

**Senate Standing Committee on Education, Employment and Workplace  
Relations Legislation Committee**

**QUESTIONS ON NOTICE**

**Fair Work Amendment (Small Business – Penalty Rates Exemption) Bill 2012**

**Outcome 4 - Workplace Relations and Economic Strategy**

**DEEWR Question No. 1**

**Senator Marshall asked on 07 December 2012, Hansard page 55**

**Question**

**Penalty rates immediately after Work Choices**

Senator Marshall referred to earlier evidence given to the Committee by Mr Hart, Chief Executive Officer, Restaurant and Catering Australia, for example (Hansard, page 34-35):

“Senator, the issue you need to understand is that new businesses set up after 27 March 2006 had no obligation to pay penalty rates in Victoria, for example, at all. So those businesses under the transitional arrangements to the modern restaurant industry award have significant labour cost increases each year phasing up until 1 July 2014.”

**CHAIR:** The restaurant and catering industry put it to us that, immediately after Work Choices—and I might get you to look at their evidence—there was an opportunity for people to engage staff in the restaurant industry on no penalty rates. When the modern award system came into effect—

**Senator XENOPHON:** Are you talking about Victoria?

**CHAIR:** It may have been Victoria. I do not mean to verbal you in any way, but I will ask you to look at the evidence. That gave people a window where there were no penalty rates paid at all. It may have just been on Sunday, or it may have been on weekends, but the modern award is transitioning them, over a five-year period, up to 150 per cent. Are you able to cast some light on whether that was right and that window was there? And why was it there? Was that an oversight of legislation? I do not recall at any point anything saying we are abolishing penalty rates.

**Mr Breen:** We will take that on notice.

**Answer**

Immediately following the commencement of Work Choices on 27 March 2006, there was scope for newly established federal system employers to engage employees on terms and conditions which did not include penalties.

This capacity applied to federal system employers that commenced operations after 27 March 2006. It was not limited to Victoria, the restaurant industry or any particular penalty rate.

Under the Work Choices legislation, any federal award in force immediately before 27 March 2006 was continued in effect as a 'pre-reform award'. A pre-reform award was binding on federal system employers who were covered by the original federal award. However, pre-reform awards did not generally bind federal system employers that commenced operations after 27 March 2006 (item 4 of Schedule 4 to the *Workplace Relations Amendment (Work Choices) Act 2005*). New employers only became bound by a pre-reform award in limited circumstances (i.e. if the Australian Industrial Relations Commission made an order to that effect, or by virtue of transmission of business rules). In practice, many federal system employers that commenced operations after 27 March 2006 were not bound by any award, and therefore would not have been obliged to pay penalty rates.

Where such employers and their employees are now covered by a modern award, they will be transitioning to modern award penalty rates. Under the model transitional arrangements included in most modern awards, including the Restaurant Industry Award 2010, penalty rates are generally being phased in through five instalments of 20%; beginning from the first full pay period on or after 1 July 2010 and ending at the first full pay period on or after 1 July 2014, when modern award penalties will apply in full. The phasing of penalty rates in the model transitional arrangements extends to employees who were not covered by a pre-modernised award, such as a pre-reform award.

We note that following the commencement of Work Choices, federal system employers could also enter into workplace agreements, including Australian Workplace Agreements, which could exclude award penalty rates without compensation. Workplace agreements were not subject to any safeguards until the introduction of the 'fairness test' (i.e. workplace agreements made between 27 March 2006 and 6 May 2007).

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**DEEWR Question No. 2**

**Senator Xenophon asked on 07 December 2012, Hansard page 58**

**Question**

**Hours in retail sectors**

**Senator Xenophon:** Certain searches have been made both by the unions and by employees. One is saying, 'Look, things have been growing.' The employees are saying, 'Things are shrinking and hours will be reduced.' Are you saying that in terms of the dataset that is currently available an academic or the government or a department if requested by the minister could actually say, 'These are the numbers of hours that have been lost in a particular sector,' say, for small retailers and things like that?

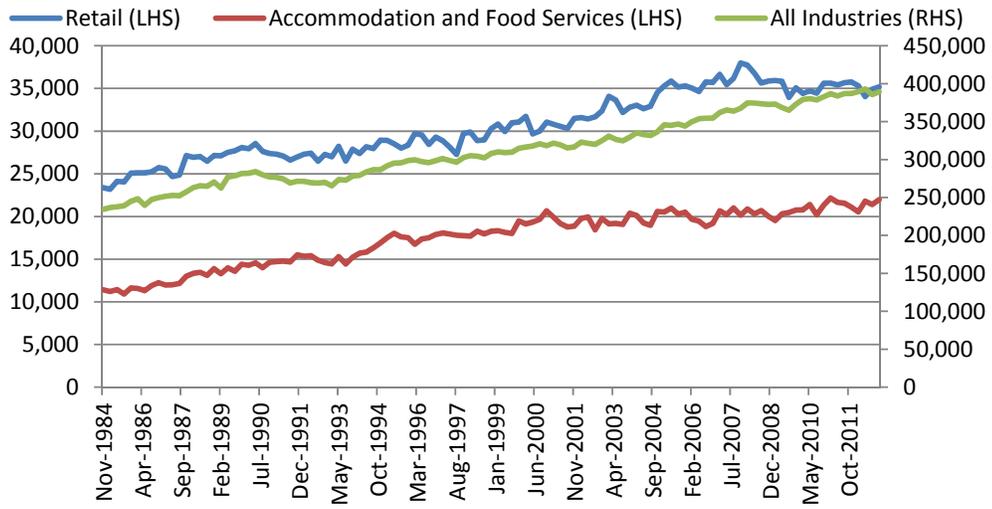
**Dr Morehead:** I think we do already have a fair bit of that data available. So I could take on notice the publications that we already have from the ABS, because we do have that type of data.

**Answer**

In its Labour Force Survey, the ABS publishes total hours worked by industry division on a quarterly basis (Cat. No. 6291.0.55.003). Chart 1 shows total hours worked, taken from the publication, in Retail Trade, Accommodation and Food Services and All Industries, over the period November 1984 to November 2012.

However, this data is not published at a more detailed industry level or for small business. Working hours data for individual sub-industry sectors (e.g. the Fast Food industry) are therefore not available.

**Chart 1: Total hours worked by industry\* (000s)**



Source: ABS Labour Force, Australia, Detailed, Quarterly (Cat No 6921.0.55.003).

\* The hours refers to the week when the survey was conducted.

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**DEEWR Question No. 3**

**Senator Xenophon asked on 07 December 2012, Hansard page 58**

**Question**

**Details on consultation with small business**

**Senator XENOPHON:** In the context of engagement with small businesses: you have heard from some of the peak bodies, particularly restaurant and catering—and you are probably familiar with their submission—has there been any engagement more recently between the department and small businesses—less than 10 employees, for instance—about the impact of penalty rates? Is that something where there has been a process of engagement about to get their feedback? That is in addition to what you have heard from some of the peak bodies.

**Dr Morehead:** There have been submissions made that we read. There are the big processes that have been going on. There is the review of the Fair Work Act, where small businesses had the opportunity to put in submissions that are publicly available. So in terms of small business voice, with these two huge processes of reviewing the Fair Work Act and then the review of modern awards, the voice of employers across all spectrums, but particularly that of small business, has had ample opportunity to be heard and to be published so that other people can see what they say.

In addition to that, the panel that did the review of the Fair Work Act held a number of meetings with small businesses when they were considering that review. The minister has subsequently had a couple of roundtables with small businesses and talked—

**Senator XENOPHON:** Could I possibly get some more details on notice about that level of engagement?

**Dr Morehead:** Yes, will do.

**Answer**

On 22 March 2012, the Fair Work Act Review Panel (the Panel) met with the Small Business Advisory Committee, which included representatives from:

- Australian Chamber of Commerce and Industry
- National Retail Association
- Starfish Business Solutions
- JTA Australia
- Kings Australia
- BDO Australia

- Council of Rural Research and Development Corporations
- Fisher Advisory Services

On 27 March 2012, the Panel met with other small business representatives from:

- Accommodation Association of Australia
- Institute of Chartered Accountants
- Pharmacy Guild
- Real Estate Institute of Australia
- Restaurant and Catering Australia
- Victorian Automobile Chamber of Commerce

Following the release of the Report on the Fair Work Act Review, the Minister met with small business representatives on two occasions (23 August 2012 and 8 October 2012) to discuss the recommendations of the Review Panel and other workplace relations matters including penalty rates. On both occasions, representatives from the following organisations were invited to attend:

- Accommodation Association of Australia
- Australian Hotels Association
- Australian Motor Industry Federation
- Australian Newsagents Federation
- Australian Retailers Association
- Australian Sporting Goods Association
- Council of Small Business of Australia
- Housing Industry Association
- Institute of Chartered Accountants
- Master Grocers Australia
- National Farmers Federation
- Pharmacy Guild of Australia
- Printing Industries Association of Australia
- Real Estate Institute
- Restaurant and Catering Australia