



Australian Government

**Department of Education, Employment
and Workplace Relations**

**Senate Standing Committee on Education,
Employment and Workplace Relations Inquiry
into Fair Work Amendment (Small Business –
Penalty Rates Exemption) Bill 2012**

**Department of Education, Employment and
Workplace Relations Submission**

1 Introduction

- 1.1 On 16 August 2012, Senator Xenophon introduced the Fair Work Amendment (Small Business – Penalty Rates Exemption) Bill 2012 (the Bill) to Parliament. The Bill was referred to the Education, Employment and Workplace Relations Legislation Committee for inquiry. The Department of Education, Employment and Workplace Relations (the Department) welcomes the opportunity to make a submission to the Committee’s inquiry.
- 1.2 Under the Bill, the *Fair Work Act 2009* (FW Act) would be amended to prevent Fair Work Australia from including in modern awards, provisions that would require or permit the payment of penalty rates by certain employers to an employee unless that employee had worked more than 38 hours in a ‘week’ or more than 10 hours during a 24 hour period.
- 1.3 The Bill applies to ‘excluded small business employer(s)’ who are defined, for the purposes of the amendments, as employers with fewer than 20 full-time equivalent employees employed in the retail industry or the restaurant and catering industry. Employees of an employer who work outside these industries are not counted. As the Bill would amend the FW Act, the employers would also be national system employers as defined in the Act.
- 1.4 The Department’s submission considers the text of the Bill and:
 - highlights the importance of small businesses to the Australian economy;
 - provides an overview of the regulation of penalty rates under the Fair Work system;
 - provides an overview of how Industrial Commissions over time have determined and reiterated that penalty rates should be provided to compensate for working unsociable hours;
 - considers the impact of the Bill on the regulation of penalty rates;
 - outlines the importance of penalty rates in the take home pay of employees, including in the retail, hospitality, restaurant and fast food awards;
 - outlines how penalty rate provisions in modern awards were determined during the award modernisation process;
 - provides an outline of existing mechanisms in the Fair Work system that provide flexibility to small businesses in setting employee wages and conditions; and
 - provides information on the current review of penalty rates being undertaken by Fair Work Australia (FWA) and outlines why FWA is the appropriate body to consider changes to Award terms and conditions for employees under the national employment system.

2 The importance of small businesses to the Australian economy

- 2.1 There are over 2 million active small businesses in Australia. Based on a definition of fewer than 20 employees, the Australian Bureau of Statistics (ABS) reported that there were 2 045 335 active small businesses in Australia at the end of June 2011.¹
- 2.2 As at June 2011 small businesses represent almost 96 per cent of all businesses in Australia. Approximately 64 per cent (1 306 023) of small businesses were

¹ ABS Cat. No. 8165.0 Counts of Australian Businesses, Including Entries and Exits, June 2007 to June 2011.

non-employing, 25 per cent (508 674) employed 1-4 people, and 11 per cent (230 638) employed 5-19 people.

- 2.3 In the private sector, small businesses employ over 2 million Australians in non-managerial positions (24.3 per cent of all non-managerial employees) and contribute around 34 per cent of industry value added², or around a fifth of Gross Domestic Product.³
- 2.4 Employees in small business are much more likely to be award reliant than employees in larger business. In 2010, 30.8 per cent of non-managerial employees in small business (fewer than 20 employees) were award reliant, compared to 11.8 per cent of non-managerial employees in business with 20 or more employees.
- 2.5 The FW Act recognises the particular circumstances of small business explicitly in its object and operation:
 - The FW Act defines small businesses as businesses with fewer than 15 employees.
 - Small business was consulted by the Australian Government during the development of the FW Act. This included convening a Small Business Working Group to help draft the Small Business Fair Dismissal Code (the Code) and checklist. The Code provides a simple set of steps that a small business employer can follow to ensure that they do not unfairly dismiss an employee. If an employer has followed the Code then the dismissal will not be unfair.
 - The unfair dismissal provisions of the FW Act further recognise the circumstances of small business with a longer qualifying period for unfair dismissal protections for employees of small business. These provisions allow for a 12 month qualifying period for employees of small businesses instead of six months.
 - Small businesses are also excluded from the obligation to pay redundancy payments under the National Employment Standards (NES).
 - Small businesses and their representatives were consulted extensively by the independent Panel reviewing the Fair Work Act (the Review), including through two small business roundtable meetings and will continue to be consulted during the development of the Government's response to the Review. The Government has already held two small business specific consultations on the Review recommendations and broader small business workplace relations matters since the Review report was released.

3 Penalty Rates

- 3.1 A penalty rate is a higher rate of pay than an employee's base rate of pay, paid for work done outside standard working hours. Section 139 of the FW Act provides that modern

² Industry value added (IVA) is the measure of the contribution by businesses in each industry to gross domestic product.

³ ABS Cat. No. 8155.0 Australian Industry, 2010–11.

awards may contain penalty rates provisions for employees working unsociable, irregular or unpredictable hours, on weekends or public holidays and for shift workers.

- 3.2 Penalty rates have been a long-standing feature of the employment safety net in Australia for employees who work weekends, public holidays and other unsociable hours. The Department submits that penalty rates currently specified in modern awards largely reflect provisions found in state awards pre-award modernisation. Current penalty rate provisions therefore do not represent a new entitlement or a significant departure from previous award protections.
- 3.3 The Department also submits that penalty rates are an important component of the total remuneration for low paid employees, including in the accommodation, retail and hospitality industries.
- 3.4 The Department does not consider there are compelling reasons to depart from the current principle that penalty rates should be provided to compensate employees for working these hours, whilst acknowledging the detail of particular provisions in modern awards is a matter to be determined by FWA.

4 Penalty Rates as compensation for working unsociable hours

- 4.1 Providing for the payment of penalty rates as compensation for working unsociable hours and weekends has been a feature of Australian workplace regulation for almost 100 years. Industrial tribunals at the state and federal level over time have determined and reiterated the position that penalty rates should be provided to employees to compensate for work in these circumstances, even as community standards about the nature, frequency and extent of working hours have changed.
- 4.2 For example:
 - 1919 - as early as 1919, the Commonwealth Court of Conciliation and Arbitration noted that penalty rates for Sundays were compensation for working unsociable hours ([1919] 13 CAR 437).
 - 1947 – the Commonwealth Conciliation and Arbitration Commission (CCAC) considered penalty rates should be payable for weekend work performed under the benchmark Metal Trades Award and provided for a Saturday penalty rate of time and a quarter (125 per cent) and increased the Sunday penalty rate to double time (200 per cent) ([1947] 58 CAR 610).
 - 1949 – the CCAC again recognised that penalty rates for Sundays were in recognition of working unsociable hours ([1949] 62 CAR 558).
 - 1950 – the Industrial Relations Commission of New South Wales noted that penalty rates for working on weekends are to compensate for disturbance of family and social life and religious observance and to discourage employers from working employees on weekends ([1950] AR (NSW) 260).

- 1999 and 2004 – in two separate test cases the Australian Industrial Relations Commission (AIRC) determined that the extension of Sunday trading did not diminish the unsociability of weekend work ([1999] AIRC Q9229 and [2004] AIRC PR941526).
- 2004 – the South Australian Industrial Relations Commission found that while seven-day trading made the historical deterrent for the Sunday work penalty rate irrelevant, there remained a significant social disability associated with Sunday work ([2004] SAIRComm 54).

4.3 As reflected in the decisions above, penalty rates are designed to provide compensation to employees for the disadvantage of working particular hours - usually weekends or unsociable hours like late at night. The compensation provided by penalty rates is for the disturbance to the employee's family, the lack of opportunity to participate in social and community events and for religious observance. At least initially, penalty rates were also awarded by industrial tribunals to discourage employers from working employees on weekends.

4.4 A number of international studies have found that working unsociable hours has a negative impact on both personal and family wellbeing. For example, North's (2006)⁴ research in the hospitality and retail industries found that weekend work results in relationship conflict and stress with immediate family members. Jamal (2004)⁵ found that employees working at weekends reported significantly higher emotional exhaustion, job stress and psychosomatic health problems than employees not involved with weekend work. Research also shows that working late night shifts has adverse health impacts. For example, Holmes et al (2001)⁶ found that night-shift workers have an increased risk of cardiovascular disease compared to their day shift counterparts. Zaho and Turner (2008)⁷ found that, compared to non-shift workers, night-shift workers experience adverse lifestyle behaviours, such as poor nutritional intake.

5 Impact of the Bill on the regulation of penalty rates

5.1 The Bill would amend the FW Act to fundamentally recalibrate the existing and common distinctions between regular and other working hours and days. It would also undermine the role of FWA in determining when penalty rates should be payable and the quantum of rates for particular circumstances.

⁴ North, D (2006) 'The Forgotten Workforce', University of Southampton, Faculty of Law, Arts and Social Sciences, PhD Thesis

⁵ Jamal, M. (2004) 'Burnout, stress and health of employees on non-standard work schedules: a study of Canadian workers', *Stress and health*, vol. 20 (3)

⁶ Holmes, A.L., Burgess, H.J., McCulloch, K., Lamond, N., Fletcher, A., Dorrian, J., Roach, G., and Dawson, D., (2001), Daytime cardiac autonomic activity during one week of continuous night shift, *Journal of Human Ergology*, 30(1): 223-228

⁷ Zhao, I., and Turner, C., (2008), The impact of shift work and people's daily health habits and adverse health outcomes, research paper, The University of Queensland

- 5.2 In doing so, the Department submits that the Bill is contrary to the modern awards objective set out in section 134 of the FW Act.
- 5.3 The introduction of a system such as the one proposed in the Bill would remove any distinction between days of work through the week and hours of work throughout a particular day. For example, the Bill removes any distinction between working hours throughout the day or night. Under the Bill, hours worked overnight between 9 pm and 5 am would be treated the same as hours worked during 'business hours' between 9 am and 5 pm. The Bill would also remove any distinction between work on weekdays and work on weekends or public holidays. For example, under the Bill, work on Christmas Day would be treated the same as work on any week day (if an employee has not worked more than 38 hours during that week or 10 hours during that day).
- 5.4 The Bill would also impact upon what is a regular working day for employees by providing that penalty rates are not payable until an employee has worked 10 hours in any 24 hour period. Including rest breaks and lunch breaks, this would require an employee under the General Retail Award 2010 to be at work for at least 11 hours before penalty rates are payable.
- 5.5 The Department submits that an extension of trading hours, largely in response to consumer demand, does not diminish the unsociability of weekend or late night work. Many employees are less inclined to work on Saturdays and Sundays because they are the primary days where other family members are available and where sport, leisure, community activities and religious celebrations occur. Employees cannot readily or easily substitute week days for activities that they would normally do on weekend days. According to the most recent ABS data, of the 11 353 400 workers in Australia,⁸ 34.5 per cent usually work on weekends.⁹
- 5.6 During the Award Simplification process in relation to applications to amend the Shop, Distributive and Allied Employees Association - Victorian Shops Interim Award 1994, to provide that Monday to Sunday be considered ordinary hours of work in response to changes to Victorian trading hours, Commissioner Hingley of the AIRC noted:

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.¹⁰

⁸ This includes independent contractors and other business operators who describe themselves as employees.

⁹ ABS *Forms of Employment, November 2011*

¹⁰ AIRC Q9229, January 1999,

- 5.7 A Full Bench of the AIRC reached a similar conclusion in 2003,¹¹ in relation to the fixing of penalty rates on Sundays. In those proceedings, representatives of retailers acknowledged that a penalty rate was appropriate to compensate employees for the disability of working on Sunday.¹² However, at issue was the appropriate level of penalty rate to ensure employers would not be deterred from opening on Sundays. The Full Bench found that the only material change that had occurred since the decision of Hingley C (above) was the greater incidence of Sunday trading in Victoria. However, the Full Bench was not persuaded that extended trading did not affect 'the disabilities endured by employees working on Sundays'.¹³
- 5.8 The Full Bench also had regard to trading patterns by providing greater flexibility for employers by other means, specifically by extending ordinary hours to Sundays and providing that employers may require staff to work on Sundays, and concluded that the double-time penalty rate was still appropriate for work performed on Sundays.
- 5.9 The Bill would prohibit the modern award safety net from providing compensation paid for the social disadvantage and other impacts set out above arising from work on weekends and late at night. It would remove financial incentives for employers to balance rosters or to consider the impact of particular rosters on employees, including those with family responsibilities.
- 5.10 The Bill would prevent any consideration by FWA of whether penalty rates would be appropriate in a particular situation. For example, the Bill would prevent FWA from hearing submissions from all interested parties and determining in accordance with the modern awards objective whether penalty rates should be payable for a retail worker in a small business who is rostered to work on Christmas Day to stack shelves for the Boxing Day sales. The Department submits that these are issues that should continue to be heard and determined by FWA, which is discussed in further detail below.

Complexity and uncertainty

- 5.11 The Department notes the comments of the FW Review Panel in relation to complexity of the workplace relations system and the transition to modern awards:

*The Panel noted some significant support for the massive reduction in regulation and complexity achieved through the award modernisation process, and commends this achievement as a substantial and lasting reform. While acknowledging there are costs and some complexity for business in moving to the new arrangements, the Panel is confident of the long-term benefits of award modernisation.*¹⁴

¹¹ AIRC PR941526 Re Shop, Distributive & Allied Employees' Association & \$2 and Under and Others

¹² Ibid at paragraphs [9] and [91]-[92].

¹³ At para [106]

¹⁴ *Towards more productive and equitable workplaces; an evaluation of the Fair Work Act*, page 105

- 5.12 The Department would be concerned about measures to increase complexity in the Fair Work system, particularly for small business employers and submits that the Bill would add complexity to the FW Act which may lead to confusion for employers.
- 5.13 For example, additional complexity would be added by introducing a new definition of 'excluded small business employer' that uses a different number of employees (20) and test (full time and full time equivalent employee) than those already used in the FW Act to define small business employers (see section 23).
- 5.14 The Bill also provides no definition or framework to determine what may constitute a 'full time equivalent employee' or whether an employer operates in a particular sector. The Bill refers to 'restaurant and catering industry' and the 'retail industry'. Whether an employer operates in a particular industry could be determined in a range of ways, including whether a particular modern award applies to their operations, whether it is in accordance to ANSZIC classifications, an ABS statistical measure, the employer's assessment or something else. In addition, the Bill does not outline how to determine whether the provisions would apply and how they would operate in respect of an employer operating a mixed business with employees performing some functions in a particular industry but other functions in another industry.
- 5.15 The Bill may result in further complexity and unfair outcomes within and between enterprises, because the effect of the Bill is that only certain employees would lose a penalty rate entitlement, not all employees in a particular industry, or employees of a particular size, or all employees within a particular business.
- 5.16 For example, an employer in the retail industry with 21 full time employees would be required to provide at least the provisions of the *General Retail Industry Award 2010* to their staff. An employer in the same street with 19 full time equivalent employees would not be required to provide the same safety net entitlements to those employees. This may result in the employer with 19 employees losing staff to other businesses which pay higher minimum wages.
- 5.17 In addition, an employer with employees performing functions in industries not excluded by the provisions may have some employees entitled to penalty rates on a particular day or time but other employees within the same business not entitled to penalty rates as a result of the provisions. This may result in additional complexity for the employer and may have other outcomes such as those employees not receiving penalty rates for that day not attending work due to the lack of compensation and the other employees being required to perform the work of those employees.
- 5.18 Lastly, the Bill does not consider interactions with other provisions of the FW Act. For example, it provides no detail on how an employer and their employees might consider and apply the 'better off overall test' if they were negotiating a collective enterprise agreement for a small business workplace in the relevant sectors or agreeing to the terms of an individual flexibility arrangement under a relevant modern award.

- 5.19 These are some examples to demonstrate that in drawing arbitrary distinctions the Bill fails to support the underlying policy argument for the Bill. In preserving penalty rates for some employees, in some small businesses, in some industries, the Bill provides no basis to undermine the longstanding policy position, reflected in the award safety net, that penalty rates should be paid for unsociable hours, weekends and public holidays.
- 5.20 In summary, the Bill has the potential to result in greater complexity, uncertainty, discontent and adverse financial outcomes for employers and employees, including as employees seek employment where they will be provided with safety net wages appropriate for the days and times they work.

6 The importance of penalty rates to small business employees in the retail and restaurant and catering industries

- 6.1 Workers who rely on penalty rates are among the lowest paid in Australia. Penalty rates therefore represent an important part of the remuneration of these workers.
- 6.2 Based on available data, workers in the sectors that would be covered by the Bill are more likely to be award reliant¹⁵ and hence rely on penalty rates to contribute a higher proportion of their take home pay than workers in other industries.
- 6.3 The Accommodation and Food Services sector is the industry with the largest number of award reliant employees in Australia (291 600 employees or 45.2 per cent of workers in that industry), followed by the retail trade industry (204 900 employees or 22.3 per cent¹⁶).
- 6.4 In addition, the workers in the sector covered by the Bill are more likely to work on weekends¹⁷. Seventy two per cent of workers in the Accommodation and Food Services sector and 56 per cent of workers in the Retail sector work on weekends, compared to only 34.5 per cent of workers across the economy.
- 6.5 As employees in these industries are more likely to be award reliant, they are more likely to be low paid. In addition, as they are more likely to work on weekends, they are more likely to be entitled to receive penalty rates. However, as set out below, these facts do not make the workers in these sectors well paid:
- The weekly minimum wage is currently \$606.40 per week (\$15.96 per hour).
 - Across all industries, the weekly full time average adult total earnings is \$1,413.10 a week, or \$73,481.20 per year.
 - Workers in the retail sector receive \$985.60 per week or around \$51,251.20 per year (which is inclusive of penalty rates).¹⁸ This is approximately 70 per cent of total weekly full time average adult earnings.

¹⁵ ABS Employee Earnings and Hours, May 2010 (cat No. 6306.0)

¹⁶ ABS *Employee Earnings and Hours, May 2010* (Cat No. 6306.0)

¹⁷ ABS *Australian Social Trends, December 2009*

¹⁸ ABS Average Weekly Earnings (original) – May 2012

- Workers in the accommodation and food services sector receive \$969.90 per week or around \$50,434.80 per year (which is inclusive of penalty rates).¹⁹ This is approximately 69 per cent of total weekly full time average adult earnings.

6.6 Penalty rates also comprise a greater proportion of these workers' salaries on average. For example, penalty rates comprise approximately eleven per cent of the salary of a casual restaurant worker and nine per cent of the salary of a casual hospitality worker who regularly work weekends.

Pete is a 29 year old waiter who is paid according to the Restaurant Industry Award 2010. He is employed as a casual and works 23 hours a week over about four days a week. Generally speaking, he works most Saturdays and Sundays. On average, he earns around \$530 per week (pre-tax), including \$58 in penalty rates. If penalty rates were removed from the award, Pete's pre-tax pay would drop by 11 per cent.

6.7 The Department estimates there are 59 400 workers in Pete's situation (adult, award-reliant, non-managerial, casual restaurant workers) – and Pete's pay and work patterns reflects an "average" for someone in his situation.

6.8 Pete is just one example of an award reliant worker who gets penalty rates. Table 1 contains a list of "typical" groups of people in the retail and restaurant and catering sectors with high rates of award reliance and who would be affected by any change to penalty rates. The first row (A) is the example of Pete discussed above.

¹⁹ ABS Average Weekly Earnings (original) – May 2012

Table 1: Number of – and average pay for – “typical”, adult, non-managerial, award reliant workers, by situation^{1,2}

Occupation	Award	Number of adult workers ³	Average days worked per week ^{4,5}			Average weekly pay ^{6,7,8}	Average pay lost if penalty rates are removed ^{9,10}
			Weekday	Saturdays	Sundays		
A. Casual restaurant worker	Restaurant Industry Award 2010	59 400	2.2	0.8	0.8	\$530	-\$58 (11%)
B. Casual hospitality worker	Hospitality Award (General) Industry 2010	53 000	2.9	0.9	0.4	\$515	-\$47 (9%)
C. Casual fast food worker	Fast Food Industry Award 2010	27 200	3.1	0.4	0.4	\$578	-\$37 (6%)
D. Casual sales assistants / salespersons	General Retail Industry Award 2010	59 900	2.3	0.6	0.3	\$446	-\$29 (6%)

¹ Table 1 is not a list of all award reliant groups entitled to penalty rates. It presents a few select examples for consideration. The average pay and average pay from penalty rates may not reflect the wide variety of individual situations – for example some people included in the average may work no penalty hours, while others who may work only penalty hours.

² We used a number of data sources to infer who received penalty rates, as no single source contained all the relevant information: modern awards were used to calculate pay rates (including casual loadings and penalty rates); ABS Employee Earnings and Hours (EEH) 2010, unpublished Confidentialised Unit Record File Data was used to estimate the number of award reliant workers, and HILDA was used to infer working patterns.

³ In the data, occupation is defined by ANZSCO definitions. These definitions do not always perfectly align with definitions in the awards. In particular, we assumed: (a) restaurant workers (for the purposes of the Restaurant Industry Award 2010) covered cafe workers and waiters (by the ANZSCO definition); and (b) hospitality workers (for the purposes of the Hospitality Industry General 2010 Award) covered bar attendants and baristas, gaming workers, hotel service managers and other hospitality workers (by the ANZSCO definition). Although the total number of award reliant restaurant and hospitality workers was calculated using EEH 2010 data, this was broken down using proportions from HILDA data.

⁴ The working patterns are derived from the Household, Income and Labour Dynamics in Australia (HILDA) survey (wave 10). The numbers of days worked per week on weekdays, Saturday and Sunday refer to the average days worked of casual workers in the particular job group. For example, from the HILDA survey, on average casual hospitality workers work 2.9 days per week on weekdays, 0.9 day on Saturday and 0.4 day on Sunday. The average may not reflect the wide variety of individual situations, but they reflect the work patterns of the group as a whole.

⁵ In addition to these working day patterns we also used weekly working hours (also estimated from the HILDA survey) to calculate the weekly pay. The weekly working hours are allocated proportionally to each of the working days based on the average working day patterns. For this table, the weekly working hours range from 19 to 34 between the four scenario cases.

⁶ All earnings are pre-tax.

⁷ The C1 classification was used for calculating pay rates. These pay rates are applied to average weekly work patterns.

⁸ HILDA contains a variable on award reliance, but it is unreliable. However all these groups were more than 45 per cent award reliant, so the issue of whether award reliant workers had different work patterns to other workers was ignored. Workers were assumed to work the same number of hours every work day.

⁹ Overtime penalty rates, public holiday penalty rates, transitional rates and shift loadings were not considered for the purpose of this analysis.

¹⁰ Where the casual loading and the penalty rate are not additive, we assume the penalty pay is the hourly pay rate less the 125% of the base rate of pay.

7 The impact of the award modernisation process on penalty rates payable by small businesses in the retail and hospitality sectors

- 7.1 Award modernisation resulted in the creation of 122 modern awards to replace over 1500 industrial instruments, including state and federal awards.
- 7.2 Following award modernisation penalty rate provisions are currently found in 116 of the 122 modern awards, indicating the wide spread use and acceptance of penalty rates as part of the safety net.
- 7.3 The penalty rate provisions currently in modern awards were determined by the Australian Industrial Relations Commission (AIRC) during the award modernisation process. In assessing the level of penalty rates for inclusion in modern awards, the AIRC acted in accordance with the modern awards objective, by giving careful consideration to:
- the operational requirements of industries;
 - prevailing arrangements under existing state and federal awards; and
 - the views of employer, employee and industry stakeholders, including through the release of consultation drafts of modern awards, oral and written submissions.
- 7.4 During the award modernisation process the AIRC also acknowledged the ongoing social disability associated with working outside normal spans of hours and on weekends. For example, in response to a submission in relation to the Restaurant Industry Award²⁰ that penalty payments should be minimal or non-existent during any periods when restaurants normally trade, including on weekends, the Full Bench concluded that such an approach:
- would ignore the inconvenience and disability associated with work at nights and on weekends;
 - did not reflect any prevailing positions in pre-reform awards and NAPSAs;
 - did not take in account the significance of penalty payments in the take home pay of employees in the restaurant industry;
 - would give the operational requirements of the industry primacy over all the other considerations the Commission was required to take into account; and
 - FWA would therefore require a more balanced approach.²¹
- 7.5 The analysis of penalty rate provisions for modern awards determined by the AIRC set out at Attachment A indicates that:
- modern awards did not introduce new penalty rate entitlements; and
 - penalty rates included in modern awards generally reflected rates commonly found in existing state awards.
- 7.6 This approach was acknowledged by the Productivity Commission in its 2011 Inquiry Report into the retail sector. The Productivity Commission described the award modernisation process thus:

²⁰ Restaurant and Catering Industry Association of Australia (RCA), 24 July 2009

²¹ ([2009] AIRCFB 865 at paragraph 232)

In selecting appropriate wage levels and other conditions in modern awards, the AIRC's approach was to select new benchmarks based on the most prevalent conditions existing in the range of pre-modern awards.²²

7.7 For example, penalty rate provisions in the General Retail Industry Award 2010, the Hospitality Industry (General) Award 2010, the Restaurant Industry Award 2010 and the Fast Food Industry Award 2010 remain significantly similar to those in pre-modern awards. As set out in Attachment A:

- the **Saturday penalty rate for full time and part time workers** under the Hospitality Industry (General Award) 2010 of 125 per cent was previously in awards from that industry in NSW, Victoria, Queensland and in South Australia for work performed prior to 1pm (after 1pm the rate in the South Australian award increased to 150 per cent). Other awards in Queensland, Western Australia, Tasmania, the ACT and Northern Territory contain a higher penalty rate of 150 per cent;
- the **Sunday casual loading** of 175 per cent in the Fast Food Industry Award 2010 was the rate provided in awards in that industry in Victoria, Queensland, Tasmania and the ACT. The rate in the modern award is below the 200 per cent loading in the Northern Territory award and the 220 per cent loading in South Australia. In the applicable NSW award, the previous loading was 115 per cent of the Sunday rate (which had a 150 per cent loading);
- the **public holiday rate for full time and part time workers** in the Restaurant Industry Award 2010 of 250 per cent was found in state awards reviewed for that industry, except in South Australia (which had a lower penalty rate of 200 per cent).
- the **public holiday rate for casual workers** in the Restaurant Industry Award 2010 of 250 per cent was the rate in Queensland, Tasmania and the Northern Territory, lower than the pre-modern awards in four jurisdictions (NSW – 250 per cent of the casual rate, Victoria – 275 per cent, Queensland – 273 per cent and the ACT – 275 per cent) and higher only than the rates provided in South Australia (220 per cent) and Western Australia (225 per cent).
- the **overtime rate** in the General Retail Industry Award 2010 of 150 per cent for the first three hours of work and 200 per cent thereafter is the same rate as existed across retail awards in all States and Territories pre award modernisation. In NSW, Western Australia and the ACT the higher rate was payable after 2 hours of work.

7.8 In relation to the outcome of the award modernisation process, in its report *Towards more productive and equitable workplaces; An evaluation of the Fair Work Act*, the independent Panel reviewing the Fair Work Act (FW Act Review Panel) found:

²² Productivity Commission (2011) *Economic Structure and Performance of the Australian Retail Industry Inquiry report* – online version, page 324

*While some wage costs may have increased for some employers as a result of the introduction of modern awards, others will have decreased, albeit incrementally, due to the five-year phase-in period. It is, however, noted that the content of awards is a matter for FWA's review of modern awards. On the other hand, the reduction in regulation as a result of award modernisation noted above is a significant benefit to employers nationally.*²³

7.9 The FW Act Review Panel also found that *the Fair Work Act 2009* (FW Act) and award modernisation did not result in a disproportionate increase in wages:

- *At an aggregate level, the Wage Price Index shows that wage growth since 2009 is around its decade-long average, which suggests that the introduction of the FW Act has not of itself changed the trend in wages growth.*²⁴

And:

- *Though nominal wages growth has been restrained, real wages have increased more than in earlier decades. Real wages did not increase in the period 1983–84 to 1991–92, compared to an annual average real increase of 1.8 per cent using male full-time AWOTE in the period 1994–95 to 2010–11.*²⁵

8 The flexibility of the current Fair Work system for small business

8.1 The FW Act provides flexibility in relation to managing penalty rates. A significant feature of the FW Act is that there are mechanisms for employers and employees to bargain for wages and other conditions of employment that differ from those contained in the relevant modern award and that best suit the needs of the employees and the particular enterprise. For example:

- An employer and group of employees can make an enterprise agreement which modified the terms of an applicable award, so long as employees are better off overall. The Department has identified enterprise agreements where penalty rates are 'rolled up' into a higher flat base rate of pay or which provide for annualised salaries which takes into account a component for penalty rates. This allows employers to better manage cash flow and to provide stability and certainty in relation to managing employee entitlements; and
- An employer and an individual employee may agree to make an Individual Flexibility Arrangement which may also alter penalty rate provisions in an award or an enterprise agreement – so long as the employee is better off overall. Under the FW Act, modern awards and enterprise agreements are required to contain a flexibility term to enable an employer and an individual employee to agree on arrangements to meet the genuine individual needs of the employer and employee.

²³ *Towards more productive and equitable workplaces; an evaluation of the Fair Work Act*, page 105

²⁴ *Ibid* page 80

²⁵ *Ibid* page 60

8.2 The Department notes the following findings in the Report from the Independent Panel which reviewed the Fair Work Act (FW Review Panel):

- *Under the FW Act, penalty rates are required to be paid under modern awards. However, the operation of award penalty rate provisions may be varied using an IFA or through an enterprise agreement.²⁶*
- *There are mechanisms available to employers to arrange their work practices without paying penalty rates—for example, by increasing the base rate of pay to compensate for the reduction in penalty rates—provided that the arrangement leaves the employee better off overall. There may be a cost impact associated with this change for employers who previously cut penalty rates without providing equivalent compensation and who now either pay penalty rates under a modern award or do not pay penalty rates but provide greater compensation to employees for their removal. This is particularly likely to affect those trading at night or on weekends.²⁷*

8.3 As an indication of the flexibilities that small businesses are already taking up, for agreements current as at 30 June 2012 with less than 20 employees:

- 22.45% of agreements, covering 21.20% of employees, contain a clause regarding a loaded hourly rate;
- 7.85% of agreements, covering 8.71% of employees, contain a clause related annualised salaries; and
- 15.82% of agreements, covering 16.83% of employees, contain a clause providing no restrictions on ordinary hours worked.

8.4 It is estimated that 45.68% of small business enterprise agreements, approved in the period 1 January 2011 to 30 June 2012 contained a flexibility term that allows for an IFA about penalty rates.²⁸

8.5 This indicates that these provisions are able to be used by small businesses to provide flexibility for employers with fair standards and conditions for employees as set under the NES and modern awards.

²⁶ *Towards more productive and equitable workplaces; an evaluation of the Fair Work Act* page 126

²⁷ *Ibid* page 126

²⁸ Small business agreements are those where the number of employees covered by the agreement is less than 20. This is considered a reasonable proxy for true small businesses although it is recognised some agreements with less than 20 employees may belong to medium to large businesses which wish to cover different sections of their business operations with separate agreements. The 45.68% figure has been estimated by taking the 37.22% of small business agreements contained the model flexibility term or a general flexibility term that allowed an IFA about any matter in the agreement and adding to it an estimate equal to 8.47% of the small business agreements with a specific flexibility term that allow for IFAs about penalty rates. The estimate has been derived by extrapolating the results of a random sample survey of 200 small business agreements with a specific flexibility term approved between 1 Jan 2011 and 30 June 2012 to the total population of small business agreements with a specific flexibility term. This sample indicated that 13.5% of small business agreements with a specific flexibility term allowed for IFAs about penalty rates.

9 Determining penalty rates – a matter for Fair Work Australia

- 9.1 Australian Governments have long recognised the role of an independent workplace relations tribunal in making determinations in relation to wages and conditions in Australian workplaces. Australia’s national workplace relations tribunal was first established as the Commonwealth Court of Conciliation and Arbitration in 1904. Since then the institution has evolved in line with substantial legislative, social and economic changes, the most recent development being the passage of the *Fair Work Act 2009* and the subsequent establishment of Fair Work Australia (FWA).
- 9.2 The Department submits that decisions in relation to wages and conditions under modern awards, including penalty rates, should be determined by the national workplace relations tribunal. In determining provisions for inclusion in modern awards, FWA is required to apply the modern awards objective set out in section 134(1) of the FW Act. The modern awards objective requires FWA to ‘provide a fair and relevant minimum safety net of terms and conditions’ taking into account a range of factors including but not limited to:
- *Relative living standards and needs of the low paid; and*
 - *The need to promote flexible modern work practices and the efficient and productive performance of work; and*
 - *The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and*
 - *The need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia.*
- 9.3 FWA is currently conducting a two year review of modern awards²⁹ under the FW Act, including applications to vary penalty rates in the retail, hospitality, fast food, restaurant and hair and beauty awards.
- 9.4 In addition to the two year review, under the FW Act FWA is required to undertake a review of modern awards every four years. This review process provides employers, employees and other interested parties with the opportunity to request variations to award conditions and to provide evidence in relation to specific operational requirements and other issues impacting particular industries, employers or employees which support their request.
- 9.5 Determining particular provisions for wages and conditions in specific industries should be a function of FWA and not provided for by establishing a legislative exemption through the FW Act.

²⁹ As provided under subitem 6(2) of Schedule 5 to the *Transitional Provisions and Consequential Amendments Act 2009*

Summary of key monetary rates – Retail Industry

	General Retail Industry Award 2010 Modern award	NSW - Shop Employees (State) Award NSW	Shop, Distributive and Allied Employees Association - Victorian Shops Interim Award 2000 Vic	Retail Industry Award – State 2004 (Qld) QLD	Retail Industry (South Australia) Award SA	Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977 (WA) WA	Retail Trades Award (Tas) Tas	Retail and Wholesale Industry – Shop Employees – Award 2000 (ACT) ACT	Retail, Wholesale and Distributive Employees (NT) Award 2000 NT
Casual loading	125%	115% + 8.33 % annual leave (compounded)	125% + 8.33 % annual leave (compounded)	123%	120%	120% Full day's work 125% Less than full day work.	120%	115%	120%
Saturday penalty – FT & PT	125%	125%	Flat dollar rate	125%	125%	FT - Ordinary hours include Saturday PT – Complex formula	Flat dollar rate	125%	125%
Saturday penalty - casual	135%	Flat dollar rate based on age of employee	Flat dollar rate	123%	120%	Complex Formula x 120%	Flat dollar amount	Complex formula	125%
Sunday penalty – FT & PT	200%	150%	200%	150%	160%	200%	200%	150%	200%
Sunday penalty – casual	200%	150%	200%	150%	170% plus casual loading	200%	200%	150% compounded (i.e. 150% of 115%)	200%
Overtime – first 3 hours	150%	150% first 2 hours	150%	150%	150%	150% first 2 hours	150%	150% first 2 hours	150%
Overtime – after 3 hours	200%	200% after 2 hours	200%	200%	200%	200% after 2 hours	200%	200% after 2 hours	200%
Evening penalty	125% Does not apply to casuals	N/A	125%	N/A	N/A	General shop: \$3.39/hr Small retail: 120%	Flat dollar rate	125%	125%
When do evening penalties apply?	After 6:00 pm	N/A	6:00 pm – 9:00 pm.	N/A	N/A	General shop: 6:00 pm – 9:00 pm Small retail: after 6 pm	Flat dollar rate	After 6:00 pm Fri	6:00 pm – 9:30 pm.
Public Holidays – FT & PT	250%	250%	250%	250%	200%	250%	250%	200%	250%
Public Holidays – casual	250%	250%	250%	250% of the casual rate	200% of the casual rate	250% of casual rate	270%	250% of the casual rate	250%

N.B The pre-modern state and federal awards used in this comparison represent a sample of retail industry awards and did not cover all employers and employees in the relevant state or territory prior to 1 January 2010. Selection is based on the assessment that the awards had significant coverage in the relevant jurisdiction

Summary of key monetary rates – Hospitality Industry

	Hospitality Industry (General) Award 2010 Modern Award	Motels, Accommodation and Resorts (State) Award NSW	Hospitality Industry - Accommodation, Hotels, Resorts and Gaming Award 1998 Vic	Hotels, Motels, Resorts and Accommodation Award - State (Excluding South-East Queensland) 2005 QLD	Hotels, Resorts and Accommodation Industry Award - South-Eastern Division 2002 QLD	Boarding Houses, Guest Houses, Etc., Award SA	Motel, Hostel, Service Flats and Boarding House Workers' Award, 1976 WA	Hotels, Resorts, Hospitality and Motels Award TAS	Liquor Industries Hotels, Hostels, Clubs and Boarding Establishments etc. (Australian Capital Territory) Award, 1998 ACT	Hotels, Motels, Wine Saloons, Catering, Accommodation, Clubs and Casino Employees (Northern Territory) Award 2002 NT
Casual loading	125%	125 % +8.33% annual leave (compounded)	125%	125%	125%	120%	125%	125%	125% +8.33% annual leave (compounded)	125%
Saturday penalty – FT & PT	125%	125%	125%	125%	150%	125% before 1:00pm 150% after 1:00 pm	150%	150%	150%	150%
Saturday penalty – casual	150%	150%	150%	125%	150%	145% before 1:00 pm 170% after 1:00 pm	150%	150%	175%	175%
Sunday penalty – FT & PT	175%	175%	175%	150%	175%	200%	150%	175%	200%	175%
Sunday penalty – casual	175%	175%	175%	150%	175%	220%	150%	175%	200%	200%
Overtime – first 2 hours (Mon – Fri)	150%	150%	150%	150% for the first three hours	150%	150% for the first three hours	150%	150%	150% for the first three hours	150%
Overtime – after 2 hours	200%	200%	200%	200% after three hours	200%	200% after three hours	200%	200%	200% after three hours	200%
Evening penalty	\$1.85 per hour	\$1.46 per hour	\$1.63 per hour	\$1.42 per hour	\$1.49 per hour	Casuals only – 30% loading in lieu of 20% casual loading	\$1.44 per hour	\$1.42 per hour	Additional 15% of standard rate	\$1.77 per hour
When do evening penalties apply?	7:00 pm to midnight	7.00 pm – 7:00 am	7:00 pm – midnight	8.00 pm – 6:00 am	7:00 pm –midnight	After 6:00pm	7:00 pm – 7:00 am	7:00 pm – midnight	7:30 pm – 6:30 am	7:00 pm – 7:00 am
Public Holiday – FT & PT	250%	250%	250%	250%	250%	200%	250%	250%	250%	250%
Public Holiday – casual	275%	250% - 275% depending on duties	275%	250%	250%	200%	225%	250%	275%	250%

N.B The pre-modern state and federal awards used in this comparison represent a sample of hospitality industry awards and did not cover all employers and employees in the relevant state or territory prior to 1 January 2010. Selection is based on the assessment that the awards had significant coverage in the relevant jurisdiction.

Summary of key monetary rates – Restaurant Industry

	Restaurant Industry Award 2010 Modern Award	Restaurant, &c., Employees' (State) Award NSW	Liquor and Accommodation Industry - Restaurants - Victoria - Award 1998 CRV Vic	Cafe Restaurant and Catering Award - State (Excluding South-East Queensland) 2003 QLD	Hospitality Industry - Restaurant, Catering and Allied Establishments Award - South-Eastern Division 2002 QLD	Cafes & Restaurants (SA) Award SA	Restaurant, Tearoom and Catering Workers' Award, 1979 WA	Restaurant Keepers Award TAS	9.5.1.1 Liquor and Allied Industries Catering, Cafe, Restaurant, Etc. (Australian Capital Territory) Award 1998 9.5.1.2 ACT	Hotels Motels Wine Saloons Catering Accommodation Clubs and Casino Employees (Northern Territory) Award 2001 NT
Casual loading	125%	120% + 8.33% annual leave (compounded)	125%	150%	123%	120%	125%	125%	125% + 8.33% annual leave (compounded)	125%
Saturday penalty – FT & PT	125%	125%	125%	150%	150%	125% before 1:00pm 150% after 1:00pm	150%	125%	125%	150%
Saturday penalty - casual	150%	125% of the casual rate	150%	150%	173%	145% before 1:00pm 170% after 1:00pm	150%	150%	150%	175%
Sunday penalty – FT & PT	150%	150%	175%	150%	150%	200%	150%	175%	175%	175% - 200% Subject to duties
Sunday penalty – casual	175%	150% of the casual rate	175%	200%	173%	220%	150%	175%	175%	200%
Overtime – first 2 hours	150%	150%	150%	150% first 3 hours	150% first 3 hours	150% first 3 hours	150%	150%	150% first 3 hours	150%
Overtime – 2 after hours	200%	200%	200%	200% after 3 hours	200% after 3 hours	200% after 3 hours	200%	200%	200% after 3 hours	200%
Evening penalty	110% 10:00pm - midnight 115% midnight - 07:00am	Additional 30% of standard rate	\$1.60 7:00pm - midnight \$2.30 Midnight – 7:00am	\$3.54 per hour	\$1.35 per hour 10:00pm - midnight \$1.96 per hour midnight - 6:00am	Additional 10% of standard rate	\$1.44 per hour 7:00pm - midnight \$1.51 per hour midnight - 7:00am	Varies according to duties	\$1.51 per hour 7:00pm-midnight \$2.22 per hour midnight-7:00pm	\$1.77 per hour
When do evening penalties apply?	10:00pm - 7:00am	Midnight – 06:00am	7:00pm - 7:00am	8:00pm - Midnight	10:00pm - 6:00am	6:00pm - 6:00am	7:00pm - 7:00am	7:00pm - 7:00am	7:00pm - 7:00am	7:00pm - 7:00am
Public Holidays – FT & PT	250%	250%	250%	250%	250%	200%	250%	250%	250%	250%
Public Holidays - casual	250%	250% of the casual rate	275%	250%	273%	220%	225%	250%	275%	250%

N.B The pre-modern state and federal awards used in this comparison represent a sample of restaurant industry awards and did not cover all employers and employees in the relevant state or territory prior to 1 January 2010. Selection is based on the assessment that the awards had significant coverage in the relevant jurisdiction.

Summary of key monetary rates – Fast Food Industry

	Fast Food Industry Award 2010 Modern Award	Shop Employees (State) Award - AN120499 NSW	National Fast Food Retail Award 2000 - AT806313CRV Vic	Fast Food Industry Award - State (Excluding South-East Queensland) 2003 - AN140114 QLD	Retail Take-Away Food Award - South-Eastern Division 2003 - AN140258 QLD	Delicatessens, Canteens, Unlicensed Cafes and Restaurants Etc. Award - AN150170 SA	Fast Food Outlets Award 1990 - AN160127 WA	Restaurant Keepers Award - AN170086 TAS	9.5.1.3 Liquor and Allied Industries Catering, Cafe, Restaurant, Etc. (Australian Capital Territory) Award 1998 9.5.1.4 ACT	Hotels Motels Wine Saloons Catering Accommodation Clubs and Casino Employees (Northern Territory) Award 2002 NT
Casual loading	125%	115%	Depends on State or Territory – Ranges from 15% to 25%	125%	123%	120%	125%	125%	125% + 8.33% annual leave (compounded)	125%
Saturday penalty – FT & PT	125%	125%	125%	150% for full time employees only	150%	150%	Not Specified	125%	125%	150%
Saturday penalty - casual	125% of the casual rate	115% of the Saturday rate	Casual loading plus a specified \$ amount per day	175% inclusive of the casual rate	173%	145% up to 12:00 midday 170% after 12:00 midday	125% of the Saturday rate	150%	150%	175%
Sunday penalty – FT & PT	150%	150%	175%	150% for full time employees only	150%	200%	Not Specified	175%	175%	175% - 200% Subject to duties
Sunday penalty – casual	175% inclusive of the casual rate	115% of the Sunday rate	175%	175% inclusive of the casual rate	173%	220%	125% of the Sunday rate	175%	175%	200%
Overtime – first 2 hours	150%	150%	150%	150% for the first 3 hours	150% for the first 3 hours	150% for the first 3 hours	150%	150%	150% first 3 hours	150%
Overtime – 2 after hours	200%	200%	200%	200% after the first 3 hours	200% after the first 3 hours	200% after the first 3 hours	200%	200%	200% after 3 hours	200%
Evening penalty	110% 9:00pm - midnight	125% after 6:00pm	110% 6:00pm - midnight	A specified \$ amount from 8:00pm until 12:30am 150% from 12:30am until 05:30am	A specified \$ amount from 10:00pm until 12:00 midnight A specified \$ amount from midnight until 06:00am	110% 6:00pm - midnight	Not Specified	A specified \$ amount from 7:00pm until 7:00am	\$1.51 per hour 7:00pm-midnight \$2.22 per hour midnight-7:00pm	\$1.77 per hour
When do evening penalties apply?	after 9.00pm	After 6:00pm	6:00pm - midnight	From 8:00pm until 05:30am	10:00pm until 06:00am	6:00pm - midnight	Not Specified	7:00pm until 7:00am	7:00pm - 7:00am	7:00pm - 7:00am
Public Holidays – FT & PT	250%	250%	250%	250%	250%	200%	200%	250%	250%	250%
Public Holidays - casual	275%	250%	250% plus the casual loading	250%	250% of the casual rate	200%	200%	250%	275%	250%

N.B The pre-modern state and federal awards used in this comparison represent a sample of fast food industry awards and did not cover all employers and employees in the relevant state or territory prior to 1 January 2010.