

## **Vice Chancellor's Public Debate**

***'That we support the Fair Work Commission's decision to reduce penalty rates'***

**Monash University**

**Tuesday 19 September 2017**

**Address by Innes Willox, Chief Executive,  
Australian Industry Group**

The Australian Industry Group (Ai Group) represents many employers in the fast food and retail industries, including some of the biggest companies in these industries. Ai Group's law firm, Ai Group Workplace Lawyers, represented the fast food industry in the *Penalty Rates Case*.

A lot of misinformation is circulating about the *Penalty Rates Decision* and it is important that the facts are understood. I'll endeavour to correct some of this misinformation tonight, with reference to the fast food industry.

The first point to make is that penalty rates are not being abolished. The Sunday penalty rates are just being adjusted to align with the Saturday penalty rates. The rates are still much higher than those that apply during the week.

The adjustments in Sunday penalty rates are being phased-in over the next three to four years in annual increments, which commenced with a 5% adjustment from 1 July this year. The annual adjustments in Sunday penalty rates will occur on the same day each year that employees receive a minimum wage increase through the Commission's Annual Wage Review.

Also, despite the unions' attempts to convince us all that penalty rates for nurses, firefighters and all others workers are under threat, the Commission's decision only concerns fast food, retail and hospitality industry workers. There are some unique issues in these industries and no-one is suggesting that penalty rates for nurses or firefighters should be changed. The Commission made this clear in its decision.

The characteristics of employees in the fast food industry are very different to those of employees in other industries. The majority of fast food workers are full-time students, aged between 15 and 19 years. Two thirds of the employees in the industry work less than 25 hours per week. About 60 per cent work on Saturdays and 60 per cent work on Sundays.

The work preferences of fast food workers are also very different to other workers. The Commission accepted, on the detailed evidence that was presented (including a survey of tens of thousands of employees), that a large proportion of fast food workers prefer to work in the evenings and on weekends rather than during regular business hours, and that many prefer to work on Sundays rather than Saturdays. These preferences are driven by personal factors (such as a preference by many employees to play sport on Saturdays) rather than by the quantum of the penalty rates that are paid.

In addition, the peak business times in the fast food industry are very different to those in most other industries. In the fast food industry, weekends, early mornings and evenings are peak times. Regular business hours have little relevance to the fast food industry and, therefore, the Commission rightly decided that Sunday penalty rates that were designed many decades ago around regular business hours need to be re-set.

Another relevant issue is that, up to the time when modern awards were introduced in 2010, many of the awards that applied in the fast food industry did not contain any weekend penalty rates at all. Tens of thousands of employees received the same rates, seven days a week. At the time, the Australian Industry Group was very vocal in arguing, on behalf of the fast food industry, that the large penalty rate costs imposed on fast food businesses by the modern award system were not fair. Even with the adjustments to Sunday penalty rates, the award penalties rates payable to a large proportion of fast food workers will be much higher than those that applied just a few years ago.

It is also relevant that a large proportion of fast food industry employees are covered by enterprise agreements. The *Penalty Rates Decision* does not apply to these employees.

The Commission's *Penalty Rates Decision* followed a major inquiry by the independent Productivity Commission into Australia's Workplace Relations Framework. As part of its inquiry, the PC carried out a detailed analysis of penalty rates in the fast food, retail and hospitality industries. Similar, to the Fair Work Commission, the Productivity Commission decided that Sunday penalty rates in these industries were too high and should be aligned with Saturday penalty rates. Also, similar to the Fair Work Commission, the PC decided that there are unique issues in these industries that are not present in other industries.

The *Penalty Rates Decision* was made by a five Member Full Bench of the independent Fair Work Commission, headed by Justice Iain Ross, the President of the Commission. For over 100 years, the Commission and its predecessors have been responsible for setting and adjusting penalty rates in awards. Penalty rates have never been set by politicians and this should not occur now.

After more than two years of proceedings, 39 hearing days, 143 witnesses and 5,900 submissions, the FWC decided that the existing Sunday penalty rates in the retail, fast food and hospitality industries were no longer fair or relevant, and needed to be modestly adjusted.

### **Judicial review of the decision by the Federal Court**

The unions had the right to have the Commission's *Penalty Rates Decision* reviewed by the Federal Court, and two unions have made applications to do so.

Over three days next week, a five Member Full Bench of the Federal Court will review the Commission's decision and determine whether any errors of law were made.

A QC and junior counsel briefed by Ai Group Workplace Lawyers will play a leading role at the hearing arguing that no errors of law have been made and that the decision should stand.

## **Workers in all industries are better off from 1 July 2017**

Two pay adjustments were operative from 1 July 2017 this year. The first was the initial incremental adjustment in Sunday penalty rates; and the second was the Annual Wage Review increase.

The Annual Wage Review increase of 3.3% applied to workers in all industries. In contrast, the Sunday penalty rate adjustments applied only to workers in the fast food, retail and hospitality industries.

The Annual Wage Review increase applied to rates paid on every day of the week. In contrast, the adjustments to Sunday rates applied on only one day of the week.

The result of the 1 July 2017 changes to awards is beyond doubt. Workers in all industries are better off.

Employees typically work on more than one day of the week; not just on Sundays. Therefore, in all industries employees had their wages boosted to a much greater extent by the 3.3% Annual Wage Review increase, than any adjustment in the Sunday penalty rate.

In July, [RMIT ABC Fact Check](#) published an analysis of the Labor Party's claim that "700,000 of the poorest-paid people in the country would take a pay cut on July 1, 2017". RMIT ABC concluded that Labor's "claim is fanciful".

## **Attempts by Labor and The Greens to overturn the *Penalty Rates Decision* through legislative changes**

The Commission's *Penalty Rates Decision* was made on the evidence and it is essential that the Decision is not disturbed by politicians.

The Labor Party has introduced a Bill into Parliament that would have the effect of overturning the decision. The Greens have introduced a similar Bill.

If passed, Labor's *Fair Work Amendment (Protecting Take-home Pay) Bill* would remove much of the independence of the independent umpire. The legislative amendments would operate retrospectively to 22 February 2017 (i.e. the day before the Commission handed down its *Penalty Rates Decision*).

Under Labor's Bill, the Commission would not be able to vary any award in any manner that is likely to reduce the take home pay of any employee, regardless of the circumstances or merits of the award variation.

What is the point in having an independent umpire if the umpire is only able to rule in favour of one of the parties? The Bill makes a mockery of the notion of having an independent tribunal to maintain awards.

## **Misinformation about enterprise agreements in the fast food and retail industries**

Similar to the misinformation that is circulating about the *Penalty Rates Decision*, there is a lot of misinformation circulating about enterprise agreements in the fast food and retail industries.

Sensationalism is rife in media articles about this topic and the facts are being widely overlooked.

The fast food and retail industries are by far the largest employers of young people in Australia. A large proportion of Australians get their start in the workforce in these industries. If it were not for the strong support of the major fast food and retail companies for young people, Australia's current youth unemployment problems would be much worse.

It is not in anyone's interests for the major fast food and retail businesses to be unfairly attacked based on misinformation. The misinformation raises concerns amongst young people and their parents, impacts upon relations between businesses and their employees, and damages the brands of businesses, which deters investment and employment.

If businesses in the fast food and retail industries decide that enterprise agreement-making has become too much trouble to bother with, then businesses, their employees and the broader community will be worse off. There is significant risk of this given the sensationalist and false claims that are currently being widely made about enterprise agreements in the fast food and retail industries.

It is time for another fact check.

The approach taken in a number of recent media articles is to compare the Sunday rates in enterprise agreements approved some years ago with the current Sunday rates in awards applicable to workers not covered by agreements. The articles then, on this basis, deem enterprise agreements in the fast food and retail industries to be unfair if the rates in an agreement are lower than the current rates in the award.

This approach is misleading, unfair and invalid for the following reasons.

*Firstly*, many enterprise agreements in the fast food and retail industries have “loaded rates” that smooth the rates across the working week, with higher rates paid on weekdays to compensate for the lower rates paid on weekends.

*Secondly*, the enterprise agreements in the fast food and retail industries have been assessed by the independent Fair Work Commission at the time when they were made and the Commission has determined that the employees under the agreement are better off overall than they would be if the relevant award applied. The Better Off Overall Test is point in time test. It requires that enterprise agreements result in employees being better off overall at the point in time when the agreement was approved.

Also, enterprise agreements typically include a range of other employee benefits beyond wage rates. These additional benefits are taken into account by the Commission when it applies the Better Off Overall Test. Beyond the entitlements expressly included in enterprise agreements, fast food and retail businesses often provide many other employee benefits – for example, discounts on take away meals and groceries, and training and development opportunities.

*Thirdly*, when the modern award system was introduced in 2010, penalty rates substantially increased for many businesses in the fast food and retail industries, and the higher rates were phased in between 2010 and 2014. Many of the enterprise agreements in the fast food and retail industries were made before 2014. Therefore, the Better Off Overall Test was assessed against the award penalty rates that applied under the phasing arrangements at the point in time when each agreement was approved.

*Fourthly*, many enterprise agreements in the fast food and retail industries have expired, and have not yet been re-negotiated because of all the uncertainty that exists around the application of the Better Off Overall Test following the decision of a Full Bench of the Fair Work Commission in a case involving Coles. In that case, the Commission decided that the Better Off Overall Test requires that every single employee covered by an enterprise agreement must be better off than under the award. Such a test is unworkable for businesses that may have tens of thousands of employees who work a vast array of different shifts, often based on the personal preferences and study commitments of individual employees.

*Finally*, enterprise agreements in the fast food and retail industries typically provide more generous wage increases than those reflected in awards. For example, McDonald's enterprise agreements have delivered real wage increases to employees of between 22% and 30% between 2012 to 2016, whilst the minimum rates in the Fast Food Industry Award increased by approximately 11% over the same period. In addition, some businesses in the fast food and retail industries pay higher rates of pay than the minimum rates set out in their enterprise agreements.

The public debate needs to focus on the real reason why enterprise agreement-making is rapidly grinding to a halt in the fast food and retail industries. That is, because the Better Off Overall Test in the *Fair Work Act* is now being applied in an unworkable manner by the Fair Work Commission, following the decision in the *Coles* case.

The *Fair Work Act* needs to be amended to implement a recent recommendation of the Productivity Commission that the Better Off Overall Test should apply to logical classes of employees, such as those at different classification levels and in different types of employment (e.g. full-time, part-time and casual).

## **Conclusion**

In conclusion, it is inevitable that the debate about penalty rates is going to continue to rage on up until, and perhaps beyond, the next Federal Election.

No doubt Labor, The Greens and the unions will continue to try to use the *Penalty Rates Decision* to attack the Government despite the facts that:

1. The decision was made by an independent tribunal, in a case that the Government played no part in; and
2. The decision was made under Labor's *Fair Work Act*, which includes the criteria which the Commission was required to apply in weighing up the arguments and determining whether Sunday penalty rates in the fast food, retail and hospitality industries needed to be adjusted.

For our part, the Australian Industry Group is going to continue to play a leading role in the public debate. We intend to continue to focus on ensuring that the facts are understood by the community and that misinformation is not left unchallenged.