

## Senate Standing Committee on Education and Employment

### QUESTIONS ON NOTICE Supplementary Budget Estimates 2015 - 2016

**Agency - Fair Work Commission**

**Department of Employment Question No. EMSQ15-000351**

**Senator Lines provided in writing.**

#### **Question**

##### **FWC - Penalty rates case**

In relation to the Penalty Rates Case can you please explain where that's up to?  
Can you explain, to the best of your ability, what's been taking place?  
What has been the process?  
How many witnesses have you heard from?  
How many more do you expect?  
When will a decision be reached?  
Has there been any commentary about the evidence raised by either employers or unions?  
Will the Commission be releasing a transcript of the Case and evidence presented?  
If so, when?  
If not, why not?

#### **Answer**

*What has been the process?*

The penalty rates issue is being dealt with as part of the 4 yearly review of modern awards, required by s.156 of the *Fair Work Act 2009*. The penalty rates case arose in late 2014 from proposals by employers to alter penalty rates in modern awards in the hospitality and retail sectors. The issue is being dealt with by a specially constituted Full Bench. A penalty rates webpage ([www.fwc.gov.au/awards-and-agreements/modern-award-reviews/am2014305-penalty-rates-case](http://www.fwc.gov.au/awards-and-agreements/modern-award-reviews/am2014305-penalty-rates-case)) has been set up on the Fair Work Commission's (the Commission) website that includes information relevant to the case, including all submissions, correspondence and a detailed timetable.

*Can you explain, to the best of your ability, what's been taking place?*

The Commission has issued a series of directions to interested parties providing a time frame for submitting submissions, witness evidence and hearings. Material is published on the Commission's website and hearings are open to the public.

The revised directions issued on 7 August 2015 set out the overall process for the remainder of proceedings however parties have requested that closing submissions be postponed until April 2016. Parties have been instructed to file consent directions in relation to those dates.

*In relation to the Penalty Rates Case can you please explain where that's up to?*

Hearings have been taking place in Melbourne and Sydney with videoconferencing to other capital cities and in some cases country centres to hear witness evidence.

Lay witness evidence in the hospitality and retail sectors (i.e. from individual employers and employees) has been heard.

Detailed information on the case can be accessed on the Commission's penalty rates webpage.

*How many witnesses have you heard from?*

The Commission expects to receive both written and oral evidence from 18 expert witnesses. To date, the Commission has received evidence from 15 expert witnesses. In relation to the hospitality lay evidence, 76 witnesses provided written statements to the Commission and of those, 63 witnesses provided further oral evidence. A total of 59 witnesses provided written statements in relation to the retail lay evidence and of those, 38 witnesses provided further oral evidence.

*How many more do you expect?*

There are approximately three expert witnesses scheduled to give evidence on 15 December 2015. There is also one further expert who needs to give evidence but has not yet been scheduled due to issues arising with objections to her evidence. It is unclear when this will be resolved.

*Has there been any commentary about the evidence raised by either employers or unions?*

A number of objections were made to evidence filed by both employer and employee parties. Objections to the hospitality and retail lay evidence were made primarily on the following grounds: opinion; submission; hearsay; relevance; speculation; conclusion; and argument. For example, parties submitted objections on the basis that the evidence represented an opinion that the witness was not qualified or competent to give. One objection was on the ground that the witness presented his opinion or conclusion about the impact of not participating in extra-curricular activities based upon speculation.

Objections to lay evidence were resolved by agreement between the parties or by determination by the Full Bench. When part of a witness statement was excluded by agreement between the parties or by determination of the Full Bench, the relevant part was struck out, the party agreed not to read the relevant part or the party filed a redacted version excluding the relevant part.

Objections to expert evidence were predominantly made on the basis of no expertise in the area/ opinion evidence not based on expertise; hearsay; relevance; and conclusion/ speculation. A common objection was that the witness did not have the specialised knowledge based on training, study or experience that would permit the expert to give particular evidence and for the Commission to make findings based upon the evidence.

Objections to expert evidence were primarily resolved via conferences conducted by a member of the Commission.

*When will a decision be reached?*

A decision will be issued after closing submissions are heard in April 2016.

*Will the Commission be releasing a transcript of the Case and evidence presented?*

Transcripts and all witness statements will be published on the Commission's website after all witness evidence is heard. Transcripts have been provided to parties on a confidential basis so as not to influence witnesses yet to give evidence. At this stage, the last witness is scheduled to be heard on 15 December 2015.

There has been a parallel process running alongside the penalty rates case that has been dealing with parties' objections to evidence and notices to produce documents. These processes are quite complex and have had their own directions issued. Certain objections have been heard by a subset of the penalty rates case Full Bench. Accordingly some commercial-in-confidence and legally privileged material will not be made publically available.