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## **WORKING PAPER SERIES**

Workplace 'Bargaining' and the  
Wages/Working Time Nexus –  
Who Benefits?

Elsa Underhill  
Santina Bertone  
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# WORKPLACE 'BARGAINING' AND THE WAGES/WORKING TIME NEXUS - WHO BENEFITS?

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## **Abstract**

*The impact of deregulation on dispersion of earnings in Victoria has been acknowledged in the findings of the recent task force enquiry into Industrial Relations in Victoria. This paper argues that the link between hours worked and rates of pay has played a significant, and understated, role in the increased dispersion of earnings evident in aggregate wages data. Drawing upon detailed analysis of hours and wages evident in Victorian agreements, data is presented on declining take-home pay flowing from hours worked coupled with loss of penalty rates. This, we argue, is attributable to the lack of substantive and procedural protections available to Victorian workers under Schedule 1A of the Workplace Relations Act, and formerly under the Victorian Employee Relations Act, 1992. We contrast these findings with collective agreements trading off penalty rates certified by the Australian Industrial Relations Commission, and Australian Workplace Agreements approved by the Office of the Employment Advocate and the Commission. We conclude by suggesting there is a scale of fair outcomes attached to the wages/hours trade-off, directly attributable to the various institutional mechanisms now influencing Australian wage determination.*

## 1. Introduction

Employment regulation in Australia has undergone major changes over the past one and a half decades. From a highly centralised and reasonably homogeneous system, changes at the federal and state levels have resulted in significant decentralisation, individualisation and diversity of bargaining and outcomes. This has not, as some would suggest, led to deregulation – in fact, the volume and complexity of regulation appears to be greater than ever. Rather, as Buchanan and Callus (1993) have pointed out, the locus of regulation has shifted significantly away from external parties (such as unions, employer associations and tribunals) to internal rule making within enterprises themselves, with or without union involvement.

We argue this change has major implications for power and control over the wage/effort bargain and, in particular, for control over working hours and the wages paid for these hours. In this, we echo the sentiments of Flanders, as quoted in Buchanan and Callus, that external regulation arose to protect workers from ‘the devastating and degrading effects of unregulated labour markets’ and to keep ‘the conflict between unions and employers within reasonable bounds’ (Flanders, 1965: 15-18, quoted in Buchanan & Callus, 1993: 519). If industrial relations is ‘a study of the institutions of job regulation’ (Flanders, 1965: 10 in Buchanan & Callus, 1993: 519) then it is relevant to study how changes in regulation, with consequent shifts in the locus of power, affect the livelihoods of workers affected by such changes.

It has long been acknowledged that the results of workplace bargaining rely generally on the relative bargaining power of the parties. Those parties with the greatest bargaining power are in the best position to achieve their desired bargaining goals, irrespective of how equitable or even productive they may be. The consequences of this imbalance are most profound in circumstances where workers are confronted with individual ‘bargaining’ over their employment relationship, with minimal legislative standards to place a floor under so-called ‘bargaining’ and provide for procedural fairness in ‘bargaining’. This, we suggest, has been the case for many Victorian workers during the 1990s.

However, the shift in bargaining power is not unique to Victoria. Research by Campling and Gollan (1999), based on the Australian Workplace Industrial Relations Survey, found that workers in non-unionised workplaces were far less likely to play a role in workplace bargaining than their unionised counterparts, whether this be through formal (e.g. voting) or informal methods (e.g. attendance at meetings). For example, only 27 per cent of survey respondents reported they had participated in a meeting of all employees, compared to 44 per cent of employees at union workplaces (Campling & Gollan, 1999: 57). From case studies conducted by the authors in lightly unionised and non-union workplaces, it was found that, where bargaining did occur, it was generally initiated and sustained by management (1999: 63). In non-union workplaces, it would appear that agreements between workers and employers regarding working hours and pay were more a case of employers setting the terms and workers accepting them rather than the outcome of deliberative bargaining in which both sides fully participated.

Penalty rates, the additional payment for hours worked at night, on weekends, public holidays and on shifts, have often been an easy target for reduction under decentralised wage determination. In their examination of more than 2000 New Zealand employment contracts, Hammond and Harbridge (1995) found that nearly half the contracts contained no provision for penalty rates, with women workers being less likely to receive penalty rates than men. Penalty rates continued to prevail in unionised and male-dominated sectors such as manufacturing, energy and finance, but where workers' bargaining power was weaker, such as in restaurants and hotels, penalty rates had been almost completely abolished. Even in the male dominated sectors of construction and manufacturing, penalty rates were often cut (1995: 369-70).

In this paper, we examine the outcomes of workplace bargaining with respect to the reduction or elimination of penalty rates and overtime premiums for workers in significantly weak bargaining positions. A common constraint of studies assessing the impact of decentralised wage determination processes has been the inability to establish actual wage outcomes relative to hours worked when penalty rates are rolled into the base rate of pay for employees working non-standard hours (Van Barneveld & Arsovska, 2001). We overcome this constraint by using a software application, *Better or Worse Off?*, developed by the Workplace Studies Centre at Victoria University, to assess take-home pay outcomes under varying hourly wage settings and work rosters. We focus primarily on Victorian workers facing individual 'bargaining' and contrast their outcomes with workers bargaining under the protection of the federal industrial relations system. Our findings suggest that, in Victoria, notwithstanding 'agreements' that appeared to provide increased wages, the take-home pay of workers was often significantly reduced. This typically resulted from working time patterns which included non-standard working hours for which penalty rates were abolished.

Have workers fared better under the federal industrial relations system? In the federal sphere, agreements can be reached at an individual level through Australian Workplace Agreements (AWAs), and collectively with and without unions. Minimum legislative standards are provided through the 'No Disadvantage Test' (NDT) and procedural fairness is supported to varying degrees through legislative requirements relating to 'genuinely consenting' to agreements (Ross and Trew, 1998) and union involvement in the bargaining process. We examine the first of these protections – the application of the NDT – to assess the extent to which the imbalance of bargaining power evident in outcomes under Victorian agreements is offset through external regulation in the federal sphere.

This paper has five parts. In part two we describe changes to the Victorian industrial relations system in the 1990s and provide an overview of outcomes under the Victorian system. We then analyse a sample of Victorian agreements and estimate the impact on take-home pay of the elimination of penalty rates in conjunction with changes to base rates of pay. The Victorian government established a Victorian Industrial Relations Taskforce in 2000 to investigate the social and economic effects arising from the abolition of Victorian awards (Taskforce, 2000a: 7). The taskforce drew upon workers' personal accounts of working under an individualised wage determination system, and we include excerpts from those accounts to illustrate the impact of the Victorian wages system upon individuals' working lives. In part three, we describe the processes

adopted by the Australian Industrial Relations Commission (AIRC) to assess whether agreements have met the NDT when those agreements involve the elimination of penalty rates coupled with the loading of base rates of pay. For this, we draw upon a number of cases concerning union and non-union agreements certified under Section 170LJ and Section 170LK of the Workplace Relations Act 1996. This examination is not exhaustive. Rather, it is intended to illustrate factors influencing wage outcomes under the federal industrial relations system when the work/effort nexus is challenged by trading penalty rates for increased base rates of pay. Part four examines the approach of the Office of the Employment Advocate (OEA) towards AWAs which replace penalty rates with a standard base rate of pay. We note the ways in which the OEA have encouraged employers to develop AWAs which eliminate penalty rates and question the adequacy of information provided by the OEA to employers who choose that path. We also note the circumstances under which AWAs with reduced rates of pay have been approved by the AIRC. In the final section, we draw together the preceding discussion and analysis and shed some light on the way that shifts in the locus of power at the workplace have operated to reduce workers' take-home pay and quality of work life. Our hypothesis is that the potential losses in take-home pay are sizeable in any arrangement where centralised, external regulation has been significantly reduced and that the extent of such losses will be highly dependent upon both minimum standards underpinning bargaining and the extent of external vetting of bargaining outcomes.

## **2. The impact of decentralised bargaining for Victorian workers under individual agreements**

Employment regulation in Victoria underwent substantial change during the 1990s. First, the Victorian government introduced the Employee Relations Act 1992, under which state awards were abolished and a limited safety net of minimum entitlements was established for all employees. These entitlements covered five issues: a base rate of pay equal to the rate in the relevant state award payable for up to 38 hours per week, 5 days cumulative sick leave per annum, 4 weeks annual leave (although not leave loading), unpaid maternity and paternity leave and notice of termination. All other employment conditions became subject to an individual or collective agreement made with the consent of an employer and employees. The Employee Relations (Amendment) Act 1994 further simplified wage levels by providing for industry sector minimum hourly wage rates, with 19 sectors and a small number of work classifications replacing the old state award rates and more than 12,000 work classifications.

In 1996, following a major exodus of employees from the state to the federal system of awards, the Victorian government referred its industrial relations powers to the federal government. The minimum standards established under the Employee Relations Act 1992 have since been regulated through Schedule 1A of the Workplace Relations Act 1996. These minima are a far cry from the 20 allowable matters included in awards under the Workplace Relations Act, being restricted to the five minimum standards formerly provided for under the Victorian Act. In 2000, concern over employment outcomes led to the newly elected Victorian Labor Government establishing an investigatory task force. The taskforce enquired into, inter alia, the nature and extent of any disadvantage incurred by Victorian Schedule 1A employees (Taskforce, 2000a: 26).

A major recommendation of the Taskforce was to establish a Fair Employment Tribunal to determine industry sector terms and conditions of employment applicable to all employees not covered by federal awards, federal certified agreements and AWAs. This would include the regulation of penalty rates, remuneration or compensation for overtime arrangements and recompense, time in lieu or substitution days for work undertaken on a public holiday (see further Zeitz, 2000). Legislation to support this recommendation was defeated in the Victorian parliamentary upper house in April 2001.

The impact of the changes introduced during the 1990s upon wage outcomes for workers covered by the Victorian 'industrial relations system' were initially difficult to assess. Agreements made under the Victorian Employee Relations Act were private and confidential, creating a major impediment to comprehensive analysis by researchers. Nevertheless, a number of small studies of Victorian agreements pointed to the loss of penalty rates and overtime rates as a significant contributor to declining terms and conditions of employment. Bell's study of approximately 100 Victorian agreements found penalty rates had been removed in 88 per cent of retail agreements and 75 per cent of hospitality and clerical services agreements. Overtime rates had been reduced or eliminated in a high proportion of cases, and the base rate of pay had been increased in only one-fifth of agreements (Bell, nd). Fox and Teicher (1994) found similar but less extreme results in their study of 30 collective agreements. In 11 agreements, salary consolidation included overtime and weekend penalties being rolled into a new base rate of pay. The Victorian Trades Hall Council analysed 75 agreements in its submission to the Senate Economics Committee enquiry into the Workplace Relations Bill. An increased spread of hours and corresponding reduction or abolition of overtime and penalty rates for night and weekend work was common (Harkness, 1996). Finally, Harkness' analysis of 15 agreements, mostly in the retail sector, found that working hours had been considerably deregulated, with no maximum or minimum number of hours applying in most agreements, and penalty rates were reduced or abolished in all agreements (Harkness, 1996; see also Bertone & Doughney, 1998).

A major study was commissioned by the Victorian Taskforce in 2000 on wage outcomes in 835 Victorian workplaces weighted to represent all workplaces (Watson, 2000). The study enabled a much fuller picture to be drawn of wage outcomes under the Victorian 'system' compared to wage outcomes in the more protected federal system. An estimated 33 per cent of the Victorian workforce, or 560,000 employees, were found to be covered by Schedule 1A of the Workplace Relations Act. At an aggregate level these employees had a higher average hourly rate of pay than their counterpart federal employees (nearly \$1 more per hour), but wage dispersion was much greater. Importantly, however, this average hourly wage rate was more likely to incorporate all former penalty rates and hours premiums. Overall, only one quarter of workplaces paid penalty rates for weekend work, while 40 per cent paid overtime rates, and employees working in the low wage sector (under \$10.50 per hour) were least likely to receive either of these rates. At the industry level, in the hospitality, recreation and services industries, just under 8 per cent of workplaces paid penalty rates and 19 per cent paid overtime rates. For the wholesale and retail industry, the figures were 28 and 65 per cent respectively. A direct comparison of the extent to which penalty and overtime rates are paid under federal agreements and awards is not possible. However,

Van Barneveld and Arsovska's (2001: 99) study of agreements on the ACIRRT Agreements Database and Monitor (ADAM) data base found that the elimination of penalty and overtime rates was relatively rare. Just under 7 per cent of union agreements and 6 per cent of non-union agreements had loaded penalty rates into a base rate of pay.

What do these outcomes mean for individual workers? In particular, what has been the impact of reduced and abolished penalty rates and overtime premiums on workers' take-home pay? The *Better or Worse Off?* model enables a micro-level analysis of the impact of these changes. The model incorporates an extensive list of variables affected by the shift away from penalty and overtime payments to a single base rate of pay for all hours worked. These include:

- basic hourly rate;
- basic hourly rate applicable on specified days (regarding cyclical rosters);
- Saturday rates (often more than one);
- Sunday rate (usually one);
- shift rates (often two, afternoon and night);
- shift rates on specified days and weekends;
- overtime rates for hours in excess of the standard week (often more than one);
- overtime rates (for work on specified days, weekends and shifts);
- casual loading;
- other loadings and allowances;
- other loadings and allowances on specified days, weekends, shifts and overtime;
- timing of pay increases in awards regarding starting dates of agreements;
- typical working patterns of most employees (working scenarios);
- working patterns of some employees that need to be accounted for;
- public holidays;
- annual leave loading;
- etc.

The 'etc.' is an implicit recognition of the specificity of some awards and agreements and the particular circumstances they are designed to meet. Simply said the range of variation may be immense. Awards have developed the ranges of conditions for particular reasons, which have been reflected in established standards of pay and conditions. These, in turn, are translated into living standards for employees and their families. Data on typical working time scenarios, established through industry consultations, are combined with the full range of hourly rates of pay (inclusive of penalties rates as appropriate) in order to determine the take-home pay before and after the changes to hourly rates of pay. A monetary value can then be placed upon the impact of reduced penalties upon individual employees' take-home pay. Analysis of non-wage entitlements is more complex, and the model incorporates an index to provide a qualitative assessment of changes to non-wage factors. These are not, however, included in the following analysis.

In order to assess the impact on take-home pay of changes to penalty rates and overtime premiums, we analysed a number of Victorian individual agreements which applied to Victorian employees during the 1990s. Forty-three agreements, drawn from a range of

industries were assessed. Disregarding non-wage entitlements (of which there were few), losses in take-home pay were observed in most cases. While the number of agreements analysed is quite small, several involved companies with multiple workplaces, suggesting the number of workers represented by these agreements is much greater than the number of agreements analysed.

Fifteen agreements were analysed in the retail industry, and comparisons were drawn for shop assistants based on two working hour patterns regarded by industry participants as typical. The first relates to working patterns of full-time employees: 27.4 standard hours, 7.6 Saturday hours, and 3 hours of overtime. The second is more typical of part-time work rosters: 22.8 standard hours, 7.6 Saturday hours, and 7.6 Sunday hours. The results are presented in Table 1 in the Appendix. The impact on take-home pay ranges from a maximum 5.9 per cent better off under the first time scenario to a maximum loss of 62 per cent under the second time scenario. Thirteen agreements eliminated penalty rates for Saturdays and 11 for Sundays. Of the seven agreements with overtime rates, all had a lower rate than that offered in the equivalent award. In dollar terms, a shop assistant grade 1 working for a clothing retailer with 19 outlets across Melbourne lost up to \$92 per week. A shop assistant in a jewellery retail chain lost between \$92 and \$99 per week, depending upon their job classification. In August 1995, average weekly total earnings for employees in the Australian retail industry were \$320.00 (Australian Bureau of Statistics, 2001). The data presented in Table 1 indicates substantial losses in pay for an already relatively low paid occupational group.

The analysis of the impact of wage changes in the accommodation, cafes and restaurants agreements, based upon intermediate service workers, are presented in Table 2 in the Appendix. The results are more variable, but agreements offering lower take-home pay predominate. The two working time scenarios used in this analysis were: (1) 20 standard hours, 8 Saturday hours, 6 Sunday hours and 4 hours overtime (night); and (2) 39 standard hours. In this industry penalty rates were eliminated in 13 of the 18 agreements analysed, and in one case where penalty rates were reduced, the base rate of pay was \$5.97 per hour compared to \$8.55 under the award. On average, a casual employee was 5 per cent or \$23.34 worse off, and a permanent employee 24 per cent or \$93.00 worse off. This industry, like the retail industry, consists of predominantly low paid workers, with average weekly total earnings in 1995 of \$343.00. These workers can ill-afford reductions in take-home pay.

A small number of agreements were analysed for education, manufacturing trades and labourers. Similar results were evident with the exception of professionals employed in the education sector. This is the only occupation analysed where an increase in pay was associated with individual agreements, and none of these agreements included a change to penalty rates.

The analysis of individual agreements suggests that the loss of penalty rates has played a major role in decreasing earnings for employees employed under the Victorian system. Submissions by individual workers to the Victorian Industrial Relations Taskforce reinforce this finding. They also illustrate the falseness of the concept of individual 'bargaining' in a system with negligible minimum standards and no procedural protections. Attempts to negotiate are rebuffed, employment outcomes are

perceived as unfair, and employment standards exploitative. The following excerpts from individual submissions to the Victorian Taskforce capture these sentiments:

*I'm a highly skilled, intelligent person and I have the ability to negotiate, yet, under Victorian minimum conditions I am simply not employed because there are hundreds of people out there who do not have the skills to negotiate and they are employed ahead of me. Therefore I am forced to work under Victorian minimum conditions (Hairdresser) (Taskforce, 2000b: 7-8).*

*All staff are expected to work public holidays and, no matter what their qualifications, receive \$5.00 per hour extra. There is no extra pay for Saturdays, Sundays, or for late night opening. As the Branch Manager I have all the usual responsibility you would expect plus those of security, so when the burglar alarm goes off at 3am, I have to attend. I am not paid for this attendance. I asked for payment and received none' (Computer Store Manager) (Taskforce, 2000b: 8).*

*After three weeks, I am told to forget the casual rate, 'I will employ you full time from the start, but I won't be paying you for Good Friday, Easter Monday and Anzac Day.' When asked why I wouldn't be paid for these three days the answer is 'Why should I pay you when you're not here'. In effect, I lost between \$500 and \$800. Unfortunately, because I was unemployed I had to accept the terms of conditions of this employment' (Casual employee converted to full-time employment) (Taskforce, 2000b: 14).*

*I receive the flat hourly rate for all the hours I work. My hours vary over my 2-week roster. The only extra pay I get is an extra \$6 per week for being in charge. Employees employed before March 1993 have more security and don't have to work night-time, weekends or public holidays because they would have to be paid penalty rates. I work these hours because I don't have to be paid any penalty rates. This is not fair to me just because I started work in 1996' (Retail worker) (Taskforce, 2000b: 23).*

Deregulation in Victoria has clearly had a negative impact on some workers in Victoria. These workers tend to be located in industries with high levels of casual employment, predominantly female workforces, and low levels of unionisation. However, the impact is not uniform within industries. Some employers are now regulated through federal awards and agreements, while their competitors have remained subject to Schedule 1A of the Workplace Relations Act. This has resulted in considerable labour cost dispersion for employers in the same industry. A number of employers expressed their concern to the Victorian Taskforce at this regulatory inequity. Excerpts from two companies illustrate these concerns.

The Mildura Fruit Company, a party to the federal agriculture award:

*It is extremely difficult to remain competitive while some companies operate outside of the federal award. These companies are not required to provide penalty rates, severance payments or award pay rates. This reduces their labour costs in a manner that imposes an unfair competitive advantage against those who wish to provide acceptable minimum conditions for employees...we support the notion that all employers operating within a particular industry should be bound by the terms of the*

*appropriate award. We also support the establishment of a government-funded inspectorate. This would reduce the incidences of award breaches and ensure a set of minimum conditions provide the floor to competition (Taskforce, 2000b: 27).*

Kamcorp Industrial Relations (consultants for large baking firms):

*Firms in the baking industry who do not have an enterprise agreement and are not bound by an Award (at least six medium sized firms and hundreds of hot bread shops) are paying their employees at rates more than 12% less than large firms such as Baking Australia...shift penalties and overtime are not payable, leading to an extraordinarily large difference in overall conditions in an industry where shiftwork and overtime are mandatory...A level playing field must be re-introduced and enforced. Victorian minimum rates must be fair and intelligible. Shift penalties and overtime should be re-introduced as minimal (Taskforce, 2000b: 28-29).*

Without a substantial floor under wage determination, and in the absence of third parties to offset the imbalance in bargaining power, the more vulnerable employees in Victoria have suffered. Their sense of injustice is compounded further by employers who differentiate between employees according to their employment commencement date and related legal obligations. This sense of injustice is not restricted to employees. Employers obliged to meet higher standards of pay and conditions under federal awards and agreements also believe they are subject to unfair employment practices. The Workplace Relations Act 1996 provides more substantive minimum standards for federal awards, and provides a number of mechanisms for third party vetting of negotiated agreements. These include the NDT applied to union and non-union certified agreements by the AIRC, and the vetting of AWAs for the NDT by the OEA and the AIRC. In the following sections, we assess the protections provided by the Workplace Relations Act and assess whether workers are better off under a more comprehensive regulatory system.

### **3. Changes to penalty rates under certified agreements of the Australian Industrial Relations Commission**

Penalty rates have traditionally been included in federal awards. With the advent of enterprise bargaining, a shift away from this tradition has become evident both through annualised salaries (mainly to consolidate overtime) and through 'buying-out' penalty rates with a higher base rate of pay for all hours irrespective of working time. The extent of this shift, however, cannot be quantified. While the DEWRSB Workplace Agreements Database Reports have consistently reported hours of work as the most common provision in certified agreements, the nature of those provisions cannot be determined from available data (e.g. DEWRSB, 2000). It was noted earlier, however, that only a small proportion of collective agreements on the ADAM database have included loaded base rates and the elimination of various penalty components (Van Barneveld and Arsovska, 2001). The elimination of penalty rates appears much less common under federal agreements than is evident in Victoria.

What protections exist in the federal system to prevent the wholesale removal of penalty rates, which has been so favoured by employers in Victoria? First, most agreements in the federal system are union agreements. Unions have traditionally been opposed to the removal of penalty rates, and it is unlikely their attitude has changed in recent years. Some unions have, nevertheless, participated in collective agreements to remove penalty rates and these are discussed further below. Second, collective agreements must pass the NDT to be certified. The NDT may create a barrier to buying out penalty rates due to the difficulty in creating a new base rate which does not disadvantage some workers. This is particularly the case where a high proportion of casual employees are employed on variable rosters. For example, a company seeking a new base rate of pay which builds in penalties but does not disadvantage workers employed primarily on weekends requires a very large increase in the base rate of pay. Workers employed only on week days would, under this scenario, receive substantial increases in take-home pay relative to weekend only workers, resulting in substantial overall increases in labour costs.

The current NDT requires that an agreement will not result, on balance, in a reduction in the overall terms and conditions of employment compared to relevant awards or other commonwealth, state or territory law. If an agreement fails the NDT, it is taken to pass the test if the Commission is satisfied that certifying the agreement is not contrary to the public interest (Sections 170LT and 170XA). The public interest test is not the traditional test of section 90 of the Act, but instead concerns furthering the objects of the Act and the objects of Part VIB of the Act. Both emphasise the facilitation of agreements.

Only a comprehensive investigation of the application of the NDT by the AIRC can answer the question of whether the NDT has prevented penalty rates from being replaced by a higher base rate but overall lower take-home pay in agreements under the federal system. This has not been possible for this paper. Nevertheless two general points can be made. First, a number of commentators suggested that the revised approach to the public interest test in the NDT would lead to more emphasis on passing agreements which may be borderline and less on maintaining community standards (McCallum, 1997; Naughton, 1997). This has eventuated. Of the major reported cases involving the NDT, changes to community standards have occurred with respect to sick leave, long service leave and annual leave (Merlo, 2000). Only one major case has occurred, to the authors' knowledge, involving the buying out of penalty rates. This case concerned up to 50 hours per week at a standard hourly rate for six consecutive days including Saturdays, Sundays and public holidays (SDAEA and Bunnings Building Supplies Pty. Ltd.). The agreement was eventually modified following its failure to pass the NDT (Print P6024).

Second, calculating the impact of trading penalty rates for a higher base rate is extremely complex, and requires a highly detailed knowledge of work rosters. This has resulted in the rejection by the AIRC of a number of proposed agreements to buy out penalty rates. In some cases, both unions and employers have hired specialists in order to determine whether a proposed agreement will pass the NDT. The case of the Melbourne Cricket Club Event Employees Certified Agreement 1998 (C. No.36029 of 1988) illustrates the first point. This case concerned the elimination of penalty rates for ground staff employed at the Melbourne Cricket Ground. In negotiations, the employer

proposed the replacement of penalty rates with an 'equalised' rate to apply to all employees irrespective of their work rosters. The 'equalised rate' developed by a major accounting firm, was based on a sample of events worked, calculated by adding ordinary time, time and a half and double time hours, then dividing by actual hours worked (Transcript, C. No.36029). The union, initially not provided with work rosters to enable their own assessment of the agreement's impact, drew upon the *Better or Worse Off?* software of the Workplace Studies Centre to analyse the agreement's impact. Expert witnesses included a mathematician hired to assess the calculations applied to the payroll data. The MCC claimed workers would be 24 cents an hour better off, while the Workplace Studies Centre analysis indicated that some workers would be between \$367.25 and \$788.12 worse off over a 26 week period. Other workers, particularly those not working Sundays, would be much better off. The agreement eventually provided for an hourly wage increase of approximately 27 per cent plus annual increases over the life of the agreement, and it retained overtime rates as per the award. Substantial base hourly wage increases such as these would appear viable only for those employers who rely heavily on employees working non-standard hours, have few standard hour employees and can be reasonably assured that the current pattern of employment will continue into the future. For others, maintaining the separation of standard and non-standard hourly rates of pay may remain the preferred option if they are truly to meet the NDT.

Members of the Commission have also drawn upon external expertise to assist with NDT calculations involving changes to penalty rates and proposed 'spread of hours' provisions (which affect the rates paid at different times), primarily in cases involving non-union agreements. In these cases, arguably there is no effective, sufficiently resourced counter party to test the veracity of an employer's claims with respect to buying out penalty rates with an appropriate base rate. The AIRC's testing of the agreement fills this void. In some instances, the AIRC has utilised the *Better or Worse Off?* model to determine the impact of proposed changes on take-home pay. The data generated by the model is then entered as evidence or used to advise parties preparing such agreements. Examples of the 'workplaces' involved have been retail, clerical, transport, metal and, increasingly, security.

Non-union security industry cases, for example, have regularly entailed a number of drafts and redrafts before they neared NDT status. Whether it is intentional or unintentional the process is like an exercise of 'testing the water'. The employer and/or employer's agent proposes a combination of base and penalty rate to the Commission. The Commissioner tests these rates using the model across possible hours scenarios that employees commonly work. Results are then forwarded by the Workplace Studies Centre to the Commission and, via the Commission, to the employer. The employer then may respond on a number of fronts: e.g. adjust the base rates; adjust the penalty rates; present more data on the employees' usual working hours, times, employment status and the like. The cycle then is repeated, sometimes interspersed with a hearing and possible expert witness appearance regarding the model and its outcomes. By successive approximations the agreement comes closer to award parity, at least in respect to the remunerative aspects of the NDT (for example, see C. No.33101 of 2000).

What this experience illustrates in part is the complexity of the buy-out calculus. In fact the complexity of the calculus creates another problem: the possibility of disadvantageous agreements slipping through the test because inadequate information was provided or circumstances change after the agreement has been certified. This is more likely to occur in the case of non-union agreements. It is simply too much to expect of Commissioners and their staff to be on top of all the possible variations and patterns of work, not just in an industry but for its particular segments, employers and workplaces.

Some non-union security industry agreements have been refused certification following failure of the NDT. In one case, the Commission gave the employer the opportunity to provide a number of undertakings prior to considering certification. These included offering permanent status to casual employees and providing detailed rosters and their impact on pay to all workers affected by the proposed agreement to enable employees to assess the agreement in a more informed manner. The proposed agreement does not appear to have been re-presented for certification (C. No.30628, Print R5252). In another case involving reduced penalty rates, the employer argued their economic survival was contingent on competing with employers who regularly breached awards. The Commission, having considered the object of the Act related to the safety net status of awards, found it would be contrary to the public interest to certify agreements which undercut the award. 'I am not persuaded that to disregard this object and other sections of the Act (for example sections 88A and 88B) based on the submission of an employer that everyone pays under the Award and in order for it to compete it too should be able to pay under the Award' (SDP Harrison, Print S0953: 4). The Full Bench later endorsed this approach in three appeals heard jointly for non-union security industry agreements which had been refused certification (Print S2571). These security industry cases highlight the role of award enforcement (or absence of) as a further protective mechanism necessary for the maintenance of take-home pay. Other non-union security industry agreements, however, have also involved reductions in take-home pay but have been approved on the basis of certification not being contrary to the public interest (for example, C3392, Print R0015).

In the security industry, some non-union agreements which eliminate penalty rates have a new base rate so low that assessing its value relative to the award is straightforward and the agreement is rejected by the AIRC. However, in other 'buying out' of penalty rate cases, the assessment is more complex. The Commission can be faced with a calculation in  $x^n$  variables depending on the set of prevailing variations in the award and work rosters. Moreover, it is likely to face additional complications because it is rarely the case that the counterfactual (the alternative posited in the agreement) is an easy 'zero penalty rates' one in all circumstances. Rather it has tended to be a mix of zeros and steps towards zero. To complicate matters further it is sometimes the case that new variations on themes are offered, namely penalties that cut across the old categories, so that comparison by direct mapping is hard.

None of this is to say that the calculations are impossible. It is to say, however, that care must be exercised. Special vigilance is needed to ensure that actual staff rosters are seen and analysed so that the working scenarios can be modelled to reflect employees' actual working patterns. It would be all too easy to model benign scenarios that, at the

end of the pay period, saw a decrease in an employer's overall payroll bill. The 'collective experience and wisdom of the Commission' (Isaac, 1999: 7) no doubt contributes to the effectiveness of the NDT applied to collective agreements, within the confines of the statutory obligations of the Workplace Relations Act 1996. The OEA has a similar role with respect to AWAs. In the next section, we assess the general approach of the OEA to AWAs buying out penalty rates.

#### **4. The OEA and buying out penalty rates under AWAs**

The Workplace Relations Act introduced individual agreements through AWAs in 1996. The OEA is charged with assessing whether an AWA passes the NDT. If the OEA has concerns that the test has not been met, it can request further undertakings from the employers. If it still has concerns after those undertakings have been given, it must pass the AWA on to the AIRC to assess. AWAs are more likely than are collective agreements to replace penalty rates with a loaded base rate. Van Barneveld and Arsovska (2001) found that almost 27 per cent of their sample of 887 AWAs included a loaded base rate (2001: 99). In his survey of 688 employers with AWAs, Gollan found that 'flexibility of hours' and 'simplification of employment conditions' were the two most common reasons for employers introducing an AWA (Gollan, 2000: 21). He also notes the high proportion of AWA respondents operating businesses with 'non-standard' hours, with 45 per cent operating 7 days per week, and almost one-third working between 17-24 hours per day (2000: 3). Accordingly, these businesses were likely to be introducing AWAs to 'increase flexibility and change working time arrangements to better suit organisational needs' (2000: 3). The sample of 100 AWAs on the OEA website also suggests that buying out penalty and overtime rates is not uncommon, and it provides evidence of the difficulty in assessing the impact of trading penalty rates and overtime pay for an increase in the base hourly rate. In 11 cases the OEA required an additional undertaking that the base rate of pay would be increased further or that parameters for shift work and working patterns and a higher rate of pay be provided. Each of these 11 involved substantial flexibility in hours and typically traded off most if not all penalty payments (OEA website, accessed 7 Jun 2001).

The OEA website provides a range of resources for employers and employees interested in AWAs. Until recently, the OEA appeared actively to encourage trading off penalty rates notwithstanding the complexity of such an exercise. An employer seeking advice on the wording of an AWA with respect to remuneration had to bypass four examples of 'loaded rates' before they encountered a sample clause which distinguished rates of pay by time of day or day of week. Yet the OEA provided no advice on how to calculate the increased hourly rate necessary to compensate for the loss of loadings, nor did it provide any indication of what might be a reasonable 'benchmark buy-out' figure for particular industry sectors. The hospitality sector AWA template, for example, commenced its description on remuneration with the following:

'Many AWAs contain wages that combine base rates of pay, penalty rates, allowances and leave loadings into an annualised salary. As well as streamlining the payroll function and creating and administrative savings for the employer, employees are

guaranteed a stable income not subject to rosters, shift allowances or the availability of overtime.’ (OEA website accessed 7 June 2001)

This approach now appears to have been moderated, with the industry templates placing more emphasis on detailed substantive provisions than on promulgating a particular approach (OEA website accessed 14 December 2001).

How has the OEA applied the NDT in relation to buying out penalty rates? Naughton noted back in 1997 that ‘At the end of the day the public may remain uninformed as to how the Employment Advocate performs its role – whether it operates as a rubber stamp or subjects AWAs to rigorous scrutiny, and how it deals with genuine consent test or applies the no-disadvantage requirement.’ (1997: 29) The scant information included in many AWAs noted by several researchers (for example, Roan et al., 2001), the risk of intimidation of individuals in the agreement making process (Isaac, 1999: 8), and the experience of individuals in Victoria participating in individual ‘bargaining’ place a heavy burden on the OEA to adopt a detailed and rigorous approach to vetting AWAs. Unfortunately promises by the OEA of the publication of the model calculator used to assess the NDT have yet to be fulfilled (Workforce, 15/6/01: 2), and assessment of their approach is accordingly difficult.

AWAs passed on by the OEA to the AIRC for assessment illustrate how some AWAs fail the NDT in relation to employee wages and benefits but are passed because approval is not against the public interest. In one curious case, a company received approval for an AWA by the OEA and entered commercial contracts based on the AWA labour costs. When the company applied a year later for the same AWA to be approved, the OEA refused approval because it did not pass the NDT. The AIRC ultimately approved the AWA on the undertaking that it was for a restricted time period (12 months) and would be terminated after that period (Print S8540). That the AWA failed the NDT with the OEA on its second presentation may indicate a more rigorous approach is being adopted than previously, but this is purely speculation given the lack of public information on OEA approval processes. Consistent with the narrower public interest test now applied to AWAs which reduce pay and conditions, other AWAs have failed the NDT but passed the public interest test in the AIRC. These AWAs have been approved for a variety of reasons, including meeting a short-term crisis (Print 5472); because of commercial benefits to a local community (Print Q7881); and providing new work experience in a voluntary organisation (Ref 2001/205). Finally, the inherent bias in the NDT resulting from testing AWAs (and agreements) against increasingly irrelevant award rates of pay suggests that eventually buying out penalty rates may meet the NDT but still result in a decrease in take-home pay.

## **5. Conclusion**

This analysis of the impact of eliminating penalty rates upon take-home pay highlights a number of concerns about changing modes of employment regulation. The equitable conversion of a payment system based upon differential rates of pay for different working times to a standard rate of pay for all hours, coupled with variable working hour arrangements, is a complex exercise. The risks of getting the calculation wrong

are high. Our evidence suggests that without appropriate legislative protections, employers have used their superior bargaining power to pass this risk on to employees. The cost of such ‘miscalculations’ has been borne by employees through reduced take-home pay. The extent to which employers attempt to achieve a fair balance, or a correct calculation, between the old and the new payment systems depends very heavily on the institutional protections offered to workers. In this respect, there is a scale of fair outcomes attached to the wages/hours conversion directly observable through the various institutional mechanisms examined in this paper.

First is the Victorian case. Victorian employees, initially employed under the Victorian Employee Relations Act and now employed under Schedule 1A of the Workplace Relations Act, have meagre substantive protections, and no procedural protections. The Victorian Industrial Relations Taskforce recommended a tribunal be empowered to consider other forms of remuneration, such as penalty rates. These Victorian employees still remain disadvantaged in the absence of legislative support for improved minimum standards and procedural fairness. Second is individual agreements (AWAs) under the Workplace Relations Act 1996. The floor of federal awards against which AWAs are tested is greater than that applicable to employees under Schedule 1A, and two vetting mechanisms exist, the OEA and the AIRC. It is clear, however, that penalty rates are more likely to be removed under AWAs than collective agreements. When AWAs have been passed on to the AIRC for further assessment, some AWAs which reduce rates of pay have been approved under the weaker public interest test now provided for in the Workplace Relations Act. Third are collective agreements certified by the AIRC. These agreements are subject to the same floor of federal awards as AWAs but, we argue, are subject to a more rigorous vetting procedure than are AWAs. The strongest form of vetting here is that provided by unions which negotiate such agreements and counter the bargaining power of employers. Less strong is the vetting process on non-union agreements. Here, the AIRC fills the void otherwise provided by unions, but substantial detailed knowledge of working patterns is necessary in order to assess the impact on take-home pay of changes to penalty rates. When an interventionist approach is adopted by members of the AIRC the procedure ensures that the new payments system does not result in a reduction in take-home pay. However, the public interest test weakens protection by emphasising agreement making over substantive outcomes.

The greater institutional protections provided by the AIRC have protected penalty rates and take-home pay to a much greater extent than the protections offered to Victorian employees under Schedule 1A. This is to be expected. Nevertheless, the current NDT appears contradictory. A disadvantage can still be formalised through approval of an AWA or certification of a collective agreement when it is not against the public interest to do so. The alternative, of course, is to be honest and to say that the NDT and the objective of buy-outs – as a matter of policy, as distinct from what employers may try to get away with by testing the water – is to reduce pay, conditions and living standards.

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**APPENDIX: Better or Worse Off? Comparison of Take-Home pay under Victorian individual contracts with state award minimum wages**

**Table 1: Retail – Elementary Sales Workers – Sample Individual Agreements**

Agreement ID No.	Permanent or Casual	Percentage increase or decrease in take-home pay	
		Time Scenario (1)	Time Scenario (2)
1	Permanent	- 2.05%	-11.07%
2	Casual	-23.37%	-31.62%
3	Permanent	+ 5.90%	-8.79%
4	Casual	-47.00%	-52.70%
5	Permanent	-55.35%	-61.54%
6	Permanent	- 8.27%	-20.99%
7	Permanent	-7.34%	-20.19%
8	Casual	+2.15%	- 8.85%
9	Permanent	-9.99%	-18.59%
10	Permanent	-6.19%	-19.20%
11	Permanent	-20.58%	-31.59%
12	Permanent	-6.23%	-15.38%
13	Permanent	-9.55%	-22.09%
14	Permanent	-2.31%	-2.39%
15	Casual	+4.99%	-6.32%

- (1) Full-time employees’ roster: 27.4 standard hours, 7.6 Saturday hours, and 3 hours of overtime.
- (2) Part-time employees’ roster: 22.8 standard hours, 7.6 Saturday hours, and 7.6 Sunday hours.

**Table 2: Accommodation, Cafes & Restaurants – Intermediate Services Workers – Sample Individual Agreements**

Agreement ID No.	Permanent or Casual	Percentage increase or decrease in take-home pay	
		Time Scenario (1)	Time Scenario (2)
1	Casual	+10.97%	+19.61%
2	Casual	-18.41%	-12.05%
3	Permanent	-42.19%	-28.00%
4	Permanent	-12.38%	+8.89%
5	Permanent	-18.98%	0%
6	Casual	-2.53%	+0.26%
7	Permanent	-15.49%	+4.08%
8	Casual	-10.25%	-3.25%
9	Casual	-4.19%	-4.51%
10	Casual	-2.48%	-2.81%
11	Casual	-10.66%	-1.25%
12	Casual	+13.20%	+25.11%
13	Casual	-3.27%	+4.17%
14	Casual	-7.30%	-0.17%
15	Permanent	-34.23%	-18.83%

16	Casual	-24.52%	-18.65%
17	Permanent	-19.7%	-1.09%
15	Casual	-0.53%	+7.17%

(1) 20 standard hours; 8 Saturday hours; 6 Sunday hours; and 4 hours overtime (night)

(2) 39 standard hours.