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Penalty Rates and Fair Pay Select Committee

Inquiry into penalty rates and fair pay

Final Report

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Penalty Rates and Fair Pay Select Committee

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Chair's foreword

Victorians are proud of the vibrant lifestyle that we enjoy in our big cities and rural towns. Behind the scenes, Victorian employees work seven days a week in our tourism, retail, food and hospitality businesses, often at hours that many of us would consider unsociable. When enjoying our weekends and evenings, it is important to remember that employees in many of the industries that contribute strongly to Victoria's way of life rely on penalty rates to make ends meet.

This inquiry, the first completed by a Legislative Assembly select committee in many years, has examined the impact on Victorians of the Fair Work Commission's 2017 decision to reduce penalty rates in the hospitality, fast food, retail and pharmacy sectors. During the inquiry, it became clear that the reduction in penalty rates is already having a significant detrimental impact on thousands of workers in the affected industries, particularly women, young people and employees in rural and regional parts of the state. These workers, many of whom are among Victoria's lowest-paid, have had their take-home pay reduced at a time when cost of living pressures are rising. As further penalty rate cuts are implemented in coming years, these effects will be magnified.

The Committee also heard that the reduction to penalty rates is likely to widen the gender pay gap and may encourage some workers to move into insecure casual employment just to make ends meet. The cuts will also reduce the amount of disposable income available to spend, which could have damaging flow-on economic effects in smaller rural and regional communities. Although employer groups argued that a reduction in penalty rates would result in greater employment and more hours for part-time workers, they provided no evidence to substantiate these claims.

Given the devastating impact of the Fair Work Commission's decision, the Committee's key recommendations are that the Victorian Government advocate for the Federal Government to restore penalty rates in the relevant awards to their previous levels, and legislate to ensure the Fair Work Commission cannot vary an award and reduce take-home pay in future.

The Committee also made a range of other recommendations aimed at protecting and supporting vulnerable Victorian workers. These include potential criminal sanctions for employers who dishonestly underpay their staff and greater education on workplace rights at the secondary and tertiary levels. The Committee also believes a review needs to be undertaken of the resources allocated to the Fair Work Ombudsman, particularly in regional areas, to ensure that the important compliance role they perform in our industrial relations system can be accessed by all Victorians. I hope the Victorian and Federal Governments will take up these recommendations.

On behalf of the Committee, I thank the individuals, employee groups, local businesses groups and industry bodies who wrote submissions and attended public hearings. The Committee greatly appreciates the time and effort of all who contributed their views and experiences during the inquiry. I also thank the members of the Committee for their constructive approach and input into the inquiry, and thank the Committee staff, Robert McDonald, Paul Groenewegen and Sarah Cox, for their support and diligence in helping to deliver the report.

Gabrielle Williams MP
Chair

Findings and recommendations

Findings

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Recommendations

RECOMMENDATION 1: The Victorian Government advocate for the Federal Government to legislate to restore penalty rates in the relevant awards to their previous levels. 39

RECOMMENDATION 2: The Victorian Government advocate for changes to the *Fair Work Act 2009* (Cth) to ensure that the Fair Work Commission cannot vary a modern award in a way that would, or would be likely to, reduce the take-home pay of any employee covered by the award. 39

RECOMMENDATION 3: The Victorian Government:

- advocate for the Federal Government to change the Fair Work Regulations 2009 (Cth) to require the relevant award and classification to be included on payslips; and
- investigate options to include the relevant award and classification on the payslips of Victorian State Government employees. 40

RECOMMENDATION 4: The Victorian Government advocate for the Federal Government to review the resources provided to the Fair Work Ombudsman and ensure it has sufficient resources to effectively carry out its role, particularly in regional and rural areas. 43

RECOMMENDATION 5: The Victorian Government advocate for the Federal Government to review the powers of the Fair Work Ombudsman and examine options for more disputes to be resolved outside the court process. 43

RECOMMENDATION 6: The Victorian Government introduce legislation to create a new criminal offence, with the option of a custodial sentence, for dishonestly underpaying wages or entitlements. 46

RECOMMENDATION 7: The Victorian Government explore opportunities to include greater education about workplace rights through secondary and tertiary education and advocate for the Federal Government to do likewise. 47

RECOMMENDATION 8: The Victorian Government investigate mechanisms to educate Victorian employers and employees about their rights and assist with the enforcement of workplace laws. 48

RECOMMENDATION 9: The Victorian Government investigate the inclusion of a penalty rates guarantee in its procurement policies. 48

1.1 Terms of reference

On 9 March 2017, the Legislative Assembly agreed to the following resolution:

- (1) A select committee be appointed to:
 - (a) inquire into and report on the economic and social impact and cost of the Fair Work Commission's recent decision to cut penalty rates to thousands of Victorian workers, particularly in relation to:
 - (i) Victoria's lowest paid, award reliant workers;
 - (ii) women;
 - (iii) young workers;
 - (iv) workers in regional Victoria;
 - (v) single parents;
 - (vi) the detrimental effect on the Victorian economy;
 - (vii) workers who may be indirectly affected as they experience the flow on effects of this decision in their enterprise bargaining, across different industries, or who work in industries which may be targeted next;
 - (b) also investigate possible safeguards and federal legislative changes, that can be advocated for at the Commonwealth, State and Territory Ministers for Workplace Relations and Work Health and Safety meeting, to protect vulnerable Victorian workers and all other relevant matters;
- (2) The Committee be required to present an interim report no later than 21 June 2017 and a final report no later than 1 September 2017;
- (3) Such Committee to consist of:
 - (a) Government members Ms Williams, Ms Blandthorn, Ms Suleyman and Mr Bull (Sunbury);
 - (b) two opposition members, nominated by the Leader of the Opposition and one cross bench member nominated by the Leader of the House, and those members to be appointed by the lodgement of names to the Speaker by 5.00 pm on the day after the motion is passed;
- (4) Ms Williams be the Chair;
- (5) Four be the quorum; and
- (6) The provisions of this resolution, so far as they are inconsistent with standing orders, have effect despite anything in standing orders.

The reporting date was extended to 30 June 2018 by resolution of the Legislative Assembly on 20 June 2017.

1.2 Committee membership

On 21 March 2017, the Speaker advised the Legislative Assembly that the Leader of the Opposition had nominated Mr Clark and Ms Ryall and the Leader of the House had nominated Mr Hibbins to be members of the Committee.

1.3 Inquiry process

The Committee advertised a call for written submissions in *The Age* newspaper on 5 April 2017 and 3 May 2017. The call for submissions was also promoted through the Parliament of Victoria's Facebook page and Twitter.

The Committee wrote to a number of key stakeholders inviting them to make a written submission. These stakeholders included:

- unions and employer organisations in the relevant industries;
- social services organisations, including housing support and volunteer groups;
- the federal minister, shadow minister and Australian Greens spokesperson for industrial relations issues; and
- economists that have publicly commented on penalty rates or previously given evidence to parliamentary committees about industrial relations issues.

The Committee tabled an interim report on 20 June 2017. In that report the Committee noted that the Shop, Distributive and Allied Employees' Association and United Voice intended to appeal the Fair Work Commission's decision in the Federal Court, which limited the Committee's ability to gather evidence from key stakeholders. The Committee sought an extension to its reporting date to mid-2018, and the Legislative Assembly amended the reporting date to 30 June 2018.

The Federal Court handed down its decision dismissing the appeal on 11 October 2017. The Committee continued with its inquiry, reopening submissions and holding further public hearings. In total, the Committee received 36 submissions. A list of the submissions is included in Appendix 1. The Committee also held four days of public hearings — three in Melbourne and one in Ballarat. Appendix 2 lists the witnesses who gave evidence to the Committee at the public hearings.

The Committee would like to thank all those who made submissions or appeared at public hearings for their input into the inquiry.

1.4 Report outline

This report consists of five chapters:

- This chapter, Chapter 1, introduces the inquiry by outlining the inquiry's terms of reference and process.
- Chapter 2 provides a background to penalty rates and outlines the Fair Work Commission's decision.
- Chapter 3 outlines the immediate impacts of the reduction to penalty rates, both on employees and employers.
- Chapter 4 looks at the broader economic impacts of the decision, including on wage growth, consumption and employment.
- Chapter 5 considers potential safeguards and legislative changes to protect vulnerable Victorian workers.

2 Background

2.1 Penalty rates

Penalty Rates have been a part of Australia’s industrial relations framework since the early 1900s, with the earliest recorded decision of a court awarding penalty rates occurring in 1909.¹

Ten years after this decision, the Commonwealth Court of Conciliation and Arbitration noted that payments for work on Sundays were compensation for working unsociable hours. The Court stated that Sunday rates were higher because ‘it is the day for family and social and religious reunions, the day on which one’s friends are free, the day that is most valuable for rest and amenity under our social habits’.²

A scheme of national penalty rates was established in 1947 following the decision handed down in the ‘Weekend Penalty Rates case’.³ The Commonwealth Court of Conciliation and Arbitration ruled that penalty rates payable under the Metal Trades Award should be 125 per cent for Saturday and 200 per cent for Sunday. In making their decision, the Court noted:

[i]n one sense the use of the term ‘penalty’ as applied to such additional amounts is a misnomer, there is no question of punishment about the matter. But in another sense it expresses accurately enough the operation of the requirement of additional payment as ... a deterrent against calling upon employees to work in the circumstances in which the additional payment is required to be made.⁴

In the decades to follow, the working landscape in Australia changed, with a move towards a seven day a week retail economy beginning in Victoria in 1987 when Saturday afternoon trading was permitted for the first time.⁵ The Victorian retail sector was then effectively deregulated in 1996 with the advent of Sunday trading.⁶ To this day, penalty rates are paid to workers employed under both enterprise bargaining agreements and the modern award system.

2.2 Fair Work Commission’s decision

In 2017, the Fair Work Commission handed down their 4 yearly review of modern awards. Section 156 of the *Fair Work Act 2009* (Cth) requires the Fair Work Commission to review all modern awards to determine if they achieve the modern awards objective.

1 *Barrier Branch of Amalgamated Miners Association v Broken Hill Pty Company Ltd* (1909) 3 CAR 1.

2 *Federated Gas Employees’ Industrial Union v Geelong Gas Company* (1919) 13 CAR 437.

3 *The Metal Trades Award re Rheem Manufacturing* (1947) 58 CAR 610.

4 *Ibid*, [615].

5 *Shop Trading Act 1987* (Vic).

6 *Shop Trading Reform Act 1996* (Vic).

In determining if an award meets the modern awards objective, the Fair Work Commission must ensure that the award provides a fair and relevant minimum safety net of terms and conditions, taking into account:

- (a) relative living standards and the needs of the low paid; and
- (b) the need to encourage collective bargaining; and
- (c) the need to promote social inclusion through increased workforce participation; and
- (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
- (da) the need to provide additional remuneration for:
 - (i) employees working overtime; or
 - (ii) employees working unsocial, irregular or unpredictable hours; or
 - (iii) employees working on weekends or public holidays; or
 - (iv) employees working shifts; and
- (e) the principle of equal remuneration for work of equal or comparable value; and
- (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
- (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and
- (h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.⁷

During the modern award review process, a number of employer bodies made requests to the Fair Work Commission to vary penalty rates in their relevant awards. The Commission agreed to review the penalty rates matter separately and subsequently handed down a decision as part of their 4 yearly review.⁸

Penalty rates in six awards were dealt with as part of that review:

- Fast Food Industry Award 2010 (the Fast Food Award)
- General Retail Industry Award 2010 (the Retail Award)
- Hospitality Industry (General) Award 2010 (the Hospitality Award)
- Pharmacy Industry Award 2010 (the Pharmacy Award)
- Registered and Licensed Clubs Award 2010 (the Clubs Award)
- Restaurant Industry Award 2010 (the Restaurant Award)

⁷ *Fair Work Act 2009* (Cth) s 134(1).

⁸ [2017] FWCFB 1001, 7 [4].

The changes to Sunday and public holiday penalty rates determined by the Fair Work Commission are set out in the table below:⁹

Award	Current Sunday penalty Rate	Proposed Sunday penalty rate	Current public holiday penalty rate	Proposed public holiday penalty rate
Hospitality Award:				
Full-time and part-time employees	175 %	150 %	250 %	225 %
Casual employees	175 %	No change	275 %	250 %
Restaurant Award:				
Full-time and part-time employees	No change		250 %	225 %
Casual employees			250 %	No change
Clubs Award:				
Full-time and part-time employees	No change		No change	
Casual employees				
Fast Food Award: (Level 1 employees only)				
Full-time and part-time employees	150 %	125 %	250 %	225 %
Casual employees	175 %	150 %	275 %	250 %
Retail Award:				
Full-time and part-time employees	200 %	150 %	250 %	225 %
Casual employees	200 %	175 %	250/275 %	250 %
Pharmacy Award:				
Full-time and part-time employees	200 %	150 %	250 %	225 %
Casual employees	225 %	175 %	275 %	250 %

The effect of the decision was to reduce Sunday penalty rates to 150 per cent for full-time and part-time employees in the Hospitality, Retail and Pharmacy Awards and to 175 per cent for casual employees in the Retail and Pharmacy Awards. Sunday penalty rates for casual employees in the Hospitality Award stayed at 175 per cent.

While the Fair Work Commission proposed a reduction to Sunday penalty rates, it did not recommend cutting rates to match the levels paid on a Saturday. The Commission noted that while working on Sunday did not have the same level of inconvenience that it once did (requiring a significant penalty rate payment to make the time worthwhile), Sundays are still considered a rest day, so a penalty rate payment is appropriate.¹⁰

When assessing if an award meets the modern awards objective, fairness is to be assessed from the perspective of both employee and employer and to this end, the Commission found that:

It is difficult to conceive of the circumstances in which setting a rate of pay for work at particular times or on particular days with the objective of deterring the scheduling of work at that time or on those days can be said to be fair to the employers covered by the relevant modern award.¹¹

⁹ [2017] FWCFB 1001, 16 [55], 17 [63].

¹⁰ [2017] FWCFB 3001, 4 [3].

¹¹ [2017] FWCFB 1001, 36 [151].

The ‘deterrence effect’ (set out in cases such as the *Weekend Penalty Rates* case¹²) was dismissed by the Fair Work Commission as remaining an objective of the payment of penalty rates.¹³ The Commission found that the idea of imposing penalty rates for working outside ‘normal’ business hours would dissuade employers from scheduling work at those times did not meet the needs of the ‘fair and relevant minimum safety net of terms and conditions’¹⁴ in the modern awards objective.

2.3 Transitional arrangements

In its decision to reduce penalty rates, the Fair Work Commission noted:

The immediate implementation of all of the variations we propose would inevitably cause some hardship to the employees affected, particularly those who work on Sundays. There is plainly a need for appropriate transitional arrangements to mitigate such hardship.¹⁵

The Fair Work Commission sought submissions on appropriate transitional arrangements, and ultimately decided to phase in the reductions to Sunday penalty rates over a four-year period. The first reduction took effect from 1 July 2017 and further reductions will take place on 1 July each year as shown below.¹⁶

Award	Sunday penalty rate				
	Pre 1 July 2017	1 July 2017	1 July 2018	1 July 2019	1 July 2020
Hospitality Award:					
Full-time and part-time employees	175 %	170 %	160 %	150 %	
Fast Food Award:					
<i>(Level 1 employees only)</i>					
Full-time and part-time employees	150 %	145 %	135 %	125 %	
Casual employees	175 %	170 %	160 %	150 %	
Retail Award:					
Full-time and part-time employees	200 %	195 %	180 %	165 %	150 %
Casual employees	200 %	195 %	185 %	175 %	
Pharmacy Award:					
Full-time and part-time employees	200 %	195 %	180 %	165 %	150 %
Casual employees	225 %	220 %	205 %	190 %	175 %

As the reductions to Sunday penalty rates in the Retail and Pharmacy Awards are more significant than the Hospitality and Fast Food Awards, a longer transition period was granted for those industries.¹⁷

¹² *The Metal Trades Award re Rheem Manufacturing* (1947) 58 CAR 610.

¹³ [2017] FWCFB 1001, 13 [39], 36 [148].

¹⁴ *Fair Work Act 2009* (Cth) s 134(1).

¹⁵ [2017] FWCFB 1001, 21 [85].

¹⁶ [2017] FWCFB 3001.

¹⁷ *Ibid*, 33 [149].

3

Immediate impact of penalty rate changes

The implementation of the first round of reductions to penalty rates has had an immediate impact on both employees and employers. This Chapter sets out the evidence the Committee received on the impact on the categories of workers affected by the changes. It also examines the potential benefits for employers and employment in the affected industries.

3.1 Impact on employees

3.1.1 Wages and consumer spending

The decision to reduce penalty rates has had an immediate effect on the wages of many workers in the affected industries. While the base rates of the awards increased by 3.3 per cent on 1 July 2017 as part of annual wage rises, for employees working on Sundays these rises were offset by reductions in penalty rates. When increases in the cost of living are factored in, many workers face a real reduction in their purchasing power and therefore their standard of living.

The table below shows the net effect on Sunday wages following the first round of penalty rate reductions for typical workers in the affected industries:

Table 3.1 Hourly rates for typical workers in the affected industries following the first round of penalty rate reductions

Award and classification	Hourly rate prior to 1 July 2017		Hourly rate from 1 July 2017		
	Weekday	Sunday	Weekday	Sunday	Change in Sunday rate
Hospitality Level 1 food and beverage attendant grade 1	\$18.21	\$31.87 (175% penalty rate)	\$18.81	\$31.98 (170% penalty rate)	+0.35%
Fast Food Level 1	\$19.44	\$29.16 (150%)	\$20.08	\$29.12 (145%)	-0.14%
Retail Level 1 (not shift worker)	\$19.44	\$38.88 (200%)	\$20.08	\$39.16 (195%)	+0.72%
Pharmacy Pharmacist	\$25.44	\$50.88 (200%)	\$26.28	\$51.25 (195%)	+0.73%

All of these employees received a wage increase for their Sunday work of less than 0.75 per cent, which is lower than the average inflation rate of 1.9 per cent during July 2017 to March 2018.¹⁸ Level 1 Fast Food workers experienced a real reduction in take-home pay of 0.14 per cent.

As part of its inquiry, the Committee wrote to a number of economists who had previously commented on penalty rates seeking the results of any analysis they had undertaken of the impact of the penalty rate reductions on wages and consumer spending. However, the Committee did not receive any responses.

The Centre for Future Work has undertaken a simulation to determine the effect on a retail worker working on a Sunday, assuming that the Fair Work Commission continues to increase minimum wages faster than both inflation and average wages in the coming three years. This simulation is shown in Figure 3.1. The Centre for Future Work concluded:

This simulation confirms that the same problem besets the Fair Work Commission's plan to stage the penalty rate reductions over an intermediate period of two or three years. Except in the first year (when the penalty rate falls by only 5 percentage points), the annual reductions in the penalty rate vastly outweigh the positive impact of higher minimum wages. And during the intervening years, the real purchasing power of the Sunday wage is eroded by normal inflation. (After all, annual increases in the minimum wage are supposed to offset those annual price increases.) By the end of the phase-in period, therefore, the real value of an hour's retail work on Sunday is just under 25 percent lower than at the outset of our simulation. That is almost the same as the full impact of the 50-point reduction in the penalty rate on the nominal rate.¹⁹

The McKell Institute undertook an analysis of growth trends and consumer spending following the first round of penalty rate reductions. It noted:

Most evident is a reduction in consumer spending in Quarter 3, 2017 – the first quarter since penalty rate reductions have been in place, suggesting the reduction in take-home pay for workers has reduced their capacity to spend.²⁰

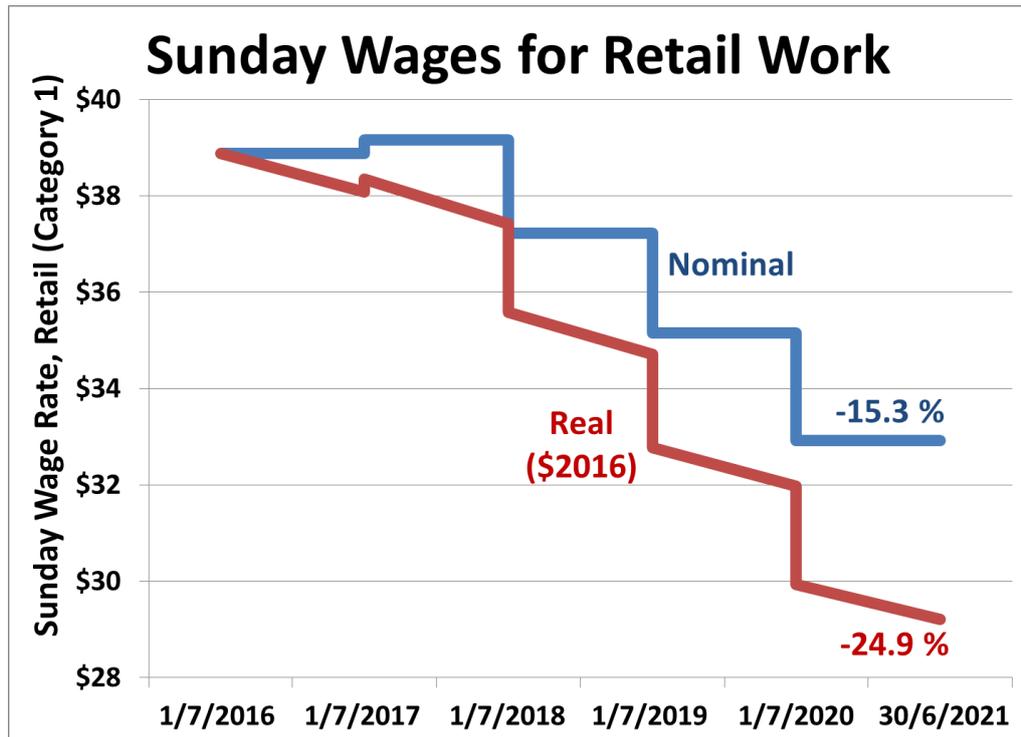
Although these are only early results, and other factors contribute to consumer spending, the Committee notes that based on the research available there may have already been a measureable detrimental impact on these employees, noting also that larger reductions in penalty rates will occur in coming years.

18 Australian Bureau of Statistics, *Consumer Price Index, Australia, May 2018*, cat. no. 6401.0 (2018), <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/6401.0Main+Features1Mar%202018?OpenDocument>> viewed 11 June 2018.

19 Jim Stanford, *Briefing Note: Penalty Rates, Minimum Wages, and Purchasing Power*, <http://www.tai.org.au/sites/default/files/Penalty_Rate_Transition_Update.pdf> viewed 11 June 2018.

20 The McKell Institute, *An Analysis of the Impact of Penalty Rate Cuts on National Growth Trends December 2017* (2017), 3.

Figure 3.1 Projected hourly wages for Sunday work, Retail Category 1



Source: Centre for Future Work

3.1.2 Women and single parents

The Committee heard that a reduction in penalty rates will disproportionately affect women²¹ and increase the gender pay gap.²² Data from the Department of Treasury and Finance estimates that the reduction in penalty rates will immediately affect 46,000 Victorian women.²³

There were two main reasons put forward as to why the cut to penalty rates would affect women more than men. Firstly, there is a higher proportion of women employees in the industries in which penalty rates have been cut. Secondly, women have a higher reliance on weekend work, which attracts penalty rates.

The Committee received consistent evidence that the industries in which penalty rates have been cut have a higher proportion of female employees. Victorian Trades Hall Council stated:

In the accommodation and food services sector and the retail sector, women make up approximately 54% of the workforce. Professional Pharmacists Australia (the union for pharmacy staff) advises that more than 61% of Victoria's pharmacists are women.²⁴

²¹ Victorian Women Lawyers, *Submission 20*, 2.

²² Ms Emma King, Chief Executive Officer, Victorian Council of Social Service, *Transcript of evidence*, Melbourne, 26 April 2017, 23.

²³ Letter from Mr David Martine, Secretary, Department of Treasury and Finance, to Secretary, Penalty Rates and Fair Pay Committee, 19 April 2017.

²⁴ Victorian Trades Hall Council, *Submission 17*, 4.

This is in line with the Workplace Gender Equality Agency's 2016-17 Annual Report, which reported that women comprise 58.2 per cent of employees in the retail sector and 52.4 per cent of employees in the accommodation and food services sector (including hospitality) across Australia.²⁵ Restaurant and Catering Australia also stated:

Women make up a significant proportion of the hospitality sector workforce with the Department of Employment estimating that women account for 55.6 per cent of those employed in the Accommodation and Food Service sector, compared to 45.9 per cent for all other industries.²⁶

The McKell Institute provided analysis to the Committee that estimated women represent 54 per cent of workers affected by the Sunday penalty rate reduction across Australia.²⁷

A number of stakeholders advised the Committee that often due to family caring responsibilities women are more likely to work on the weekends and are therefore more susceptible to the effects of the reductions in penalty rates.²⁸ Professor Lisa Heap, Women's Lead Organiser, Victorian Trades Hall Council told the Committee:

... we know that 54–55 per cent of employees in the retail and hospitality area are women. We also know that those relying on penalty rates to meet household expenses are more likely to be women, more likely to be sole parents with very low combined household incomes and more likely to be in regional and rural areas.²⁹

In 2014, the Centre for Work + Life at the University of South Australia undertook a survey to measure reliance on penalty rates. It found:

Of those who received penalty rates for working unsocial hours, over one third relied on this penalty rates [sic] for household expenses. Those relying on penalty rates were more likely to be women, sole parents or with combined household incomes less than \$30,000.³⁰

FINDING 1: The Fair Work Commission's decision to reduce penalty rates disproportionately impacts women, who have a greater representation in the affected industries and a greater reliance on penalty rates.

3.1.3 Young workers

Young workers (those aged 18-24) work in the retail and hospitality industries in large numbers, and often work on weekends, making them more likely to be the recipients of penalty rates.

²⁵ Workplace Gender Equality Agency, *Annual Report 2016-2017*, 10.

²⁶ Restaurant and Catering Australia, *Submission 18*, 7.

²⁷ The McKell Institute Victoria, *Submission 21*, 13.

²⁸ Victorian Trades Hall Council, *Submission 17*, 7; Victorian Women Lawyers, *Submission 20*, 2 - 3; Ms Emma King, Chief Executive Officer, Victorian Council of Social Service, *Transcript of evidence*, Melbourne, 26 April 2017, 23.

²⁹ Professor Lisa Heap, Women's Lead Organiser, Victorian Trades Hall Council, *Transcript of evidence*, Melbourne, 26 April 2017, 3.

³⁰ Centre for Work + Life, *Evenings, nights and weekends: Working unsocial hours and penalty rates*, report prepared by Tony Daly (2014), 18.

The Young Workers Centre submitted to the Committee that over 147,000 young people work in the retail, accommodation and food services industries in Victoria, comprising 31.5 per cent of all retail employees and 42.1 per cent of all accommodation and food services employees in the state.³¹

In the report *Evenings, nights and weekends: Working unsocial hours and penalty rates*, analysis of the 2014 Australian Work and Life Index survey data shows that younger employees are more likely to work weekends, evenings or other ‘unsociable’ hours.³² The analysis also shows that as a result of their days and times worked, young employees are more likely to receive penalty rates.³³

The Committee received evidence from the Youth Affairs Council of Victoria, who submitted that before factoring in a reduction in penalty rates, young people are already vulnerable in the workforce. They stated this was due to slow wage growth, illegal underpayment of employees and inexperience in the workplace meaning young people have less confidence in and knowledge of their workplace rights.³⁴

Victorian Council of Social Service (VCOSS) Chief Executive Officer, Emma King, advised the Committee that young people often get their first employment opportunity in the retail or food service sectors, but that with the changing nature of the workforce, jobs are now more likely to be casual, providing a lack of certainty for future income.³⁵ Llewellyn Reynders, VCOSS policy manager stated:

...young people quite clearly are going to be heavily represented in the people affected by this [penalty rate reduction] decision, and it will make so many other life transitions, including moving out by yourself, independent living, being able to afford housing and other costs of living much, much harder.³⁶

FINDING 2: Young Victorians are a large proportion of the retail and hospitality workforce and will be significantly impacted if the reductions in penalty rates are implemented by their employers.

3.1.4 Rural and regional Victorians

The effect of the reduction in penalty rates on employees in rural and regional Victoria was raised in much of the evidence gathered by the Committee during the inquiry. The Committee travelled to Ballarat to hear from stakeholders and welcomed submissions from a range of organisations representing employees and employers in regional areas.

³¹ Young Workers Centre, *Submission 11*, 3.

³² Centre for Work + Life, *Evenings, nights and weekends: Working unsocial hours and penalty rates*, report prepared by Tony Daly (2014), 8.

³³ *Ibid*, 18.

³⁴ Youth Affairs Council of Victoria, *Submission 6*, 5 - 6.

³⁵ Ms Emma King, Chief Executive Officer, Victorian Council of Social Service, *Transcript of evidence*, Melbourne, 26 April 2017, 28.

³⁶ Mr Llewellyn Reynders, Policy Manager, Victorian Council of Social Service, *Transcript of evidence*, Melbourne, 26 April 2017, 29.

Department of Treasury and Finance data estimates that the reduction in penalty rates will affect 22,000 employees in regional Victoria.³⁷ The McKell Institute provided a submission to the Committee focusing on the effect of penalty rate cuts to regional communities. The Institute submitted that the retail and hospitality sectors employ 18 per cent of people living in regional and rural Australia and that on average, rural employees earn seven per cent less per year than employees in metropolitan areas.³⁸

In a 2015 report prepared prior to the Fair Work Commission's decision on the reduction to penalty rates, the McKell Institute conducted a study on the potential impact of a cut (either partial or full) to penalty rates. It estimates that a partial reduction to penalty rates in the retail and hospitality sectors would result in regional Victorian employees losing between \$67 million and \$127.6 million per annum.³⁹

The Committee received evidence from a number of stakeholders on the impact on regional economies when disposable income is reduced. The Victorian Trades Hall Council submitted that the flow on effect from a reduction in penalty rates for regional employees may lead to a drop in spending, a subsequent reduction in demand and a resulting drop in living standards in rural and regional communities.⁴⁰ Brett Edgington, Secretary of the Ballarat Regional Trades and Labour Council supported this position:

When you are a little regional town of 3000 to 3500 people, with the disposable income amongst those 3500 people at their local milk bar and the local pub, it becomes a microcosm. When you start taking \$40 to \$70 a week out of some of the pockets of that community, that is not going in through the local fish and chip shop, the milk bar or the hotel.⁴¹

FINDING 3: The reduction in penalty rates will reduce the disposable income of many employees in the affected industries, which is likely to have a flow on economic effect, particularly in small regional Victorian communities.

3.2 Impact on employers

The Committee received evidence from several employer groups who submitted that a reduction in penalty rates would ultimately lead to an increase in confidence in the business sector, leading to a boost in employment and increased hours for existing employees.

³⁷ Letter from Mr David Martine, Secretary, Department of Treasury and Finance, to Secretary, Penalty Rates and Fair Pay Committee, 19 April 2017.

³⁸ The McKell Institute Victoria, *Submission 21*, 11.

³⁹ The McKell Institute, *Who Loses When Penalty Rates are Cut?* (2015), 19.

⁴⁰ Victorian Trades Hall Council, *Submission 17*, 8.

⁴¹ Mr Brett Edgington, Secretary, Ballarat Regional Trades and Labour Council, *Transcript of evidence*, Ballarat, 21 March 2018, 6.

3.2.1 Job creation

In handing down its penalty rates decision, the Fair Work Commission concluded that based on the evidence provided to it, a reduction in penalty rates may result in a ‘modest positive effect on employment’.⁴² The Commission acknowledged however that it might be difficult to quantify the exact effect on employment due to the reductions to penalty rates.⁴³

The Committee accepted a range of submissions and heard from several witnesses who supported the view of the Fair Work Commission on a potential increase to employment, both through the creation of new jobs and by offering existing staff additional working hours.

Restaurant and Catering Australia, the national industry association for businesses in the hospitality sector, submitted to the Committee the results of research they had previously commissioned on the potential effects on business as a result of reducing penalty rates. One thousand restaurant and café owners were surveyed, with 52 per cent responding that they would employ additional staff if penalty rates on weekends were reduced. The survey showed that on average across the sector, an additional 3.15 staff per day per business would be employed.⁴⁴

The Victorian Chamber of Commerce and Industry (VECCI) submitted to the Committee that a reduction in penalty rates would allow some businesses to open on Sundays and public holidays, providing new employment opportunities, especially in regional areas.⁴⁵ Representatives from Commerce Ballarat, Ballarat’s local chamber of commerce gave evidence to the Committee on behalf of their members echoing the views put forward by VECCI:

Just a few comments from another member, who said that as the Sunday penalty rates for full-time and part-time employees continue to wind back to 150 per cent over the next two years they are anticipating making available more part-time and full-time positions and reducing the amount of casual positions in their business.⁴⁶

However, the McKell Institute undertook an analysis of employment growth in the third quarter of 2017, during which the first reduction to penalty rates was implemented. It found that during that period the retail industry had not shown any significant rise in employment and the accommodation and food services industry actually saw a slight reduction in employment.⁴⁷

⁴² [2017] FWCFB 1001, 142 [688].

⁴³ Ibid, 142 [689].

⁴⁴ Restaurant & Catering Australia, *Submission 18*, 6.

⁴⁵ Victorian Chamber of Commerce and Industry, *Submission 13*, 1.

⁴⁶ Ms Hayley Coates, Board Member, Commerce Ballarat, *Transcript of evidence*, Ballarat, 21 March 2018, 24.

⁴⁷ The McKell Institute, *An Analysis of the Impact of Penalty Rate Cuts on National Growth Trends December 2017* (2017), 8.

3.2.2 Additional hours for staff

In addition to receiving evidence on the potential for job creation as a result of reduced penalty rates, the Committee heard that moving forward, businesses anticipate being able to offer additional working hours to existing employees and in some sectors anticipate being able to employ more part-time and full-time staff, rather than relying on a casual workforce.

The survey conducted by Restaurant and Catering Australia and submitted to the Committee reported that 41 per cent of businesses surveyed would open for longer hours if penalty rates were reduced, opening on average an extra 5.07 hours on a typical Sunday or public holiday.⁴⁸

However, John Hart, then Chief Executive Officer of Restaurant and Catering Australia advised the Committee that it would take several years for these benefits to be realised:

I think at least two to three years is about the time frame around which particularly in the catering sector you would need to see a change. For instance, in the current hearings we are looking at what the impacts of the change that we experienced following the 2012 decision have been, and it is very clear that they took at least 18 months to manifest. So I think it would need longer.⁴⁹

At a public hearing, James Fleming, Legal and Industrial Officer, Australian Council of Trade Unions provided the committee with research from Dr Martin O'Brien and Professor Ray Markey and Dr Eduardo Pol which examined the number of jobs and additional hours created since 1 July 2017 when the first reduction in penalty rates was implemented. The research found:

There was no statistically significant change in the proportion of award-dependent hospitality workers working on Sundays, no statistically significant change in Sunday hours worked by award-dependent hospitality workers, no statistically significant change in weekly hours worked by award-dependent retail workers and no statistically significant change in weekly hours worked by award-dependent hospitality workers. Interestingly, in fact there was a statistically significant decrease in the proportion of award-dependent retail workers working on Sundays and a statistically significant decrease in the Sunday hours worked by award-dependent retail workers, so employment actually went down in those respects.⁵⁰

Professional Pharmacists Australia also advised that there has been no increase in the opening hours of pharmacies, or more pharmacists employed following the first penalty rate reduction,⁵¹ although they also advised that not all pharmacies have passed on the changes to penalty rates.⁵²

⁴⁸ Restaurant & Catering Australia, *Submission 18*, 6.

⁴⁹ Mr John Hart, Chief Executive Officer, Restaurant and Catering Australia, *Transcript of evidence*, Melbourne, 26 April 2017, 15.

⁵⁰ Mr James Fleming, Legal and Industrial Officer, Australian Council of Trade Unions, *Transcript of evidence*, Melbourne, 20 March 2018, 15; Dr Martin O'Brien, Prof Ray Markey and Dr Eduardo Pol, *The Short Run Employment Impact of the Fair Work Commission Penalty Rates Decision* (Paper presented to the 14th Western Economic Association International Conference, Newcastle, 11 January 2018).

⁵¹ Mr Chris Walton, Chief Executive Officer, Professional Pharmacists Australia, *Transcript of Evidence*, Melbourne, 20 March 2018, 10.

⁵² *Ibid*, 5.

Noting it has been less than 12 months since the first penalty rates reductions took effect, so far it appears that none of the anticipated benefits of the penalty rate reductions have been realised.

FINDING 4: There is no evidence that new jobs have been created, or additional hours offered, following the first round of penalty rate reductions.

3.2.3 Difficulties attracting staff

The Committee heard evidence that reducing penalty rates can make it harder for employers to attract staff on Sundays, as they are unwilling to work if they are not paid a high enough penalty rate. Cameron Walls, an employee pharmacist based in Wodonga, told the Committee:⁵³

... when the decision came into effect on 1 July last year to start reducing the penalty rates it started to become harder to find pharmacists. By October the owner of the business had decided that they would no longer trade on Sundays because they could not provide the staff to open regularly. That came into effect on 31 October, that change in our opening hours. I am still receiving complaints. Even last week I had a complaint about the fact that we are not open on Sundays. If our customers need their medication or information about their medication or medical conditions on a Sunday, they have to travel further to talk to a pharmacist who does not know them or have access to their medication records. They have to wait till 9.00 a.m. on Monday morning when we open, or they have to present themselves to an emergency department where they have to wait hours to be seen, because that takes a while. So it has really had a negative impact on the local community as well.

Commerce Ballarat acknowledged the difficulties attracting qualified staff in regional Victoria, but argued that reducing penalty rates will allow businesses to employ more full-time and part-time staff and invest in training. Jodie Gillett, Chief Executive Officer, Commerce Ballarat, advised the Committee:

We are also constantly getting feedback from both retail and hospitality, hospitality in particular, around skill shortages being a real issue. If we see an increase — and once again this is just an opinion — in part time and full time work, we would also think that we will see an increase potentially in investing in those people with training and that maybe they will be a more stable workforce. We really need to see an improvement, I guess, in the skills in our hospitality sector in order for it to grow, as well.⁵⁴

For many employees, there will be no choice but to continue to work Sunday shifts with reduced penalty rates if they need the money to make ends meet. However, the Committee notes some employees are likely to elect to stop working Sundays if they do not feel they are being adequately compensated for working on the weekend. This could exacerbate skill shortages in some industries, particularly in regional Victoria. To counter this impact, some employers could choose not to implement the penalty rate reductions, or pay wages above the award, in order to retain and attract qualified staff.

⁵³ Mr Cameron Walls, Professional Pharmacists Australia, *Transcript of Evidence*, Melbourne, 20 March 2018, 3.

⁵⁴ Ms Jodie Gillett, Chief Executive Officer, Commerce Ballarat, *Transcript of evidence*, Ballarat, 21 March 2018, 21.

3.2.4 Rural and regional Victoria

The Committee received evidence that some rural and regional employers cannot always afford to pay penalty rates, resulting in business owners and their families working on Sundays and public holidays instead of employing staff. Jodie Gillett, CEO, Commerce Ballarat, advised the Committee:

... we need to remember the family businesses, because if they cannot afford to employ someone to work, then they are working themselves. In regional Victoria in particular that is just a common occurrence. We have so many members where, on long weekends and at Easter, it is the entire family [...] that is actually working. We need to remember their family time is just as important as it is for the general citizens.⁵⁵

An alternative is for businesses to close on public holidays and Sundays, which can be detrimental to tourism. Hayley Coates, of Commerce Ballarat, explained:

... it affects the tourism levels coming into the town, because if people come one year and they find that everything is closed, they do not return a second year. It has a major impact on tourism for a town like Ballarat, which as you can see is very heritage focused, very tourism based. It makes a significant impact. We do not have the actual figures in front of us as to the scale that it is, but not being able to have businesses open and operating affects locals — locals up and leave and they go away for long weekends if there is a public holiday — and people do not come and replenish those locals, so all of the businesses suffer and our overall economy suffers as a result.⁵⁶

This can also result in lost hours for staff:

We do have a high amount of students in the city. I know last year there were a lot of our members who talked about their casual staff who actually missed a lot of hours over that fortnight because the business was closed. Obviously they are students and they need to be working to be paying their rents, and we would prefer the businesses to be open because it is better for everyone. It is not just hospitality; it is retail that is a real issue for us. Retailers often do not choose to open on the weekends, which once again does not help with the escape expenditure.⁵⁷

The Committee heard from Commerce Ballarat that a reduction in penalty rates may enable some rural and regional employers to open on Sundays and public holidays when they have previously been closed, which may assist businesses to meet the demand and expectations of residents and visitors to their areas. The Committee also heard that some employers may also employ staff instead of working themselves. However, as discussed in section 3.1.4, the reduction in disposable income may also result in employees in the affected industries having less money to spend at these rural and regional businesses.

55 Ms Jodie Gillett, Chief Executive Officer, Commerce Ballarat, *Transcript of evidence*, Ballarat, 21 March 2018, 18.

56 Ms Hayley Coates, Board Member, Commerce Ballarat, *Transcript of evidence*, Ballarat, 21 March 2018, 17.

57 Ms Jodie Gillett, Chief Executive Officer, Commerce Ballarat, *Transcript of evidence*, Ballarat, 21 March 2018, 18.

4 Broader economic impacts

In addition to the immediate impact on employees and employers, the decision to reduce penalty rates will have longer-term impacts on the economy. This Chapter outlines the evidence received by the Committee in relation to these broader economic impacts, including wage growth, employment and demand for welfare services.

4.1 Wage growth

The Fair Work Commission's decision has come at a time when Australia has endured close to six years of stagnation, or minor increases, in wages.⁵⁸ As at March 2018, wages in the private sector nationally had grown at 2 per cent in Australia and 2.2 per cent in Victoria over the previous twelve months.⁵⁹ In March 2018, the Consumer Price Index (CPI) in Australia was 1.9 per cent and in Melbourne it was 2.2 per cent.⁶⁰ This means that wages in Australia and Victoria have simply just kept up with inflation.

When wages rise faster than inflation, people get an increase in real average earnings and there is usually an increase in living standards. However, when wages rise at or below the level of inflation, living standards can decrease as the amount of disposable income the average Australian household has, decreases. This is particularly the case at the moment as housing and utility prices continue to rise.⁶¹

The hospitality and retail industries employ some of Australia's lowest paid workers. As at November 2017, the average weekly earnings for an adult in Australia was \$1,628.10 per week. The accommodation and food services industry had the lowest average weekly earnings at \$1,112.90 per week, closely followed by the retail trade industry at around \$1,200 per week.⁶²

The Chifley Institute estimates that once the full penalty rate reduction recommended by the Fair Work Commission comes into effect, an employee covered by their respective award, working eight hours each Sunday in the retail and pharmacy industry, could lose up to \$4,043 per year. The same research

58 David Scutt, 'Australia's wages data beats - but there's still a big problem with most people's pay', *Business Insider Australia*, 21 February 2018, <<https://www.businessinsider.com.au/australia-wage-price-index-rba-implications-interest-rates-2018-2#3PMwP71Cvae5M2Op.99>> viewed 10 May 2018.

59 Australian Bureau of Statistics, *Wage Price Index, Australia, March 2018*, cat. no. 6345.0 (2018). <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/6345.0>> viewed 22 May 2018.

60 Australian Bureau of Statistics, *Consumer Price Index, Australian, March 2018*, cat. No. 6401.0 (2018), <<http://www.abs.gov.au/ausstats/abs@.nsf/products/902A92E190C24630CA2573220079CCD9?OpenDocument>> viewed 9 May 2018.

61 Greg Jericho and Gareth Hutchens, 'Whatever happened to wage rises in Australia?', *The Guardian Australia Edition (online)*, 1 March 2018, <<https://www.theguardian.com/australia-news/2018/mar/01/whatever-happened-to-wage-rises-in-australia>> viewed 10 May 2018.

62 Australian Bureau of Statistics, *Average Weekly Earnings, Australia, November 2017*, cat. No. 6302.0, (2017), <<http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/6302.0Main%20Features4Nov%202017?opendocument&tabname=Summary&prodno=6302.0&issue=Nov%202017&num=&view=>>> viewed 9 May 2018.

estimates that a fast food employee could lose up to \$2,021 and a hospitality employee up to \$1,963 per year.⁶³ It would require these retail and pharmacy employees to work an extra 26 days per year and fast food and hospitality employees an extra 13 days per year to earn the same amount they were earning before the penalty rate reduction.⁶⁴

As discussed in section 3.1, the reductions in penalty rates will not be offset by increased in base rates of pay. Nick Thurlbeck of Commerce Ballarat advised the Committee:

Sunday [...] rates for full-time and part-time employees actually increased by 0.33 per cent on 1 July 2017 despite the decrease in penalty from 175 per cent to 170 per cent.⁶⁵

Hayley Coates, also of Commerce Ballarat, further explained:

I would say it would be an offset. When the wages increased on 1 July 2017, that 5 per cent decrease in the penalty rate was actually offset by the increase in the actual wage level to the point that it was still an increase. They are still actually receiving more money than they did the previous year.⁶⁶

However, given CPI increases are currently approximately 2 per cent,⁶⁷ these employees are facing rises in living expenses which are greater than their 0.33 per cent increase in wages. As larger reductions are implemented, wage growth will continue to stagnate or even reduce.

FINDING 5: The penalty rate reductions will result in wage stagnation or wage reductions for employees in the retail, fast food, hospitality and pharmacy industries who depend on penalty rate work for a significant proportion of their income.

4.2 Employment

The Fair Work Commission, in supporting its decision, noted:

...that there are likely to be some positive employment effects from a reduction in penalty rates, though it is difficult to quantify the precise affect.⁶⁸

⁶³ Victorian Trades Hall Council, *Submission 17*, 5.

⁶⁴ Chifley Research Centre, *Cutting Penalty Rates Measuring the Impact, March 2017* (2017), <<http://www.chifley.org.au/new-report-measures-the-impact-of-penalty-rate-cuts-on-workers>>, viewed 11 June 2018. The research assumes each employee works 8 hours on a Sunday for 52 weeks a year.

⁶⁵ Mr Nick Thurlbeck, Board Member, Commerce Ballarat, *Transcript of evidence*, Ballarat, 21 March 2018, 14.

⁶⁶ Ms Hayley Coates, Board Member, Commerce Ballarat, *Transcript of evidence*, Ballarat, 21 March 2018, 14.

⁶⁷ Australian Bureau of Statistics, *Consumer Price Index, Australia, Mar 2018*, cat. No. 6401.0, (2018), <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/second+level+view?ReadForm&prodno=6401.0&viewtitle=Consumer%20Price%20Index,%20Australia-Mar%202018-Latest-24/04/2018&&tabname=Past%20Future%20Issues&prodno=6401.0&issue=Mar%202018&num=&view=&>> viewed 11 June 2018.

⁶⁸ [2017] FWCFB 1001, 436 [689].

It also noted that:

In addition, the Hospitality and Retail sectors have a number of features which distinguish them from other industries. In particular, public holiday work is more common and, on the evidence before us, reducing the public holiday penalty rate will increase employment and have a number of positive effects on business.⁶⁹

Restaurant and Catering Australia (R&CA) stated in its submission that reducing penalty rates will have a positive effect on employment. They suggested it will allow businesses in the hospitality sector to cater for the public demand of longer opening and trading hours. R&CA provided evidence from Jetty Research that had surveyed 1,000 restaurant and café owners:

- 52 per cent of the owners surveyed claimed they would employ on average 3.15 additional staff per day if penalty rates were reduced.
- 41 per cent of the businesses surveyed said they would open longer for up to 5.07 hours per day.⁷⁰

At a public hearing in Ballarat, Commerce Ballarat supported the idea that a reduction in penalty rates will lead to increased employment. The feedback they had received from their membership was that they expected the reduction in penalty rates to create more jobs and working hours.⁷¹

In its submission to the Committee, the Victorian Young Liberal Students' Association argued that the decision to reduce penalty rates may also create new employment opportunities for students and young people:

The Commission's decision will help alleviate some of the stress faced by thousands of young Victorian jobseekers by creating new employment opportunities for the least experienced prospective workers just trying to get their foot in the door.⁷²

Many students rely upon casual and part-time employment in these industries to meet everyday expenses such as food and housing. Others use this employment to develop practical job skills and improve their future employability as they study.⁷³

VECCI believes that the penalty rate reduction will allow Victorian businesses to be more confident when rostering and hiring staff, help to improve customer experiences, make more hours available for employees and provide more employment opportunities for young people, especially in regional Victoria.⁷⁴

In its submission to the Senate's Education and Employment References Committee inquiry into Penalty Rates, the Australian Chamber of Commerce and Industry (ACCI) proposed that a reduction in penalty rates could be an antidote to underemployment in Australia. Using ABS data, ACCI states that at May 2017 178,400 Australians (20 per cent of employees) working in the food service

69 [2017] FWCFB 1001, 436 [1956].

70 Restaurant & Catering Australia, *Submission 18*, 3.

71 Ms Jodie Gillett, Chief Executive Officer, Commerce Ballarat, *Transcript of evidence*, Ballarat, 21 March 2018, 21.

72 Victorian Liberal Students' Association, *Submission 36*, 2.

73 *Ibid.*

74 Victorian Chamber of Commerce and Industry, *Submission 13*, 1.

industry and 196,900 (16.1 per cent) in the retail industry are underemployed. ACCI believes that a reduction in penalty rates will allow employers to offer more work hours and reduce underemployment.⁷⁵

As discussed in section 3.2 of this report, there has been no evidence that the initial reduction in penalty rates has immediately led to the creation of jobs or additional hours. Ged Kearney, then President of the ACTU, told the Committee that experience in other jurisdictions casts doubt on the theory that reducing penalty rates will create jobs:

[T]here is very little evidence anywhere to show that cutting people's pay increases employment. In fact I really would struggle to quote any evidence at all to show that it would. In fact in Australia — I am trying to think when penalty rates were cut in South Australia — during the award modernisation process in the retail sector there was no impact on employment. When penalty rates went up in New South Wales — I think it was in the hospitality award during the award modernisation process — there was no impact on employment. In other countries overseas, in certain states in the United States where there have been huge increases in the minimum wage, like in the state of New York I think, there has been no impact on employment; in fact it has acted as a stimulus for the economy. The OECD, the IMF and the World Bank — there is lots of research to show that there is very little impact. So all of the research and all of the data, in our opinion, points to the exact opposite of what is being argued by the employers, and all it will do is make life incredibly hard for those low paid people.⁷⁶

University of Melbourne Economics professor, Mark Wooden, agreed that it is unlikely that new jobs will ever be created and that the more likely outcome is an increase in extra hours for existing staff:

They're talking about a fairly modest reduction — some going from a penalty rate of 175 per cent to 150 per cent, others going from 250 to 225 per cent...A minimal reduction means there's going to be a minimal impact, and you can't say it's necessarily going to increase employment... What's going to happen is those staff who have their pay cut on Sunday who were working, for example, 10am to 2pm might now be rostered on from 10am to 4pm.⁷⁷

There is also evidence that when wages are reduced, this reduces economic activity and actually results in a decrease in employment. A public letter, signed by over 75 Australian professionals working in economics and related disciplines states:

We do not expect that lower wages for work on Sundays and public holidays will result in significant net job creation in retail and hospitality, for several reasons. ... Economic research indicates that overall business activity in retail and hospitality, and hence overall employment in those sectors, depends most importantly on the level of consumer expenditure on retail and hospitality services, which in turn is determined mostly by aggregate economic performance and personal incomes. Lower wages for work on Sundays and holidays cannot increase the overall budget

75 Australian Chamber of Commerce and Industry, submission to the Senate Education and Employment References Committee Inquiry into Penalty Rates (2017), 9.

76 Ms Ged Kearney, President, Australian Council of Trade Unions, *Transcript of evidence*, Melbourne, 26 April 2017, 43.

77 Burke, Liz, 'Do penalty rate cuts really equal job creation?', *news.com.au*, 24 February 2017, <<http://www.news.com.au/finance/work/at-work/do-penalty-rate-cuts-really-equal-job-creation/news-story/c43ac5998fa5f000bc92b0c4f8d70c11>> viewed 8 May 2018.

constraint that limits consumer spending ... By reducing the relative costs of operating on Sundays versus other days of the week, lower penalty rates will likely encourage a shift of activity from other days to Sundays and holidays. New demand for lower-cost labour on Sundays will be at least partly offset by reduced demand for labour on other days. And by shifting consumer demand from other days to Sundays, lower penalty rates could actually reduce productivity and operating margins on those other days of the week, with unpredictable effects on overall employment levels.⁷⁸

They also note that at lower wage rates, employees will be less inclined to supply their labour, which could have a detrimental effect on workforce participation and further undermine the performance of household incomes and national growth.⁷⁹

FINDING 6: There is so far insufficient evidence that the penalty rate reductions will have a positive effect on employment.

4.3 Inequality

As at March 2017, a family of two adults, with two dependent children, earning less than \$959.25 per week, are said to be living below the poverty line. For a single person, the poverty line is estimated at \$510.71.⁸⁰ The Australian Council of Social Services estimated that in 2014, 32.1 per cent of people living below the poverty line in Australia have jobs.⁸¹ Based on ABS data, 54.4 per cent of employees in the accommodation and food services sector and 35.3 per cent of employees in the retail sector earn less than \$500 per week, compared with 19.0 per cent across all industries.⁸²

As wages are reduced as penalty rates are reduced, more people reliant on penalty rates may be pushed under the poverty line, or those already there, will face even more difficult circumstances. Emma King from VCOSS expressed her concerns at a public hearing:

Our member organisations are stretched. They are committed to doing everything that they can to protect all Victorians, particularly vulnerable Victorians. But when we have a third of people who are in poverty who have a job but cannot make ends meet, we know that the impact of cutting penalty rates is going to be devastating.⁸³

78 Progress in Political Economy (PPE), *Penalty Rate Cuts Will Boost Inequality, Not Employment* (2017), <<http://ppesydney.net/penalty-rate-cuts-will-boost-inequality-not-employment>> viewed 21 May 2018.

79 Ibid.

80 Melbourne Institute of Applied Economic and Social Research, *Poverty Lines: Australia, March Quarter 2017*, <https://melbourneinstitute.unimelb.edu.au/__data/assets/pdf_file/0004/2435368/Poverty-lines-Australia-March2017c.pdf>, 2.

81 Australian Council of Social Service, *Poverty*, 2016, <<https://www.acoss.org.au/poverty>> viewed 9 May 2018.

82 Australian Bureau of Statistics, *Employee Earnings and Hours, Australia, May 2016*, cat. No. 6306.0, (2016), <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/6306.0Main+Features!May%202016?OpenDocument>> viewed 13 June 2018.

83 Ms Emma King, Chief Executive Officer, Victorian Council of Social Service, *Transcript of evidence*, Melbourne, 26 April 2017, 24.

The Victorian Trades Hall Council expressed their view that as retail employees are already amongst the lowest paid in Victoria, it is not feasible for them to absorb any sort of pay cut. They believe affected employees will have to work an extra two to four extra hours per week to find the money for essentials, resulting in more time away from their families, recreational activities and important events.⁸⁴

The Young Workers Centre gave evidence that many young people get their first experiences in the work force in the retail, accommodation and food services industries, particularly in part-time and casual employment. Many of these employees struggle to make ends meet and spend the majority of their income on essentials such as rent, bills and food or textbooks if they are studying, with little left for savings or recreation.⁸⁵ In their submission to inquiry, the Health Workers Union raised their concerns that young people that have had their pay reduced due to penalty rates cuts may become severely stressed.⁸⁶

At a public hearing, Mohammed Abu Sayem, a hotel worker, articulated the stress and difficult choices some families may face from a reduction in penalty rates:

If Fair Work tries to reduce our moneys, especially the weekend rates, it is so difficult to run our everyday life, even the children's education costs and even our own medication costs. Sometimes we have to be thinking, 'Okay, that is my medication cost [gone] because I have no choice'.⁸⁷

As employees in industries such as retail, hospitality and pharmacy, face a reduction in penalty rates, penalty rates for employees in other industries, such as nurses and paramedics are being maintained at the original levels. In the view of Victorian Trades Hall Secretary, Luke Hilakari, this has the potential to create a divisiveness and resentment in the workforce or even a feeling low self-worth for employees who may feel that their occupations are valued less than others:

What we are afraid of is we will end up in a system where people will say, 'They've got the penalty rates, why should they have them now?', and there will be that sort of unfair burden of jealousy that says nurses or paramedics or the people who give up their weekends, why should they get something that we do not?⁸⁸

Similar issues were raised by Chris Walton, CEO of Professional Pharmacists Australia. Mr Walton pointed out the important role that pharmacists play in the community as health professionals. He feels that pharmacists, with a graduate's starting salary at \$42,000 per annum in comparison to \$65,000 for medicine, and an average wage of \$31 to \$32 per hour are one of the lowest paid health employees. He is concerned that pharmacists are seen as just part of retail rather than an integral and valued part of the health system:⁸⁹

⁸⁴ Victorian Trades Hall Council, *Submission 17*, 6.

⁸⁵ Young Workers Centre, *Submission 11*, 6.

⁸⁶ Health Workers Union, *Submission 35*, 17.

⁸⁷ Mr Mohammed Abu Sayem, Hotel Worker, United Voice, *Transcript of evidence*, Melbourne, 27 April 2017, 7.

⁸⁸ Mr Luke Hilakari, Secretary, Victorian Trades Hall Council, *Transcript of evidence*, Melbourne, 26 April 2017, 5.

⁸⁹ Mr Chris Walton, CEO, Professional Pharmacists Australia, *Transcript of evidence*, Melbourne, 20 March 2018, 2 - 6.

It is respect as much as the dollars. It is a sense that as health professionals they believe they really, really care and get to know their local communities and give that extra. They already felt poorly paid, and to then take a potential cut in their take-home pay — unless their employer does the right thing and does not implement the cut — they felt a further cut to an already low take-home pay was just a step too far... Why would you study one of the hardest subjects at university for five years and build up your HECS debt to earn \$26 an hour? You could do more stacking shelves at the grocery store.⁹⁰

Despite relatively low rates of inflation, Melbourne is ranked by the Economist Intelligence Unit as the fifteenth most expensive city in the world in which to live.⁹¹ Demographia ranks Melbourne as the fifth most unaffordable housing market in the world and claims that Melbourne house prices are almost ten times higher than the median household income.⁹² The cost of housing and accommodation has the biggest impact on people's living expenses and accounts for around 22 per cent of the average household's weekly expenditure.⁹³

The reduction in penalty rates for retail and food service workers, already amongst the lowest paid in Victoria, will severely impact the capacity of workers reliant on penalty rates to buy a home, increase mortgage stress or adversely affect their ability to live relatively comfortably in what is already one of the world's most expensive cities.

4.4 Gender pay equity

The Workplace Gender Equality Agency (WGEA) is an Australian Government agency charged with promoting and improving gender equality in Australian workplaces.⁹⁴ The WGEA calculates the national gender pay gap using data from the Australian Bureau of Statistics (ABS). The national gender pay gap is the difference between women and men's average weekly full-time base salary earnings, expressed as a percentage of men's earnings.⁹⁵ It is a measure of women's overall position in the paid workforce and does not compare like roles.⁹⁶ As at November 2017, the WGEA calculated that the gender pay

⁹⁰ Mr Chris Walton, CEO, Professional Pharmacists Australia, *Transcript of evidence*, Melbourne, 20 March 2018, 6.

⁹¹ Parliamentary Library & Information Service, *The Cost of Living: An Explainer No. 1, April 2018*, Parliament of Victoria, 18.

⁹² David Chau, *Australian property 'severely unaffordable', Sydney crowned 'second least affordable market'*, ABC News, 23 January 2018, <<http://www.abc.net.au/news/2018-01-22/australian-housing-unaffordability-experts-disagree-on-extent/9349796>> viewed 16 May 2018.

⁹³ Parliamentary Library & Information Service, *The Cost of Living: An Explainer No. 1, April 2018*, Parliament of Victoria, 6.

⁹⁴ Workplace Gender Equality Agency, *Our Role* (2018), <<https://www.wgea.gov.au/about-wgea/our-role-0>> viewed 3 May 2018.

⁹⁵ Base pay is defined as the award pay or agreed rate of pay for ordinary time hours paid for. For jobs held by employees whose pay is set in an award or an agreement (either collective or individual), the weekly base rate of pay includes overaward (or overagreement) pay and all taxable allowances (dirt, height, tool, etc.) and penalty payments (e.g. shift loadings) specified in the award or agreement. Australian Bureau of Statistics, *Labour Statistics: Concepts, Sources and Methods, Jun 2005* (2005), cat. No. 6102.0.55.001, <<http://abs.gov.au/AUSSTATS/ABS@NSF/Previousproducts/00476A051960D731CA256EF9000C206C?opendocument>> viewed 11 June 2018.

⁹⁶ Workplace Gender Equality Agency, *What is the gender pay gap?* (2018), <<https://www.wgea.gov.au/about-wgea/our-role-0>> viewed 3 May 2018.

gap was 15.3 per cent nationally, and 12.2 per cent in Victoria.⁹⁷ From these figures, the retail trade sector had a national gender pay gap of 8.1 per cent, the accommodation and food services sector had a gap of 11.6 per cent and the health care and social assistance sector a gap of 22.8 per cent.⁹⁸

Emma King, CEO of VCOSS, expressed her fears for how the reduction in penalty rates may affect women in these industries, where a sizeable gender pay gap already exists:

So we know that the impact is already there for women in terms of looking at a significant gender pay gap. It plays across all industries but it plays across the retail, accommodation and food industries very particularly, and the reality of then cutting penalty rates I think will exacerbate that considerably.⁹⁹

The Victorian Women Lawyers Association (VWL) noted their concerns for how the Fair Work Commission's decision will affect gender pay equity in their submission to the Committee:

VWL submits that the reduction in Sunday penalty rates will increase the wage gap between men and women. The average Australian woman retires with around half the superannuation balance of the average man. This gender gap emerges because women are more likely to be engaged in part time or casual work to balance caring responsibilities. VWL submits that the Commission's decision will serve to compound the economic disadvantage for women and increase the wage gap.¹⁰⁰

In its decision, the Commission differentiated between what it viewed to be 'career' and 'non-career' work in the fast food industry:

The evidence supports the retention of the current Sunday penalty rate for level 2 and 3 employees. In this context we note that level 2 and 3 employees are, generally speaking, regarded as 'career' employees with the major chains whereas casual and part-time crew members (level 1 employees) are usually regarded as 'non-career' employees.¹⁰¹

Under the Fast Food Award 2010, Level 1 employees prepare, cook or serve food or beverages whereas Level 2 employees are supervisors and trainers and Level 3 employees are store managers.¹⁰² Professor Heap, Women's Lead Organiser, Victorian Trades Hall Council, took issue with the Commission's description of Level 1 work:

The Fair Work Commission indicated that it considered the work to be 'non-career' work in its decision, which was breathtakingly gendered, I believe, in the way they handled this matter. For the women who we are dealing with, particularly in the retail industry, this is their career. They see it as that. They have devoted their lives to working in this area, and language associated with demeaning or devaluing their

97 Workplace Gender Equality Agency, *Australia's gender pay gap statistics*, <<https://www.wgea.gov.au/sites/default/files/gender-pay-gap-statistics.pdf>> viewed 3 May 2018, 5.

98 Ibid, 6.

99 Ms Emma King, Chief Executive Officer, Victorian Council of Social Service, *Transcript of evidence*, Melbourne, 26 April 2017, 29.

100 Victorian Women Lawyers, *Submission 20*, 3.

101 [2017] FWCFB 1001, 16 [57].

102 *Fast Food Award 2010*, Schedule B – Classifications, <<http://awardviewer.fwo.gov.au/award/show/MA000003>> viewed 11 June 2018.

work, calling it ‘non-career’, not only has a negative impact on the work value in itself but also allows it to be considered to be lesser within the community, and that is something that is problematic from the point of view of valuing women’s work over time.¹⁰³

As discussed in section 3.1, the majority of employees in the industries affected by the penalty rate reductions are women. Cutting penalty rates in these industries will reduce wages earned by women and is likely to increase the disparity between male and female earnings.

FINDING 7: Reducing penalty rates in the retail, fast food, hospitality and pharmacy industries is likely to increase the disparity between male and female earnings.

4.5 Consumption and flow on economic effects

Professor Phil Lewis, Director of the Centre for Labour Market Research at the University of Canberra, expects benefits for consumers to come from the penalty rate reduction:

The biggest beneficiaries from reducing penalty rates would be consumers. They would pay lower prices, at times which better suit their lifestyle and with better service as retailers hire more staff. Unfortunately, as with most regulation of business, it is the consumer who pays the ultimate penalty. The commission’s decision goes some way to reducing the penalty to consumers.¹⁰⁴

Jodie Gillett from Commerce Ballarat agreed and gave evidence to the Committee that businesses and tourism in Ballarat are already suffering from the effects of penalty rates. She highlighted the Easter period in Ballarat and that because of four public holidays in a row from Good Friday to Easter Monday, many hospitality businesses are choosing to open on only some of the days over Easter as they can’t afford to open over all four days. Ms Gillett believes this has had an adverse effect on tourism in Ballarat as many visitors to the region over Easter are finding that many businesses are closed and will choose to avoid the area in the future.¹⁰⁵ There is also the concern that as retail businesses in Ballarat close on public holidays because they can’t afford the penalty rates, many locals choose to visit Melbourne to shop on public holidays, taking money out of the local economy.¹⁰⁶

Some hospitality businesses pass on the costs of penalty rates to consumers by charging a surcharge on Sundays or public holidays. They state that these surcharges assist them to meet the increased staffing costs on those days and make it profitable to remain open. Reducing penalty rates may enable these businesses to decrease or remove these surcharges, which will benefit their

¹⁰³ Professor Lisa Heap, Women’s Lead Organiser, Victorian Trades Hall Council, *Transcript of evidence*, Melbourne, 26 April 2017, 4.

¹⁰⁴ Phil Lewis, ‘Lower penalty rates mean more jobs and more productivity’, *Financial Review*, 24 February 2017, <<http://www.afr.com/news/policy/industrial-relations/lower-penalty-rates-mean-more-jobs-and-more-productivity-20170224-gukuk9#ixzz5ECWcZaW2>> viewed 9 May 2018.

¹⁰⁵ Ms Jodie Gillett, Chief Executive Officer, Commerce Ballarat, *Transcript of evidence*, Ballarat, 21 March 2018, 18.

¹⁰⁶ *Ibid*, 17 - 18.

customers. However, Brett Edgington, Secretary of the Ballarat Regional Trades and Labour Council told the Committee that the additional revenue raised through surcharges is not always passed on to employees:

... there are places in Ballarat that I know of that charge a surcharge on a Sunday or a public holiday that do not pay penalty rates to their staff. All we have seen so far is some bosses in hospitality, retail and tourism pocket some extra money over the public holidays with no net benefit to their staff whatsoever.¹⁰⁷

The Australian Chamber of Commerce and Industry believes reducing penalty rates will enable businesses to meet consumer expectations to be open for long hours seven days a week. They argue high penalty rates make it very difficult for retailers to open for longer hours, or on Sundays and public holidays and be competitive and a reduction in penalty rates is a good start in helping these businesses meet consumers demand and be more competitive:

We need to be pulling levers that will enable these businesses to interact with the market in order for them to survive and it is clear that in our modern, digital economy our offering services between the hours of 9am to 5pm Monday to Friday does not satisfy customer needs.

The modest reduction in penalty rates awarded by the Fair Work Commission is not the silver bullet when it comes to helping businesses in dealing with the challenges they face but they are one of many measures that can help and in doing so will increase the work on offer and help preserve jobs.¹⁰⁸

Although there may be benefits for some consumers, Luke Hilakari representing the Victorian Trades Hall Council at the Committee's public hearing raised concerns that as workers' penalty rates are reduced, they will have little money left over to pay for anything but the essentials such as their mortgage, utilities, groceries and fuel. This means less money to pay for luxury items, leading to a reduction in consumption and less income for small and large businesses. A reduction in consumption would lead to a drop in business profits and reduce the potential to grow jobs and the economy.¹⁰⁹

This view is supported by research by the McKell Institute, which found penalty rates are likely to have significant impacts on spending, and much of this impact is likely to be felt locally. Their research found:

Reductions to ongoing spending included choices such as getting rid of pay TV, prepay mobiles or landlines, downgrading internet plans or doing less in the way of maintenance on vehicles and the house.

This could also mean cancelling children's dance or music lessons, or not allowing them to take part in sports. Such activities tended to be with local providers, meaning that cancelling them would have a notable impact on the local economy.¹¹⁰

¹⁰⁷ Mr Brett Edgington, Secretary, Ballarat Regional Trades and Labour Council, *Transcript of evidence*, Ballarat, 21 March 2018, 6.

¹⁰⁸ Australian Chamber of Commerce and Industry, submission to the Senate Education and Employment References Committee Inquiry into Penalty Rates, 2017, 49-50.

¹⁰⁹ Mr Luke Hilakari, Secretary, Victorian Trades Hall Council, *Transcript of evidence*, Melbourne, 26 April 2017, 12.

¹¹⁰ The McKell Institute, *Who Loses When Penalty Rates are Cut?* (2015), 26 - 7.

Whilst there is no conclusive evidence that the reductions in penalty rates will lead to lower prices, reduced surcharges and businesses opening longer hours, if they do eventuate the committee accepts this will be of some benefit to consumers. However, employees of these businesses will earn less with reduced penalty rates and may need to work additional hours to make up the lost income and meet cost of living pressures.

FINDING 8: Reductions in penalty rates may result in some benefits for consumers, if businesses are open longer or prices are reduced. However, this benefit is likely to come at the expense of the employees of these businesses, who will have to choose between reduced wages or working longer to make up lost income.

4.6 Casualisation of the workforce

As at August 2017 casual employees accounted for 25.1 per cent of the workforce in Australia.¹¹¹ Casual workers are paid a higher hourly rate, usually around 25 per cent, known as casual loading, than their equivalent full and part time colleagues. The casual loading is to compensate casual employees for the lack of job security and the sick and annual leave entitlements they don't receive, but that their full time and permanent part time colleagues do receive.¹¹² While some workers and businesses may prefer the flexibility of casual work, the Victorian Trades Hall Council in its submission articulated what they see as its downsides:

Casual and insecure employment leads to financial insecurity, poorer occupational health and safety outcomes, inability to plan lives or take out a loan, reduced career options, less training opportunities and the loss of sick and annual leave and other entitlements needed to survive.¹¹³

The concern amongst many of the organisations that made submissions to this inquiry was that full and part time workers who have their wages reduced as a result of penalty rate reductions may be drawn to casual work and the higher hourly rates provided by casual loading in order to make ends meet. This may be even more likely for workers in the hospitality sector, where casual workers received no reduction in Sunday penalty rates, while the award penalty rates for part time and full time workers were reduced by 25 per cent.¹¹⁴ Michael Robson, representing United Voice at the public hearing on 27 April 2017 stated:

... one of the things that we know about casualisation is that often it is a choice between those things you identified — it is a balancing for our members between things like sick leave and things like annual leave or carers leave and the extra source of income. And unfortunately when margins are as tight as they are for low-paid workers like we find in the hospitality industry, the choice really comes to, 'Well, I may need sick leave and I may need carers leave to look after my elderly parent or

¹¹¹ Australian Bureau of Statistics, *Characteristics of Employment, Australia, August 2017*, cat. No. 6333.0 (2018), <<http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/6333.0Media%20Release1August%202017?opendocument&tabname=Summary&prodno=6333.0&issue=August%202017&num=&view=>> viewed 30 April 2018.

¹¹² Fair Work Ombudsman, *Casual employees*, <<https://www.fairwork.gov.au/employee-entitlements/types-of-employees/casual-part-time-and-full-time/casual-employees>> viewed 3 May 2018.

¹¹³ Victorian Trades Hall Council, *Submission 17*, 10.

¹¹⁴ The McKell Institute, *Submission 21*, 14.

my child, but what I need is the money in my pocket this pay period so that I can pay the bills, so that I can make sure that there is food on the table'. And that is really the choice that people are facing.¹¹⁵

James Fleming, from the ACTU, articulated the risks of choosing casual work over permanent work, when he appeared at the public hearing on 28 March 2018:

The casual loading is superficially attractive, especially as we know casual employees tend to be more often more dependent employees and more likely to be living week to week. If you get more money in the hand and you are living week to week, that is superficially attractive. But what the research actually shows — and this was accepted by the commission — is that it does not actually even do its job. The loading does not even do its job of compensating you for what is lost. Just in terms of those narrow areas of leave, redundancy pay et cetera, the research shows that casual employees, even on a per-hour basis, when you take all that into account are getting paid less. But, as you suggest, it is superficially attractive, and people are being drawn to that. They might be drawn to that for a while, for a year or so — until they experience sickness or illness or they are made redundant and they do not get paid — before they realise that it was not such a good deal.¹¹⁶

In contrast, Commerce Ballarat believes that the reduction in penalty rates would see a reduction in the number of casual workplace positions and an increase in the number of permanent full-time and part-time positions as employing permanent staff becomes more affordable. They believe that permanent employees are able to take on greater responsibility and trust than casual employees. This would allow business owners to spend more time to grow their business and spend time with their families, rather than be burdened with the day-to-day operations of the business.¹¹⁷

The retail and hospitality industries already have a higher than average proportion of casual employees, with 65 per cent of hospitality and 36 per cent of retail workers being in casual employment, accounting for 35 per cent of all casual workers employed in Australia.¹¹⁸

The Committee is concerned the reduction in penalty rates risks making some of Victoria's lowest paid workers even more vulnerable by encouraging them to take up casual employment instead of permanent employment.

FINDING 9: The reduction in penalty rates for permanent and part-time work may encourage some workers to move to insecure casual employment.

115 Mr Michael Robson, National Industrial Officer, United Voice, *Transcript of evidence*, Melbourne, 27 April 2017, 10.

116 Mr James Fleming, Legal and Industrial Officer, Australian Council of Trade Unions, *Transcript of evidence*, Melbourne, 20 March 2018, 18.

117 Ms Hayley Coates, Board Member, Commerce Ballarat, *Transcript of evidence*, Ballarat, 21 March 2018, 23.

118 Parliament of Australia, *Characteristics and use of casual employees in Australia* (2018), <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1718/CasualEmployeesAustralia#_Toc504135058> viewed 18 May 2018.

4.7 Demand on welfare services

The Australian Government and state and territory governments spent an estimated \$157 billion on welfare in 2015-16, an average of \$6,566 per person.¹¹⁹ The Australian Government provides welfare services such as employment and job seeking services, residential care and home care and support services. The states provide services such as social housing, family support, out-of-home care and accommodation support.¹²⁰

Recipients of welfare payments such as the Newstart Allowance, Austudy and Youth Allowance are able to earn a certain amount of income through working while still receiving welfare. As the amount of income they receive through work increases, the amount they receive from these government payments, decreases. Conversely, as the amount of money they earn through work, decreases, the amount of money they are eligible to receive from the government increases.

Eligibility for Newstart depends on the recipient's circumstances and salary. A person with a partner will no longer be eligible for the Newstart allowance once their income reaches \$963.50 per fortnight whereas a single principal carer of a dependent child will no longer be eligible for their Newstart allowance once their income reaches \$2,040.00 per fortnight.¹²¹

ABS figures show that in May 2016, the average part-time cash earnings for males was \$637.20 and \$633.60 for females. Male casual employees earned \$585.00 per week on average and casual female employees \$471.40.¹²² A large number of part-time and casual employees receive some sort of welfare benefit payment to supplement their income.¹²³ As penalty rates are reduced in certain industries, and wages decrease, these people may become more reliant on welfare payments from the government.

Richard Denniss, from the Australia Institute, has calculated that if 20 per cent of the potential figure of 285,000 workers affected by the penalty rates reduction are receiving welfare benefits, then there will be an increase in annual welfare payments of \$78 million.¹²⁴

Emma King, CEO of VCOSS, expressed her concern as to how the Fair Work Commission's decision will affect the demand on welfare services:

¹¹⁹ Australian Institute of Health and Welfare, *Australia's Welfare 2017* (2017), 2.

¹²⁰ Australian Institute of Health and Welfare, *Australia's Welfare 2017* (2017), 18.

¹²¹ Department of Human Services, *Newstart Allowance Income Test* (2018), <<https://www.humanservices.gov.au/individuals/services/centrelink/newstart-allowance/how-much-you-can-get/income-and-asset-limits/income-test>> viewed 14 May 2018.

¹²² Australian Bureau of Statistics, *Employee Earnings and Hours, Australia, May 2016*, cat. No. 6306.0 (2017), <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/6306.0>> viewed 14 May 2018.

¹²³ As at March 2018, of Australians who were employed and worked up to 29 hours per week, 111,900 received a Newstart Allowance, 55,238 received a Youth Allowance and 22,777 received a parenting payment— Australian Government, *DSS Demographics March 2018*, <<https://data.gov.au/dataset/cff2ae8a-55e4-47db-a66d-e177fe0ac6a0/resource/c9bcd6ed-b6bd-423b-abc5-86b54bd7a591/download/dss-demographics-march-2018.xlsx>>, viewed 13 June 2018.

¹²⁴ Richard Denniss, *The Impact of Penalty Cuts on Personal Tax Revenue and Welfare*, report for the Australia Institute, Canberra, 2017, 9.

Cutting wages is also short-sighted and it is self-defeating. What do we think happens when people are made more financially vulnerable and when they are driven further into poverty? They turn to the government for support. These changes will likely increase the burden on the Victorian government to fund support, such as social housing, homelessness services and mental health services. They will likely increase the burden on the federal government to provide income support.¹²⁵

Many working parents rely on penalty rates to help pay for child care expenses. There is often a fine line between the wages made from working and the cost of child care and whether or not it's worth someone's while to work when most of the money is going to child care. Some parents may end up having to work extra hours to make up for the pay lost due to penalty rate reductions to simply pay for child care. Professor Heap, Women's Lead Organiser, Victorian Trades Hall Council, stated:

So it is a zero-sum game. I think it will push some women out of the labour market completely. I think in the end it will be too hard. That is my speculation or my hypothesis at this stage: it will be too hard to manage the thing and will sort of push them out of the labour market, which is exactly what we do not want, because then they will be totally reliant on welfare benefits or social welfare benefits and not where they want to be in relation to their households.¹²⁶

Launch Housing, an independent Melbourne based community organisation committed to ending homelessness, conducted a survey that found over half of its clients work in the retail or hospitality industries. Most of these people rent their accommodation privately, and their income is vitally important in their ability to afford suitable and safe accommodation. As house and rental prices continue to rise, many Victorians are living with housing stress.¹²⁷ Launch Housing also suggests that:

The changes to penalty rates will have a negative impact on housing affordability for low paid workers and in some cases this will be very significant and place them at severe risk of homelessness.¹²⁸

Council to Homeless Persons (CHP), another organisation dedicated to ending homelessness, has also drawn a link between the reduction to penalty rates and the potential for homelessness. In their submission to the Committee, CHP states that they feel that a reduction in income for some people is the difference between whether or not they can afford rent and may increase the likelihood of eviction. The CHP points out the competition in Victoria for low cost rental accommodation. They feel that as people can no longer afford to pay their rent, the demand for low cost rentals will increase and it is inevitable that some will miss out and become homeless.¹²⁹

¹²⁵ Ms Emma King, Chief Executive Officer, Victorian Council of Social Service, *Transcript of evidence*, Melbourne, 26 April 2017, 24.

¹²⁶ Professor Lisa Heap, Women's Lead Organiser, Victorian Trades Hall Council, *Transcript of evidence*, Melbourne, 26 April 2017, 11.

¹²⁷ Launch Housing, *Submission 22*, 5-7.

¹²⁸ *Ibid*, 9.

¹²⁹ Council to Homeless Persons, *Submission 24*, 2.

If Launch Housing and CHP are correct, and the Fair Work Commission’s decision leads to an increase in homelessness and a greater need for public housing, the Victorian Government will come under pressure to provide this resource.

FINDING 10: The reduction in penalty rates may lead to a greater reliance on income support payments by affected workers and an increased demand on welfare services.

5

Safeguards and potential legislative changes

Stakeholders raised a range of options to protect vulnerable Victorian workers from reductions in take-home pay and to ensure they are paid fairly.

This Chapter outlines the proposals, including possible changes to the Commonwealth Fair Work Act, greater enforcement of existing laws and a new Victorian criminal offence for the most serious cases of underpayment of employees.

5

5.1 Changes to the *Fair Work Act 2009* (Cth)

5.1.1 Current Fair Work Act provisions

Under section 134(1) of the *Fair Work Act 2009* (Cth) the Fair Work Commission must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account the factors listed in section 2.2 of this report. If a modern award does not meet this objective, the Fair Work Commission must vary the award such that it only includes terms that are ‘necessary to achieve the modern awards objective’.

A number of stakeholders criticised the current Fair Work Act stating that it does not sufficiently protect vulnerable workers and safeguard their conditions of employment. JobWatch stated in its submission:

JobWatch is concerned about the Decision to the extent that any decision to reduce minimum pay and entitlements for the lowest paid workers is anathema to the concept of a minimum wage and a set of award safety net entitlements.¹³⁰

Victorian Trades Hall Council stated:

... if the FWC can make this decision within the current parameters, then clearly the current parameters are inadequate for women workers and need to change.¹³¹

The Committee also received evidence that the Fair Work Commission’s decision demonstrates that the Act is not in line with community sentiment. United Voice provided evidence that 62.3 per cent of Australians oppose pay rates being cut for people who work on weekends and public holidays.¹³² Ian McSporran stated in his submission:

¹³⁰ JobWatch, *Submission 12*, 3.

¹³¹ Victorian Trades Hall Council, *Submission 17*, 7.

¹³² United Voice, *Submission 5*, 5.

If the FWC ... believe that cutting the wages of Victoria's lowest award paid workers and lowering the minimum safety net for terms and conditions of employment when wage growth is at a historical low and the cost of living is increasing, then in my opinion they are seriously out of touch with community expectations.¹³³

The Ballarat Regional Trades and Labour Council suggested a future Federal Government should scrap the Fair Work Act and start again.¹³⁴ At a public hearing, Council Secretary Brett Edgington stated:

The balance has really shifted away from working people. ...The reason that the balance has shifted so far is because there is no justice in that system. There is no justice in that system, and I say that very clearly having dealt with many, many workers coming in through Trades Hall. If you have wages that are stolen, the process of conciliation through the Fair Work Ombudsman is difficult and ineffective. The remedy to follow that up into the Federal Court is expensive and absolutely and utterly out of the reach of low paid workers. The system itself is completely and utterly non navigable to low paid workers who have experienced issues or problems in the industrial system.¹³⁵

5.1.2 Take-home pay protections

Several changes to the *Fair Work Act 2009* (Cth) were suggested to the committee. Ged Kearney, then President of the Australian Council of Trade Unions, argued for the Act to be changed so that the Fair Work Commission could not vary an award in a way that results in a reduction in take-home pay:

Whilst we respect the independence of the Fair Work Commission, the penalty rates decision highlights deficiencies in the legal framework within which the commission operates, and shows that the Fair Work Act needs to be amended in order to strengthen the safety net. As an immediate priority, legislative changes are needed to clarify that an award cannot be varied in such a way as to reduce an employee's or future employee's take-home pay.¹³⁶

Brendan O'Connor MP provided a submission to the committee including a copy of the Fair Work Amendment (Protecting Take-Home Pay) Bill 2017, which was passed by the Australian Senate on 30 March 2017 but is yet to be considered by the House of Representatives. The bill would:

... invalidate the Commission's decision ensuring the proposed cut to penalty rates will not occur and ensure that the Commission could not, in future, vary a modern award in such a fashion to result in decrease of a worker's take home pay.¹³⁷

Specifically, it proposes to add a new section to the Fair Work Act which provides:

¹³³ Mr Ian McSparran, *Submission 7*, 5.

¹³⁴ Ballarat Regional Trades and Labour Council, *Submission 8*, 2-3.

¹³⁵ Mr Brett Edgington, Secretary, Ballarat Regional Trades and Labour Council, *Transcript of evidence*, Ballarat, 21 March 2018, 5.

¹³⁶ Ms Ged Kearney, President, Australian Council of Trade Unions, *Transcript of evidence*, Melbourne, 26 April 2017, 37.

¹³⁷ Mr Brendan O'Connor MP, *Submission 23*, 1.

A modern award cannot be varied in a way that would, or would be likely to, reduce the take-home pay of any employee covered by the award.¹³⁸

An alternative bill was introduced to the Federal Parliament by the Australian Greens. The bill also included take-home pay protections but would also legislate penalty rates so that the penalty rates as at 1 January 2017 could not be reduced by a determination of the Fair Work Commission. In his submission to the Committee, Adam Bandt MP stated:

It is time penalty rates were protected in law. To that end, the Greens have introduced a bill (Fair Work Amendment (Protecting Weekend Pay and Penalty Rates) Bill 2017) into federal parliament to reverse the Fair Work Commission decision and protect penalty rates. The bill legislates to protect penalty rates by amending the Fair Work Act 2009 to protect penalty rates in a modern award from being varied to make the penalty rate lower than in force under the award on 1 January 2017. This provision would prevent the Fair Work Commission determination from coming into effect and prevents penalty rates from future cuts.¹³⁹

Another option proposed to the committee was to amend the Fair Work Act to provide the Commission with the ability to make ‘take-home pay orders’. JobWatch explained in its submission:

Alternatively, the FWC should be empowered to make take home-pay orders in relation to the Decision so that no worker need be worse off. ‘Take-home pay’ is the pay an employee or outworker actually receives after tax and certain deductions such as salary sacrifice arrangements, and includes wages, allowances, incentive-based payments and overtime.

During the transition to modern awards if the FWC was satisfied that an employee, or a class of employees, to whom a modern award applied had suffered an award modernisation-related reduction in take-home pay, the FWC could make a take-home pay order requiring the payment of an amount or amounts to the employee or employees that the FWC considered appropriate to remedy the situation.

The federal parliament could empower the FWC to make take-home pay orders to ameliorate any reduction in pay suffered by workers as a result of the Decision.¹⁴⁰

Although take-home pay orders would protect the pay and conditions of existing workers, they could still result in lower rates of pay for new employees not covered by the orders. In evidence to the committee, the Victorian Council of Social Service raised concerns about this possibility:

... there seems to be a suggestion — and perhaps I am incorrect in my interpretation — that this would apply to existing workers but it would not apply to new hires. It risks creating two classes of employee in a workplace and also creates an incentive for employers to shift their workforce from people covered by any transitional provisions to workers who are not, where they would have more freedom to pay the lower pay rates.¹⁴¹

¹³⁸ Fair Work Amendment (Protecting Take-Home Pay) Bill 2017 (Cth), Schedule 1, 4.

¹³⁹ Mr Adam Bandt MP, *Submission 10*, 1.

¹⁴⁰ JobWatch, *Submission 12*, 6.

¹⁴¹ Mr Llewellyn Reynnders, Policy Manager, Victorian Council of Social Service, *Transcript of evidence*, Melbourne, 26 April 2017, 28.

Michael Robson from United Voice shared this concern:

United Voice is opposed to is creating two tiers of workers, and I think there is a problem that some proposals are to do that. The first problem with that is we do not believe that there is a legal basis in the act to justify red circling or grandfathering; we believe the opportunity to issue take home pay orders went out with the transitional provisions. We also say that it is, I suppose, unnecessary to create two tiers of workers, so that there are older workers who have stayed in the industry for a longer period of time and they deserve to have no reduction in pay and yet to have people coming into the industry, working in identical conditions, doing the same job, not receiving the same benefits as those workers.¹⁴²

The Committee received evidence this was already occurring in some sectors.

Tim Gaunt from the Communication Workers Union told the committee:

... for a number of years at Australia Post their new starters — PDOs, postal delivery officers, if you want to call them — have started on a non penalty shift, so they start at 6.30 in the morning, whereas previous to that if they started at 6 o'clock, they would be entitled to a 15 per cent penalty. ... Without that 15 per cent, they are looking at I think it is \$3.24 an hour less than the person that they are working next to who happened to have started before this regime came in. You are talking about approximately \$120 a week less for them. Once they have finished their probation, their wage increases and I think it is about \$3.70 less per hour they get paid. That is \$136 a week difference to the person next to them.¹⁴³

The Committee believes in the principle of equal pay for equal work. The Committee therefore does not support the creation of a system where longer-term employees are paid different penalty rates than newer employees for the same work.

The decision to reduce penalty rates for some of the lowest paid workers in the retail and hospitality sectors demonstrates the current provisions in the Fair Work Act are inadequate to ensure a fair and relevant minimum safety net of terms and conditions. If the Act is left unchanged, the Fair Work Commission could further reduce penalty rates or reduce penalty rates for employees in other industries.

The Committee does not believe it is fair that the Fair Work Commission can reduce the take-home pay of employees through its decisions. Given the significant adverse impact of this decision, the Committee believes it should be overturned and penalty rates in the relevant awards restored to their previous levels.

The Committee also believes action needs to be taken to ensure that the Fair Work Commission cannot make similar decisions in future. The Committee therefore supports amendments to the Fair Work Act to provide that the Fair Work Commission cannot vary a modern award in a way that would, or would be likely to, reduce the take-home pay of any employee covered by the award.

¹⁴² Mr Michael Robson, National Industrial Officer, United Voice, *Transcript of evidence*, Melbourne, 27 April 2017, 6.

¹⁴³ Mr Tim Gaunt, Industrial Officer, Communication Workers Union, *Transcript of evidence*, Ballarat, 21 March 2018, 11.

RECOMMENDATION 1: The Victorian Government advocate for the Federal Government to legislate to restore penalty rates in the relevant awards to their previous levels.

RECOMMENDATION 2: The Victorian Government advocate for changes to the *Fair Work Act 2009* (Cth) to ensure that the Fair Work Commission cannot vary a modern award in a way that would, or would be likely to, reduce the take-home pay of any employee covered by the award.

5.1.3 Other changes to the Fair Work Act

In its submission, the Victorian Trades Hall Council recommended:

That the state government lobby the federal government to legislate to introduce requirements in the FWA that the FWC must consider the impact of their decisions as they relate specifically to women, to address issues of equal pay and gender remuneration equality.

We would recommend the inclusion of equal pay or equal remuneration principles within the act which set out more clearly for the tribunal its obligations in the way it should handle considerations in this area. Guidance can be drawn from the equal remuneration principles of the Queensland Industrial Relations Commission as a starting point.¹⁴⁴

As discussed in the previous chapters, the decision to cut penalty rates has had a disproportionate effect on women. A recent report from the Senate Finance and Public Administration Committee noted that equal remuneration is not an explicit object of the Fair Work Act, nor does the Act provide a positive duty on the Fair Work Commission to remedy gender pay inequity. That Committee recommended that gender pay equity be an overall object of the Fair Work Act and that the government conduct a comprehensive consultation process to investigate other changes needed to the Act to achieve pay equity for Australian women.¹⁴⁵ The Federal Government is yet to respond to that report.

The Committee supports further measures towards gender pay equity being included in the Fair Work Act and awaits with interest the government response to the Senate Committee report.

Another suggestion put to the Committee was for better information to be provided to employees about their wage rates through changes to the content of payslips. The Young Workers Centre proposed:

Regulation 3.46(2)(b) of the Fair Work Act 2009 should be amended to require that the following additional information be specified on a payslip:

- The employee's industrial instrument inclusive of the relevant Award or agreement name
- The classification applicable to the employee under the industrial instrument (i.e. 'retail employee level 1').¹⁴⁶

¹⁴⁴ Victorian Trades Hall Council, *Submission 17*, 12.

¹⁴⁵ Senate Finance and Public Administration Committee, *Gender segregation in the workplace and its impact on women's economic equality*, 59.

¹⁴⁶ Young Workers Centre, *Submission 11*, 13.

There are already over 10 specific requirements for payslips under the Fair Work Regulations 2009 (Cth), including the hourly rate of pay. The Committee believes there is value in any measure that will further inform workers about their entitlements. The Committee would support further consideration of this proposal to determine the best way for it to be implemented. The Committee also believes the Victorian Government should examine how it can include this information on the payslips of Victorian State Government employees.

RECOMMENDATION 3: The Victorian Government:

- advocate for the Federal Government to change the Fair Work Regulations 2009 (Cth) to require the relevant award and classification to be included on payslips; and
- investigate options to include the relevant award and classification on the payslips of Victorian State Government employees.

5.2 Improved enforcement

Underpayment of vulnerable workers was a regular theme throughout the inquiry. Many stakeholders provided evidence that there are significant levels of non-compliance with penalty rates and that the current mechanisms available to enforce the correct wages can be burdensome, time-consuming and out of reach to most vulnerable workers.

5.2.1 Extent of non-compliance

Employers have a legal obligation to pay the correct wages. However, employees often do not know their correct rates of pay, and face challenges when trying to force employers to pay them correctly. In its submission, the Young Workers Centre provided evidence that young workers report penalty rates are frequently ignored by employers, stating 42.9 per cent of those who worked unsociable hours did not get paid penalty rates.¹⁴⁷ There have also been a number of recent high profile cases involving large franchise organisations allegedly systematically underpaying workers.

The Youth Affairs Council provided similar evidence stating:

... in a recent survey of over 1,000 young Victorian workers, the Young Workers Centre reported that 1 in 5 young workers were paid at base rates below the national minimum wage order. While three quarters of the young people worked unsocial hours, such as nights and weekends, less than half were paid penalty rates for this work. Young workers in the retail sector were especially vulnerable; more than a third of them were not paid the correct minimum wage. Many young workers did not know their rights; more than half of those who were underpaid believed they were receiving the legal minimum rate.¹⁴⁸

¹⁴⁷ Young Workers Centre, *Submission 11*, 11

¹⁴⁸ Youth Affairs Council Victoria, *Submission 6*, 6.

In 2016-17, the Fair Work Ombudsman received 10,535 reports of non-compliance. Half of these reports alleged issues of non-compliance in the hospitality (36 per cent) or retail (14 per cent) industries.¹⁴⁹ Despite the hospitality industry employing around 7 per cent of Australia's workforce, it accounted for the highest number (17 per cent) of disputes the Ombudsman assisted with and it was also the industry with the highest number of infringement notices issued (39 per cent) and court actions commenced (27 per cent).¹⁵⁰

The Committee is concerned at this reported high level of non-compliance, particularly in the hospitality sector. The following sections explore possible measures to improve compliance with existing workplace laws.

FINDING 11: Non-compliance with employee entitlements is disproportionately higher in the hospitality and retail industries compared with other sectors.

5.2.2 Fair Work Ombudsman and court proceedings

The Fair Work Ombudsman (FWO) is a Commonwealth independent statutory office established under the Fair Work Act. It offers free services to employers and employees to ensure compliance with Australian workplace laws.¹⁵¹ The Ombudsman is often the first point of contact for an employee who believes they are being paid incorrectly, such as not being paid the correct penalty rates.

The Committee believes there is great value in having a free, easily accessible service to assist employers and employees resolve disagreements about rates of pay. Its annual report states that the FWO recovered more than \$30.6 million in unpaid wages for more than 17,000 workers through requests for assistance involving a workplace dispute and FWO-initiated activities in 2016-17.¹⁵²

However, the Committee received evidence that the Fair Work Ombudsman would benefit from additional investigators to carry out its functions. Ballarat Regional Trades and Labour Council Secretary Brett Edgington told the committee:

... there are two Fair Work Ombudsman offices in western Victoria, one in Geelong and one in Warrnambool. Amongst those two offices, the last time I inquired, there were five officers out working for the Fair Work Ombudsman in western Victoria, covering Geelong, Ballarat, Bendigo and all the way to the South Australian border. There is not a hope that those five officers can even start to make a dent on the extent of the issues here in western Victoria.¹⁵³

He further explained the limitations of the Ombudsman's role, as it can only assist through a mediation process and doesn't have the legal authority to make determinations:

¹⁴⁹ Fair Work Ombudsman, *Report 2016-17*, 17.

¹⁵⁰ *Ibid*, 21.

¹⁵¹ Fair Work Ombudsman, *Our role*, <<https://www.fairwork.gov.au/about-us/our-role>>, viewed 16 May 2018.

¹⁵² Fair Work Ombudsman, *Report 2016-17*, 14.

¹⁵³ Mr Brett Edgington, Secretary, Ballarat Regional Trades and Labour Council, *Transcript of evidence*, Ballarat, 21 March 2018, 5.

Nine times out of 10, we will take kids to the Fair Work Ombudsman. So we will put in a dispute, the Fair Work Ombudsman will go to a mediation and it will all be done over the phone. The kid will come up. We will sit down with the kid, the young worker, and we will do all the calculations of how much is owed and where they have been ripped off. We will get to that and we will put all of that to that process. The boss will turn around and go, 'I dispute this'. The process will go through, the mediation will wrap up and then the last thing the mediator will say to the young worker and their parent is, 'If you would like to pursue this further, you will need to file with the Federal Court'.¹⁵⁴

Westjustice has reported similar experiences:

At present, employers cannot be compelled to attend FWO mediations. When pursuing underpayment claims, Westjustice usually sends a letter of demand to the employer setting out our calculations and the amount owed. We routinely find that employers ignore this correspondence.

For some cases, we have found that assistance from the FWO to investigate and mediate disputes has meant that employers are more likely to participate in settlement negotiations. However, in the experience of Westjustice, it is unfortunately common for employers to refuse to attend mediation with employees in cases of non-payment of wages. For many clients, this has meant that the FWO has closed the file as the FWO cannot compel attendance.¹⁵⁵

Under the small claims procedure under the Fair Work Act, employees can seek to claim up to \$20,000 through a magistrates' court or the Federal Circuit Court. The Act provides that the court is not bound by any rules of evidence and procedure and may act in an informal manner and without regard to legal forms and technicalities. A party to small claims proceedings may be represented in the proceedings by a lawyer only with the leave of the court.¹⁵⁶

Its annual report states the FWO assisted over 700 people to pursue their small claims directly before the courts in 2016–17. The courts awarded more than \$975,500 to 171 applicants. In preparation for appearances, the FWO offers assistance to both employees and employers such as help completing court documents.¹⁵⁷

However, the Committee was told pursuing a small claim through the court can be a challenging process for some employees. Brett Edgington stated:

It is a very lengthy and complicated process and the small claims court normally does not accept the intervention of a lawyer or a legal representative in that process. So it is pretty much up to the worker to represent themselves — to collate and present the information — and the bar is quite high in the small claims tribunal process.

If the extent of the wage theft is greater — and we have certainly represented people where you are talking \$30 000, \$40 000 in unpaid wages — then it goes to the federal jurisdiction now. I believe the application fee for a hearing in the Federal Court is between \$600 and \$700. It requires at least a solicitor and at some stage a barrister.

¹⁵⁴ Ibid, 9.

¹⁵⁵ Westjustice, *Submission to the Senate Committee for Education and Employment Legislation Inquiry into the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017*, <http://www.westjustice.org.au/cms_uploads/docs/westjustice-inquiry-into-vulnerable-workers-bill-submission.pdf>, viewed 16 May 2018, 21.

¹⁵⁶ *Fair Work Act 2009* (Cth), s 548.

¹⁵⁷ Fair Work Ombudsman, *Report 2016-17*, 16.

It requires extensive evidence collection and collation, and it also involves a pre hearing process as well. Now, Ballarat Trades Hall, through the legal centre, have got a couple of cases that far. We have never got it to a hearing — it is always settled in pre hearing, only because it comes down to money. It comes down to, ‘Okay, you’re owed \$30 000, the boss will offer 20 in the pre hearing, it is going to cost you X amount more than that to pursue’.¹⁵⁸

JobWatch shared these concerns and also encouraged changes to the way disputes are resolved:

JobWatch recommends that a specialist Employment Contracts Small Claims Industrial Division be set up at either the Magistrates Court of Victoria or VCAT to hear such claims expeditiously, inexpensively and without the need for lawyers or recourse to the strict rules of evidence.¹⁵⁹

Brett Edgington recommended:

... give the Fair Work Ombudsman some power to make determination, without having to pass on to the Federal Court to settle these cases would be a great start, so there could be a low cost or no cost process that workers could go through through the Fair Work Ombudsman.¹⁶⁰

There have been recent changes to the Fair Work Act to give the Fair Work Ombudsman greater evidence gathering powers. The *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth) aimed to strengthen the evidence-gathering powers of the Fair Work Ombudsman to ensure that the exploitation of vulnerable employees can be effectively investigated and created new offences of intentionally hindering or obstructing the Ombudsman. These changes are welcome, but the Committee believes further work can be done in this area.

The Committee believes the Federal Government should review the powers of the Fair Work Ombudsman and examine options for more disputes to be resolved through dispute resolution processes or mediation outside the court process. To ensure all employees have equal access to the services of the Fair Work Ombudsman, the Committee also recommends that the resourcing of the Fair Work Ombudsman be reviewed to ensure it has sufficient resources to effectively carry out its role, particularly in regional and rural areas.

RECOMMENDATION 4: The Victorian Government advocate for the Federal Government to review the resources provided to the Fair Work Ombudsman and ensure it has sufficient resources to effectively carry out its role, particularly in regional and rural areas.

RECOMMENDATION 5: The Victorian Government advocate for the Federal Government to review the powers of the Fair Work Ombudsman and examine options for more disputes to be resolved outside the court process.

¹⁵⁸ Mr Brett Edgington, Secretary, Ballarat Regional Trades and Labour Council, *Transcript of evidence*, Ballarat, 21 March 2018, 10-11.

¹⁵⁹ JobWatch, *Submission 12*, 7.

¹⁶⁰ Mr Brett Edgington, Secretary, Ballarat Regional Trades and Labour Council, *Transcript of evidence*, Ballarat, 21 March 2018, 5.

5.3 Increased penalties

During the inquiry, the Committee received evidence that current penalties are insufficient to effectively deter employers from underpaying wage entitlements including penalty rates. In its submission, the Young Workers Centre stated:

Wage violations are the result of employer decisions. The systemic nature of wage violations in Australia today suggests that the repercussions are low risk and can be ignored in this decision making. Existing legal and regulatory structures in place to enforce employee rights and to prevent violations are failing to ensure employment standards are being upheld.¹⁶¹

5.3.1 Increased pecuniary penalties

Under the Fair Work Act, an employer can be prosecuted for contravening a modern award, contravening an enterprise agreement, failing to keep records and other offences. The court can award civil remedies and can also impose pecuniary penalties.

In September 2017, new provisions were introduced into the Fair Work Act to increase penalties for serious contraventions of the Act.¹⁶² A serious contravention requires a person to have 'knowingly contravened the provision' as 'part of a systematic pattern of conduct'.

The explanatory memorandum stated:

The Bill also addresses concerns that civil penalties under the Fair Work Act are currently too low to effectively deter unscrupulous employers who exploit vulnerable workers because the costs associated with being caught are seen as an acceptable cost of doing business. The Bill will increase relevant civil penalties to an appropriate level so the threat of being fined acts as an effective deterrent to potential wrongdoers.¹⁶³

The Fair Work Ombudsman supported these increased penalties, noting:

In some of these cases, the existing framework has not been sufficient to deter ongoing and systemic conduct across sectors, industries and regions, and usually with respect to these workers. Some unscrupulous employers view non-compliance as a business model and do not fear being caught out for their behaviours, or consider penalties associated with their breaches of the law an acceptable cost of doing business.¹⁶⁴

These increased penalties are an important signal to employers of the importance of paying employees correctly.

¹⁶¹ Young Workers Centre, *Submission 11*, 20.

¹⁶² Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017

¹⁶³ Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, Explanatory Memorandum, ii.

¹⁶⁴ Senate Standing Committee on Education and Employment, Inquiry into the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, *Submission No. 4*, 7.

5.3.2 Criminal offences

A number of contributors to the inquiry called for criminal sanctions to be introduced for cases of culpable underpayment, or what is sometimes called ‘wage theft’. In its submission, Ballarat Regional Trades and Labour Council argued:

Victorian workers feel the full force of the broken Fair Work Act, having to run the gauntlet of the Fair Work Ombudsman and the Federal Court for conciliation and arbitration which is costly, time consuming and in many cases exasperatingly futile. The Victorian Government might consider dealing with the worst excesses of wage theft and non-compliance by introducing legislation under the Crimes Act to offer protections to working Victorians.¹⁶⁵

The Victorian Trades Hall Council and its Young Workers Centre have also argued for deliberate wage underpayment to become criminal offence, with a maximum penalty of ten years in prison.¹⁶⁶

Commerce Ballarat agreed employers should always pay the correct entitlements:

Culpability suggests mens rea and knowledge that you are doing the wrong thing, and there would have to be some fairly strict standards around that. ... We have no objection to penalties for people who are not doing the right thing.¹⁶⁷

However, they raised concerns about the potential impact on employers when false claims are made:

... the impact of accusations such as that on small businesses, medium businesses or large businesses across that sector is incredibly damaging, and the damage that it does to our economy, the damage it does to employees that are being employed currently and being paid correctly and properly by some of those businesses that may get named with unsubstantiated claims is incredibly damaging.¹⁶⁸

The US City of Seattle made wage theft a crime in 2011.¹⁶⁹ Employers can be criminally prosecuted for failing to pay wages promised to their employees and if an employer is convicted of the gross misdemeanour, the City can also revoke the employer’s business licence. A complaint can be made to the Seattle Police Department, who will investigate and forward a report to the Criminal Division of the Seattle Attorney’s Office for a decision on whether to file the charge. The Criminal Division attorneys then work with the victim toward making a provable case.¹⁷⁰

¹⁶⁵ Ballarat Regional Trades and Labour Council, *Submission 8*, 2.

¹⁶⁶ Ben Schneiders & Royce Millar, ‘Push to jail employers for up to 10 years for ‘wage theft’ *The Age*, 7 April 2018 <<https://www.theage.com.au/politics/victoria/push-to-jail-employers-for-up-to-10-years-for-wage-theft-20180407-p4z8ap.html>>, viewed 16 May 2018.

¹⁶⁷ Ms Hayley Coates, Board Member, Commerce Ballarat, *Transcript of evidence*, Ballarat, 21 March 2018, 24.

¹⁶⁸ Mr Nick Thurlbeck, Board Member, Commerce Ballarat, *Transcript of evidence*, Ballarat, 21 March 2018, 24-25.

¹⁶⁹ City of Seattle, *Ordinance Number 123596*, <http://clerk.seattle.gov/-archives/Ordinances/Ord_123596.pdf>, viewed 16 May 2018.

¹⁷⁰ Seattle City Attorney, *Wage Theft*, <<https://www.seattle.gov/cityattorney/crime-victim-assistance/wage-theft>>, viewed 16 May 2018.

However, in the first three years after the law was enacted, no prosecutions for wage theft were undertaken. It has been suggested this was due to a lack of complaints and the high standard of proof required in criminal cases. Seattle has since entered into an agreement with the US Department of Labor under which they will refer cases to the City Attorney's Office.¹⁷¹

The Committee believes there needs to be effective deterrents to ensure employers pay their employees correctly. The reported level of non-compliance indicates current penalties are not effective in deterring unscrupulous employers from doing the wrong thing. The recent increases to the pecuniary penalties for breaches of the Fair Work Act are welcome. However, the Committee believes the prospect of a custodial sentence would be a more effective deterrent than financial penalties. The Committee therefore believes a criminal offence for cases of culpable underpayment of employees should be introduced.

RECOMMENDATION 6: The Victorian Government introduce legislation to create a new criminal offence, with the option of a custodial sentence, for dishonestly underpaying wages or entitlements.

5.4 Education

Throughout the inquiry, many stakeholders commented that employees often don't know that they are being underpaid, or that they are entitled to penalty rates. The Fair Work Ombudsman undertakes a number of educational activities and provides an Online Learning Centre,¹⁷² but employees would need to know they are being underpaid to go and look for these resources.

The Committee believes there are opportunities to better educate young Victorians about their rights as employees during their secondary and tertiary education.

The Young Workers Centre recommended:

Workplace rights and safety training should be embedded in high school career and work-readiness programs and curriculum and mandated in all Victorian high schools for students Year 10 and above to ensure they have an understanding of how the minimum wage and National Employment Standards, Awards and enterprise agreements apply to them, allowing them to better enforce the pay rates they are legally entitled to.¹⁷³

171 Seattle Times, *Seattle takes aim at wage theft; first 3 years of law came up empty*, <<https://www.seattletimes.com/seattle-news/seattle-takes-aim-at-wage-theft-first-3-years-of-law-came-up-empty>>, viewed 16 May 2018.

172 Fair Work Ombudsman, *Welcome to the Online Learning Centre*, <<http://fairwork.cls.janison.com/Auth/Login?ReturnUrl=>>, viewed 16 May 2018.

173 Young Workers Centre, *Submission 11*, 34.

Malaysian Progressives in Australia suggested:

The FWC could work with universities and student organisations and clubs to ensure that all students are aware of the minimum employment standards and common awards through the normal course of their studies, beyond simply making the information available.¹⁷⁴

Prevention is better than cure. If Victorians are educated about their rights as employees throughout their secondary and tertiary education, they will feel more empowered to raise these issues early and reduce the opportunities for unscrupulous employers to underpay them. The Committee recommends the Victorian Government works with the Federal Government to explore opportunities to include greater education about workplace rights through secondary and tertiary education.

RECOMMENDATION 7: The Victorian Government explore opportunities to include greater education about workplace rights through secondary and tertiary education and advocate for the Federal Government to do likewise.

5

5.5 Victorian Government Initiatives

As Victoria has referred its industrial relations powers to the Commonwealth, the Victorian Parliament and Victorian Government are limited in the actions they can take to safeguard and protect vulnerable workers. However, a number of contributors to the inquiry put forward ideas for initiatives the Victorian Government could take to assist vulnerable employees.

5.5.1 Victorian agency

In its submission, JobWatch stated:

In 2005, in response to the Howard government's WorkChoices legislation, the then Victorian state Labour [sic] government set up the Office of the Workplace Rights Advocate (OWRA) to provide information about, and promote and monitor the development of, fair industrial relations practices in Victoria.

... One of OWRA's functions was essentially to 'name and shame' employers who were using the WorkChoices legislation (e.g. Australian Workplace Agreements) to cut the minimum pay of its employees. JobWatch suggests that OWRA version 2 or a similar agency be created with relevant immunities (e.g. from defamation etc) and, with the assistance of JobWatch, set out to 'name and shame' in parliament those employers taking advantage of the Decision en masse.... OWRA version 2 could be up and running quickly and inexpensively and would make target employers think twice before implementing the penalty rates cuts authorised by the Decision.¹⁷⁵

¹⁷⁴ Malaysian Progressives in Australia, *Submission 16*, 3.

¹⁷⁵ JobWatch, *Submission 12*, 6-7.

Victorian Trades Hall Council also suggested a state-based enforcement unit:

That the state government considers introducing a dedicated enforcement unit to tackle rampant wage fraud and ensure employer compliance of pay and conditions, including penalty rates.¹⁷⁶

As outlined in section 5.2.2, the current process of enforcing correct payment of employees through the Fair Work Ombudsman and the courts is time consuming and difficult. The Committee agrees there would be benefit in a state based agency that can assist Victorian employees with disputes. The agency could also assist to enforce the new criminal offence the Committee has recommended in Recommendation 5 and educate Victorian employees about their rights, as outlined in Recommendation 6.

The Committee also recognises that most employers seek to do the right thing and pay their employees correctly. New business owners need to quickly familiarise themselves with the different classifications, rates of pay and conditions in the relevant awards and all employers need to stay up to date with any changes. A new Victorian Government agency could also assist employers understand their responsibilities and help them to ensure they pay the correct wage rates and entitlements, including penalty rates.

RECOMMENDATION 8: The Victorian Government investigate mechanisms to educate Victorian employers and employees about their rights and assist with the enforcement of workplace laws.

5.5.2 Penalty rates guarantee in procurement

The Victorian Government is a large purchaser of goods and services. It currently uses its procurement policies to ensure minimum local content requirements in major projects and to encourage the employment of apprentices and trainees.¹⁷⁷ These requirements help grow the Victorian economy and increase employment.

In its submission, the Victorian Trades Hall Council recommended:

That the state government considers excluding from tendering or government contracts any companies or parent companies that pass on the FWC ruling and cut their workers' wages.¹⁷⁸

The Committee supports the Victorian Government using its purchasing power to encourage employers to pay their employees full penalty rates, and not implement the cuts approved by the Fair Work Commission. This would also send a strong signal to employers about the value of penalty rates.

RECOMMENDATION 9: The Victorian Government investigate the inclusion of a penalty rates guarantee in its procurement policies.

¹⁷⁶ Victorian Trades Hall Council, *Submission 17*, 12.

¹⁷⁷ Department of Economic Development, Jobs, Transport and Resources, *Victorian Industry Participation Policy Guidelines*, <http://economicdevelopment.vic.gov.au/__data/assets/pdf_file/0006/1312935/VIPP_General_Guidelines.pdf>, viewed 16 May 2018, 8.

¹⁷⁸ Victorian Trades Hall Council, *Submission 17*, 12.

Appendix 1

List of submissions

Submission no.	Name of individuals/organisations
1	Sharon Murphy
2	Daniel McLean
3	Angelos Kenos
4	Timothy Mason
5	United Voice
6	Youth Affairs Council Victoria
7	Ian McSparran
8	Ballarat Regional Trades and Labour Council Incorporated
9	Name withheld
10	Adam Bandt MP
11	Young Workers Centre
12	Jobwatch
13	Victorian Chamber of Commerce and Industry
14	Ai Group
15	Professional Pharmacists Australia
16	Malaysian Progressives in Australia
17	Victorian Trades Hall Council
18	Restaurant and Catering Industry Association
19	Retail and Fast Food Workers Union
20	Victorian Women Lawyers
21	McKell Institute
22	Launch Housing
23	Brendan O'Connor MP
24	Council to Homeless Persons
25	Tina Caddy
26	Timothy Belcourt
27	Daniel Rebbечи
28	Danniel Jones
29	Julia Sutton
30	Wendy
31	Louise Deutscher
32	Sharon Askew
33	Phillip Tyson
34	Carol Burney
35	Health Workers Union
36	Victorian Liberal Students Association

Appendix 2

List of witnesses

Public Hearing — Melbourne — 26 April 2017

Name	Position	Organisation
Luke Hilakari	Secretary	
Professor Lisa Heap	Lead Organiser of Women's Team	Victorian Trades Hall Council
Keelia Fitzpatrick	Coordinator of Young Workers Centre	
John Hart	Chief Executive Officer	Restaurant and Catering Industry Association
Emma King	Chief Executive Officer	Victorian Council of Social Service
Llewellyn Reynders	Policy Manager	
Ged Kearney	President	Australian Council of Trade Unions

Public Hearing — Melbourne — 27 April 2017

Name	Position	Organisation
Michael Robson	National Industrial Officer	
Carl D'Souza	Hotel worker	United Voice
Mohammed Abu Sayem	Hotel worker	

Public Hearing — Melbourne — 20 March 2018

Name	Position	Organisation
Chris Walton	Chief Executive Officer	Professional Pharmacists Australia
Cameron Walls	Pharmacist Division Committee	
James Fleming	Legal and Industrial Officer	Australian Council of Trade Unions

Public Hearing — Ballarat — 21 March 2018

Name	Position	Organisation
Brett Edgington	Secretary	Ballarat Regional Trades and Labour Council
Tim Gaunt	Industrial Officer, Communications Workers Union	
Jodie Gillett	Chief Executive Officer	
Hayley Coates	Board member	Commerce Ballarat
Nick Thurlbeck	Board member	

Extract of proceedings

The Committee divided on the following question during consideration of this report. Questions agreed to without division are not recorded in this extract.

Committee meeting – 20 June 2018

Report adoption

That the final draft report (including chapters 1 to 5 and appendices) as amended be the final report of the Committee.

The Committee divided (Ms Williams in the Chair).

Ayes 3	Noes 2
Ms Blandthorn	Mr Clark
Mr Bull	Ms Ryall
Ms Suleyman	

Question agreed to.

Minority reports

Penalty Rates and Fair Pay Select Committee

Minority Report by Robert Clark MP and Dee Ryall MP

This inquiry has been a blatant misuse of public funds by the Andrews government.

The inquiry was established simply as a way of trying to help Federal Opposition Leader, Bill Shorten, in his attempts to attack the Turnbull government over a decision made by the Fair Work Commission, a Commission established by a Federal Labor government and for which Mr Shorten had responsibility as Minister for Workplace Relations.

Three senior Parliamentary officers have had to spend many hours of their time supporting the work of the inquiry, time that could have been spent far more valuably on inquiries on issues for which the Victorian Parliament and government actually have responsibility, or to speed up projects to improve public access to documents and information held by the Parliament. The inquiry has also taken up the time of Hansard and other staff, as well as expenses such as advertising, hearing venue hire and transport and logistics costs, not to mention the time of the seven MPs on the committee.

While the issues involved are important, the Victorian Parliament and government have almost no role in them. Both sides of Victorian politics have made clear they do not support reductions in penalty rates for Victorian public sector employees. Furthermore, the pay and conditions of Victorian public sector employees, including penalty rates, are determined almost universally under enterprise bargaining agreements, rather than under awards set by the Fair Work Commission.

Most stakeholders have recognised the partisan motivation for this inquiry and its lack of genuine purpose. The partisan motivation for the inquiry was reinforced by the fact the government chose to establish a separate select committee dominated by government MPs, rather than refer the issue to the existing Economic, Education, Jobs and Skills Committee, the relevant Joint Investigative Committee of the Parliament. In consequence, it was difficult for the inquiry to attract witnesses other than from unions and union-aligned organisations who wished to use the inquiry as a platform to pursue their campaign.

The inquiry majority have struggled to come up with definitive findings of fact on issues in contention between stakeholders. During the time of the inquiry, only the first initial stage of the Fair Work Commission's decision had come into effect, providing only limited actual evidence of the effects of the decision. Thus, witnesses mostly were reduced simply to asserting and re-asserting their predictions and policy positions.

There is a stark contrast between the majority's numerous recommendations for the Victorian government to urge the Federal government to take action, and their limited, tentative and qualified recommendations for the Victorian government to do anything other than what the government has already committed to do. It is usually a lot easier to tell someone else what they ought to do than to actually commit to do something yourself!

In short, this inquiry has been yet another instance in which the Andrews government has misused the resources of the Parliament for Labor Party purposes, instead of for achieving better laws and better government for Victoria.

Inquiry into Penalty Rates and Fair Pay Minority Report

Sam Hibbins MP

Member for Prahran

I support the final report.

This minority report provides additional comments regarding penalty rates cuts contained in enterprise bargaining agreements.

Background

The Fair Work Commission's decision to cut penalty rates in several awards was proceeded by cuts to penalty rates within multiple enterprise bargaining agreements in the retail and fast food industries.

The Retail and Fast Food Workers Union submission states:

The recent decision to cut penalty rates must be understood in the context of the workplace experience of many thousands of Victorians. The best way to properly understand the impact of these cuts is by understanding the lived reality of workers currently experiencing similar or worse cuts.

That experience is identified through analysis of retail and fast food workers employed in Victoria in workplaces which have enterprise agreements (made under current or former legislation) negotiated and implemented by the relevant employers (or their successors) and often negotiated with the Shop Distributive and Allied Employees Association (the SDA) which implement similar or worse cuts.

Such enterprise agreements generally include a slightly higher base rate of pay whilst substantially cutting penalty rates and other loadings. This results in many workers being worse off than if they were covered by the relevant award, making these enterprise agreements non-compliant with the better of overall test contained in the Fair Work Act.

Recommendations

It would highly incongruous for the state government to advocate for the range of changes contained in the final report, yet ignore the thousands of workers left worse off than under the award because of cuts to penalty rates in their enterprise agreement.

The Retail and Fast Food Workers Union submission recommends:

Amending section 206 of the Fair Work Act to provide that the full rate of pay under each enterprise agreement must be at least the full rate of pay under the Award would help to immediately remedy the issues described in this submission.

Further, such a change should be made retrospective. The modern award structure, without transitional arrangements, has been in place since 1 July 2014. That is an appropriate point to make retrospective the obligation to compensate workers who have been paid less than the minimum floor that is a key object of the FW Act and which was intended to be created through the NES and the modern award system.

The State of Victoria should vociferously lobby and advocate for such a change.

RECOMMENDATION: The state government should advocate to the Federal government to amend the Fair Work Act 2009 (Cth) to ensure employees covered by an enterprise agreement will not receive a rate of pay, casual loading or penalty rates below the national minimum wage order or relevant award.



Sam Hibbins MP

Member for Prahran