TRANSCRIPT

PENALTY RATES AND FAIR PAY SELECT COMMITTEE

Inquiry into penalty rates and fair pay

Melbourne — 26 April 2017

Members

Ms Gabrielle Williams — Chair
Mr Robert Clark — Deputy Chair
Ms Lizzie Blandthorn
Mr Josh Bull

Mr Sam Hibbins
Ms Dee Ryall
Ms Natalie Suleyman

Witnesses

Mr Luke Hilakari, secretary,
Professor Lisa Heap, women’s lead organiser, and
Ms Keelia Fitzpatrick, coordinator, Young Workers Centre, Victorian Trades Hall Council.
The CHAIR — Before I introduce our representatives from the Victorian Trades Hall Council, I declare open today’s public hearings for the Penalty Rates and Fair Pay Select Committee. I also remind people to turn their mobile telephones to silent. I welcome our witnesses here today, Luke Hilakari, Keelia Fitzpatrick and Professor Lisa Heap.

All evidence taken by this committee is protected by parliamentary privilege. Therefore you are protected against any action for what you say here today, but if you go outside and repeat the same things, including on social media, those comments may not be protected by this privilege. All evidence given today is being recorded by Hansard. You will be provided with a proof version of the transcript for you to check as soon as it is available. Verified transcripts, PowerPoint presentations and handouts will be placed on the committee’s website as soon as possible. If we have any media present today, we welcome the media covering the hearing today, and we remind you of the following guidelines: cameras must remain focused only on the persons speaking; operators must not pan the public gallery, the committee or the witnesses; and filming and recording must cease immediately at the completion of the hearing. Broadcasting or recording of this hearing by anyone other than accredited media is not permitted.

I invite our presenters today to proceed with a 5 to 10-minute opening statement, which will be followed by questions from the committee. We will move around committee members, and there will be a substantive question followed by a supplementary question from each of the committee members. I welcome you to present. Thank you.

Mr HILAKARI — We begin by thanking the members of the select committee for having us here today. We appreciate the time you have taken on a very cold Monday morning. We are the Victorian Trades Hall Council. We were founded in 1856. We are the peak body for unions in Victoria. We represent 41 different affiliated unions and 430 000 workers across this fine state. Over the past 150 years the Victorian Trades Hall Council and its affiliate unions have campaigned for things like penalty rates, the minimum wage, OHS laws, maternity and parental leave, domestic violence leave, superannuation, long service leave and, importantly, the greatest contribution Victoria might have made to this world — the eight-hour day.

Pivotal to these rights: we consistently and continually see that these rights that we have long established have been under attack. Not a day goes by when we have not seen someone exposed in the media for inventing new ways to evade or dodge the law. The mechanisms used to achieve these outcomes include labour hire, complex supply chains, sham contracting, casual employment and franchising. In the last year, before we saw the Fair Work Commission’s decisions, some of our largest companies came under the spotlight, including Caltex, United Petroleum, 7-Eleven, Domino’s, Grill’d, Pizza Hut, Australia Post and Subway — just to name a few. We believe industrial law in this country is broken. It particularly hurts vulnerable workers, including young people, women, people of colour, single parents and people living in regional Victoria.

The VTHC has spoken on numerous occasions to various Senate and parliamentary inquiries about this problem, and we think that the current industrial framework no longer protects workers. When it comes to the attack on penalty rates we think this is just the latest manifestation of a system that is fundamentally broken. How can it be that an industrial relations system has rules that have been written to allow it to reduce the pay of some of Australia’s poorest workers? This penalty rate cut will affect 700 000 Australians largely in hospitality, retail and pharmacy. It will cost the average Sunday worker between $2000 and $4000 a year. These are people who can earn as little as $19 an hour.

This is a life-changing cut. Budgets will need to be changed, people will be moving homes, things will be sacrificed and people will be forced to get a second and third job to maintain their current living standards. This is how we create an underclass in Australia, and it is happening at a time of growing inequality. In 1985 the minimum wage was 68 per cent of the average male weekly earnings. Today that has dropped to 42 per cent. Housing prices are going up, the cost of living is not getting any cheaper and insecurity of work is growing.

I think it is useful for us to take a moment just to think about why we have penalty rates. Penalty rates exist because they make up for things that are otherwise sacrificed during the week. They also make up for a lower base rate of pay. By sacrificing things on the weekend, we are talking about family occasions, going to the football, going to weddings — things that we all like to participate in. The weekends, we say, are still special.

There is an argument that has been put out there by large business and the business lobby that this will create more and more jobs if we cut these people’s pay, and we fundamentally reject that. We know that employers do
not put on extra people because they are just angels; they put on extra people when the demand requires it. It is consumer demand that would require extra staff going on, be it in the production of goods or the delivery of services. We think that reducing the spending power of 700 000 Australians may have the opposite effect rather than creating jobs.

Malcolm Turnbull had an opportunity to intervene in this case, and he still does. There is a bill before the Parliament, before the Senate, that passed the Senate, that had all the crossbench reverse their previous position on this to support legislation that would enshrine penalty rates. We think this is a good step forward. This is not just an issue that we are seeing in small businesses. This affects small and large hospitality businesses. George Calombaris would be the latest example of that.

Lastly, I think if people who are working in hospitality, retail or pharmacy were listening to this conversation, a lot of them would say, ‘Well, what we are actually talking about?’, because many of them do not receive penalty rates in the first place. Their wages are being stolen, the law is being broken and there is very little being done to enforce it.

I now would like to pass on to both Lisa and Keelia just to supplement.

Prof. HEAP — I would like to address you today on the issue of the impact of the decision and change to penalty rates on women workers in Victoria. Some of you may already be aware that, as an adjunct professor at the Australian Catholic University, I also am a parliamentary library fellow of this Parliament, which is very exciting. I produced a parliamentary library paper in August 2016, copies of which are available for you in case you have not seen it, on the issue of the position of women in the labour market in Victoria. That paper sets out the research project that we commenced in April of 2016, which is due to run for three years. It sets out what is happening for working women in Victoria. The position of working women as explored in our research is precarious in Victoria as in elsewhere within Australia, and that was before the contemplation of the current impact of the penalty rates decision.

Our research tells us that the position is precarious because women are experiencing high degrees of gendered violence at work, they are having difficulties managing work/caring transitions, pay inequality is a common feature for them and they are more likely to be employed in precarious or insecure work. The decision of the Fair Work Commission in relation to penalty rates adds to the question of insecurity and the gender pay gap for working women. I would like to talk to you, firstly, about the disproportionate impact on women from the decision and, secondly, because of the terms of reference of your inquiry, the inadequacies within the Fair Work Act and the potential areas for change. It is somewhat difficult to do this because we do not have our written submissions in front of you, but we intend to back up these oral submissions in writing.

Firstly, to the issue of the disproportionate impact on women, 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.

That data tells us something about the narrative that is currently running in some areas that this work, particularly for women in retail, is work that they do in order to have pin money to top up lively family budgets. That is not the truth. The evidence tells us in terms of research but also what we have been told in terms of the women that we are engaging with. The women we engage with tell us that they are required to work on weekends, particularly on Sundays, in order to meet household budgets for the necessities, not for luxuries, so their lack of penalty rates will have a significant impact on their ability to just make ends meet.

The other narrative which is common in some areas is that the women will be able to make up the lost hours and that this will not impact on their wages because they will be able to make up the lost hours. Of course, for working women that is hardly an answer. Obviously they are already indicating that they are having difficulties in managing work/care transitions, so additional working hours, particularly to get the same amount of money, is just not a reasonable position to put forward.

Some research from Jim Stanford suggests that in order to make up the decline in Sunday wages from 200 per cent to 150 per cent a worker will have to increase their hours by about 33 per cent in order to make up the loss of wages. This is just not something that is sustainable for the women we are working with, who are mainly telling us that they work particularly on Sundays because that is when they have family and caring
responsibilities for young children and also because they can maximise their wage in low-paid areas through adding the penalty rate to their 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 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.

Penalty rates for these women are decreasing in this area at the same time as social welfare benefits are declining by cuts from the commonwealth government to social welfare benefits. This is a major double impact for women at this time, and they are telling us that it is going to cause major stress for them. For them, the issue is really problematic. They cannot afford to not have the penalty rates, so what they are telling us is that they will have to actually leave and seek employment elsewhere. Then they will meet the difficulties of trying to get flexible work in a labour market that does not want to recognise their caring responsibilities.

The decrease is going to have a disproportionate impact on women. It will increase the gender pay gap. The Fair Work Commission failed, we believe, to adequately take this into account in its decision-making. When you read through the decision of the Fair Work Commission, it notes in a number of areas the potential impact on working women. It actually goes through the fact that any reduction in Sunday penalty rates and awards would apply and may impact adversely on the gender pay gap, but it failed to take that into account as a principal consideration in its decision-making, even when it had the evidence before it. This leads us to a view that there are inadequacies both in the way the tribunal was handling the issue of equal pay and also in the construction of the act.

The act itself: the Fair Work Commission’s decision describes the question of the impact on the women and the gender pay gap as one of the considerations that it should take into account, amongst many others. We believe that this should be altered to include an explicit objective of the Fair Work Act that in considering reviews of awards or other decision-making parameters of the Fair Work Commission it must take into account the issue of equal pay and the impact of decision-making on the position of women in the labour market. If it can make the decision that it made within the current parameters, then clearly the current parameters are inadequate in that area, so we would make recommendations to have an explicit objective of the Fair Work Act include a positive duty when making or varying awards that the impact on women and equal pay needs to be taken into account.

Secondly, the decision-making of the commission in relation to the way it treated the question of work for equal or comparable value by concluding that because it affected men in the same industry as women was fundamentally flawed in international jurisprudence when we look at the consideration of equal and comparable worth. Clearly we need to put more specific parameters within the act around how the commission needs to deal with that if that is how they view comparable worth, which is completely inadequate. 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.

Also we believe that the actual language of the decision-making, the use of terms distinguishing between ‘career’ and ‘non-career’ work and the way that it actually dismissed the arguments around the impact on women indicate that the tribunal is gendered in the way it is handling matters and there clearly needs to be parameters put in place.

The CHAIR — I will just get you to wind up quickly if you could.

Prof. HEAP — Clearly there needs to be parameters put in place to ensure some expertise is brought into the tribunal in this area. I will hand over to Keelia.

Ms FITZPATRICK — Thank you.

The CHAIR — If you could keep your comments short, that would be appreciated.
Ms FITZPATRICK — Sure. I will commence by just sharing some quotes from young people who the Young Workers Centre has heard from about the impact they see this decision having on our lives. Ash, who is 20 and a retail worker, said:

The cut to penalty rates will make it harder to afford stuff like textbooks that are required for my studies. Those textbooks cost upwards of $300 every semester, so the extra money from weekends and public holidays is really useful in being able to afford those. With hours being so tight in retail, without penalty rates I know I would struggle financially.

Claire, who is 23 and a hospitality worker, said:

I am saving almost all of my money to buy a house right now. All the leftover goes on petrol, bills and food. The cut to penalty rates will mean my income will suffer massively. Working weekends and nights is really isolating me from my friends and family, but I do it so I can get into my own home faster.

And finally Cory, who is 20 and also a retail worker, said:

The cut to penalty rates would mean I would have to work more, which means either less study or getting rid of the one day off I have a week, which would have an effect on my mental health.

I would just like to make a few more comments about the themes that Luke touched on, about general non-compliance in the industries that are affected by this cut. So once the decision was announced, the number one thing that we heard from young people was, ‘I was not getting penalty rates anyway’. So it will not come as a surprise to members, I am sure, and Luke highlighted some of the examples of widespread non-compliance in sectors such as retail, hospitality and fast food that have been uncovered in the last 18 months. These are the industries where young people aged 15 to 24 are employed in the highest numbers.

What we find in these industries is that, rather than the award being complied with, employers tend to pay a flat rate, and I should say that there are no enterprise agreements in place in these workplaces. For these young people, they are usually paid a take it or leave it flat rate of $14 to $23 per hour depending on the type of employer. Particularly in hospitality, if an employer is offering more than the minimum wage of $17.70 an hour across hours of work, it is considered a pretty good deal that a young hospo worker would be likely to take.

The CHAIR — If I could just get you to wind up now.

Ms FITZPATRICK — Sure. I will just put a caveat on that comment and make the point that there is a racial overlay to this issue as well. For many migrant workers and international students this flat rate — the going flat rate that I have mentioned — is more likely to be between $10 and $14 an hour, and in the young workers centre in the legal centre that we have we have heard as low as $5 per hour.

The CHAIR — Thank you very much, each of you, for your submissions. I will start the questioning, if you do not mind, and ask you to start off with whether in your experience, in the conversations you are having, your affiliates and the workers they represent are concerned that these cuts may be extended to other industries, and talk around that concern.

Mr HILAKARI — I might start. They are completely concerned about this. What we have seen is where there has been a reduction or a take-up of a change, it quickly becomes more than just a single industry standard. What we know is that Fair Work has also asked for additional submissions when it comes to restaurants. They have asked for additional submissions when it comes to hairdressers. That is just the tip of the iceberg for us. 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? We fundamentally think that everyone should have that, because that is a right that they have earned over a long period of time, that they have fought for and gained.

Prof. HEAP — Just to add to that, I think from the people I am dealing with, both the affiliates of Trades Hall and the women themselves, are really concerned about what this means for feminised industries and how we are actually going to make any headway in closing the gender pay gap. If this is the narrative that is going through, that there are types of work that can be treated in this way — and it tends to be in those feminised industries — then closing the gap does not seem to be even an ideal anymore for them. That is a very concerning matter.
The CHAIR — By way of a supplementary, are you being contacted by individuals, either within these affected industries or those concerned that it will impact on them, who are relaying to you their concerns about what this pay cut means for them? Are you feeling that concern on an individual level?

Ms FITZPATRICK — Yes. As I said, a lot of the young people that we assist in the young workers centre are not getting the penalty rates to begin with, but the way in which this topic has dominated public discourse has made people check their pay slips, start thinking about the agreement or award that they are covered by and whether their employer is actually doing the right thing. So we have had an increase in queries about pay rates rather than penalty rates themselves.

Prof. HEAP — Also, in terms of women, the conversation is largely about trying to reorganise lives because, as I said before, the narrative that we are getting from most women is not that they can stay in the work if the penalty rate is there, but they will actually have to find other work that will pay them a higher rate because of the need for the family budget, the household budget.

Mr HILAKARI — The equivalent of the cut would be having to work an extra 26 days a year if you worked every Sunday. Now imagine you trying to find an extra 26 days in your busy schedule or imagine what it is like for a person who is juggling a family who is already on such a low pay.

The CHAIR — Twenty-six days? Wow.

Mr CLARK — Could you tell us what Trades Hall Council’s policy is about enterprise bargaining agreements negotiating reductions or elimination of penalty rates?

Mr HILAKARI — I think what you might be hinting at is for me to talk about the SDA agreement.

Mr CLARK — You are welcome to talk about that, but I am just asking more generally in terms of EBAs and policy on these things.

Mr HILAKARI — We support the democratic processes in which unions can make their decisions on a workplace by enterprise level about what that agreement looks like. Various workplaces do have a rolled-up rate. We have got some industrial language, but, for everybody else, a ‘rolled-up rate’ is that there will be an increase to the base rate but there may be a reduction to — it could be nightly rates or it could be weekend rates. That has happened from time to time where a workforce has made a decision to lend that way. What that can tend to mean is that people who are working more on sort of that 9–5 basis, their rates will be lifted up but it may be there will be a reduction in some weekend rates.

We support the democratic processes of unions to make that decision, as they will have a collective vote. This is quite separate to what we have seen happen in this Fair Work decision. There was no negotiation here. There was no trade-off. There was no bargain. It was just a plain old decision to cut the pay, which we just think is abhorrent.

Mr CLARK — To follow on from that, is your concern about the differential between ordinary time and the rates that apply out of hours or is it concern about the overall package of take-home pay that workers get?

Mr HILAKARI — I think it would be both for us. We are concerned about the overall take-home package. I sort of touched on a bit earlier how that pay gap is starting to creep away. That is a huge concern, but we are also concerned about, particularly in these industries, people who are looking to work on those weekends. They are trying to make up for a very small weekly pay. They are looking to make up for what the Monday to Friday pay is, and it is the weekend that gets them by. So the answer to the question is we are concerned about both.

Prof. HEAP — Can I supplement that by just saying that overwhelmingly in the feminised industries women are award reliant and there is not a lot of bargaining that goes on. I think that is a really important point not to lose in this, because if the award base is reducing, that is not the minimum for these women workers — it is the minimum and the maximum. That is a really important aspect I think everyone, particularly the decision-makers, fails to take account of in reducing the base and the impact on those feminised industries that are award reliant.

Ms BLANDTHORN — It was good to hear in your comments, and I think it has been common in the debate around this issue, the impact on young workers. But I was particularly interested, Professor, in your
comments in relation to older women and the impact on them, because I think often what happens when people think about the retail and hospitality industries in particular is they think about the young people who work in those industries. There is no doubt that there are significant impacts from this decision on those people, particularly people who are trying to study and live independently. But I am concerned that a voice that is being left out of this discussion is that of those older women who are often, as I think you picked up, sole parents as well, who are roughly earning, from memory, about $30 000-odd a year and trying to meet the increasing cost of living. Do you have indications, or perhaps it is something that you can provide us in your written submission as well, about how big those numbers are and what the impacts on that cohort in particular are?

**Prof. HEAP** — There is some research from a report in 2014 that we will certainly be relying on in our written submissions to you and which we can make you aware of around the fact that you exactly pointed out — that there are large numbers of women, as you explained, who are on those household incomes of $30 000 and who are award reliant. I suspect that the decision has prompted a whole range of new research that is coming through the pipeline, hopefully in time for your inquiry, so we will be doing a bit of a literature search to include those figures in our submission as well.

But overwhelmingly what is coming through is that there are two major narratives that are being put out there. One is that it is happening to young people who are transitioning from university and it is okay for them to earn less because that is just what everyone does, but that is not the right narrative either because that is not the experience of every one of those young people — some of them are reliant on this money just to get by. Secondly, the other narrative that I alluded to which is the one that it is just all pin money for women who are just topping up the family budget, and the evidence just demonstrates that is not true, that those who are reliant on penalty rates are more likely to be reliant on them to actually meet the necessities in their household budget.

**Mr HILAKARI** — You would be perfectly describing one of my former delegates, Margarita. She works in a local hotel. She is a housekeeper there; she flips the beds to get the hotel ready — 8 to 12 minutes per room to clean. She is on $30 000 a year; she will get somewhere close to a $4000 cut. She is not sure how she is going to make that money up. For housekeepers, it is the second most dangerous industry to be working in because of the injuries that people have to their backs, because flipping those beds is not an easy task to do. She is a single mum; she is going to struggle. What does she do? She physically cannot work more hours, so is she going to leave the industry she has been in for the entire time that she has been in Australia? She does not know.

**Ms BLANDTHORN** — I guess by way of supplementary the other thing I would be interested in your comment on is the extent to which we are almost pitting one cohort of middle-aged female workers against another. If you take nurses, for example — no-one is questioning that we should not pay nurses penalty rates; in fact I think the Leader of the Opposition said that himself — but if we are going to continue to pay women who are perhaps nurses penalty rates and at the same time say that the value of work and therefore the value of the person is perhaps different when it comes to the person who is making the beds in the hotels or serving people in shops — —

**Mr HILAKARI** — It does not say much of us as a community if that is the type of value that we place on people who are doing the work that we desperately want and need them to do.

**Ms RYALL** — I am finding this a little bit hard because we actually do not have anything hard and fast at this point in time.

**Mr HILAKARI** — Yes, I know.

**Ms RYALL** — Everything is up in the air, so a lot of this is circumstantial in the sense that we do not know exactly what the outcome will be. Given the negotiation of rates down in many circumstances with many organisations, and I allude to Bunnings, which was raised by the member for Essendon in Parliament not so long ago, and there is KFC and other organisations, and also, my understanding is, with the involvement of people like Bill Shorten and the AWU and Cesar Melhem in those negotiations, how has that impacted the people that you are talking about?

**Mr HILAKARI** — I do not think this is the impact that we are sort of talking about. The discussions that we have been having are around how does an institution like Fair Work make a decision that is just a straight-up cut with no benefit at the other end. This is not a bargain. This has not been an opportunity for the workers to come in and have a collective say or a vote over these conditions. This is just a straight up and down cut. What we say
about that is that the rules should not be written like that. If this was an AFL football match and we thought that the decisions being made are consistently wrong, we would then change the rules. That is what we think about this.

Ms RYALL — In that instance, what is to prevent your EBAs, and I am just thinking —

The CHAIR — I just remind the member about the terms of reference as well, what our actual focus is.

Ms RYALL — in relation to the EBAs, what is there to stop you, in relation to the terms of reference, Chair, negotiating arrangements similar to what has happened previously under the people that I have mentioned in this instance?

Mr HILAKARI — Do you want to talk about the BOOT test?

Prof. HEAP — Yes. Currently we have a system that says if you bargain, you have to come to an arrangement where people are better off overall. Clearly these agreements that you are referring to or that have been in the media have been through that process. Whether that is something that needs to be unpacked as well in terms of looking at whether that better off overall test has been interpreted correctly by the same tribunal that we have a concern with is something that needs to be addressed. But there is a system whereby there is a check and balance. The arrangement is done. It is meant to be checked off. It is meant to be a rigorous check that goes through. We need to now clarify those checks and we need to look at the test. Obviously that better off overall standard and the way the commission has interpreted it in the past is under scrutiny. There have been decisions of higher courts that are now unpacking that thinking — —

Ms RYALL — It is more about you at union level. What is to stop you negotiating EBAs, if this goes through as stated — a big if — what is not to stop you going through at EBA level with the relevant industry, such as hospitality, to correct that imbalance that you are suggesting?

Prof. HEAP — Can I just reinforce that the majority of the people I am dealing with, particularly the women in the retail area, are not covered by EBAs. That is one of their complaints we have had about the gender pay gap in this country — that a system that relies on enterprise bargaining has not delivered for working women the wage increases that we will see. That is a real problem with the system. Any idea that we could make up these gains through bargaining just will not work for the women that I am working with because they are not getting bargains anyway.

Secondly, the way the system works is that if you lower the floor down, then you are bargaining against a floor that has gone down. The employers have been given another upper hand in that system in terms of loading up power. They have been given a lower base rate to work with, so the idea that you are going to expend all your bargaining power to get up to what you used to have means that you are not going to make any advancements. Given that we have got a problem already with the falling and declining wage growth in this country, that is not a system that anyone needs to be going near where we are going to have negative wage growth effectively, because we are actually going to be bargaining only to get what we used to have.

Mr HILAKARI — For workers who want to be on EBAs, they have been fantastic things for Australian workers. You do not want to be on the award. If you look at something like the Coles agreement, the average worker on there is $100 a week better off. EBAs have been fantastic things, and we proudly do that work because collectively that is how we make our advancements.

The CHAIR — Thank you very much. The comments around the impact of EBA negotiations were interesting.

Mr J. BULL — Keelia, Luke and Lisa, thank you for being here today and for presenting to the committee. You briefly touched on impacts on rural and regional Victorians. Sunbury, my electorate, could be considered peri-urban, if you like, or peri-rural. In these types of communities, and certainly right across Victoria, we know that there is a whole range of disadvantages that are faced in terms of transport, access to jobs and the like. I just wanted you to outline more on those social impacts for people in both the regions and in rural Victoria.

Ms FITZPATRICK — I think the types of Victorian communities that you are describing often involve a lot of small businesses, a lot of family-run businesses, that are often reliant on the minimum framework and the Fair Work ombudsman to guide how they run the IR/employment components of their business. Again, as Lisa
just spoke about, lowering the floor lowers the take-home pay and the conditions of regional Victorians in a way that affects them disproportionately.

I also might take this opportunity to talk about the ombudsman, because there has been a lot of discussion about the Fair Work Commission, who obviously made this decision, but for award-reliant workers or workers that do not have an agreement in their workplace the key government body that they deal with for their employment law rights is the ombudsman. I just wanted to comment quickly — and it might be of interest to this committee because of the terms of reference — that the approach that the ombudsman takes to compliance is one of deterrence. What this means is that the ombudsman assumes their enforcement activities will have broader ripple effects. So a business will see the ombudsman taking another through an enforceable undertaking process or through litigation and it is assumed that that other employer will see the ombudsman taking that action and be deterred from underpaying their own staff, for example.

I wanted to point the committee to research that has just come out of the University of Melbourne — Hardy and Howe from the centre for employment and industrial relations in the law school at Melbourne University. They have found that this approach adopted by the ombudsman of strategic compliance through deterrence — the exact opposite is happening in Australia. Those that participated in this study conducted by the law school found that those who had greater knowledge of ombudsman enforcement methods are less likely to think that they will get caught. So the Fair Work ombudsman strategy is having a counterintuitive approach.

Mr HILAKARI — And you would think that would be right. I think in the last annual report they did 50 prosecutions — 800 staff. If you think of someone not paying their wages deliberately avoiding the law, for them it is the best interest-free loan they have ever had, because they only have to pay that amount of money when they get busted. In an industry where you have 50 per cent turnover of staff, half the staff are already out the door before they get exposed, but they very rarely get exposed. So this is money that they have stolen and they are just banking. When they do get exposed and the Fair Work ombudsman does step in, penalties rarely, rarely get given. All they have to do is pay that money forward. The worker does not get that interest made up and the worker does not get a bonus for being ripped off. That employer does not get penalised significantly for doing any of this.

If you think about how the system has been framed, there is no stick. There being no stick in place incentivises bad employers to rip workers off. If we walked down Chinatown right now — if you just go down to Little Bourke Street — I promise you every second employer down there will be defrauding their workers. They will be stealing wages, and there is no cop on the beat that will do something about it.

Ms FITZPATRICK — If I can just add one more thing, Josh, I wanted to bring up the ombudsman because I think young Victorians in regional areas will be more reliant on the ombudsman to enforce their rights. That is a fact because they are smaller businesses who will tend to be award reliant. The way that the ombudsman carries out compliance is really important, and I am not convinced that the ombudsman is putting adequate resources into regional areas. It is a fact that young workers and regional Victoria come under the same grouping in Fair Work, so we are putting young people and regional Australians together in the one package, which will give you some insight as to how the ombudsman’s resources are being allocated.

Prof. HEAP — Just to specifically answer your question as well from a research point of view, the has done some data on modelling the regional impact of the loss of penalty rates, so it is worthwhile having a look at the McKell Institute’s data there. I just remind you that that 2014 study, which came out of the Centre for Work + Life at the University of South Australia, did indicate that there is a disproportionate number of people relying on penalty rates in regional and rural Australia.

Mr J. BULL — Thank you. You managed to answer my supplementary as well.

Mr HIBBINS — I just want to clarify some of your comments in regard to EBAs. There are thousands of workers who would actually be better off under the award rather than an EBA, and I am referring to fast-food workers, particularly at McDonald’s, KFC and Hungry Jack’s, who have had their penalty rates effectively abolished. I would just like to clarify your position. Surely Trades Hall is opposed to those EBAs, and surely the effects, particularly on young workers, would be informing your campaign against penalty rates?

Mr HILAKARI — What we are seeing is the Fair Work Commission — —
The CHAIR — I do not think we are here to be commenting on specific EBAs. I will again draw the member to the terms of reference.

Mr CLARK — On a point of order, Chair, certainly it is relevant to examine particular EBAs and how they work, as well as particular awards.

The CHAIR — In response to that, I draw the member’s attention to what the terms of reference state. If you go to those terms of reference, it is an inquiry into the economic and social impact and the cost of the Fair Work Commission’s recent decision into the cut to penalty rates. We need to focus on that decision.

Ms RYALL — In supporting that point of order on the decision to shut down that debate, it might actually draw a comparison to see how that very much relates to the Fair Work Commission’s decision, which is absolutely in order I would suggest. Otherwise you are gagging debate to only produce information that you are willing to hear. The member for Prahran, I would suggest, is absolutely in order.

The CHAIR — I will allow the member for Prahran to recast that question, so it is relevant.

Mr HIBBINS — On the point of order, I would just point out that under the terms of reference (a)(vii), it states:

workers who may be indirectly affected as they experience the flow on effects of this decision in their enterprise bargaining …

We are in an environment where there is one EBA, the Coles EBA, that has now been struck down by the Fair Work Commission. There is now a likelihood that future EBAs across a range of industries will not be able to take the same approach to penalty rates. Those workers will then be, I guess, bargaining on the pretext that their penalty rates will be in sync with the award, which is set to be reduced. So I think it is entirely in line with the terms of reference.

Ms BLANDTHORN — On the point of order, the terms of reference clearly go to the decision of the Fair Work Commission in relation to penalty rates. The member for Prahran asked a specific question about whether the Trades Hall Council do or do not support particular enterprise agreements without drawing the link between those enterprise agreements and the recent decision in relation to penalty rates. And his supplementary comments still do not draw the link between the agreements that he has raised and the decision in relation to penalty rates as opposed to any other decisions of the Fair Work Commission.

Mr HIBBINS — In my question I did ask about the effect that those EBAs have had on young people — how that was impacting or whether that was informing their stance and their position on penalty rates.

Ms FITZPATRICK — I am happy to comment and give a general point of clarification: that the Young Workers Centre and Trades Hall supports strongly the vigorous application of the BOOT test so that workers are going to be better off overall. Something the Young Workers Centre is seeing frequently is something called zombie agreements, so WorkChoices-era agreements that have not been terminated, so continue to live on today. The core problem that we have with those agreements for the workers that they cover is that WorkChoices-era agreements were not subject to a BOOT test. So it is incredibly unfair that workers who are teenagers and in their early 20s today are working under agreements that were not subject to that test. I think it is Trades Hall’s view that every worker in this country covered by an agreement should feel safe that the agreement that they are working under has been scrutinised fully by the commission.

Mr HIBBINS — A supplementary question: I wonder whether you are aware of a private members bill introduced by Adam Bandt in the federal Parliament, the Fair Work Amendment (Pay Protection) Bill 2016, which closes the loophole in the Fair Work Act so wages under EBAs cannot fall below full rates of pay, which includes penalty rates, which would mean the thousands of workers who are now being paid less than the award would be paid no less than the legal minimum. Do you support this legislation?

Mr HILAKARI — I would have to see the full legislation.

Mr HIBBINS — So you are not aware of the legislation?

Mr HILAKARI — No. I have not read the full legislation.
Ms SULEYMAN — Thank you very much for your presentation. For someone who is representing an electorate like St Albans in the west, a very low socio-economic area with a lot of challenges, your presentation touched on single parents, in particular those who would be receiving a social welfare payment, and the decline from the commonwealth. We have seen cuts in payments to so many vital areas and then the penalty rates as well. Can you just explain a little bit more the chain reaction for single parents in particular and women that would be affected by both of these areas declining?

Prof. HEAP — Yes. So at the moment the comments are anecdotal. They arise from the conversations that we are having as opposed to being research based because we are not there yet. But as I tried to explore, the impact is largely about the fact that there is no choice but to seek other employment, whether that be to take their employment elsewhere completely or whether to seek out another way of earning some more money to top up the loss. So that is the biggest stress that is occurring for these women, that decision. ‘Will I seek to go somewhere else completely in an environment’ — where there is the question about: will this happen in other industries — ‘where I am likely to get work?’ versus, ‘Will I just take on another job to try and make the difference up?’ So it is a real difference, and a difference that is going to make the difference as in feeding the children, shoes for the children and those sorts of things. There is that thing about how is that gap in income going to be made up.

The idea that it could be made up by working more hours for the same amount of money is really problematic when you look at the expenses of child care and other caring arrangements — any increasing hours or different hours come with a cost associated with child care as well. 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.

Ms SULEYMAN — Just a supplementary. You spoke about the non-compliance at the moment and that there has been an overwhelming amount of response that there are so many employees that have not been paid penalty rates as it is, just flat rates. How can governments — whether it is federal — protect workers so that there can be compliance?

Ms FITZPATRICK — I kind of touched on this before, that we think that there needs to be a more proactive investigation-driven enforcement model rather than the orthodox deterrent strategy that the ombudsman is currently using, and we think the proactive investigation-driven approach needs to be focusing on low-wage industries rather than the model of just reacting to complaints only. Currently to get the ombudsman to look into a workplace where a worker calls and talks about not getting payslips or getting paid below award rates, the ombudsman will actually need to hear from multiple workers until they are in a position to do anything about it. We think that is problematic. We think there need to be stronger penalties for violations. As Luke mentioned before, the penalties as they currently exist are simply not high enough to deter a business from giving it a go. I also think that the use of compliance deeds and enforceable undertakings as they are currently used by the ombudsman needs to be interrogated as to whether it is effectively protecting vulnerable workers.

Mr HILAKARI — There should be tighter regulations in this country about if you are or are not allowed to engage another human being. If you want to rent a car, you have to give over your drivers licence and fill out 30 different forms and sign your life away and pay fees, and the whole kit and caboodle. If you want to hire a human, there is none of that. And if you get exposed for doing the wrong thing while hiring a human, you can still go on and run businesses. That needs to change. Where we have found that people are ripping off other human beings, there should be laws around that. You guys, I hope, will make some comment in that direction, but the federal government needs to make changes. We think the current system of work is broken, the definition of what is an employee is broken, and with the rise in or the changing of the digital nature of our economy, that will only get worse.

The CHAIR — Thank you. In the couple of minutes we have left, I noticed that you touched on some initial comments around the claims about job creation, and we know that is one of the main points put forward by those advocating for a cut to penalty rates. I am just wondering whether you want to go into any more detail about the evidence that you have encountered or the work you have done around that claim and that goes to its
veracity around the potential for these cuts to create more jobs or to create more hours or more employment — variations on the theme?

**Mr HILAKARI** — I might start, and then you can finish.

**Prof. HEAP** — Yes.

**Mr HILAKARI** — We have got a wealth of experience here dealing with different businesses. Part of the privilege of being part of the union movement is that you get to see so many different employers and employees and how they work together. What we simply know is that the only case in which an employer puts on another employee is when demand demands it — ‘I need someone else to serve at that counter because the queue is too long’; ‘I need someone in the factory to make an extra good because the demand is so high’. That only happens because of growth in consumption. That is consumer demand at its very best. When you take this much money out of the economy, out of the hands of people who do not save this money — their wages are so low that that money goes straight into the essentials. It is paying for the rent, it is paying the mortgage, it is paying for the fruit and veg, it pays for the rest of the groceries and it pays for the fuel and a couple of luxuries if they are lucky. The luxuries drop off — they are the first things to go — and that is money that is going to be stripped away from small and large businesses across the country. That is revenue they would have otherwise received. This is a terrible short-term mistake if you want to grow jobs in this country.

When you think about these jobs, having to find an extra 26 days a year to make up if you work on a Sunday, that is not creating new jobs; that is just people competing for those jobs. We have got 750 000 people in this country who are unemployed. We have got over a million people who are underemployed. This will not solve problems; this is creating more problems.

**Prof. HEAP** — This is one of the most frustrating things, from my point of view, about the commission’s decision, because it was clear in the Productivity Commission report on the issue of penalty rates, which has driven some of this, and also from the evidence before the commission itself and in the decision of the commission itself that it could not make that causal link based on all of the evidence either. The strongest it got to was it may — it may — do something around employment. For me the frustration is, faced with the fact that there has been no ability to demonstrate that causal link in all of these inquiries and then reducing predominantly women’s wages, that the commission chose — against the evidence and without reliable evidence — to make that decision. That is one of the reasons why we are saying we need to change the system, because if the tribunal, without any evidence about that so-called economic benefit — and even itself accepting that it has not got the evidence to do that — can still make that choice, that is a real problem for us in terms of the way they are valuing this work and the way they are valuing these workers.

**The CHAIR** — Great. Thank you very much for your time in presenting to us today. We will close the submission there.

**Mr HILAKARI** — Thank you to the committee.

**The CHAIR** — We would like to circulate copies of the report that you referred to, and we can do so.

**Witnesses withdrew.**