



ACCI SUBMISSION

Senate Education, Employment
and Workplace Relations Legislation Committee

Inquiry into the Fair Work Amendment (Small Business –
Penalty Rates Exemption) Bill 2012

SEPTEMBER 2012

Senate Education, Employment and Workplace Relations
Legislation Committee Inquiry – Fair Work Amendment (Small
Business – Penalty Rates Exemption) 2012

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1. ABOUT ACCI

1.1 Who We Are

The Australian Chamber of Commerce and Industry (ACCI) speaks on behalf of Australian business at a national and international level.

Australia's largest and most representative business advocate, ACCI develops and advocates policies that are in the best interests of Australian business, economy and community.

We achieve this through the collaborative action of our national member network which comprises:

- All state and territory chambers of commerce
- 29 national industry associations
- Bilateral and multilateral business organisations

In this way, ACCI provides leadership for more than 350,000 businesses which:

- Operate in all industry sectors
- Includes small, medium and large businesses
- Are located throughout metropolitan and regional Australia

1.2 What We Do

ACCI takes a leading role in advocating the views of Australian business to public policy decision makers and influencers including:

- Federal Government Ministers & Shadow Ministers
- Federal Parliamentarians
- Policy Advisors
- Commonwealth Public Servants
- Regulatory Authorities
- Federal Government Agencies

Our objective is to ensure that the voice of Australian businesses is heard, whether they are one of the top 100 Australian companies or a small sole trader.

Our specific activities include:

- Representation and advocacy to Governments, parliaments, tribunals and policy makers both domestically and internationally;
- Business representation on a range of statutory and business boards and committees;
- Representing business in national forums including Fair Work Australia, Safe Work Australia and many other bodies associated with economics, taxation, sustainability, small business, superannuation, employment, education and training, migration, trade, workplace relations and occupational health and safety;
- Representing business in international and global forums including the International Labour Organisation, International Organisation of Employers, International Chamber of Commerce, Business and Industry Advisory Committee to the Organisation for Economic Co-operation and Development, Confederation of Asia-Pacific Chambers of Commerce and Industry and Confederation of Asia-Pacific Employers;
- Research and policy development on issues concerning Australian business;
- The publication of leading business surveys and other information products; and
- Providing forums for collective discussion amongst businesses on matters of law and policy.

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2. INTRODUCTION

1. The Australian Chamber of Commerce and Industry (ACCI) welcomes the opportunity to provide a written submission in relation to the Committee's inquiry into the Fair Work Amendment (Small Business – Penalty Rates Exemption) Bill 2012 (the Bill).
2. ACCI members, particularly relevant Industry Association members, may make submissions to this inquiry. This submission is made without prejudice to ACCI or its members' views.

3. KEY ISSUES

Background

3. The explanatory memorandum to the Bill indicates that:¹

The purpose of this bill is to seek a compromise between small business operators and their employees in relation to penalty rates.

The original intention of penalty rates was to compensate employees for hours worked outside the standard Monday to Friday working week. This concept is now largely outdated: thanks to improvements in technology, the development of a global economy and the deregulation of trading hours, many businesses trade over all seven days. As such, many part time or casual employees consider weekends to be part of their regular hours.

Generally, the Fair Work Act and modern awards do not recognise this shift towards a seven day week. The intention of this bill is to allow small businesses in the hospitality and retail sector, defined as those businesses with fewer than 20 full time and full time equivalent employees, to remain true to the original intention of penalty rates while avoiding the high cost burden during specific days of the week.

To achieve this, the bill states that for small business in those industries, penalty rates do not apply unless an employee has worked for more than ten hours in a day, or more than 38 hours over a seven day period.

4. The Senator's second reading speech, *inter alia*, indicated:²

This bill is an attempt to balance the need for penalty rates and the strain they are placing on small business.

...

The aim of this bill is to acknowledge that many small business employees are missing out on shifts or even jobs because small businesses simply can't afford to open on days with high penalty rates.

... [i]f we cannot find some sensible common ground, then both small businesses and employees, including prospective employees, will end up being disadvantaged.

¹ The Senate, Explanatory Memorandum, p.2.

² Second reading speech, Senator Xenophon, 16 August 2012.

5. ACCI supports the policy intention underpinning the proposed measures and their practical application.

Provisions

6. The Bill makes a number of targeted amendments to the *Fair Work Act 2009* (Act) and would only apply to terms in modern awards that prescribe penalty rates.
7. The intended effect of the measures is that penalty rates that would be ordinarily applicable by virtue of legal obligations arising from any relevant modern awards (which are limited to two industry sectors, namely the “*restaurant and catering industry*” and the “*retail industry*”) would not apply to an “*excluded small business employer*” (as defined in s.155A(2)) in certain circumstances. Those circumstances are outlined at proposed s.155A(1).
8. Section 139(1)(e) of the Act indicates that modern awards may include terms about “*penalty rates*”.
9. The combined effect of ss.136 and 137 would mean that terms that contravene Subdivision D of Part 2-3 of the Act would have no effect.

ACCI Detailed Response

10. ACCI and small businesses operating in the service industries welcomes this timely Parliamentary inquiry and commends Senator Nick Xenophon for introducing legislation with the intention of the concomitant goals of assisting small business trade and to provide employment opportunities for workers.
11. Whilst the Bill is limited to only small businesses and two industry sectors, relevant small businesses would see this as a necessary buffer to the adverse cost impact of many modern awards on their business operations and continuing capacities to employ.
12. ACCI notes that the Bill, however commendable, does not deal with other award terms that have caused difficulties for employers in the retail sector such as minimum engagement clauses.

Case Study – Terang Hardware and Minimum Engagement Clauses

13. The practical effect of the *General Retail Industry Modern Award 2010* applying to a business from 1 January 2010 was that it resulted in

workers losing shift work due to the inability of the small business to provide a three hour minimum during the week.

14. Prior to the commencement of the modern award, the minimum engagement shift for a casual worker was two hours in Victoria. This changed to three hours as a result of the Part 10A award modernisation process. Applications were made in **early 2010** to amend the clause to reflect the pre-existing clause contained in the Victorian pre-reform federal award of two hours, and to include a provision to allow secondary school students to work less than the minimum.
15. The Shop, Distributive and Allied Employees Association and the ACTU vigorously opposed the application and the application was ultimately not successful with a decision handed down on **9 July 2010**.³ A subsequent appeal against this decision by the retail Industry Associations was also not successful.⁴ This is despite evidence from actual employees who had lost their shifts and small businesses who gave evidence of their inability to provide additional work because of the strict requirements of the modern award.
16. Part of the evidence led by employers in the first case is set out below:⁵

[17] The NRA led evidence from two secondary school students from Terang Secondary College in Terang in South Western Victoria. Both had been employed by the Terang and District Co-op during weekday afternoons until January 2010. They gave evidence that they lost their jobs because the award required a minimum engagement of three hours and they were only available after school from approximately 4.00pm until the store closed at 5.30pm. In the case of one of the students he was unable to work at the associated supermarket which remained open later because of sporting commitments. The NRA also led evidence from the owner of a newsagency in suburban Adelaide who said that in 2010 he had ceased to offer afternoon shifts to school students as they were not able to work the three hour minimum engagement after school before his shop closed at 5.30pm.

[18] The MGA led evidence from three employers that operate small supermarket businesses in country Victoria. They each employ local juniors in their businesses. They explained the difficulties in moving

³ [2010] FWA 5068. The decision can be found here:
<http://www.fwa.gov.au/decisionssigned/html/2010fwa5068.htm>

⁴ [2010] FWA 7838. The decision can be found here:
<http://www.fwa.gov.au/fullbench/2010fwafb7838.htm>

⁵ [2010] FWA 5068.

from a two to a three hour minimum engagement period for school students. In some cases the change has led to less employment of juniors after school during the week. The witnesses explained why the ability to employ such juniors on two hour engagements after school is beneficial to the business, beneficial to other employees and often preferred by the students themselves because they are looking to fit some casual work into their school, sport and other commitments.

[19] ... The ARA did however tender the results of a survey of retail outlets. This survey revealed that over 50% of respondents employ students on short shifts before close of business and that the majority of students are not available until 4.00pm or later. Most businesses close at or before 5.30pm, and most students are available for work for two hours or less. A majority of respondents asserted that they will stop employing school students after school or stop employing students at all. About 60% of respondents dedicated that they do not employ school students because of the minimum shift requirements in the award.

17. Vice President Watson in a further decision,⁶ which was the subject of an unsuccessful appeal, accepted the evidence tendered by the employer parties, ACCI and the Victorian Government who supported the application. This included the House of Representatives Standing Committee on Education and Training report, "*Adolescent overload? Report of the inquiry into combining school and work: supporting successful youth transitions*", October 2009 and an ACCI "*Issues Paper Youth Employment*", May 2010.⁷ The decision was handed down on **20 June 2011**.
18. The SDA appealed the decisions of FWA to the Federal Court, with the Federal Court finally rejecting the judicial review and union appeal on **11 May 2012**.⁸
19. Unfortunately, by the time the Federal Court upheld the legal validity of the variation and provided certainty to employers and employees, the young workers in question who lost their shifts could not rely upon the clause as they were no longer a secondary student.

⁶ 2011 FWA [3777]. The decision can be accessed here:

http://www.fwa.gov.au/decisionsigned/html/2011fwa3777.htm#P129_11428

⁷ The ACCI "*Issues Paper Youth Employment*" can be accessed here: <http://www.acci.asn.au/getattachment/234ff3be-f1b4-4779-9e5a-bf6826fda42e/Youth-Employment-May-2010.aspx>

⁸ *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* [2012] FCA 480.

20. The PC noted in its report that minimum engagement clauses are a constraint on employer and employee flexibility:⁹

The Commission recognises that there are many important considerations to balance in determining optimal award provisions in relation to shift duration. While the recent FWA decision was welcomed by retail industry employer groups and, if upheld, will benefit many students seeking to work after school, the Commission notes the prescriptive minimum hours requirements in the award remain unchanged with respect to all other casual employees and indeed in relation to students working before school (for example delivering newspapers) or otherwise not meeting the strict and limited circumstances set out in the decision. This continues to be a constraint on employer flexibility and there is a risk that the restriction will have a perverse effect on many of the casual employees it is seeking to protect.

21. The lengthy chronology of this one amendment under one modern award illustrates how difficult employers and employees have found in obtaining sensible changes to modern awards since they commenced on 1 January 2010.
22. Whilst the topic of penalty rates may be controversial, it is welcome that a Parliamentary inquiry will provide an opportunity for a mature and rational policy debate about the real, and not hypothetical impact, modern awards are having on small business across the community.
23. The Committee will be aware that these businesses have a personal face. They are largely micro businesses, many of whom are run by families and owners put in their own hours to keep open the doors. They sacrifice time with their own families to run business during the day servicing the demands of customers and consumers, only to return home at night to do the paperwork. They run on tight margins and many have mortgaged their own homes to take on a risk which ultimately provides for jobs in the community. Small businesses should not be taken for granted and their cost pressures, whatever their sources, need to be taken seriously and if required, assisted by changes in the law.
24. Public commentary from the Government and Opposition to date indicates that the subject matter should be left to employers and their representatives to litigate before Fair Work Australia or the courts.

⁹ PC report, at pp. 356 – 357.

25. Even then, and despite a number of applications lodged by employers before the Tribunal as part of the statutory requirements under Schedule 5, Item 6 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, the Government has categorically indicated support for the status quo of existing penalty rates:¹⁰

Minister for Employment and Workplace Relations Bill Shorten has reaffirmed the Government's unequivocal support for penalty rates in modern awards, including for weekends and public holidays.

Mr Shorten said the Gillard Government would not entertain calls to reduce penalty rates in modern awards.

26. The small business community expects that if the legislature has created the legal rules that requires strict compliance or risk significant penalties, the legislature should, at the very least, consider whether those legal rules should be amended when circumstances warrant this and there is evidence to suggest that moderation is warranted.
27. ACCI reiterates that it supports the underlying policy intent of the proposed measures. It is consistent with a key recommendation in ACCI's submission to the independent Panel Review of the Act.¹¹

Small Business or Micro-Business Exemption

6.3 Due to the significant cost impost on employers and inflexibility that is imposed on firms, disproportionately small firms, ACCI believes that serious consideration for a small business exemption (20 employees or less) or microbusiness exemption (10 employees or less) is warranted. It is clear that the small business community is most negatively affected by the strictures and cost impost of awards and just as other parts of the Act recognises the burden on small firms (ie. in redundancy and unfair dismissal), there should be a similar consideration of the regulatory burden of modern awards. Such relief could apply to some or all parts of the modern award, but would not cover minimum wage classifications. The employee would be protected by the NES safety-net for all other conditions.

28. One employer provided the following response to ACCI's National Employer Survey specifically on penalty rates, which is illustrative of the many frustrations amongst the SME community:

¹⁰ Hon. Bill Shorten MP, Media Release, "Penalty rates for the future", 18 September 2012.

¹¹ ACCI submission to the Post Implementation Review of the *Fair Work Act 2009*, p.10.

I still do not understand how we can move to seven day trading and still have penalty rates. Surely any hour of any day should be an hourly rate. Sure, if staff work over a sensible number of hours overtime should be paid but not simply because it is a Sunday – many of our part time and casual staff can only work weekends so in fact there is no penalty. We open to provide a service in a remote area and at best break even. Further, we try to employ pharmacy students and school students to give them experience but this gets challenging when wages have penalty rates attached as well – it defeats the purpose. Also, the three hour minimum payment has detrimentally affected our ability to employ and train younger staff for after school work. The earliest most can get to work is 4-4.30pm and we shut at 6.15pm. This minimum needs to be removed as it creates a barrier to employing younger staff.

29. The measures are also consistent with ACCI's Service Industries Blueprint which includes a dedicated chapter on workplace regulation.¹²
30. The Parliament has recognised the disproportionate burden on legal compliance for small business.¹³ This Bill continues to recognise that small business does not have the same capacities as larger firms.

Modern Awards

31. Modern awards generally commenced on 1 January 2010 and followed a process of rationalisation and amalgamation of thousands of federal and state industrial awards into 122 industry and occupational based “modern awards”. Employers continue to make complex transitional wage calculations over a five year transitional period as a result of increased costs from moving from former instruments to the modern award. This is directly contrary to the Government's statutory commitment that “*the creation of modern awards is not intended to disadvantage employees or increase costs for employers*”.¹⁴
32. Whilst historical and complex issues concerning overlapping coverage have been removed to some extent and do provide some limited benefit to the services sector, there still remains the enduring problem of in-built regulatory inflexibility in this form of unique regulation. Australia remains the only country in the world to have such a system –

¹² <http://www.acci.asn.au/Files/Services-The-New-Economic-Paradigm-ACCI-s-Service->

¹³ See section 121 (exemption from obligation to pay redundancy pay for small businesses) and s.388 (small business fair dismissal code) of the *Fair Work Act 2009*. See also CGT concessions for small business under the *Income Tax Assessment Act 1997*; s6D of the *Privacy Act 1988* (small business exemption); and the Superannuation Small Business Clearing House.

¹⁴ Award Modernisation Request, incorporating the Variation of Award Modernisation Request under s.576C(4) of the *Workplace Relations Act 1996*.

with 122 different sets of regulation in a supposedly simplified and reformed system. The process of “modernising” awards did not involve a detailed consideration of the merits of whether historical employment standards (which are artefacts of a bygone era of ‘paper’ disputes initiated by trade unions) should be retained or modified to better suit the contemporary world of work. For example, unions defend penalty rates and oppose any moderation to existing rates because they have been a feature of our industrial relations system for the last 100 years, despite enormous changes in our society and the way businesses operate since that time.

ACTU Submission to the PIR Review of the *Fair Work Act 2009*¹⁵

Wage-related entitlements

In Australia, penalty rates form an important component of employees’ total take-home pay. Penalty rates, which date back more than 100 years, are designed to compensate employees for working at unsocial hours, such as evenings, nights and weekends, when employees would otherwise be spending time with friends and family. Some employers have recently criticised their relevance, and complained about their cost (quoting erroneous figures). The truth is that unsocial shifts are generally offered to casual workers, and casual workers receive very modest penalty rates. For example, in the retail sector, a casual worker receives nothing extra for working during the evenings or at night, only 8% extra for working on Saturdays, and 60% extra for working on Sundays, and double time for working on public holidays. In contrast, in many OECD countries, weekend work in the retail sector is banned or restricted (especially for young workers), or else attracts loadings of up to 100% of the normal salary. Australian employers have nothing to complain about.

33. ACCI supports a sustainable and effective safety net of minimum wages and conditions of employment. However, in many ways, the so-called “modern” awards preserve existing award terms, many of which are inherently inflexible as they operate on a one-size fits all approach and were arbitrated following disputes of decades past. The services sector is extremely diverse and dynamic and such inflexible labour rules do not reflect the evolution of the sector or the specific needs of firms.
34. As modern awards operate on a national common rule basis (by reference to industry or occupation rather than by naming a firm), some employees that were previously award free are now award

¹⁵ ACTU Submission to the Post Implementation Review of the *Fair Work Act 2009*, 17 February 2012, Volume 1, p.36.

regulated. Many small businesses from former state systems are now transitioning to higher labour costs. (Small businesses that are unincorporated in Western Australia remain outside of the modern award system).

35. Late nights and weekends are significant trading periods in the services sector. Typically awards have adopted a series of penalty rates which compensate employees for working 'unsociable hours'. This original justification for a high penalty rate regime has limited foundation, with the advent of fundamental changes in our society, particularly in the retail and restaurant sectors. Despite this reality, a number of modern awards have adopted a more restrictive span of ordinary hours, that is, hours where employers are not required to pay higher rates of pay, and maintained the penalty rates. These penalty rates are a deterrent to operating outside of designated ordinary hours and where penalties have increased under the new modern award, this has threatened the viability of business, the majority of them SMEs in the services sectors.
36. For example, in Queensland, independent supermarkets traditionally trade long hours and this has been recognised for decades by the former State industrial awards and could trade up to 12 midnight on week nights without having to pay penalty rates. Under the new "modern" award these businesses have to pay a 25% penalty after 6pm to permanent employees and overtime rates (50% penalty) to all employees after 9pm. On Sundays a 100% penalty is applied to all hours worked when only a 50% penalty previously applied. On Saturdays after 6pm all employees are paid at overtime rates. The result is increased labour costs and a consequential pressure on these small businesses to reduce operating hours, making them less competitive and reducing employment opportunities. Some fast food operators have indicated that the modern award will increase labour costs by \$1,896 per week or \$98,600 per year – an increase of 34.5 per cent in total labour costs.¹⁶
37. Parliament provided the statutory mandate and instructions to the Australian Industrial Relations Commission (AIRC) to create modern awards under then Part 10A of the *Workplace Relations Act 1996*. Parliament has also created national minimum employment standards under the National Employment Standards. Under the Act, there is a hybrid dual safety net which is governed by the rules set by Parliament.

¹⁶ "Unions wrong on award modernisation: NRA", Queensland Business Review, 24 August 2009.

38. The Parliament now has responsibility to monitor the effect of these rules and act when there is evidence to suggest legislative intervention is warranted. Whilst there are a number of applications before the Tribunal as a result of the two year review of modern awards, it is clear that any decision of the Tribunal will take time and the outcome is unknown. At this stage, unions and the Commonwealth will not support the applications lodged by employers to vary penalty rates and other conditions of modern awards. It is possible that an aggrieved party may appeal the decision before a Full Bench (if made by a single member) or the courts, even if an employer application is successful and the Tribunal grants a variation to a modern award.
39. ACCI understands that there will be opposition to this Bill. To address some of those concerns, ACCI recommends an amendment to the Bill to require an automatic obligation to conduct a statutory review of the measures.

Productivity Commission Inquiry - Retail Industry

40. The Productivity Commission (PC) Report, *"Economic Structure and Performance of the Australian Retail Industry"* examined workplace relations regulation at Chapter 11 of their report.¹⁷ The PC's comments on penalty rates is relevant to the Committee inquiry.

Extract from PC Report Chapter 11 Workplace Relations Regulation

Penalty rates

The biggest single industry concern in relation to the retail award modernisation process is the impact on penalty rates and, as a further consequence, on the trading hours flexibility of employers.

...

In principle, penalty rates in awards should not be set in excess of the minimum necessary to avoid unfair or unduly harsh treatment of employees, and an efficient level of penalty rates would be one which is just sufficient to induce people with appropriate skills to voluntarily work the relevant hours. Some workers may be very comfortable with (or even prefer) weekend and evening work and, for these people, the additional pay incentive may not need to be as large as exists under the current penalty rate structure. If work at existing penalty rates is keenly sought, this may also be suggestive of

¹⁷ Productivity Commission 2011, *"Economic Structure and Performance of the Australian Retail Industry"*, Report no. 56, Canberra.

those rates being higher than is necessary to compensate workers for working at times that are inconvenient.

...

The use of penalty rates affects the relative costs of doing business at different times of the day or times of the week and therefore influences decisions about trading hours. Faced with growing competition from online businesses that are accessible to consumers 24 hours a day, 7 days a week, retailers are keen to extend their trading hours for the convenience of their customers.

...

However, some retailers are making the decision not to trade at times now permitted under deregulated or substantially liberalised shop trading hours (chapter 10), largely because penalty rates make it unprofitable for them to do so.

...

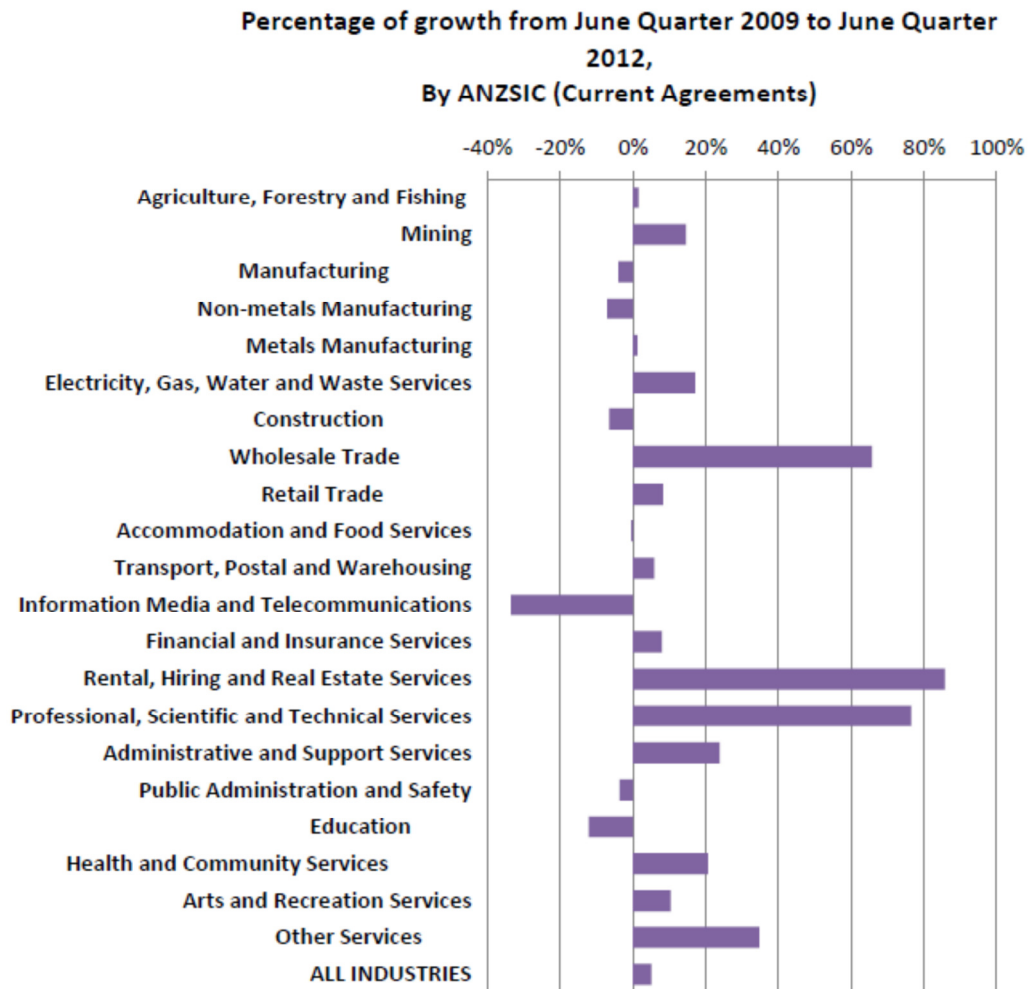
Submissions from union groups (for example, see SDA, sub. DR183 and the ACTU, sub. DR180) noted that some of their members depend on penalty rates to increase their take home pay. However, if penalty rates discourage retailers from trading at times penalty rates apply, or when retailers do trade they employ mainly junior casuals (ARA, trans., p. 15), the hours worked and take home pay of many employees could decrease as could overall employment levels. Thus a balance needs to be struck.

...

The modern retail award does not restrict retailers' flexibility in terms of when they can trade. Penalty rates in the award do, however, impact on the relative attractiveness of trading at different times. Because attitudes towards extended or late shifts and weekend and public holiday work will vary from workplace to workplace, penalty rate and other related provisions set in awards are unlikely to be optimal for many enterprises. The default penalty rate regime set by the modern award can be modified through enterprise bargaining. Indeed, a key focus of enterprise bargaining in the retail industry has been to reduce or remove the distinction between ordinary hours and hours which attract penalty rates.

However, as will be discussed below, there is scope for increased enterprise-based bargaining in the retail industry and within enterprise agreements for the more widespread adoption of flexibility provisions. But some aspects of the FW system, such as the operation of the better off overall test, may be inhibiting the adoption of flexibility enhancing provisions (section 11.6).

41. Enterprise agreements are not the dominant mode of engagement for small business employers and their staff in the retail, accommodation and food service industries. This is illustrated by the latest DEEWR “Trends In Enterprise Bargaining Report (June Quarter)”:¹⁸



42. The Government's commissioned report of the *Fair Work Act 2009*, titled “Towards a more productive and equitable workplace: An evaluation of the Fair Work legislation” (13 June 2012), recommended changes to encourage and make it easier for employers and employees to enter into Individual Flexibility Arrangements (IFAs).

43. The Panel recommended that:¹⁹

¹⁸ Page 10.

¹⁹ Page 19.

The provisions in relation to individual flexibility arrangements be amended to make IFAs easier to access and more attractive to both employers and employees.

44. In a number of areas, the Act has imposed changes that has made it less flexible than our system was decades ago. Amongst a range of targeted amendments that are required to be made to the Act, consistent with ACCI's submissions to the Review Panel, ACCI strongly recommends as a matter of priority that amendments are made to ensure that IFAs are workable.
45. It is clear that IFAs are not delivering the individual flexibility as promised to industry following the removal of statutory workplace agreements (which existed since 1997 under different tests) until 2008.
46. The Panel referred to a 2011 survey by Fair Work Australia which indicated that only 6% of employers surveyed responded that they had used an IFA.²⁰
47. Amendments are also required to ensure that IFAs have a longer nominal duration than 28 days and that the test for an IFA ensure that an employer is able to confer non-financial benefits in exchange for monetary benefits.

Characteristics of Small Businesses

48. ACCI has attempted to provide additional relevant information on the characteristics of small businesses who may be impacted by these measures.
49. According to the ABS latest data, as at June 2011, there were 826,389 (38.8%) employing businesses and 1,306,023 (61.2%) non-employing businesses. Of the employing businesses, 739,312 (89.5%) employed less than 20 employees.²¹
50. A recent survey on family businesses in Australia found that the 82.7% of respondents indicate that they consider their business to be a family business. The majority of family firms, 63.6% (68.6%), are small (1-19 employees); 32.2% (25.5%) are medium (20-199 employees); and 4.1%

²⁰ Ibid, at p.108.

²¹ ABS Cat. 8165.0 - Counts of Australian Businesses, including Entries and Exits , Jun 2007 to Jun 2011, released 31 January 2012.

(5.9%) are large (200 or more employees) businesses. The median number of employees in family businesses is 12.8 (10.5).²²

51. A publication titled “Key statistics on small business” is published by the Industry Policy and Economic Analysis Branch in the Industry and Small Business Policy Division of the Department of Innovation, Industry, Science and Research.²³
52. Table 4 of that publication is extracted below and illustrates that small businesses are concentrated in services sub-sectors such as retail trade (92.2%), and accommodation/food services (82.9%).²⁴

Table 4: Small business numbers within the services sector, June 2009

Services subsectors	Number of businesses	Number of small businesses	Small business share of services subsector (%)
Construction	341 618	333 744	97.7
Professional, scientific and technical services	231 465	224 257	96.9
Rental, hiring and real estate services	217 464	214 050	98.4
Financial and insurance services	149 645	147 302	98.4
Transport, postal and warehousing	133 263	129 775	97.4
Retail trade	139 609	128 678	92.2
Health care and social assistance	92 395	87 700	94.9
Other services	85 476	82 978	97.1
Administrative and support services	76 561	70 414	92.0
Wholesale trade	76 302	70 363	92.2
Accommodation and food services	77 111	63 930	82.9
Arts and recreation services	27 496	26 026	94.7
Education and training	23 551	21 622	91.8
Information media and telecommunications	17 986	16 873	93.8
Public administration and safety	8053	7147	88.7
Electricity, gas, water and waste services	5569	5119	91.9
TOTAL SERVICES	1 703 564	1 629 978	95.7

Data source: ABS Cat. No. 8165.0, datacube 9.

²² The MGI Australian Family and Private Business Survey, July 2010

<http://peak.fambiz.org.au/documents/item/251> p.13

²³ Available here:

<http://www.innovation.gov.au/SmallBusiness/KeyFacts/Documents/SmallBusinessPublication.pdf>

²⁴ Ibid, p.10.

53. As at August 2006, 19.2 per cent of small business operators earned a gross weekly income of between \$400 and \$599. This was followed by 15.2 per cent of small business operators who earned a gross weekly income of between \$600 and \$799. A total of 1.5 per cent of small business operators earned a negative or nil gross weekly income and 3.0 per cent of small business operators earned a gross weekly income of between \$1 and \$149.²⁵
54. Small business employ 45.5 per cent of all award reliant employees. Of the 1.36 million employees paid according to awards, 619,800 were employed by small businesses.²⁶

Research

55. In 2010, Fair Work Australia commissioned the Workplace Research Centre (WRC), University of Sydney, to conduct a program of case study research that examines the impact of minimum wage increases on enterprises and their employees.²⁷
56. The study was conducted over a nine-month period spanning from March to November 2010 and was based on case studies of 20 enterprises across four industries (Community services, Manufacturing, Retail and Hospitality). The case study enterprises were selected for inclusion in the study on the basis that significant proportions of their employees were award-reliant.
57. In summary, the study found that in the retail and hospitality industry, careful management of hours through lean rostering was a tool used by most employers to control employment costs. In these enterprises, practices such as sending employees home early and cancelling shifts if trade was slow, calling people in with limited notice when trade picked up unpredictably, and managing hours and tasks to avoid paying penalty rates were favoured and applied.
58. In addition, retail and hospitality employers continue to use lean rostering to contain costs by selecting specific categories of employees to work across the pattern of hours in order to optimise their wages bill. Most businesses schedule employees according to the relative value of individual employees in terms of their productive capacity vis-à-vis their cost per hour.

²⁵ Ibid, Table 9, p.23.

²⁶ ABS Cat. No. 6306.0.

²⁷ FWA 2011, "Enterprise case studies: Effects of minimum wage-setting at an enterprise level", Research Report 7/2010.

59. While lean rostering assists employers to keep their labour costs under control, it has caused underemployment of staff who are willing to work more hours if available and thus reduced staff loyalty. This has also reduced the ability of business to recruit and retain “good” employees.
60. In addition to direct employment costs, some employers in the study also discussed increases in the indirect costs of employment. This includes dealing with workers' compensation claims, the impact of regulation upon staffing levels and the resources that are required to adhere to all forms of regulation, including labour standards. In the case of small businesses this tended to manifest in increasing hours for owner-operators or in some cases put on another staff member to assist with administration for compliance. In larger operations, it tended to mean increased workloads for human resources departments and in some cases legal fees.
61. The following table presents enterprise operating environments and adjustments made to retail and hospitality operations during the period of the study (i.e. from March to November 2010, which covers the period following the \$26 per week increase in the minimum wage effective from 1 July 2010).
62. The adjustment strategies are consistent with the results of the ACCI National Employer Survey, as well as other surveys conducted by the ACCI Chamber and Industry Associations.
63. ACCI's surveys on the impact of minimum wage decisions on small businesses indicates that there can be negative consequences on firms, consumers and workers when non-productivity labour costs are increased on firms, particularly small firms employing award-reliant workers.²⁸

²⁸ The results of the survey on small businesses and the impact of the 2010 and 2011 Annual Wage Review decisions can be found here:
http://www.fwa.gov.au/sites/wagereview2012/submissions/ACCI_sub_awr1112.pdf

Table: Enterprise operating contexts and adjustment strategies

Operating Environment	Adjustment Strategy
Retail	
<ul style="list-style-type: none"> • Retailers have experienced flat and declining trade since the GFC. • Constant price discounting to attract customers has put considerable pressures on retailers' margins. • At the same time, operating costs of retail business have increased incrementally. <p>Labour costs made up a critical component of overall operating costs for retailers.</p>	<ul style="list-style-type: none"> • Retailers respond to reductions in revenue by minimising their total wage bill and maintaining labour costs at the level of benchmarked labour costs to sales ratios by: <ul style="list-style-type: none"> ◦ Shedding staff (esp. casual); ◦ Shortening work hours; ◦ Pushing staff to work harder and faster; ◦ Owners working longer hours in the business themselves;
<p>Minimum wage increases have a pronounced effect on businesses in the retail sector because they are the central guide to wages.</p> <p>Retailers indicate that increases in minimum wage rates have a pronounced impact on retail margins when the percentage level of wage increase is higher than that of Consumer Price Index (CPI) increases.</p>	<ul style="list-style-type: none"> ◦ Relocating staff and tasks to avoid paying penalty rates; and ◦ Increasing proportion of junior employees • Unlike other industries, most retailers have limited capacity to pass on increasing cost to consumers.
Hospitality	
<ul style="list-style-type: none"> • Drop in patronage or trade coincides with increased operating costs. • Skill shortages in trained kitchen staff and staff with customer service skills. 	<ul style="list-style-type: none"> • Increase promotional activities to boost patronage. • Increase food and beverage prices. • Minimise labour cost through: <ul style="list-style-type: none"> ◦ Reducing the work hours of casual staff to reduce base pay rates; ◦ Hiring apprentices in place of fully qualified staff; ◦ Lean rostering by changing employee working hours in response to fluctuations in demand; and ◦ Reducing operating hours to minimise penalty rates

Source: FWA 2011, *Enterprise case studies: Effects of minimum wage-setting at an enterprise level*, Research Report 7/2010 p. 153-62.

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