertainty in relation to wages and rostering, and it is premised on an unsubstantiated claim that reducing the wages of workers will result in more staff being employed, more small businesses operating or expanded trading hours. There is no economic basis for singling out small businesses in the retail, restaurant and catering industries, and it is trite to suggest that the Bill will do anything more than increase employer profit margins at the expense of some of the lowest-paid workers in Australia.

The Bill must be rejected.

Annexure 1: The traditional and evolving rationale for penalty rates

The historic rationale for penalty payments applicable to work performed outside normal spans of hours in evenings and at night, on weekends and on public holidays has been twofold: to provide *compensation* for the inconvenience of working non-standard hours outside 'normal' hours of work, and as a *deterrent* against employers rostering long, abnormal or anti-social hours.

In 1909 Justice Higgins, the then-President of the Commonwealth Conciliation and Arbitration Commission ("CCAC"), arbitrated an award involving mining workers in Broken Hill and Port Pirie. The relevant agreed working pattern involved 48-hour weeks, made up of 6 eight-hour shifts per week. Justice Higgins awarded overtime payment of time-and-a-quarter "for all time of work on the seventh day in any week, or an official holiday, and all time of work done in excess of the ordinary shift during each day of twenty hours"[60]. By imposing overtime rates for the periods beyond what was considered the standard span of working hours at the time, Justice Higgins' gave recognition to the concept that work outside of standard hours or in excess of a reasonable working week are worthy of special compensation.

Early cases relating to the imposition of overtime penalty rates continued to develop as a mechanism for assisting in securing workers' opportunities for leisure. In awarding penalty payments to steamship stewards in 1910, the CCAC acknowledged that the particular industry did not allow for much leisure time, and indeed that it "preclude[ed] any eight hours' day, any half-holiday, and rest on one day of the week", but went on to accept the workers' claim to "seek to have their little opportunities for leisure time secured from being violated through any slack management" on the basis that "employers will be more likely to give the required leisure if they are put under a penalty of extra payment"[61].

In 1912, Justice Higgins – in considering wages payable to rural workers involved in working with perishable crops - reinforced the proposition that workers should be secured adequate leisure time, and said: "[i]t is eminently better, more conducive to peace, that definite hours of work for each day should be prescribed … There is no doubt that a little foresight on the part of employers prevents the necessity for much overtime, and the fact that they have to pay for overtime will tend to induce such foresight"[62].

---

[60] *Barrier Branch of Amalgamated Miners Association v Broken Hill Pty Company Ltd* (1909) 3 CAR 1 at 2
[61] *Federated Marine Stewards & Pantrymen's Association v Commonwealth Steamship Owners' Association* 4 CAR 61
[62] *Rural Workers Union and South Australian United Labourers Union v Mildura Branch of the Australian Dried Fruits Association and Others (1912) 6 CAR 61*

These cases assisted in developing the compensatory and deterrent rationales which underpin penalty rates. In 1932 Justice Drake-Brockman reviewed the wage rates payable in the railway industry and said:

> "The objects of overtime rates may be said to be two: firstly, to compensate the employee concerned for being called upon to work outside ordinary hours; and secondly to subject employers to a penalty for the purpose of discouraging work beyond those ordinary hours. In relation to classes of employees engaged in or dependent in regard to their working hours on train timetables, the Court's aim has been to provide an appropriate compensation to such employees, without imposing on the employer a penalty which would not, and could not – having regard to the nature of the service – greatly restrict overtime[63].

Although these early cases recognised the importance of leisure time and maintaining barriers around usual working hours and overtime, the use and scope of the phrase "penalty rates" was inconsistent. The first national test case dealing with weekend rates, the 1947 *Weekend Penalty Rates Case*[64], considered the term:

> "'Penalty Rate' is not a term of art. It is used by those skilled in industrial law in widely divergent meanings. Usually an award provides for an ordinary rate of remuneration, payable for the ordinary work of a standard period performed under normal conditions, and for additional amounts to be paid where work is done under special conditions of time, place or circumstance. 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. Those skilled in industrial law use the term 'penalty rates' in senses ranging from that which includes all such forms of additional remuneration to that which includes only those in which the element of deterrence appears to the exclusion, or almost the exclusion, of the element of compensation – principally, if not solely, the extremely high rates sometimes imposed by way of deterring from work on Sunday in certain industries".
>
> …

---

[63] Commonwealth Railways Commissioner v Australian Workers; Union (1932) 31 CAR 815 at 822
[64] (1947) 58 CAR 610

> "If an award contains a prescription of conditions to be observed by the parties and goes on to provide for payments higher than normal to be made for work done outside the prescribed conditions, those payments may properly be regarded as 'penalty rates'. There are then both the express prescription of a normal course of conduct and the provision of a deterrent against infringing that prescription which, apart from special usages, are ordinarily involved in the idea of a 'penalty'. But if the award merely permits work to be done under varying conditions at varying rates, and there is no prescription of which is intended to be normal, rates for work done under some conditions are not to be said to be 'penalty rates' merely because they are higher than rates for work done under other conditions. Thus, having regard to the usual framework of awards, rates for overtime will always, or almost always, be penalty rates, but additional rates e.g. for work done in the wet or in great hear or great cold or confined spaces will not generally be 'penalty rates'. Nor will rates payable for shift work, i.e. where the award provides the alternative of working standard hours either within a fixed spread of hours or on shift, either generally or under specified conditions. In effect, 'penalty rates' on this view would be confined to overtime rates, although it may extend to others."

Weekend Penalty Rates

As the concept of penalty rates developed, a distinction was drawn between circumstances where penalties are payable for work performed outside the span of ordinary hours on weekdays and work performed on weekends. Shift loadings and penalty rates for work on weekends evolved to specifically compensate for the social disability associated with weekend work.

Sunday has long been given special significance beyond the general proposition that workers' are entitled to leisure time. In 1919, Higgins J said:

> The true position seems to be that extra rates for all Sunday work is given on quite different grounds for an extra rate for work on the seventh day [in any week]. The former 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; whereas the latter rate is given because seven days per week for work are too many. This involves that even if time and a half be paid for Sunday work; there should be extra pay also for the seventh day of work. But the extra pay should be time and a half, not double rates. The norm of work being six week days and Sundays free, the payment for departure from the norm should be two time and a half rates, which is equivalent to one double rate.[65]

[65] Gas Employees Case *(1919) 13 CAR 437 at 469*

In the 1938 *Milk Processing & Cheese, etc Manufacturing Case*[66], Kelly P considered the appropriate rate to be paid for work performed on Saturdays, Sundays and Public Holidays. He said:

> "Where work performed on Saturday afternoons, Sundays or holidays is "overtime work", in the ordinary acceptance of that term, that is to say, where it either is in excess of the ordinary 48 hour work of the week or else is performed outside of the ordinary working hours prescribed, the so-called "penalty rates" should be allowed in accordance with the usual practice, their purpose being not only to compensate the employees for the inroad made upon time which the community devotes to recuperation or leisure but also to discourage the employment of workmen for long daily or weekly periods of labour with a view to protecting the individual as far as may be practicable from undue mental and physical strain and fatigue. In addition to this, a special item of compensation is due with reference to the employee's loss of full participation, with the rest of the community, in the traditional and customary week-end of religious, social and family observances or in the occasional holidays sanctioned as suitable public observance by the Legislature.
>
> In the case of work performed on Sundays and public holidays, which constitutes portion of the ordinary working-week, and which does not transgress the limits of any prescription of ordinary daily working-hours necessary for a particular section of the industry, only the latter group for compensation exists.

The *Weekend Penalty Rates Test Case*[67] considered appropriate penalty rates payable for work performed under the then-*Metal Trades Award* on Saturday and Sundays. It was argued by the Applicants, who sought an increase in the penalty rates payable, that Saturday had become a "non-working day" for a majority of Australian workers, and that a penalty was therefore owing. It was submitted:

> "Saturday, it is said, is the great day for recreation, while Sunday is the day of religious observance and family reunion. Saturday is the day on which competitive sports and various forms of organised social activities and public entertainment are held, as well as being the day which by common usage has come to be set aside for individual recreation in outdoor activities"[68].

Although the Commission did not come to a view that Saturdays were a "general whole holiday" as was sought, it did impose a penalty of time-and-a-quarter for work performed between midnight on Friday and

[66] (1938) 15 SAIR 61
[67] *In the matter of the National Security (Industrial Peace) Regulations and of the Metal Trades Award 1941 re Rheem manufacturing Co Pty ltd* (1947) 58 CAR 610
[68] (1947) 58 CAR 610

midnight on Saturday, as an extra payment not cumulative upon any shift premium otherwise payable, and in recognition that Saturday remained a "half-holiday". That penalty rate was made in recognition of "the degree to which the tendency for Saturday to become a whole holiday… has progressed; partly upon the circumstance that it is Saturday afternoon which is the principal loss of these shift workers, and partly upon the necessity of doing comparative justice as between difference classes of workers"[69]. The Commission also increased the Sunday penalty to double-time, increased from time and a half.

In 1950 the Industrial Commission of New South Wales in Re Engine Drivers General (State) Interim Award said[70]:

> 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.

In 1964 Justice Beattie awarded double-time on Sunday for chemists, that being the overtime rate payable by other employers in other areas where time worked on Sundays was not ordinary time. His view in making the order was this is would be anomalous if traders whose hours were then being extended were given more favourable terms than employers whose trading hours were not extended[71]. He further held that an overtime rate of time and a half was payable for work performed on Saturdays, which was "the day of the weekly half-holiday" during which employees "are required to be freed from work, including overtime".

By the mid-70s it was common practice that double-time rates would apply to all work done on any day which is a holiday or a Sunday, and that a lesser penalty loading would apply to Saturday work.

The "24/7 economy" and ordinary hours on Sundays

The de-regulation and proliferation of Sunday trading in the 1990s led to employer claims that Sunday work should include provision for normal trading hours and the reduction or removal of Sunday penalties. In 1999 Commissioner Hingley declined to include ordinary hours on Sundays for three Victoria retail awards, or to alter the relevant penalty rate[72]. Commissioner Hingley said:

---

[69] Ibid at [623] – [624]
[70] [1950] *AR (NSW) 260* at 267
[71] Chemists (State) Award 1964 AR 126; 1964 AILR Rep 96; 19 IIB 439
[72] The *Shop, Distributive and Allied Employees Association - Victorian Shops Interim Award 1994*, the *Shop, Distributive and Allied Employees Association (Food and Liquor Stores) Interim Award 1994* and the *Shop, Distributive and Allied Employees Association (Booksellers and Stationers) Interim Award 1994*.

> I am not persuaded, on what is before me, that the combination of deregulated shop trading hours and the evolution of new shopping lifestyles and consumer demands, consequentially means that for retail workers, an expanded daily spread of hours, late night hours and Saturday and Sunday work, are a sought after lifestyle corollary, diminishing the unsociability of such work schedules. It is a corollary of such changes, should the Commission so determine, 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[73].

By the mid-2000s ordinary hours for work performed on Sundays became common in retail industry awards (and in awards in other sectors) and the question became what the appropriate rate would be for such work. In 2004 a Full Bench of the Australian Industrial Relations Commission ("AIRC") considered an application by the Shop, Distributive and Allied Employee's Association (SDA) to make an award roping in 17,628 employees into the *Shop, Distributive and Allied Employees Association – Victorian Shops Interim Award 2000*. In that decision, a Full Bench came to the conclusion that it was necessary to "recognise the reality that retailing is a seven-day a week industry" in Victoria, and that there was "no reason to distinguish between retailing and the many other industries which operate over seven days, whether those industries be in the services sector of our economy, in arts and entertainment, in health services, in manufacturing, distribution or any other sector. In many of those industries the Commission's awards recognise work performed on Sunday as part of the standard working hours"[74]. Accordingly, that decision introduced provision for ordinary hours of work between 9am and 6pm on Sundays for retail workers covered by the award.

Despite widening the scope of ordinary hours, the majority of the Full Bench (Watson SDP and Raffaelli C) went on to determine that a penalty rate was still payable for work performed in ordinary hours on Sundays. In awarding the double-time penalty the Bench commented that the only "material change" which had occurred in the Victorian retail sector since 1992 was the greater incidence of Sunday trading which, in their view, did not affect "the disabilities endured by employees working on Sundays."[75]

The penalty was clearly categorised as compensation for the disability associated with working on a Sunday, and not directed to deterring the working of Sunday ordinary time hours"[76].

In rejecting the employer submission that the disability associated with working on Sundays had decreased as a result of the extension of normal trading hours (as a result of legislative re-regulation), the Commission

---

[73] Dec 1440/98 M Print Q9229
[74] *Shop Distributive and Allied Employees Association v $2 and Under* (2003) 127 IR 408 at 88.
[75] Ibid at [106]
[76] *Shop Distributive and Allied Employees Association v $2 and Under* (2009) 135 IR 1 at [91]

accepted evidence that there remains a “significant social disability associated with work on a Sunday”. The Commission relied on the evidence of Dr Michael Bittman, whose analysis of time-use data produced by the Australian Bureau of Statistics (ABS) indicates that:

- Sunday remains an overwhelmingly non-work day, with only one of five employed working age persons working on a Sunday, compared with four out of five on weekdays;
- in the 23 year period between 1974 and 1997, the proportion of persons living in large metropolitan centres and aged 20 – 59 working for at least two hours on Sunday rose from 9% to 17%;
- working on Sundays reduces family leisure time by over two hours, inclusive of reduced parents’ time with their children and reduces leisure time in the company of friends by an hour and a half; and
- time lost on Sundays by persons working on Sundays is not recovered on other days of the week, other than four additional minutes eating with family members[77].

Dr Bittman’s conclusion, which was accepted by the majority, was that as compared to those who work on weekends “Sunday workers miss out on key types of social participation and have less opportunity to balance the demands of work and family”[78]. The majority further determined that the disability endured by Sunday workers was heightened where the work performed on Sunday was part of ordinary hours.

The majority also accepted evidence from Dr Graeme Russell which concluded:

- family and close relationships matter both to individuals and to family and individual outcomes, including child development;
- time together, shared activities and the active involvement in the lives of other family members are essential to sustain effective family relationships and positive outcomes for families and individuals;
- Sundays are very important in providing time and opportunity for participation / involvement between people; and
- more employees prefer not to work on Sundays[79].

Justice Giudice agreed with the conclusion of the majority that the evidence of Dr Bittman and Dr Russell demonstrates a significant social disability associated with work on a Sunday “subject only to the reservation that it suits some people to work on that day”, however disagreed with the majority’s conclusion as to the appropriate quantum of the penalty for work performed in Sunday ordinary hours[80].

---

[77] Ibid at [93]
[78] Ibid at [94]
[79] At [96]
[80] at [6]

In 2004 the South Australian Industrial Relations Commission heard an application by the Australian Retailers Association ("ARA") seeking to vary the *Retail Industry (South Australia) Award* to expand the scope of ordinary hours of work to include Sunday work, and to reduce penalties payable on Sundays following South Australian legislation which increased allowable trading hours[81]. As with the Victorian case, the employer associations argued that historical rationale for the application of penalty rates was an anachronism in a modern economy which trades 7 days a week.

The SAIRC held that there was no longer any doubt that the retail industry in SA is a seven-day industry and that the historical deterrent basis for the Sunday work penalty was therefore no longer appropriate[82]. Accordingly, it was held that work on Sundays should be capable of forming part of ordinary hours. However, under the decision work performed on Sundays attracted a 60% penalty loading intended to take into account considerations including the disabilities associated with Sunday work. The Bench (Hampton and Bartel DPP and Dangerfield C) made a general conclusion that the evidence before them, which again included the evidence of Drs Bittman and Russell, was that there remained a significant social disability associated with Sunday work.

In coming to this conclusion the Bench took into account the changed social context, noting that "[t]he sorts of detriment identified in the earlier decisions have in some respects decreased and other changed in society which have resulted in additional disabilities associated with work on Sundays". Social changes which were identified as continuing to present significant challenges for Sunday workers in terms of families trying to balancing their work and family lives include:

- more women in the workforce, particularly with dependent care responsibilities (especially for younger children);
- more families in which both partners are in the paid workforce and share the care of children and other domestic responsibilities;
- more men who want to be active participants in family life, and more involved with their children; and
- more people in the paid workforce with dependent care responsibilities (e.g. care of elderly parents) and whose engagement in family life is dependent on availability at critical times (e.g. divorced / separated parents with weekend access to children)[83].

The Bench said:

[81] [2004] SAIRComm 54
[82] E.g. see [200]
[83] At [201] - [202]

> "While the impact of Sunday work on employees will and does vary from employee to employee, the general proposition of Dr Bittman that for employees who work on a Sunday, certain activities that might otherwise be undertaken on that day are mostly not done at all. There is no simple transference of some events to other available days of the week. We also generally accept Dr Russell's conclusion that for some employees, working on Sunday poses a risk to social and family interactions. The evidence of individual employee witnesses who identified negative aspects of working on Sundays was consistent with these conclusions. Their evidence indicated that the nature of the activities foregone were, in the main, social and family interactions, the loss of which could not be compensated by having time off elsewhere in the week.
>
> In adopting the conclusions of Drs Bittman and Russell we acknowledge, and certain employee evidence confirmed, that for some individuals Sunday work poses no risk and may indeed be beneficial. We also note the parameters set by Dr Russell that in order for Sunday work to pose a risk to social and family interactions it must be worked on a continuing basis."[84]

Fair Work Australia has continued to acknowledge the social disability associated with working outside normal spans of hours and on weekends, and the need to balance the modern award objectives. For example, the Restaurant and Catering Industry Association of Australia (R&CA) submitted during the Award modernisation process that penalty payments should be minimal or non-existent during any periods when restaurants normally trade, and sought to reduce or remove penalty payments during those times and specifically on weekends. Of these submissions, the Full Bench said:

> "The R&CA's approach is directed at substantially reducing or eliminating penalty payments provided for in existing instruments applying to the restaurant industry during times when restaurants are open. That approach ignores the inconvenience and disability associated with work at nights and on weekends – which are the basis for the prevailing provisions in pre-reform awards and NAPSAs. Nor does the R&CA approach take into account the significance of penalty payments in the take-home pay of employees in the restaurant industry. A modern restaurant award based on the penalty rates proposed by the R&CA would give the operational requirements of the restaurant and catering industry primacy over all of the other considerations which the Commission is required to take into account, including the needs of the low paid and the weight of regulation. A more balanced approach is required."[85]

---

[84] At [186] – [187]
[85] [2009] AIRCFB 865 at [232]

Annexure 2: Estimated reductions in minimum wages under the Bill

NOTE:

The pay rates cited in this Annexure are based on the minimum wage rates which apply following the 2011 - 2012 minimum wage case, but do not take into account any transitional phasing which arises as a result of the relevant pre-modern award instruments which may apply to individuals.

Modern awards came into effect on 1 January 2010. Transitional arrangements under the relevant legislation mean that, until 1 July 2014 (when the full modern award rates will apply), individual pay rates need to be calculated with reference to the pre-modern award entitlement that used to cover, or would have covered, the employee before 1 January 2010 as well as the relevant modern award entitlement. The transitional provisions include a phasing schedule which allows wages, loadings and penalty rates which are higher or lower than pre-existing conditions to be progressively introduced.

For this reason, the estimates in this annexure are indicative only.

The *General Retail Industry Award 2010*

The minimum wage rates payable to Level 1 employees (the lowest classification level) under the *General Retail Industry Award 2010* are:

Level 1	Weekly minimum	Hourly minimum	Casual Minimum (125%)
Adult	666.10	17.53	21.91
20 years (90%)	599.49	15.78	19.72
19 years (80%)	532.88	14.02	17.53
18 years (70%)	466.27	12.27	15.34
17 years (60%)	399.66	10.52	13.15
16 years (50%)	333.05	8.76	10.96
Under 16 (45%)	299.75	7.89	9.86

Weekend penalty rates, and the applicable loadings under the current award, are as follows:

	Ordinary time rate		Saturday		Sunday	
	Permanent (100%)	**Casual (125%)**	**Permanent (125%)**	**Casual (135% between 7am and 6pm only)**[86]	**Permanent (200%)**	**Casual (200%)**
Adult	17.53	21.91	21.91	23.67	35.06	35.06
20 (90%)	15.78	19.72	19.73	21.30	31.56	31.56
19 (80%)	14.02	17.53	17.53	18.93	28.04	28.04
18 (70%)	12.27	15.34	15.34	16.56	24.54	24.54
17 (60%)	10.52	13.15	13.15	14.20	21.04	21.04
16 (50%)	8.76	10.96	10.96	11.83	17.52	17.52
Under 16 (45%)	7.89	9.86	9.86	10.65	15.78	15.78

If the Bill is enacted, *permanent employees* in small retail businesses who work less than 38 hours per week or less than 10 hours of work during a 24 hour period will:

- lose a 25% penalty for evening work on weekdays (after 6pm);
- lose a 25% penalty for work on Saturday; and
- lose a double-time penalty and have their pay halved on Sundays

Casuals in small retail businesses who work less than 38 hours per week or less than 10 hours during a 24 hour period will:

- lose a 10% penalty for work performed between 7am and 6pm on Saturdays;
- lose a 75% penalty for work performed on Sundays.

For Saturday work, the difference between the current and proposed wages is:

	Saturday					
	Permanent (125%) *current*	**Permanent (100%) *proposed***	***Difference per hour***	**Casual (135% between 7am and 6pm only)**[87]	**Casual (100%) *proposed***	***Difference per hour***
Adult	21.91	17.53	4.38	23.67	17.53	6.14
20 (90%)	19.72	15.78	3.94	21.30	15.78	5.52
19 (80%)	17.53	14.02	3.51	18.93	14.02	4.91
18 (70%)	15.34	12.27	3.07	16.56	12.27	4.29
17 (60%)	13.15	10.52	2.63	14.20	10.52	3.68
16 (50%)	10.96	8.76	2.20	11.83	8.76	3.07
16 and under (45%)	9.86	7.89	1.97	10.65	7.89	2.76

[86] Outside these hours cl 29.2 applies so that workers are paid time and a half for the first three hours and double time thereafter
[87] Outside these hours cl 29.2 applies so that workers are paid time and a half for the first three hours and double time thereafter

Therefore, a permanent adult worker (and a casual worker) will earn about $26 less on a Saturday for working a 6 hour shift. A casual worker will earn about $37 less.

For Sunday work, under the Bill, the difference between the current and proposed wages is:

	Sunday					
	Permanent (200%) *current*	**Permanent (100%) *proposed***	***Difference per hour***	**Casual (200%) *current***	**Casual (125%) *proposed***	***Difference per hour***
Adult	35.06	17.53	17.53	35.06	21.91	13.15
20 (90%)	31.56	15.78	15.78	31.56	19.72	11.84
19 (80%)	28.04	14.02	14.02	28.04	17.53	10.51
18 (70%)	24.54	12.27	12.27	24.54	15.34	9.20
17 (60%)	21.04	10.52	10.52	21.04	13.15	7.89
16 (50%)	17.52	8.76	8.76	17.52	10.96	6.56
16 and under (45%)	15.78	7.89	7.89	15.78	9.86	5.92

Therefore, a permanent adult worker who works an 6 hour day on a Sunday will lose a 100% penalty and will earn about $105 less. A casual will lose a 75% penalty and will earn about $79 less for a 6 hour shift[88].

The *Restaurant Industry Award 2010*

The minimum wage rates payable to Level 1 employees (the lowest classification level) under the *Restaurant Industry Award 2010* are:

LEVEL 1	**Weekly minimum**	**Hourly minimum**	**Casual minimum**
Adult (20+)	624.00	16.42	20.53
19 years (85%)	530.40	13.96	17.45
18 years (70%)	436.8	11.49	14.37
17 and under (60%)	374.40	9.85	12.32
16 and under (50%)	312.00	8.21	10.26

Weekend penalty rates, and the applicable loadings under the current award, are as follows:

LEVEL 1	**Ordinary time rate Mon - Fri**		**Saturday**		**Sunday**	
	Permanent (100%)	**Casual (125%)**	**Permanent (125%)**	**Casual (150%)**	**Permanent (150%)**	**Casual (175%)**
Adult (20+)	16.42	20.53	20.53	24.63	24.63	28.74
19 (85%)	13.96	17.45	17.45	20.94	20.94	24.43
18 (70%)	11.49	14.36	14.36	17.24	17.24	20.11
17 (60%)	9.85	12.31	12.31	14.78	14.78	17.24
16 and under (50%)	8.21	10.26	10.26	12.32	12.32	14.37

[88] Casuals may still be entitled to an extra 10% for Saturday work between 7am and 6pm because it is an entitlement under cl13 (casual employees) and could be considered a loading rather than a penalty

If the Bill is passed, both *permanent employees* and *casual employees* in small retail businesses who work less than 38 hours per week or less than 10 hours of work during a 24 hour period will:

- lose a 25% penalty on Saturdays;
- lose a 50% penalty on Sundays;
- lose a 10% penalty for work performed between 10pm and midnight on weekends; and
- lose a 15% penalty for work performed between midnight and 7am on weekdays.

The wage differentials for permanent employees would be:

PERMANENT EMPLOYEES (FULL-TIME AND PART-TIME)	**Saturday**			**Sunday**		
	Permanent (125%) *current*	**Permanent (100%) *proposed***	***Difference per hour***	**Permanent (150%) *current***	**Permanent (100%) *proposed***	***Difference per hour***
Adult (20+)	20.53	16.42	4.11	24.63	16.42	8.21
19 (85%)	17.45	13.96	3.49	20.94	13.96	6.98
18 (70%)	14.36	11.49	2.87	17.24	11.49	5.75
17 (60%)	12.31	9.85	2.46	14.78	9.85	4.93
16 and under (50%)	10.26	8.21	2.05	12.32	8.21	4.11

The wage differentials for casual employees would be:

CASUAL EMPLOYEES	**Saturday**			**Sunday**		
	Casual (150%) *current*	**Casual (125%) *proposed***	***Difference per hour***	**Casual (175%) *current***	**Casual (125%) *proposed***	***Difference per hour***
Adult (20+)	24.63	20.53	4.10	28.74	20.53	8.21
19 (85%)	20.94	17.45	3.49	24.43	17.45	6.98
18 (70%)	17.24	14.36	2.88	20.11	14.36	5.75
17 (60%)	14.78	12.31	2.47	17.24	12.31	4.93
16 and under (50%)	12.32	10.26	2.06	14.37	10.26	4.11

This means that a level 1 adult employee working less than 38 hours in total during a week, or less than 10 hours in any 24 hour period, who performs a 6 hour weekend shift will earn about $25 less on a Saturday, and about $50 less on a Sunday.

The *Hospitality Industry (General) Award 2010*

The current minimum wage rates for level 1 employees under the *Hospitality Industry (General) Award 2010* are:

LEVEL 1	**Weekly minimum**	**Hourly minimum**	**Casual minimum**
Adult (20+)	624.00	16.42	20.53
19 (85%)	530.40	13.96	17.45
18 (70%)	436.80	11.49	14.37
17 (60%)	374.40	9.85	12.32
16 and under (50%)	312.00	8.21	10.26

The weekend penalty loadings and rates payable to a Level 1 employee are:

LEVEL 1	**Ordinary time rate**		**Saturday**		**Sunday**	
	Permanent (100%)	**Casual (125%)**	**Permanent (125%)**	**Casual (150%)**	**Permanent (175%)**	**Casual (175%)**
Adult (20+)	16.42	20.53	20.53	24.63	28.74	28.74
19 (85%)	13.96	17.45	17.45	20.94	24.43	24.43
18 (70%)	11.49	14.36	14.36	17.24	20.11	20.11
17 (60%)	9.85	12.31	12.31	14.78	17.24	17.24
16 and under (50%)	8.21	10.26	10.26	12.32	14.37	14.37

Under the Bill, employees in small business who work less than 38 hours per week or less than 10 hours of work during a 24 hour period will lose a 25% loading on Saturdays. On Sundays permanent employees would lose a penalty 75%, and casual employees would lose a penalty of 50%.

For Saturday work, minimum wage rates would be affected as follows:

	Saturday					
	Permanent (125%) *current*	**Permanent (100%) *proposed***	***Difference per hour***	**Casual (150%) *current***	**Casual (125%) *proposed***	***Difference per hour***
Adult (20+)	20.53	16.42	4.11	24.63	20.53	4.10
19 (85%)	17.45	13.96	3,49	20.94	17.45	3.49
18 (70%)	14.36	11.49	2.87	17.24	14.36	2.88
17 (60%)	12.31	9.85	2.46	14.78	12.31	2.47
16 and under (50%)	10.26	8.21	2.05	12.32	10.26	2.06

For Sunday work, minimum wage rates would be affected as follows:

	Sunday					
	Permanent (175%) *current*	**Permanent (100%) *proposed***	***Difference per hour***	**Casual (175%) *current***	**Casual (125%) *proposed***	***Difference per hour***
Adult (20+)	28.74	16.42	12.32	28.74	20.53	8.21
19 (85%)	24.43	13.96	10.47	24.43	17.45	6.98
18 (70%)	20.11	11.49	8.62	20.11	14.36	5.75
17 (60%)	17.24	9.85	7.39	17.24	12.31	4.93
16 and under (50%)	14.37	8.21	6.16	14.37	10.26	4.11

This means that a permanent (full-time or part-time) employee will earn about $25 less on Saturdays. On Sundays, a permanent employee will earn about $74 less, and a casual will earn about $50 less.

Workers would also:

- lose a 10% penalty for evening work performed on weekdays between 7pm and midnight; and
- lose a 15% penalty for work performed on weekdays between midnight and 7am.

The *Fast Food Industry Award 2010*

The current minimum wage rates for level 1 employees under the *Fast Food Industry Award 2010* are:

	Weekly minimum (Permanent employees)	**Hourly minimum**	**Casual minimum (adult)**
Adult	666.10	17.53	21.91
20 years (90%)	599.49	15.78	19.72
19 years (80%)	532.88	14.02	17.53
18 years (70%)	466.27	12.27	15.34
17 years (60%)	399.66	10.52	13.15
16 years (50%)	333.05	8.76	10.96
Under 16 years (40%)	266.44	7.01	8.77

The current weekend penalty rates are:

	Ordinary time rate		**Saturday**		**Sunday**	
	Permanent	**Casual**	**Permanent (125%)**	**Casual (150%)**	**Permanent (150%)**	**Casual (175%, including casual loading)**
Adult	17.53	21.91	21.91	26.30	26.30	30.68
20 (90%)	15.78	19.72	19.73	23.67	23.67	27.62
19 (80%)	14.02	17.53	17.53	21.03	21.03	24.54
18 (70%)	12.27	15.34	15.34	18.41	18.41	21.47
17 (60%)	10.52	13.15	13.15	15.78	15.78	18.41
16 (50%)	8.76	10.96	10.96	13.14	13.14	15.33
Under 16 (40%)	7.01	8.77	8.76	10.52	10.52	12.27

If the Bill applies to workers under this award (which is unclear - the Bill exempts small businesses in "the restaurant and catering industry" who presumably fall predominantly under the Restaurant Industry Award) then it will have the following impact:

Permanent employees and casual employees in small fast food businesses who work less than 38 hours per week or less than 10 hours of work during a 24 hour period will:

- lose a 25% penalty on Saturdays;
- lose a 50% penalty on Sundays;
- lose a 10% penalty for work on weekdays between 9pm and midnight; and

- lose a 15% penalty for work on weekdays after midnight.

For permanent workers, the hourly wage difference would be:

	Saturday			**Sunday**		
	Permanent (125%) ***current***	**Permanent (100%)** ***Proposed***	***Difference per hour***	**Permanent (150%)** ***current***	**Permanent (100%)** ***Proposed***	***Difference per hour***
Adult	21.91	17.53	4.38	26.30	17.53	8.77
20 (90%)	19.73	15.78	3.95	23.67	15.78	7.89
19 (80%)	17.53	14.02	3.51	21.03	14.02	7.01
18 (70%)	15.34	12.27	3.07	18.41	12.27	6.14
17 (60%)	13.15	10.52	2.63	15.78	10.52	5.26
16 (50%)	10.96	8.76	2.20	13.14	8.76	4.38
Under 16 (40%)	8.76	7.01	1.75	10.52	7.01	3.51

For casual workers on weekends the hourly wage difference would be:

	Saturday			**Sunday**		
	Casual (150%) ***current***	**Casual (125%)** ***Proposed*** (Current ordinary time rate with 25% casual loading)	***Difference per hour***	**Casual (175%)** ***current***	**Casual (125%)** ***Proposed*** (Current ordinary time rate with 25% casual loading)	***Difference per hour***
Adult	26.30	21.91	4.39	30.68	21.91	8.77
20 (90%)	23.67	19.72	3.95	27.62	19.72	7.90
19 (80%)	21.03	17.53	3.50	24.54	17.53	7.01
18 (70%)	18.41	15.34	3.07	21.47	15.34	6.13
17 (60%)	15.78	13.15	2.63	18.41	13.15	5.26
16 (50%)	13.14	10.96	2.18	15.33	10.96	4.37
Under 16 (40%)	10.52	8.77	1.75	12.27	8.77	3.50

Therefore, an adult (level 1, casual or permanent) working an 6 hour shift on a Saturday would earn about $26.00 less on a Saturday, and would earn about $53 less on a Sunday, for all hours worked under 38 per week and provided they were rostered for a shift of 10 hours or less.