Master Grocers Australia Ltd

Trading as:

MGA Independent Retailers

Senate Education and Employment References Committee Inquiry into Penalty Rates

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Submission

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Senate Education and Employment References Committee Inquiry into penalty rates

The Federal Government has requested the Senate to form a Committee of Inquiry into penalty rates and has called for submissions to assist in the inquiry. MGA welcomes the opportunity to comment on the penalty rates in the modern awards and in the General retail Industry award in particular

About MGA

MGA is a National Employer Industry Association representing independent grocery and liquor stores in all States and Territories of Australia. Independent supermarkets and liquor stores (independent supermarkets) comprise a significant subsector of the retail industry in Australia. They range in size from small, to medium and large businesses. Although many of the medium sized businesses would not be categorised as such from a legal perspective, they are in fact relatively "small" in comparison to the large supermarkets in the retail industry. Despite competing in a dominated market, independent supermarkets play a major role in the retail industry and make a substantial contribution to the communities in which they trade.

The stores operate under banners such as Supa IGA, IGA, IGA Xpress, Friendly Grocer, Foodland, FoodWorks, SPAR, Supabarn, Cellarbrations, Bottle-O, IGA Liquor, Local Liquor, Duncans and Bottlemart. Australia's 4000-plus independent grocery and liquor retailers employ 115,000 people and generate annual sales of $13 billion. Through their membership of MGA they are regularly provided with information on any proposed legislative or regulatory changes and how they may be affected by new laws and regulations. Independent supermarkets are the businesses referred to in this submission. MGA members are conscious of their responsibilities in respect of sales of tobacco products and they welcome this important inquiry into the prospective sales of e- cigarettes and vaporisers in their stores.

Submission responses by MGA to the questions in respect of referral by the Australian Senate on 19th June 2017 to the Senate Education and Employment References Committee.

Question 1

Do the penalty rates paid by some bigger businesses give them an advantage over smaller businesses?

The Australian award system provides for the payment of a wage rate established by the Fair Work Commission based on the industry type, employee classification and age. These rates are commonly referred to in the modern awards as the base rates. The increase to the base rate is decided by the Fair Work Commission on an annual basis.

The Fair Work Act makes provisions for an employer and an employee to negotiate a workplace agreement which currently enables the parties to increase a base rate to a higher level when negotiating an enterprise bargaining agreement. Any increase to the base rate is usually subject to adjustments being made in other areas of the award, as part of the bargaining process. Which may include lowering penalty rates n exchange for a higher base rate. Any business that is wealthy naturally can afford to increase the base rate wages in order to gain lower penalties and will usually outrun its smaller less financially sound competitors in bargaining an agreement. It is inevitable that a wealthier and bigger employer will have a distinct advantage over a smaller employer and that is not restricted to having an advantage in respect of wages payments or reduced penalties.

There are businesses of all sizes in the retail industry and larger supermarket businesses such as Coles and Woolworths, who employ thousands of employees across Australia, are naturally in a much stronger position to reward their staff from a financial perspective, than a small business of say 25 employees who can only afford to pay the minimum rates and the award defined penalties under the General Retail Industry Award (GRIA).

Whilst the majority of small to medium sized business are generally not able to negotiate increases to a base rate significantly than that which exists in the award, due to financial inhibitors, there are some small to medium businesses that have rewarded their employees with a higher base rate in exchange for lower penalties, but they are in the minority.

Coles and Woolworths supermarkets have been negotiating enterprise agreement for many years with the Shops and Distributive Allied Employees Association, long before the introduction of the Fair Work Act and they have always paid slightly above the base rate in the award. There have naturally been gains made in respect of lower penalties or trade- offs in other clauses of the General Retail

Industry Award (GRIA). The bargaining process has never been questioned because that is common practice.

The problem that has arisen recently is that a number of adverse effects of outcomes of the bargaining process between the Coles and Bi-Lo and the SDAEA have come to light. After the terms were scrutinised in these agreements, it seems that some individual employees were actually not benefitting from the bargaining process at all, and in fact were worse off than under the award. The law is quite clear that all employees who will be affected by a negotiated agreement must be better off under an agreement than under the applicable award. It is not acceptable for some employees to suffer any lesser terms or conditions than those that exist in the Award. *[(Section 193(1) Fair Work Act].*

The 100 % penalty rate on Sunday is a severe detriment in the retail industry to conducting a retail business that operates over a seven day week and there are numerous factors why the imposition of such a high penalty rate on Sunday has caused the Fair Work Commission to adjust the Sunday penalty rate by 50%. Reasons such as not being able to operate a business effectively at the weekend because of inability to pay high wages, the owner having to work in the business on Sunday because he/she cannot afford the Sunday penalty rate and even a proprietor not being able to open aa shop at all because of the high penalty have all been promulgated as valid reasons for change. Fortunately, these factors have been recognised by the FWC as valid reasons to lower the rate for the Sunday penalty over a period of time.

The ability to negotiate an agreement which can involve reducing penalty rates is available to all businesses but of course a bigger business is able to negotiate a higher wage rate or it can afford to increase other award benefits in exchange for reducing other benefits in a more significant way compared to a smaller business. The final outcome will inevitably be influenced by the relative wealth of the organisation.

Small businesses that continue to operate their businesses under the terms of the GRIA do consider the terms and conditions that their larger counterparts are able to negotiate as a considerable threat to their ability to compete on a level playing field. Small businesses are threatened at every turn from a myriad of angles including trading hours, opening times, red tape, payroll tax and of course the strict laws that pervade our industrial relations system. Small businesses struggle to understand why a large business is able to gain any advantage particularly in the form of a lower penalty rates simply because they are able to pay a slightly higher base rate or they are able to trade off other award conditions. The inequity that is created by this apparent gain by bigger businesses will, to some extent be

alleviated by the decision of the Fair Work Commission to lower Sunday penalty rates, but this will take several years before the Sunday penalty rates adjustments are fully implemented.

Lowering the penalty rates means that the base rate is increased to a level that compensates for any monetary loss but a major problem that this creates for small businesses is that the higher base would have to be paid to an employee whose hours of work are such that they never work at times when a penalty is generally applied. For example a 9.00am to 5.00 pm employee who works during the week would have to be paid at the higher base rate that has been negotiated in the agreement so that the benefits of a lower weekend penalty rate are outweighed by the increased wage rates payable for ordinary hours during the week. The costs to the employer in these circumstances then becomes prohibitive and this is a significant deterrent to making a enterprise agreement. Whereas this problem would not necessarily be significant for a larger business.

The question that has recently arisen however is whether some of the terms and conditions that have been negotiated by big businesses are really as beneficial as may first appear, which was evident the recent decision of the Fair Work Commission.[1] Providing better conditions in respect of certain aspects of the award other than immediate remuneration is only likely to benefit some employees and therefore may not necessarily be a benefit subject to times when the benefit may or may not be available" Such benefits may never be utilised and therefore cannot be guaranteed to offset a reduced penalty. This was particularly evident in the decision of Full Bench of the FWC at para 11.[2] where the decision read, "As a matter of simple logic the more hours that are worked during times when the Agreement rates are higher the better off the employee will be. Conversely, the more hours worked when the award rates are higher, the worse off the employee will be compared to the award. In other words if the employee works predominantly at night or on weekends the higher base rate under the agreement will be counter balanced by lower penalties payable under the agreement at these times". Again at para 17 of the decision.[3] the Full bench stated, "In our view these benefits can be quantified and should be taken into account. There is a need for some caution however in making the comparisons. For example, the rest and meal break provisions of the agreement provide for a 15 minute rest break compared to a 10 minute rest break in the Award. This can be seen as an advantage. However, the rest break under the Agreement is only available for shifts of 4 hours whereas under the Award the rest break is available for shifts of 4 hours or more." Therefore, the

[1] Duncan Hart v. Coles SupermarketsAustralia Pty/Ltd and Bi-Lo Ltd T/A Coles (C2015/4999 Australian Meat Industry Employees Union v. Coles Supermarkets Australia Pty ltd and Bi-Lo Pty Ltd T/A Coles and Bi-Lo C2015/6084)

[2] Ibid

[3] Ibid

Bench concluded, for an employee who has 4 of the 6 shifts that were exactly 4 hours it was unlikely there was a benefit to the employee by this term of the agreement.

Negotiating an enterprise agreement is a means of setting out what the respective parties are able to gain for their clients as part of the bargaining process. The Agreements that were negotiated in this case affected large organisations and the benefits in most cases have appeared to be beneficial but recently there do appear to be flaws in the outcomes of the bargaining process and their effects that have led to inequities for some employees. This has obviously produced considerable scepticism in respect of the unsatisfactory effects the outcomes of enterprise bargaining can have for employees, which have left at least some employees at a disadvantage.

The results of the case [4] demonstrate that agreements that have been negotiated since the introduction of enterprise bargaining has enabled large businesses to negotiate lower penalty rates and reduce other benefits, but whilst they have enjoyed the benefits of lower penalties, albeit having paid a higher hourly rate not all personnel have benefitted from the negotiations.

Any enterprise agreement negotiated by any business must fully comply with the BOOT test overall and any deviation from the terms and conditions of the award must make every employee better off overall. A large organisation will inevitably have strong bargaining power and be in an advantageous position in the negotiation process but the law applies to all agreements and it was clear that many employees were not being paid what they would have been entitled to under the award.

Question 2

The operation, application and effectiveness of the BOOT

In 2010 the Rudd Government introduced the Fair Work Act 2009 which provided new agreement making provisions for Australian businesses. Previously, under the Workplace Relations Act 1996 agreements were also able to be made, provided that they satisfied the "no disadvantage test." The new industrial relations laws in 2010 provided for a new test namely, the "better off overall test," (the BOOT) and any proposed agreement that is to operate in place of an award must pass this test in order to become operational in an Australian business.

[4] ibid

In order to pass the BOOT an agreement is tested by the Fair Work Commission and it must be proven to the satisfaction of the FWC that each award covered employee that will be affected by a proposed new agreement will be better off overall under the agreement than under the award.

The Fair Work Act states at Section 193(1)*"An enterprise agreement that is not a greenfields agreement passes the better off overall test under this section if FWA is satisfied, as at the test time, that each award covered employee, and each prospective award covered employee, for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee."*

The lowering of Sunday and Public penalty rates are the main attraction in the bargaining process for an enterprise agreement. It may still mean that the majority of employees are better off with the higher rate, but that is subject to the extent of the decrease in the penalties and the utilisation of any other negotiated benefits . There are other offsets that may or may not include a monetary benefit. These may include increased payments for parental leave or an extra week in annual leave per year. That of course will be dependent on whether all employees are able to take advantage of the benefit. Obviously, a parental leave benefit would not apply to all employees. An increase to annual leave would only benefit permanent employees and in an organisation that relies heavily of casual labour the benefit for these employees would obviously be non- existent.

The effect of the BOOT when negotiating an enterprise agreement is that wherever the parties want to provide for clause that provides for a monetary allowance, consideration must be given to whether it will be more advantageous to the employee. It is not sufficient that the agreement as a whole makes the majority of employees affected by the agreement better off overall. Each employee affected by the agreement must be better off overall. It is irrelevant that both parties to the agreement are satisfied with the terms and conditions of the agreement as was demonstrated in the case of Hart v. Coles Supermarkets case[5].

The difficulty for many large businesses is that there might easily be some employees who might be adversely affected even though the intention would be to provide for better off overall conditions for everyone.

The award does provide for scrutiny by the FWC before approval of an agreement. There have been numerous occasions where a Commissioner has found that some terms in an agreement do not

[5] Ibid

satisfy the BOOT and the Commissioner therefore requires undertakings from the parties that any discrepancies will be remedied before he/she approves the Agreement.

There has been considerable criticism expressed about the problems of meeting the BOOT that many employers have avoided making agreements and have chosen to remain subject to their relevant award conditions. The biggest deterrent to making an enterprise agreement in the retail industry has been the demands of meeting the BOOT.

The no disadvantage test under the previous Workplace Relations Act was a far more workable system than that which currently exists with the BOOT. It was easier to ensure that by entering into an agreement an employee was not disadvantaged but if every employee has to be better off overall, and in big businesses that may involve hundreds of staff, then there will always be difficulty in providing for that in every aspect. The test is far too rigid to ensure total compliance with the law and therefore if achieving the demands of the BOOT is not achievable, and the Coles decision certainly revealed that there is room for error, then the law should be amended to provide for a more appropriate test.

Question 3

The provisions of the Fair Work Amendment (Pay Protection) Bill 2017

The Fair Work Act 2009 (the Act) states that if an enterprise agreement applies to an employee the 'base rate of pay', which is the rate payable for ordinary hours must not be less than the base rate of pay payable pursuant to the modern award (Section 206). Any work performed other than for "ordinary hours", including inter alia, overtime, work that attracts penalty rates, or payment for allowances attracts additional payments for an employee . The Fair Work Act currently does not provide that these payments in the award need to be increased by any particular percentage if wage rates are increased and there is no provision in the FWAwhich states that they cannot be lower than those provided for in the modern award .

The Fair Work Amendment (Pay Protection) Bill 2017 provides that in the event of any increases to wages awarded by the Fair Work Commission that increases would apply to the "full rate of pay." If the Bill becomes law then the "full rate of pay" would include any applicable penalty and any negotiated agreement would have to include the applicable penalty rate. Does that mean that this if this proposed law is successful every employer who has negotiated an agreement in good faith since

2010 will be required to pay the current applicable penalty rates under the award when a wage rate is increased? This would appear to be the case.

This would affect thousands of employers large and small who have negotiated their agreements under the current laws. The consequences would not be confined to just large employers who have been described as “unscrupulous,” but many other businesses who entered into bargaining arrangements in good faith.

The argument that everyone has a right to a fair wage etc and should be protected is not denied but the result of back tracking on agreements that have been operational for years would be devastating for thousands of businesses and their employees. It would not just mean that staff will be paid higher wages or back paid, It will mean that many jobs will be in jeopardy or cease to exist. The so called “unscrupulous employers” large, medium sized and small will simply not employ staff and the effect particularly on the retail industry will mean a loss of jobs.

That is not to say that there is not room to amend the enterprise agreement making provisions of the Act. The re- introduction of the “no disadvantage test” may be a solution. It is the BOOT that is the problem. It would mean of course that a previously vital bargaining tool has been lost. It seems that a few cents increase in the base rate will no longer compensate for the loss of a penalty because of the danger that there many be employees in the organisation who could suffer more losses than gains. What other benefits can be traded? There will need to be more emphasis on the trading of benefits under the award that do not attach to a monetary amount, unfortunately these are relatively few and the result could be that enterprise bargaining will eventually cease altogether. There appears to be little appetite to negotiate an agreement amongst medium to small business in the retail industry at the present time due to what is perceived as the complexities associated with the procedures.

Question 4.

Any other matters related to penalty rates in the retail sector

MGA submits that the penalty rates system in Australia is currently restricting the ability to grow small independent businesses. Employers are restricted in their ability to offer employment because they simply cannot afford to pay the penalty rates that exist in the current award system. And they have been buoyed by the decision of the FWC to lower the Sunday penalty rates to 50%, but now they face further increases to penalty rates on Saturdays.

There have been numerous calls over the years for changes to the penalty rate system calling for, at a minimum, the reduction from 100 per cent on Sundays to at least 50 per cent on the basis that society has changed, we are a seven day society and in the retail industry in particular, Sunday work is no different to any other day of the week. In 2012 A Senate Standing Committee[6] examined the proposed amendments to the Fair Work Act in 2012 and examined the issue of whether the rationale for penalty rates was largely outdated as claimed by the Australian Chamber of Commerce and Industry (ACCI) in its submission:[7]

> *'Typically awards have adopted a series of penalty rates which compensate employees for working unsociable hours. This original justification for a high penalty rate regime has limited foundation, with the advent of fundamental changes in our society, particularly in the retail and restaurant sectors. Despite this reality, a number of modern awards have adopted a more restrictive span of ordinary hours, that is, hours where employers are not required to pay higher rates, and maintained higher penalty rates. These penalties rates are a deterrent to operating outside of the designated ordinary hours and where penalties have increased under the new modern award this has threatened the viability of business, the majority of them in the small to medium enterprises in the services sector…'*

This extract was then followed by the following employer quote from a survey undertaken by ACCI:[8]

> *'I still do not understand how we can move to seven day trading and still have penalties. Surely any hour of the day should be an hourly rate. Sure if staff work over a sensible number of hours overtime should be paid not simply because it is a Sunday – many of our part time and casual staff can only work weekends so in fact there is no penalty. We open to provide a service in a remote area and at best break even. Further we try to employ pharmacy students and school students to give them experience but this gets challenging when wages have penalties attached as well. It defeats the purpose.'*

MGA endorses this last quote as a typical response from small retailers in the independent supermarkets and liquor stores around Australia. The impact of high penalties continues to affect the livelihoods of many small retailers. In some areas stores only open on Sunday if they self- operate the business or use family members as labour. This naturally impacts on their lives and the lives of their families. Some retailers prefer not to open their businesses at all on Sunday. This has a serious impact

[6] Senate Standing Committee 2012 Education Employment and Workplace Relations Committee : Fair Work Amendment (Small Business – Penalty Rates Exemption) Bill 2012
[7] Australian Chamber of Commerce and Industry Submission 106 page 10 to Senate Standing Committee 2012. : Fair Work Amendment (Small Business – Penalty Rates Exemption) Bill 2012 Page
[8] Ibid page 10

on employment because if the cost of labour is too high and jobs are not available then ultimately both employees and employers will suffer losses.

The penalty rates debate is not new, it has been raging for years and determining whether to impose or maintain a penalty and the mechanism for doing so is bound to meet with the strong opposing opinions. It raises the question of whether consideration of the adoption of a less regulatory system, would enable employers and employees to make their own decisions in regard to the application of penalty rates. This would allow variations to penalty rates according to market needs and the specific industry.

There is a persistent cry that retail is driven by consumer demand and this has resulted in the extension of trading hours in Australian jurisdictions over the last twenty years, and in most parts of Australia, retailers open their doors for trade on Sunday. The consequence of wanting to trade on Sunday means there is a demand for labour. A retailer may have a sufficient number of full time and part time workers for the Monday to Saturday trade but may find that the need to employ more weekend staff to cope with an increased number of Sunday shoppers, who want the store to open on Sunday. The retailer naturally wants the benefits of the potential profits and is also is aware of the need to service the community. To fill the employment needs most retailers will look to employing casual labour, with either juniors or students as the main targets. Students are usually the objective of the required labour and are attractive because they are likely to be flexible in the hours they are prepared to work. Women, who are often unable to work during the week because of family commitments, are also generally available at weekends when their partners are free to provide child care.[9] So there is a ready supply of labour but at what cost? Who determines the value of work that is performed at allegedly "unsociable hours"? The FWC is currently the authority charged with this responsibility and as the FWC has assumed this role over decades and previous attempts to allow employers and employees to determine their own penalties, as in WorkChoices, the likelihood of deregulated approach to determining penalty rates is unlikely.

Freedom for two parties to negotiate their own contractual terms is a right that should be available to all Australians. It is suggested that parties should be able, to negotiate what they consider to be fair to suit their own needs in the first instance, and then to seek the compulsory guidance of a third party, in the person of a Commissioner within the IR system, who could ensure that no group or person, who might be perceived as vulnerable, is disadvantaged. However, the sceptre of the old WorkChoices still runs deeply in the minds of those who regarded that system as unfair and to simply allow contracting out of the current award system is an improbable scenario in the immediate future.

[9] Supra 4 page 14

Australia is a long way from deregulation to the extent that the parties will achieve total freedom to determine their own rules.

Even though the FWC has decided to reduce penalty rates by 50% obviously keeping jobs available and increasing job opportunities is a priority whether there is support for a regulated system or not.

In 2013 there was a proposal by the then Federal Labour Government to enshrine penalty rates in the Fair Work Act. The Prime Minister at the time, Ms Julia Gillard, in an address to the Australian Council of Trade Unions flagged the proposal to insert a new modern award objective into the Fair Work Act to protect penalty rates.[10] This proposal was applauded by trade unions and condemned by employers. It caused a wave of opposition from employers who had long been fighting for either the abolition of penalty rates or at least their reduction. The experiences of the so called "WorkChoices system"[11] still weighed heavily on the minds of trade unions and employees and hence this proposal to ensure the protection of penalties in law was seen as the antithesis of the amended laws that were introduced in March 2006. The Fair Work Act was not amended to provide for the inclusion of a "penalty clause" at that time.

Sunday penalty rates provisions in other countries provide interesting comparisons with Australia. There are non-regulated or minimally regulated systems for determining Sunday penalties in the United Kingdom. The employer and the employee determine the terms and conditions for working on Sunday using their own contractual arrangement.[12] There is no law or award, similar to the Australian award system that governs working on Sunday in the United Kingdom. Sunday in the UK retail industry is no different to working on any other day. There are rules around whether an employee can be compelled to work on Sunday but the system otherwise is not regulated to the extent that applies in Australia.

In Europe a similar system of payment for work on Sunday exists as in the United Kingdom. The European Parliament encourages all European states to respect the rights on workers not to work on Sunday on a regular basis. Members of the European Parliament have taken a pledge to promote a day of rest during the working week which "in principle will be Sunday."[13] However, with respect to payment for work on Sunday in European countries it is mainly left to the contractual arrangement between the employer and employee, although some countries do provide statutory compensation for work on a rest day. However, it may be that Sunday in the retail industry is not always the "rest

[10] Address by Prime Minister, Julia Gillard to the ACTU Canberra March 13th 2013
[11] Amendments to the Workplace Relations Act 1996
[12] Gov. UK-- Sunday working
[13] European Sunday Alliance – Pledge for a work free Sunday and decent work" 2014

day". In the Productivity Commission Research Report in September 2014, reference was made to the payment of penalty rates for Sunday work:[14]

> *'The information for most jurisdictions is based on the statutory provisions contained in the ILO legal data base applying to compensation for work undertaken on rest days and /or public holidays and is not retail specific. The level of compensation may vary due to state or provincial legislation or through the use of collective agreements.'*

There is almost no compensation for working on Sunday in any states in the USA or New Zealand. There is evidence that supports the less restrictive industrial relations system in New Zealand as a cheaper and more attractive system for employers, where penalties and wages are lower. Economic factors have caused many businesses to move to New Zealand from Australia. In 2011 the restructure of Heinz Ltd caused the loss of 330 jobs across its Australian factories and the company cited the cost of labour and restrictive labour laws as major factors for the move.[15] The managing director of Simplot Australia, a food processing company, said in 2013 when the plant moved from Tasmania to New Zealand that penalty rates were a major factor in the move. He was quoted as saying:[16]

> *'…a base rate of pay of $60,000 a year could leap to $100,000 a year when overtime, payroll and penalties were included.'*

Mr Bill English the Finance Minister in New Zealand at the time said that his country benefitted from, "a more flexible industrial relations environment".[17]

The current system of a regulated penalty system has become embedded in Australia. MGA has a particular focus on the small independent retail business sector and recognises the need to retain a form of regulation that may provide compensation to those who work during what may still be regarded as "unsociable hours" but, at the same time providing an opportunity for small business owners to operate in a consumers world, that requires them to service the community needs over a seven day period, MGA submits that a regulated system has the advantage of providing clear guidelines to a small retailer who may not have the necessary skills or the time to negotiate appropriate penalty rates with an individual employee. Most retailers are not concerned about reducing penalty rates to unreasonable levels they are more concerned with having penalty rates that enable them to operate their businesses efficiently and profitably. It seems there has been progress in

[14] Productivity Commission Research Report "Relative costs of doing business in Australia : Retail trade September 2014 Page 96
[15] "Australian jobs on the move to NZ "Sydney Morning Herald Madeleine Heffernan April 18th 2012
[16] Supra note 20
[17] Supra note 20

this respect and it is hoped that there will be no interference in the positive outcome of the Sunday penalty reduction to 50% on Sunday.

Conclusion

MGA thanks the Senate Education and Employment References Committee Inquiry for the opportunity to make these comments on the penalty rates and their impact on the General Retail Industry Award and the independent retail sector in particular.

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Master Grocers Australia

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