Australian Retailers Association

Committee Secretary
Senate Education and Employment Committees
PO Box 6100
Parliament House
Canberra ACT 2600

Email: eec.sen@aph.gov.au

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SUBMISSION TO THE EDUCATION AND EMPLOYMENT REFERENCES COMMITTEE INQUIRY INTO PENALTY RATES

The Australian Retailers Association (ARA) offers support, information and representation to around 7,500 retailers across the nation, representing more than 50,000 shop fronts. The ARA ensures the long-term viability and position of the retail sector as a leading contributor to Australia's economy.

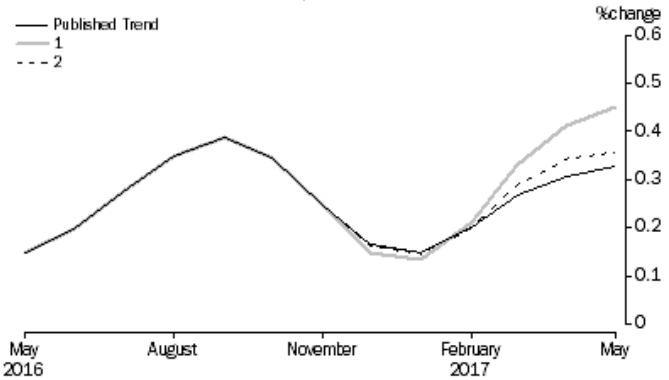
The ARA is by far Australia's largest retail organisation with coverage from the country's very largest retailers to small and medium retail businesses across all types of retail.

Current state of the retail sector

The state of the retail sector has certainly improved, but only slowly and cautiously.

General figures from the Australian Bureau of Statistics (ABS) shows an increase in general retail trade from $25.1b in May 2016, increasing to $26b in May 2017. This represents an increase of just 3.82% year-on-year.

RETAIL TURNOVER, Australia



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Source: ABS

However, despite some positive news, retailers remain concerned about tough trading conditions and continue to seek practical employment outcomes which work for employee and employer.

The ARA's members place a high value on the employment relations services we offer. The ARA engages closely with its membership on a full range of employment relations services, and has directly sought feedback from its members on the issues to be dealt with by the Education and Employment References Committee (**Committee**) in its Inquiry into Penalty Rates (**Inquiry**).

Our approach to this submission

1. The ARA has approached the submission with a view to clarifying the significant amount of misinformation that appears to be circulating both in the media and the Parliament regarding the issues of enterprise agreements and penalty rates.

2. The ARA has structured this submission so that we deal with each of the matters referred to the Committee separately. Where these matters appear to be closely linked we have combined the matters so that we are not repeating earlier submissions.

Terms of Reference A - claims that many employees working for large employers receive lower penalty rates under their enterprise agreements on weekends and public holidays than those set by the relevant modern award, giving those employers a competitive advantage over smaller businesses that pay award rates.

3. At the outset, the ARA notes the absence of any definition of "large employers" or "smaller businesses". This represents a barrier to the ARA's ability to address this issue. ARA has, however, considered the commentary surrounding the issue and has made assumptions as to the likely meaning to these terms to be applied by the Committee.

4. The ABS uses three definitions of business size:

    (a) large businesses, which are those with employment of 200 or more persons;
    (b) medium businesses, which are those with employment of 20 to less than 200 persons;
    (c) small businesses, with employment of less than 20 persons.

5. Given, however, that the Inquiry is considering the *Fair Work Amendment (Pay Protection) Bill 2017* (**Bill**) the ARA has considered the types of employers named

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in the Second Reading Speech of Senator Rhiannon in relation to the Bill. Senator Rhiannon names the following employers:

(a) Coles;
(b) Woolworths;
(c) Domino's;
(d) McDonald's;
(e) Hungry Jack's; and
(f) KFC.

6. It is therefore apparent that the Committee's reference to "large employer" is intended to capture businesses of, or around, the size of those referred to by Senator Rhiannon. For abundant caution the ARA treats "large employer" as a business with 5,000 or more employees.

Sub-issue A – Public Holiday penalty rates

7. The ARA submits that the assertion that employees of large employers receive lower penalty rates on public holidays under their enterprise agreement than those set by the *General Retail Industry Award 2010* (**GRIA**). Table A below compares the public holiday penalty rates paid by Woolworths and Coles (under the agreements which currently apply to those businesses) to employees working on public holidays to the penalty rates under the GRIA.

Table A

	GRIA	Coles Agreement	Woolworths Agreement
Permanent penalty	125%	150%	150%
Casual penalty and loading	150%	150%	150%

8. It follows from this that employees employed by Coles and Woolworths are paid a penalty rate for public holiday work which is equal to or greater than the penalty rate paid to employees under the GRIA. It should also be noted that this does not take into account the higher base rates of pay applicable under the Coles and Woolworths enterprise agreements, which we consider in further detail below.

Sub-issue B – Weekend penalty rates

9. The ARA accepts that in some circumstances employees working at Woolworths and Coles receive penalty rates on weekends which are lower than the rates applicable to employees under the GRIA. These are set out in Table B below:

Table B

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	GRIA	Coles Agreement	Woolworths Agreement
Permanent Saturday	25%	0%	0%
Casual Saturday	35%	20%	20%
Permanent Sunday*	50%	50%	50%
Casual Sunday*	75%	70%	70%

*Penalty rate to apply once transition to reduced penalty rates is completed.

10. There are two key points that need to be made in relation to this. The first is that the enterprise bargaining system has always supported outcomes such as this, where award entitlements are varied to meet the operational needs of individual businesses, and where those award entitlement variations are offset by other benefits. The second is that the reduced weekend penalties are offset by other benefits for employees including, most importantly, significantly higher base rates of pay.

The Industrial History

11. The ARA has had the benefit of reviewing the submissions of the Australian Chamber of Commerce and Industry (**ACCI**) in relation to the history of enterprise level bargaining, contained both within the submissions of the ACCI to the Senate Education and Employment Legislation Committee's inquiry into the *Fair Work Amendment (Pay Protection) Bill 2017* and to the Inquiry. The ARA adopts those submissions.

12. In the long term, and in the ARA's submission commendable and important, intention of enterprise bargaining was summarised by then Prime Minister Keating in 1993, and is extracted at paragraph 110 of the ACCI's submission to this Inquiry. Prime Minister Keating described an Australia working towards an industrial relations system where awards represented a safety net which over time would become simpler, and most employees (and businesses) would have their wages and conditions determined by enterprise level agreements. We remind this Inquiry of the following statement by then Prime Minister Keating:

    "These agreements would predominately be based on improving the productive performance of enterprises, because both employers and employees are coming to understand that only productivity improvements can guarantee sustainable real wage increases.

    We would have an Industrial Relations Commission which helped employers and employees reach enterprise bargains, which kept the safety net in good repair, which advised the Government and the parties of emerging difficulties and possible improvements, but which would rarely have to use its compulsory arbitral powers."

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13. The vision set out above has predominantly been maintained in the 24 years since. Australia has continued its shift towards enterprise level bargaining with simplified awards. Consistent throughout this has been the capacity for businesses to vary safety net entitlements to develop terms and conditions tailored to their operations, with a focus on productivity gains, while ensuring employees overall were sufficiently compensated for any reductions in safety net entitlements. And the retail industry has operated within this framework in the same way that other industries have. Large and smaller retail businesses have bargained at workplace level with their employees, in most cases exchanging lower weekend penalty rates for higher base rates of pay.

Compensating for reduced penalties and the focus on productivity

14. The industrial landscape shifted towards workplace level bargaining from the late 1980s, gathered steam in the 1990s and continues still. At the same time society, and in particular consumer patterns, underwent significant change, from one where access to retail services was limited to five and a half days (Monday to Friday and Saturday morning) to one where consumers seek access to retail services seven days a week and in some cases 24 hours a day.

15. With a shift towards weekend shopping retail employers of all sizes identified the need to control labour costs at these expanded shopping times in order to provide adequate customer service. Prohibitive weekend penalty rates were "bought out" through higher base rates of pay. This ensured retail employers of all sizes could operate with sufficient staffing levels on Saturdays and Sundays to drive sales, and therefore productivity gains.

16. Table C below sets out the most recent publicly available rates of pay for a permanent shop assistant under a range of enterprise agreements of large retail employers and the GRIA rate which applied at that time.

Table C

Agreement	Date from	Base rate (weekly)	GRIA rate at date	Difference
Coles	1 December 2013	$773.80	$683.20	$90.60
Woolworths	1 January 2015	$800.65	$703.90	$96.75
Bunnings	1 July 2015	$797.56	$721.50	$78.06
IKEA	September 2016	$890.34	$738.70	$151.64
Costco	1 February 2017	$874.00 - $950.00	$738.70	$135.28-$211.30

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17. As can be seen from that table, these retail employers are paying base rates of pay that are substantially higher than the GRIA, effectively "buying out" penalty rates. A cursory review of industrial history demonstrates this has been common practice in enterprise bargaining for decades. The certified agreement which covered employees working in Woolworths supermarkets in New South Wales and the Australian Capital Territory in 1995 adopted the same approach of elevated base rates and reduced penalty rates. This was lawful then and it is lawful now. It is also a legitimate means of achieving one of the central aims of bargaining – productivity gains.

18. The Committee should conclude from this that while it is correct to say that some large employers pay lower penalty rates on weekends than is applicable under the GRIA, this is legitimate and lawful given those employers also pay a higher base rate of pay. The Committee should not allow itself to be distracted by unsubstantiated, hysterical allegations that employees are being "ripped off" through penalty rate reductions.

Sub-issue C – Competitive advantage

19. The proposition that larger retail employers enjoy a competitive advantage over smaller retail employers by virtue of paying lower weekend penalty rates is unsustainable for two fundamental reasons:

    (a) any "advantage" any retail employer paying reduced weekend penalty rates might enjoy is more than offset by the higher costs those retail employers expend generally across the course of a trading week; and

    (b) the proposition appears to proceed on the basis that smaller employers cannot bargain for the same, or similar, terms and conditions as larger employers. Such a proposition is erroneous and contrary to the available data.

20. The retail employers included in Table B above pay substantially higher rates of pay to employees working Monday to Friday, up to $3.00 per hour, or 14%. It is not presumed, or asserted, that these employers are suffering a competitive disadvantage at these times. Where a large employer is paying a 50% penalty rate on a Sunday, and the GRIA provides for a 95% penalty (at the time of these submissions), the difference between these two shrinks significantly when the higher base rate is taken into account.

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21. Enterprise bargaining is open to, and utilised by, employers of all sizes in the retail industry. We have extracted in Table D data below from the Department of Employment.

Table D

Quarter	Mar 15	June 15	Sep 15	Dec 15	Mar 16	June 16	Sep 16	Dec 16
Agreements approved	11	19	16	11	23	17	17	14
Employees covered	1,100	3,500	9,900	1,100	2,500	2,100	300	1,000

*Source: *Trends In Enterprise Bargaining* December Quarter 2016. Department of Employment

22. It is reasonable to conclude the following from this:

(a) a maximum of one large retail trade employer (using the minimum 5,000 employee benchmark the ARA has presumed as set out above) entered into an enterprise agreement in the relevant period;

(b) at least 127 "smaller" retail trades employers entered into enterprise agreements in the same period; and

(c) a number of small businesses (using the ABS definition) entered into enterprise agreements in the same period.

Summary in relation to Terms of Reference A

23. The information outlined above should cause the Committee to reach the following conclusions in relation to Terms of Reference A:

(a) employees of large retail employers receive penalty rates on public holidays that are equal to or higher than those provided for under the GRIA;

(b) employees of large retail employers receive penalty rates on weekends that are predominantly lower than those provided for under the GRIA, but these lower penalty rates are offset by higher base rates of pay and other beneficial conditions;

(c) the proposition that large retail businesses enjoy a competitive advantage by virtue of paying lower penalty rates on public holidays is erroneous because large retail employers do not pay lower penalty rates on public holidays; and

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(d) the proposition that large retail businesses enjoy a competitive advantage by virtue of paying lower penalty rates on weekends is erroneous because any labour cost advantage associated with lower weekend penalty rates is offset by higher base rates of pay and because smaller retail businesses are able to, and do, enter into enterprise agreements.

Matter B - the operation, application and effectiveness of the Better Off Overall Test (BOOT) for enterprise agreements made under the *Fair Work Act 2009* (FW Act).

The BOOT and the objects of the FW Act

24. From the perspective of the retail industry the operation and application of the BOOT has resulted in a near collapse of bargaining, leading to the conclusion that the BOOT is acting contrary to its intent. The BOOT applies to enterprise agreements under Part 2-4 of the FW Act. The object of Part 2-4 is set out at section 171, which says:

The objects of this Part are:

(a) to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits; and

(b) to enable the FWC to facilitate good faith bargaining and the making of enterprise agreements, including through:

(i) making bargaining orders; and

(ii) dealing with disputes where the bargaining representatives request assistance; and

(iii) ensuring that applications to the FWC for approval of enterprise agreements are dealt with without delay.

25. Further, the objects of the FW Act include, at section 3(f):

"achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action".

26. Considering these together, a measure of the operation, application and effectiveness of the BOOT is the extent to which enterprise-level collective bargaining is being promoted, whether it is promoting productivity benefits, whether

it is promoting simplicity and fairness. The ARA is highly concerned that the BOOT is failing to achieve these objects, and it is essential that a more practical approach to its application, focused on productivity benefits, be adopted.

Enterprise bargaining in retail is declining at alarming rates

27. The BOOT applied to enterprise agreements made after 1 January 2010. Table E sets out the number of enterprise agreements approved in Retail Trades in the three years prior to 1 January 2010 and in each year following 1 January 2010.

Table E

Year	Agreements approved
2007	538
2008	521
2009	685
2010	401
2011	119
2012	118
2013	117
2014	93
2015	57
2016	71

**Source: Historical table: All wage agreements, by ANZSIC division, lodged in the quarter: December quarter 1991 – The most recent published quarter: Department of Employment https://docs.employment.gov.au/node/31266*

28. Table F sets out the number of agreements current in the retail industry on the last day of each year in the same period

Table F

Year	Agreements approved
2007	840
2008	1217
2009	1775
2010	2011
2011	1911
2012	1569
2013	1049
2014	318
2015	273
2016	237

**Source: Historical table: All wage agreements, by ANZSIC division, current on last day of each quarter: December quarter 1991 – The most recent published quarter: Department of Employment https://docs.employment.gov.au/node/31264*

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29. The above data identifies an alarming trend in bargaining at the enterprise level in retail. A FW Act which is intended to promote enterprise level bargaining is failing to do so, and at current rates there will be less than 200 enterprise agreements operating in the largest private sector employing industry in Australia within 12 – 18 months.

The BOOT is a primary reason for this

30. The application of the BOOT by the Fair Work Commission (FWC) is a primary reason for the retail bargaining decline. Retail employers filing enterprise agreements approved by an overwhelming majority of their workforce are being met with an FWC process which focuses on fanciful what if scenarios, a process which appears to be directed towards rejecting enterprise level arrangements rather than approving them.

31. We set out below two case studies which highlight the problem.

Beechworth Bakery

32. Beechworth Bakery bargained with a union and 12 employee nominated bargaining representatives, and the 232 employees who would be covered by the *Beechworth Bakery Employee Co Pty Ltd Enterprise Agreement 2016* were invited to vote on whether the approve the agreement. From this, 167 employees cast a valid vote, and 143, or 86%, voted in favour of the agreement. This is an overwhelming majority in anyone's language.

33. On 27 June 2016 Beechworth Bakery lodged an application with the FWC for approval on the agreement. More than five months later, on 9 December 2016, the FWC approved the agreement after seeking, and being provided with Undertakings by the company[1]. Deputy President Sams concluded that there were some concerns whether employees who only worked on Sundays (of which there was one) and to a lesser extent public holidays, could be worse off under the agreement, and approved the agreement after the company undertook to pay employees who worked only on Sundays or public holidays the relevant award rate plus 1.5%.

34. The union appealed the approval decision, and on 6 April 2017 a Full Bench of the FWC upheld the appeal, overturning the decision to approve the agreement[2]. The FWC remitted the application for approval back to DP Sams. DP Sams, on 2 May

[1] [2016] FWCA 8862
[2] [2017] FWCFB 1664

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2017, approved the agreement with Undertakings[3]. DP Sams noted the following matters which the ARA considers are relevant to the Inquiry, and it would assist the Committee to bear these in mind:

[18] *In balancing the benefits against the detriments in the Agreement, the exercise is not a 'line by line' or 'clause by clause' comparison, but an overall assessment as to whether the BOOT has been satisfied. Hart v Coles did not reject, alter or amend that statutory instruction; see: Armacell Australia Pty Ltd & Ors [2010] FWAFB 9985 at para [41]; AKN Pty Ltd [2015] FWCFB 1833 at paras [43]-[44]; National Tertiary Education Industry Union v University of New South Wales [2011] FWAFB 5163 at para [46].*

[19] *To demonstrate this further, the Macquarie Dictionary's definition of 'overall' is 'covering or including everything; altogether; an overall estimate; the position viewed overall'.*

[20] *By focussing only on a rate of pay for work on a particular day in an agreement with a higher rate of pay for work on the same day under the Award and ignoring all of the agreement's other beneficial (and detrimental) terms, is in my opinion, an erroneous approach.*

[21] *In the context of understanding the BOOT, it is also helpful to reflect on what was said in the Explanatory Memorandum to the Fair Work Bill 2009. At para 152, it is said:*

> *'The BOOT will be an 'on the papers' assessment of the pay and entitlements of an agreement and will avoid the complicated assessment procedures adopted for the Fairness Test, such as accepting written submissions from employees on the personal value of intangible benefits. Undertakings will not be a feature of the approval process except where FWA is satisfied that the effect of accepting the undertaking is not likely to cause financial detriment to any employee covered by the agreement or result in substantial changes to the agreement. Before accepting an undertaking FWA must seek the views of bargaining representatives for the agreement.'*

[22] *At para 818, the Explanatory Memorandum records:*

> *'Although the better off overall test requires FWA to be satisfied that each award covered employee and each prospective award covered employee will be better off overall, it is intended that FWA will generally be able to apply the better off overall test to classes of employees.* ***In the context of the approval of enterprise agreements, the better***

[3] [2017] FWCA 2418

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> ***off overall test does not require FWA to enquire into each employee's individual circumstances**.' (My emphasis)*
>
> ***[23]** This is consistent with what Lawler VP said in University of New South Wales re University of New South Wales (Professional Staff) Enterprise Agreement 2010 [2010] FWAA 9588 at para [96]:*
>
> > *'It is trite to observe that awards typically contain both monetary and non-monetary terms and conditions. Obviously enough, the BOOT calls for an overall assessment. Comparing monetary terms and conditions is, at the end of the day, a matter of arithmetic. There is an obvious problem of comparing apples with oranges when it comes to including changes to non-monetary terms and conditions into the "overall" assessment that is required by the BOOT. In such circumstances the Tribunal must simply do its best and make what amounts to an impressionistic assessment, **albeit by taking into account any evidence about the significance to particular classes of employees covered by the Agreement of changes to particular non-monetary terms that render them less beneficial than the equivalent non-monetary term in an award**. In my view, it may also be relevant to consider the terms of any existing agreement and whether there is a relevant change of position when compared to that existing agreement.' (my emphasis)*

35. Beechworth Bakery waited more than 10 months, and endured an appeal process, to have an agreement which its workforce clearly saw as beneficial approved. It can be presumed, given they instructed Counsel in the matter, that they incurred significant legal costs. They were, however, ultimately successful in having an enterprise agreement approved. This has not, however, been the case for the retail and other industries.

H&M

36. Unfortunately, the practical and sensible approach adopted by DP Sams is something of an outlier in the current BOOT application process.

37. In late March 2016 H&M applied for approval of the *H&M Enterprise Agreement 2016*. In a decision issued almost 10 months later the FWC dismissed the application for approval[4]. Alarmingly, the decision to dismiss the application was not made on an identification of any single employee working for the employer would not be better off under the agreement. What the Commission did was to proffer hypothetical rostering arrangements never used by the employer, purport to identify detriment to employees and rely on those to reject the agreement.

[4] [2017] FWC 310

Ultimately this decision cost employees of H&M the opportunity to earn significant additional income.

38. These are not isolated examples, and unfortunately are becoming more commonplace.

Productivity Commission Review

39. The ARA strongly recommends the Committee review Chapter 20 of the *Productivity Commission Inquiry Report – Workplace Relations Framework*, and in particular the outcomes and recommendations in relation to the BOOT. The Productivity Commission identified, consistent with the submissions above, that:

*"the application of the BOOT discourages enterprise bargaining and creates uncertainty during the agreement approval process. The BOOT should be replaced by a no-disadvantage test (**NDT**)."*[5]

40. The Productivity outlined the basis for this change at pages 694 to 700 of its report. Critically, the Productivity Commission proposed the NDT apply to classes of employees, rather than individual employees. This would substantially simplify the agreement approval process and provide certainty throughout the process.

Summary in relation to Terms of Reference B

41. The information outlined above should cause the Committee to reach the following conclusions in relation to Terms of Reference B:

(a) enterprise-level bargaining in the retail industry has declined at alarming levels since the introduction of the BOOT;

(b) that decline is due, at least in part, to the manner in which the BOOT is being applied;

(c) to operate effectively, change needs to be made to the BOOT which reduces, rather than increases, the technical approach of the FWC and the matters against which the BOOT is measured; and

(d) the Committee should concur with the Productivity Commission's recommendation to replace the BOOT with the NDT.

Terms of Reference C & D - the desirability of amending the Fair Work Act 2009 to ensure that enterprise agreements do not contain terms that specify penalty rates which are lower than the respective modern award; and the provisions of the *Fair Work Amendment (Pay Protection) Bill 2017* (Bill)

[5] Productivity Commission Inquiry Report – Workplace Relations at page 645

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42. It is the ARA's understanding that the proposition that amending the FW Act to ensure that enterprise agreements do not contain terms that specify penalty rates which are lower that the respective modern award is the central object of the *Fair Work Amendment (Pay Protection) Bill* 2017. Given this, the ARA has determined to consider these matters together.

The Bill would accelerate the decline in enterprise bargaining

43. The ARA has identified the sharp decline in enterprise bargaining in the retail industry earlier in these submissions. The ARA further submits that the amendments proposed in the Bill would substantially accelerate this. Retail employers would have no incentive to bargain under a system where there was no opportunity for them to drive productivity gains by having more employees working at the times when more customers are seeking access to their stores.

The Bill would harm retail industry employers and employees

44. Given the strong likelihood that the Bill would accelerate the decline in enterprise bargaining in the retail industry, it follows that this will have a deleterious impact on retail employees and employers.

45. The hysteria surrounding enterprise bargaining outcomes in the retail industry ignores the fact that retail employees in Australia, as a result of bargaining, are among the highest paid in the world. Retail shop assistants with no relevant formal qualifications have, as a result of enterprise bargaining, had access to rates of pay that equate to, and exceed the rates for employees with trades qualifications. The Committee should very carefully consider the interests of retail employees in developing its view on this matter. The Committee should ask itself whether the intent of the Bill, which on the surface appears noble and protective of employees, will instead result in a reduction in their overall position.

46. The Bill will also harm retail employers, who will shy away from bargaining because they cannot achieve the productivity gains that are crucial to their bargaining aims. Even if those employers do continue to bargain they have two options – align their entire agreement with the GRIA, and therefore remove the higher base rates of pay for employees, or incur additional labour costs. The ARA has set out later in these submissions findings from the FWC in relation to the impact of labour cost increases on allocation of labour hours. Those findings were that if labour costs increase, retail businesses roster less hours. As a result, employment opportunities diminish. The Committee should very carefully consider this consequence.

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The Bill would require significant additional amendments to the FW Act

47. The Bill appears to have ben crafted without appropriate consideration of its impact, in particular on the overall objects of the FW Act and on Part 2-4 in particular. Implementation of a requirement to meet modern award penalty rates will substantially eliminate the capacity for productivity gains. This would be contrary to the objects of the Act, and the objects of Part 2-4.

48. Implementation of the Bill would there require the following further amendments to the FW Act:

    (a) Section 3(f) would need to be amended to remove the word "productivity".

    (b) Section 171(a) would need to be substantially rewritten to remove reference to flexible and to remove the words "that deliver productivity benefits".

Summary in relation to Terms of Reference C & D

49. The information outlined above should cause the Committee to reach the following conclusions in relation to Terms of Reference B:

    (a) the Bill, if implemented, would accelerate the decline in enterprise bargaining in the retail industry;

    (b) the Bill, if implemented, would cause harm to both employers and employees, and would reduce employment and hours worked in the retail industry; and

    (c) the Bill, if implemented, would require changes to the objects of the FW Act and Part 2-4, and the Committee carefully consider the impact of this on the economy.

Terms of Reference E - any other related matter related to penalty rates in the retail, hospitality and fast-food sectors.

50. The ARA focuses this element of its submission on the retail industry, however a number of the principles apply to the other named industries and our membership covers fast food.

51. The ARA was the primary proponent for the reduction of penalty rates under the GRIA. The ARA proposed these reductions because it formed the view that the existing GRIA penalty rates, and in particular the Sunday penalty rate, was impairing employment growth and productivity in the retail industry.

The nature of the penalty rates case

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52. On 23 February 2017 a five member Full Bench of the FWC issued its decision in relation to the Penalty Rates Common Issue[6] (**Decision**). The case involved 39 days of Hearings, 143 lay and expert witnesses, some 5,900 individual contributions and thousands of pages of submissions. The case was one of the most extensive industrial cases conducted in Australia's history.

53. Perhaps unsurprisingly, given the sheer volume of materials presented during the case, the Decision was also one of the most lengthy decisions in Australian industrial history, running to more than 500 pages.

54. What this should tell the Committee is that the FWC carefully considered all of the evidence and materials before it and reached a conclusion, in relation to the retail industry, that the existing Sunday and public holiday penalty rates meant the GRIA was not meeting the Modern Awards Objective, and that they should be reduced.

55. Central to the Decision were the following findings:

(a) Sunday is a significant trading day for retail businesses;

(b) retail businesses fix labour budgets to a proportion of retail sales, and so changes in labour costs impact on the amount of labour rostered;

(c) existing Sunday penalty rates caused retail businesses to:

i. close stores;

ii. restrict trading hours;

iii. limit activities performed;

iv. operate with less experienced junior staff; and

v. operate with more hours performed by owners;

(d) reducing Sunday penalty rates was likely to result in:

i. more stores opening;

ii. an increase in trading hours;

iii. a reduction in hours worked by owners; and

iv. an overall increase in hours worked.

[6] [2017] FWCFB 1001

(e) the existing Sunday penalty rates overcompensated employees for the disutility associated with Sunday work.

56. The ARA presented to the FWC a number of expert reports which identified why there was a need to change Sunday penalty rates. The ARA considers that expert evidence identified:

(a) retail employers believe there is a need to pay higher rates on Sundays, but believe a 50% penalty is appropriate;

(b) retail employees believe a 50% penalty rate is sufficient for them to work on Sundays;

(c) while lost time with family and friends is the most significant detriment associated with Sunday work for retail employees, one of the other significant detriments is a lack of sufficient staff, which is a direct result of the high Sunday penalty rate; and

(d) the introduction of the GRIA in New South Wales, which resulted in Sunday penalty rates increasing from an additional 50% in 2009 to an additional 100% in 2014 had a significant and enduring negative impact on employment in the retail industry in New South Wales.

57. Given the totality of the evidence before the FWC and the extensive and careful assessment of that evidence by the FWC, it follows that the Decision was correct, and should stand. Any moves to legislate to overturn the effect of the Decision is legally questionable and sets a dangerous precedent. Industrial tribunals have held responsibility for setting and amending conditions of employment for more than 100 years. Any move by the Parliament to sweep away that responsibility brought about as a result of what can only be described as false and misleading commentary about the impact of the Decision must be rejected.

Myths surrounding the decision

58. Media coverage, research and commentary in the aftermath of the decision has been notable for its absence of reason and objectivity. The ARA has set out below a number of the myths which need to be broken in order for a mature discussion about the impact of the decision to be held.

Myth 1 – Penalty rates have been cut to unprecedented levels

59. An uninformed observer would presume that the Decision will result in the cutting of penalty rates to new lows. This is simply false. Table G sets out the penalty rates which applied to Sunday work prior to the commencement of the GRIA.

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Table G

State/Territory	Pre-Modern Award/NAPSA	Sunday penalty
NSW	NAPSA Shop Employees (State) Award	50%
VIC	Victorian Shops Interim Award 2000	100%
QLD	NAPSA Retail Industry Award – State 2004 (QLD)	100% (Non-exempt stores) 50% (Exempt stores and Independent Retailers)
WA	Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977	100%
NT	Retail, Wholesale and Distributive Employees (NT) Award	100%
TAS	NAPSA Retail Trades Award	100%
SA	NAPSA Retail Industry (South Australia) Award	60%
ACT	Retail and Wholesale Industry - Shop Employees - ACT Award 2000	50%

60. The retail award applicable to the largest State in Australia by population provided for a 50% Sunday penalty prior to 2010. The retail award applicable to the third largest State in Australia by population provided for a 50% Sunday penalty for the significant majority of retail businesses prior to 2010. Additionally, one State and one Territory also provided for Sunday penalty rates that were at or near the Sunday penalty rates determined in the Decision to be appropriate for the retail industry in Australia.

Myth 2 – retail employees will lose up to $6,000 per year

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61. No retail employee could lose $6,000 in a year as a result of the Decision. In its submission to the FWC in relation to the transition from existing Sunday penalty rates to the reduced rates, the ARA identified the "worst case scenario". We have extracted this below:

62. For a full time retail shop floor employee (non-shiftworker) engaged at Retail Employee Level 1 under the Retail Award the extreme, being the absolute upper end of the potential detriment brought about by the Sunday penalty rate reduction, can be quantified using the limitations imposed by the Retail Award. Given the provisions of the Retail Award highlighted above, the following applies to this calculation:

    (a) the employee can only work a maximum of three Sundays in each four week period;

    (b) only the hours between 9.00am and 6.00pm on a Sunday are impacted by the penalty rate reduction (unless the retail business trades beyond 6.00pm);

    (c) an employee who worked the entirety of the spread of hours between 9.00am and 6.00pm on a Sunday would be entitled to a break of at least 30 minutes, meaning that they would work a maximum of 8.5 hours on each Sunday at the reduced penalty rate; and

    (d) therefore a full time retail employee can be required to work a maximum of 25.5 hours on Sundays in any 152 hour, four week period.

63. Table H sets out the worst case scenario detriment.

Table H

Current			
Sunday	Other	Total	
25.5 x $38.88	126.5 x $19.44	$3,450.60	
At 50% penalty			

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Sunday	Other	Total	**Reduction from current**
25.5 x $29.16	126.5 x $19.44	$3,410.59	$247.86 per 4 weeks $2974.32 per annum*

*Assumes employee takes annual leave and takes no sick leave

64. It needs to be noted, however:

(e) this scenario is not consistent with the evidence before the FWC, in that no employee witness who appeared in the matter worked patterns of work that would result in a detriment at this level, and all employer evidence demonstrated that working patterns of this type are not utilised in the retail industry;

(f) this scenario is based on an immediate move to a 50% Sunday penalty rate, when the decision was taken to transition to the 50% penalty rate over four annual stages.

(g) this scenario assumes, contrary to the findings of the FWC, that no additional hours will be offered to or worked by an affected employee.

Myth 3 – the impact on specific electorates

65. In June 2017 the Mckell Institute released *"Counting the Cost: The Impact of Sunday Penalty Rate Reductions on Urban Australia* (**McKell Report**). The McKell Report identified the electorates which it asserted would be hardest hit by the Sunday penalty rate changes, and sought to quantify the cost of the changes.

66. The ARA has analysed the data produced in the McKell Report and highlights the following failings:

(a) the data assumes every retail employee who works on a Sunday works 8 hours;

(b) the data assumes every retail employee who works on a Sunday is a permanent employee;

(c) the data assumes every retail employee who works on a Sunday is an adult; and

(d) the data assumes the GRIA Sunday penalty rate of 50% was immediately implemented from 1 July 2017;

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(e) the data assumes no additional hours are offered or worked.

No, or few, employees work 8 hours on a Sunday

67. In the Penalty Rates case evidence was called from a number of retail employee witnesses. Of those witnesses, none worked 8 hours on a Sunday at a time where all of those hours would be impacted by the Decision, bearing in mind that it is only the hours between 9.00am and 6.00pm that are impacted.

68. In the penalty rates case the evidence was that retail employers traded fewer hours, and rostered shorter shifts, on Sundays than they did on other days.

69. In many of the electorates identified in the McKell Report retail trading hours simply do not allow shifts of 8 hours to be worked. The Holt electorate, which the McKell Report identifies as being the second hardest hit by the reductions, includes Cranbourne, Endeavour Hills and Narre Warren. Even a cursory view by the McKell Institute of retail trading hours in these locations would have identified for them that their calculations were fundamentally flawed.

70. Table I sets out the Sunday trading hours of shopping centres in these areas:

Table I

Centre	Sunday Hours	Maximum possible working hours
Cranbourne Park	10.00am to 5.00pm	6.5 hours
Fountain Gate	10.00am to 5.00pm	6.5 hours
Endeavour Hills	10.00am to 5.00pm	6.5 hours

71. These failings become even more stark when the focus shifts to regional areas. The McKell Report asserts that Capricornia in Queensland will see a total loss in disposable income annually of almost $3.2 million. Again this is based on all employees being adult, permanent and being paid for an 8 hour working day. Again, a cursory level of research would have alerted the McKell Institute to the impossibility of this outcome.

72. Capricornia includes the towns of Rockhampton and Yeppoon. Table J sets out the Sunday trading hours of shopping centres in these areas:

Table J

Centre	Sunday Hours	Maximum possible working hours
Stockland Rockhampton	10.00am to 4.00pm	5.5 hours

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Yeppoon Central	10.30am to 4.00pm	5 hours

73. At very best, assuming all employees working on Sundays in Capricornia work the full hours that retail stores are open, the McKell Report has exaggerated the impact by at least one-third.

Not all employees working on Sundays are permanent

74. Research conducted as part of the Penalty Rates case[7] identified that just over 36% of employees in retail are employed on a casual basis. The failure of the McKell Report to account for casual employees is either a significant, and almost inexplicable, error, or a deliberate attempt to overstate the impact of the reductions in penalty rates.

75. The Sunday penalty rate reduction for casual employees under the GRIA is half that of permanent employees. By ignoring casual employees the McKell Report has substantially overstated the impact of the reductions. On this matter alone the difference is in the vicinity of 18%.

Not all employees working on Sundays are adults

76. Expert evidence accepted in the Penalty Rates case[8] identified that in November 2013, 18.3% of the retail workforce was aged 19 or under. That same research estimated that employees aged 15 to 18 made up approximately 22.1% of the retail weekend workforce.

77. Employees aged between 15 and 19 years of age are paid, under the GRIA, between 45 and 80% of the adult rate of pay. It again seems implausible that the McKell Institute would not be aware that junior employees make up a significant proportion of the retail weekend workforce. The failure of the McKell Report to account for the significant number of junior employees is a further significant error which highlights the tendency of the report to wildly overstate the impact of penalty rate changes.

Rates of pay for retail employees working on Sundays increased from 1 July 2017

78. The McKell Report assumed the full reductions in Sunday penalty rates would commence from 1 July 2017. This was despite the McKell Institute identifying within the report that it was aware of the content of the Decision, and therefore it

[7] Industry Report Retail Trade
[8] Characteristics of the Workforce in the National Retail Industry with regard to age, weekend work and student status, Peetz and Watson

could be presumed that the full reductions were never going to be implemented at once. The Decision clearly communicated the FWC's intention to phase the increases in over time.

79. Essentially, the rate of pay for all employees working under the terms of the GRIA on Sundays increased from $38.44 per hour prior to 1 July 2017, to $39.16 per hour from 1 July 2017. If we were to assume the minimum wage increase on 1 July 2018 will equate with the 2017 increase (3.3%), the following rates will apply from 1 July 2018:

    Permanent Retail Employee Level 1 - $37.33
    Casual Retail Employe Level 1 - $38.37

80. By 1 July 2018 the total reduction in Sunday pay for a retail employee level 1 working on a permanent basis is $1.11 per hour, and for a casual is 7 cents per hour. In contrast, the McKell Report calculates this amount as more than $9 across the board.

Employees will work more hours

81. The FWC found, in the Decision, that retail employers will roster more hours when Sunday penalty rates are reduced. The McKell Report ignores this, and proceeds on the basis that not a single additional hour is worked by any employee anywhere. This conflicts with the accepted evidence of a Bakers Delight franchisee who will reduce her own hours, and undertake more activities to drive better sales, which necessarily will result in additional hours being worked. It conflicts with the evidence of key decision makers at major national chains who will open more stores, increase trading hours and undertake more activities to drive better sales on Sundays, which necessarily will result in additional hours being worked.

Summary in relation to Terms Of Reference (e)

82. The information outlined above should cause the Committee to reach the following conclusions in relation to Terms of Reference (e):

    (a) the Decision was a carefully considered outcome based on analysis of a significant amount of evidence put before the independent industrial decision maker with the required expertise to make decisions of this nature;

    (b) the Decision will result in positive employment outcomes for the affected industries and will not result in harm to employees;

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(c) the commentary, media and "research" regarding the negative impact of the Decision has been enormously overstated and is divorced from the reality; and

(d) the Committee should accept and support the Decision and continue to allow the expert independent Fair Work Commission to utilise its expertise to establish and vary minimum safety nets.

Conclusion

The Committee needs to consider the benefits and intended benefits of an effective bargaining system to all those who choose to participate in it. The current systems, when functioning properly does meet a better overall outcome for both employees and employers, however the current evidence given around perceived inadequacies does not consider the benefits in greater base pay, other compensation or flexibility.

The retail industry has higher levels of closure rates compared with the average of all industries. In fact, the sector faces a fierce competitive environment, and we are seeing concerning trends with numerous businesses shedding jobs in the face of higher costs. This is concerning as the retail sector makes a significant contribution to youth and low skilled employment. Retail and hospitality provide stepping stones into the labour market for many Australians, but they are continuing to face difficult circumstances which are exacerbated by excessive penalties and less flexibility in Australia.

The ABS define underemployed workers as part-time workers who want, and are available for more hours of work than they currently have. While full-time workers are defined as those who work part-time hours during the week for economic reasons (such as being stood down or insufficient work being available). Therefore there is significant demand for additional hours of work in the retail and hospitality industries, and this work can be offered to the underemployed as businesses move to increase hours through more reasonable penalty rate settings.

The retail sector needs policy levers that will enable businesses and employees to interact with the market in order for them to survive. It is clear that in our modern, digital economy our service offerings between the hours of 9am to 5pm Monday to Friday does not satisfy customer needs. There are constant issues around the implementation of the BOOT in bargaining that need to be addressed. There is also a need to arbitrate and oversee agreements which the FWC should be able to do with the best interests of the majority of businesses and employees being considered.

Australian Retailers Association

Our members thank the Education and Employment References Committee in its Inquiry into penalty rates for the opportunity to be involved in this consultation and we would be pleased to discuss this submission further, or be called as a witness, at your convenience.

Kind regards,

Russell Zimmerman
Executive Director
Australian Retailers Association

Heath Michael
Director of Policy, Government & Corporate Relations
Australian Retailers Association