

ADDRESSING THE UNFAIR APPLICATION OF CASUAL LOADINGS AND PENALTIES IN THE AWARDS OF THE AUSTRALIAN SERVICE SECTOR

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SECTION A: PARTS OF THE INQUIRY THAT WILL BE ADDRESSED IN THIS SUBMISSION

The Inquiry Issues Paper No. 1 sets out that one of the tasks of the inquiry is to explore the

fair and equitable pay and conditions for employees, including the maintenance of a relevant safety net”.¹

Further, the Issues Paper discourses thus on its approach:

As with all Productivity Commission inquiries, under its Act the Commission is required to recommend policies to maximise the wellbeing of the community as a whole. This inquiry is not intended to maximise the benefits to any particular groups, whether they be businesses, unions, employees, consumers or other stakeholders, as their individual interests may not coincide with those of Australians as a whole. Of course, the interests of the different parties form part of this broader assessment. The Commission’s approach recognises the social as well as the economic aspects of wellbeing; and in the case of an inquiry into workplace relations, the concepts of fairness and equitable treatment, the balance of negotiating strength and the ability of parties to remain well-informed and able to manage their own interests effectively are clearly relevant, albeit sometimes difficult to balance.²

The Inquiry Issues Paper No. 2 also specifically sets out the intention of the Inquiry to explore penalty rates in some detail.

Using these ambitions of the Inquiry as a springboard, I propose to discuss the application of penalty rates in various industries, but focusing chiefly on Retail, Food and Hospitality work, as I believe these industries to be both unusually exposed to penalties, as well as being relatively unfairly rewarded for work done outside “ordinary hours”. I will be particularly focused on issues of equity, as I expect the inquiry is likely to receive several submissions that will ignore or play down the equity issue in favour of other business-led arguments.

It should be further noted that I believe that the application of casual loadings (which also tend to dominate the industries of Retail, Food and Hospitality) often cannot be unpicked from penalties, as they are usually bundled together. Therefore, while the Issues Papers do not focus on casual loadings, I believe it is impossible, in the current WR system, to address penalties without addressing casual loadings.

As well as dealing with the industries of Retail, Food and Hospitality, I will also explore industries that are similarly exposed to both casualisation and/or penalty-attracting hours, as well as comparisons with some industries that are well known for vastly different treatment in these areas.

¹ Issues Paper No. 1, p.iii

² *ibid*, p.15

Whilst there is nowadays a significant proportion of employees who are not working to an award, I take the principle that award conditions are required to set the baseline for negotiation of individual or collective agreements, so that any award (or NES) change necessarily flows through also to those employed under non-award instruments, such as EBAs.

SECTION B: HISTORY AND PRINCIPLES OF WAGE PENALTIES

The McKell Institute provides a brief yet concise history of penalties in Australia:

In *Barrier Branch of Amalgamated Miners Association v Broken Hill Pty Company Ltd (1909)*, Justice Higgins awarded penalty payments valued at time-and-a-half of ordinary payments be made for work on the seventh day in any week, an official holiday and 'all time of work done in excess of the ordinary shift during each day of twenty hours'. Higgins awarded the penalty rates, firstly as compensation to employees being made to work at inconvenient times, but secondly to act as a deterrent against 'long or abnormal hours being used by employers'.

The rationale for penalty rates; that employees should be appropriately compensated for working long hours at inconvenient and unsociable hours, was reaffirmed almost forty years later by the Commonwealth Conciliation and Arbitration Commission. It decided that Saturday work should be paid at 125% of the base rate, and people working on Sundays should receive double-pay. Shortly afterwards in 1950, the NSW Industrial Relations Commission noted that 'employers must compensate employees for the disturbance to family and social life and religious observance that weekend work brings'.

More recently, the new modern award objective under the Fair Work Amendment Act (2013), introduced by the former Labor Government which took effect in January 2014, places a requirement on the Fair Work Commission to consider the need for extra remuneration for people employed during 'overtime; unsocial, irregular or unpredictable hours; working on weekends or public holidays; or working shifts', when making sure that these modern awards provide a just safety net, ultimately providing safeguard for penalty rates.³

Further to the Saturday, Sunday, and Public Holiday provisions mentioned above, there has been a general rule of double-time-and-a-half extended to Public Holidays in most awards. Several awards also include penalties for hours worked in the evening or night, as variously defined by the particular award.

The principle of penalties for work outside "ordinary hours" has come under philosophical attack from various sources in the last few decades. The cut and thrust of these arguments are based on two main propositions:

Proposition 1) That penalties, especially in small business environments in the service industries, are an unwieldy impost to business costs, and that reduction (or elimination) of penalties will lead to healthier businesses in this sector, which will have a knock-on effect of increased employment.

Proposition 2) That penalties were originally created to compensate workers for loss of opportunity to engage in religious observance and sporting endeavour, as well as to mitigate against overwork, and that these factors have lost importance in modern social mores, and overwork is now addressed by overtime allowances and, to some extent, shift allowance.

³ "The Economic Impact of Penalty Rate Cuts on Rural NSW" - The McKell Institute, p.6 - (http://mckellinstitute.org.au/wp-content/uploads/pdf/McKell_Penalty_Rates_WEB.pdf)

As regarding **Proposition 1**, which is sufficiently promulgated by business lobby groups that I need not cite particular examples, I would counter-argue that the case is far from proven. Whilst it may seem common sense that decreased overall wages would lead to greater employment and better business outcomes (ie - profitability), real-world economic modelling is rarely that simple. In fact, having read several submissions from business lobbies to the Fair Work Commission (FWC) and the Australian Industrial Relations Commission on this matter, what is immediately apparent is that sophisticated modelling is never presented. In lieu of that, for example in the 2013 FWC hearing to vary the Restaurant Industry Award, we are presented with a procession of anecdotes and surveys of employer attitudes and projected behaviours in a low penalty environment.⁴ Obviously, these submissions are vulnerable to a fairly large dose of “rent-seeking”.

Absent strong economic modelling arguing for reduction of penalties, I will instead refer to modelling done by the MacKell Institute that argues that for every dollar saved in wages paid in a local economy, about one third of that is also extracted from the local economy⁵, which demonstrates that it is not a zero-sum game.

Further, the argument that businesses in the service sector should receive benefits in reduced wage penalty liabilities, in order to maximise profitability (and overall employment numbers) tends in itself to “rent-seeking”. The question begged here is that somehow wages are (or should be) subject to flexibilities that other business inputs, such as raw materials and utilities, are not. I make this somewhat reductive case to argue a more moderate case: that employer-based profit arguments are never sufficient to override employee equity arguments in and of themselves.

Proposition 2 is also misleading. It is perhaps well exemplified by a submission from Professor Phil Lewis, appearing for the Restaurant and Catering Association in the aforementioned FWC hearing on the Restaurant Industry Award, that:

the rationale on which the introduction of penalty rates in Australia was first based no longer exists. Sunday is not a day of religious observance for most Australians. Similarly participation in sport and outdoor activity is minimal compared with time spent on audio/visual media. He said penalty rates were introduced at a time when the labour force was predominantly male, full-time in industrial jobs with little casual or part-time work. Most retail outlets shut at midday on Saturday and reopened on Monday. Weekends were for socialising, recreation, participating in sport and worship.⁶

Let me first address the question of religious observance. A study by McCrindle Research for Olive Tree Media in 2011 demonstrates that 44% of respondents who identify as having a religion also report semi-regular to regular worship attendance. As the report also approximates that half the population reports no religion, the general population semi-regularly or regularly worships at the rate of approximately 22%. Further, the vast majority of those religious affiliations tend to the Abrahamic faiths, all of which tend to favour worship, as well as Sabbath observance, between the penalty-attracting hours of Friday evening to Sunday night⁷.

⁴ [2013] FWC 7840 - (<https://www.fwc.gov.au/documents/decisionssigned/html/2013fwc7840.htm>)

⁵ The MacKell Institute, *op. cit.*, pp. 15-16

⁶ [2013] FWC 7840, *op. cit.*, Section 174

⁷ Australian Communities Report - McCrindle Research/Olive Tree Media -

(<http://www.olivetreemedia.com.au/resources/Olive%20Tree%20Media/Apologetics%20Series/Reseach%20Summary-web.pdf>)

Next, let me deal with sport and recreation. An ABS study from 2006 reports that Australian adults tend by a factor of 4 to 1 to attend sporting events on weekends against weekdays. Similarly, sports and physical recreation participation is reported at a factor of about 2 to 1.⁸

Even more tellingly, the same analysis reports socialising, visiting entertainment venues, religious activities, travel and other social and community interaction being conducted on weekends as opposed to weekdays at a factor of between 2 to 1 and 4 to 1.

To this should be added the issue of family and child-rearing commitments, as well as family interaction. Whilst I will not be citing particular figures, it should perhaps go without saying that, for any households with dependant school-age children, the commitment required during “ordinary hours” on weekdays, when school attendance frees up adult householders to work, are significantly compromised on weekends.

To summarise, the Australian weekend is *still* significantly different to weekdays in enough respects that penalties are warranted, both to mitigate against loss of healthy social participation, and to subsidise other remedies, such as weekend childcare.

SECTION C: HISTORY AND PRINCIPLES OF CASUAL LOADINGS

Originally, the casual loading was instituted by regulatory authorities as a way to compensate workers in intermittent employment (such as workers in seasonal industries, workers subject to employment with several different employers over the year, on-call workers and workers solicited to boost particular workforces at a time of peak demand) for their periods of unemployment between jobs.⁹

However, as leave provisions became standardised, and then increased, for the permanent workforce, the casual loading shifted its focus, as it was seen to be a handy instrument to compensate those in intermittent or impermanent employment for leave entitlements foregone. In key determinations in 1964, 1974 and 2000, largely Federal industrial determinations raised the casual loading rate to not only recompense against increasing permanent leave entitlements, but also to accommodate other work conditions that were not leave-based.¹⁰

Thus, the casual loading was also used to compensate for other foregone benefits, including leave loading, long service leave, and termination notice pay. Still later, more abstract losses suffered by casual employees were accounted, in the nature of reclassification opportunities, termination likelihood, access to training, roster uncertainty and redundancy benefits.

By 2001, nearly 70% of casual loading rates across Australia were between 20% and 25%¹¹.

⁸ “Sports And Physical Recreation: A Statistical Overview” - ABS -

(<http://www.abs.gov.au/ausstats/abs@.nsf/Products/F237E09BA9DE8312CA257AD9000E279C?opendocument>)

⁹ “Fixed Term Work In Australia” - Anthony O’Donnell, pp. 146-149

-(http://www.jil.go.jp/english/reports/documents/jilpt-reports/no.9_australia.pdf)

¹⁰ Metal, Engineering & Associated Industries Award Determination (December 2000) - M1913 - Australian Industrial Relations Commission, pp. 32 -40

¹¹ Judgement (3 April, 2001) - Queensland Industrial Relations Commission - (http://www.qirc.qld.gov.au/resources/pdf/rulings/casual_loading.pdf)

Two recent watersheds that detail the components of the casual loading come from an important Queensland determination of 2001¹², as well as from a Federal AIRC determination of the Metal Industry award of 2000.¹³ These determinations arrived at new increases in the loading to 23% and 25% respectively, and, since then, the rate of 25% dominates Federal modern awards as the standard rate over “ordinary hours”.

The guiding underlying principle of the casual loading in my estimation is threefold:

- 1) That casual employees should have equity with their permanent colleagues in remuneration, and not suffer loss due to lack of benefits that attach to permanency. As casual employees are more and more likely to be employed for long periods, this holds increasing legitimacy.
- 2) That casualisation should be actively discouraged in industries where on-call, intermittent or seasonal requirements do not have prevalence, on the basis that, of its nature, casual work is inimical to the well-being of the employee, leading as it does to decreased protections in the areas of rostering, termination, reclassification, training and consistent work-life balance.
- 3) That casual loading provides an efficient and easily managed accounting benefit to employers, by eliminating complicated award provisions that need to be worked out and provided, especially for short term hirings.

To rehearse the accounting principles behind the current 25% standard casual loading may seem redundant, but I will spend a little time going through it because I believe that it is crucial that the current standard rate is respected as an equitable one.

Some of the casual loading components are easy to account, because they relate to foregone leave and other benefits that can be easily accounted and compensated in an hourly rate. I will deal with these first:

- Annual Leave Foregone
- Sick (or Personal) Leave Foregone

The combined component of these lost benefits has been judged by several tribunals since the 1970s as approximately 15% to 20%.

Next, we encounter some components that are a little harder to account:

- Termination Notice Foregone
- Redundancy Payment Foregone

These lost benefits have often been adjudged at round 4% combined.

Next are the more chimerical components:

¹² *ibid.*

¹³ AIRC Dec 2000 - *op. cit.*

- Reclassification And Training Foregone (based on an assumption that casual employees are less likely to be offered anything other than basic training, and are much less likely to be promoted to a higher pay grade due to increased skill and responsibility)
- Loss of rostering certainty and likelihood of termination

Whilst these lost benefits are very difficult to account as a figure, both the Queensland and Federal determinations mentioned considered them legitimate parts of a casual loading claim.

And, thus, we land at a figure roughly equivalent to the 25% currently favoured in modern awards for casual loading, against which I would not argue.

SECTION D: THE CONCEPT AND CALCULATION OF “EFFECTIVE CASUAL LOADING” AND “EFFECTIVE PENALTY RATE FOR CASUALS”

There is a very important point that I wish to make about the 25% casual loading as now commonly accepted. By my figuring, *all* penalty, shift and overtime payments should be subject to a casual loading *multiplier*. That is to say, when aggregating hourly rates, it is right and proper that the appropriate permanent rates (after penalties, shift allowances and overtime premiums) should be *multiplied* by 125% to arrive at the casual rate for that work, irrespective of when that work is done.

I will explain my reasoning by step.

Equity demands that leave periods be paid at rates that assume the same accumulation of penalties and shift allowances that time worked accrues, and this is frequently accounted for in award of leave entitlements for permanents. In some awards studied, the permanent employee is entitled to receive their leave entitlement calculated to include all the shift allowances, penalties and other time-based allowances that would normally apply in a “worked” week (except overtime).

In other awards, partly, one expects, to save the burden of calculating what shift allowances, penalties, etc., need to be acquitted, a “leave loading” (now standardised at 17.5% on top of ordinary hourly rates), is used instead. In many ways, leave loading uses a similar rationale to the casual loading itself, in that it averages multiple lost benefits to a quantifiable single benefit. In fact, its introduction in the early 1970s was made to effect just that purpose.

In yet other awards, leave loading is played off against the usual worked penalties and allowances, with the higher figure being used to calculate the leave payment.

A final group of awards, smaller in number, refers back to the minima of the NES. It is a regrettable inequity that some of these more exposed industries, such as the service industries, are only covered by the NES in regard to leave entitlements, which tends to allow only that leave shall be paid at the “ordinary hours” rate, whether or not those hours were earned at a significantly higher penalty-attracting or shift-allowance-attracting rate.

The central concept here is that all awards that go beyond the NES entitlement for leave payment calculations are based on the premise that leave payments should reflect the rate at which the entitlement was earned, and this is promulgated in many awards.

Therefore, the only equitable way of calculating casual rates in “non-ordinary hours” is to apply the 25% loading *after* the incurred penalty or shift allowance, by *multiplying* the after-penalty rate or after-shift-allowance rate by 125%.

However, as will be seen below, a fair number of the awards discussed below treat casual loadings as an *additional* percentage rather than a *multiplying* percentage.

For example, in the Manufacturing Industry Award, a casual employed on a Public Holiday will receive 312.5% of the ordinary hours permanent rate (by *multiplying* the 250% permanent rate by 125%), whereas in the General Retail Industry Award, a casual so employed will receive 275% of the ordinary hours permanent rate (by *adding* 25% to the 250% to the permanent rate).

A corollary of this is that these *additional* loadings can only be justified if one assumes that the benefits foregone by casuals are only foregone on the “ordinary hours” rate, but that the penalty-attracting and shift-allowance-attracting components of their wage are somehow immune from loading. I find this unconscionable in terms of equity, especially if some awards studied (Manufacturing and Mining, in particular) already allow the loading to be tested against ordinary hours plus penalties and shift allowances in cases of casuality.

In order to demonstrate how this equity is subverted by:

- 1) the use of *addition* of a 25% loading, rather than a *multiplication*, and,
- 2) in some cases, the partial or complete subsummation of casual loadings within penalties;

I will introduce the concepts of “Effective Casual Loading” and “Effective Penalty Rate For Casuals”, and describe their calculation. They will be used extensively in the rest of this article.

Many awards describe penalty-attracting casual hourly rates not by detailing the separate components, but in a similar fashion to this:

30.3 Work on a public holiday must be compensated by payment at the rate of 250% (275% for casual employees).¹⁴

Whilst the obvious intent in a case like this (common in service industry awards) is to set out the casual loading percentage of 25% as an *addition*, rather than a *multiplier*, the mix of penalty and casual rate is not easy to parse. Although the implication here may be that, conceptually, the

¹⁴ Fast Food Industry Award (2010) - Fair Work Commission - (https://extranet.employment.gov.au/ccmsv8/CiLiteKnowledgeDetailsFrameset.htm?KNOWLEDGE_REF=216297&TYPE=X&ID=4735584986694217788889912894&DOCUMENT_REF=399661&DOCUMENT_TITLE=Fast%20Food%20Industry%20Award%202010&DOCUMENT_CODE=MA000003)

instrument is claiming casual loading only on the original 100% rate (“ordinary hours”), and leaving the penalty component unloaded, further examples create even more difficulty.

For example, in the General Retail Industry Award, standard daytime hours worked on a Saturday are calculated thus:

- Permanent Hourly Rate: 125% of “ordinary hours”
- Casual Hourly Rate: 135% of “ordinary hours”

Further, in the same award, standard daytime hours on a Sunday allow for this:

- Permanent Hourly Rate: 200% of “ordinary hours”
- Casual Hourly Rate: 200% of “ordinary hours”

How, indeed, is one to parse these aberrations of equity? How, also, to understand the underlying concept? And how to test the equity?

In order to make viable and consistent acquittals of these various ad-hoc mixtures of penalty rate and leave loading that pepper the awards, I use the aforementioned concepts of “Effective Casual Loading” and “Effective Penalty Rate For Casuals”, calculated thus:

- “Effective Casual Loading” - by dividing the casual hourly rate by the permanent hourly rate, then subtracting 1 and then multiplying by 100, we arrive at a percentage that represents the “Effective Casual Loading”, which assumes that the penalties must match between the two outcomes.

For example, using the Retail Award Saturday standard hours mentioned above, we figure this:

$$\begin{aligned} 135 / 125 &= 1.08 \\ 1.08 - 1 &= 0.08 \\ 0.08 \times 100 &= 8 \end{aligned}$$

Thus, 8% is the “Effective Casual Loading” for that shift in the award, if the penalty rates are both assumed matched at 25%.

- “Effective Penalty For Casuals” - by dividing the casual hourly rate by 125% of ordinary hours, then subtracting 1 and then multiplying by 100, we arrive at a percentage that represents the “Effective Penalty For Casuals”, which assumes that the casual loadings must always multiply post-penalty hourly rates by 125%.

For example, using the Retail Award Sunday standard hours mentioned above, we figure this:

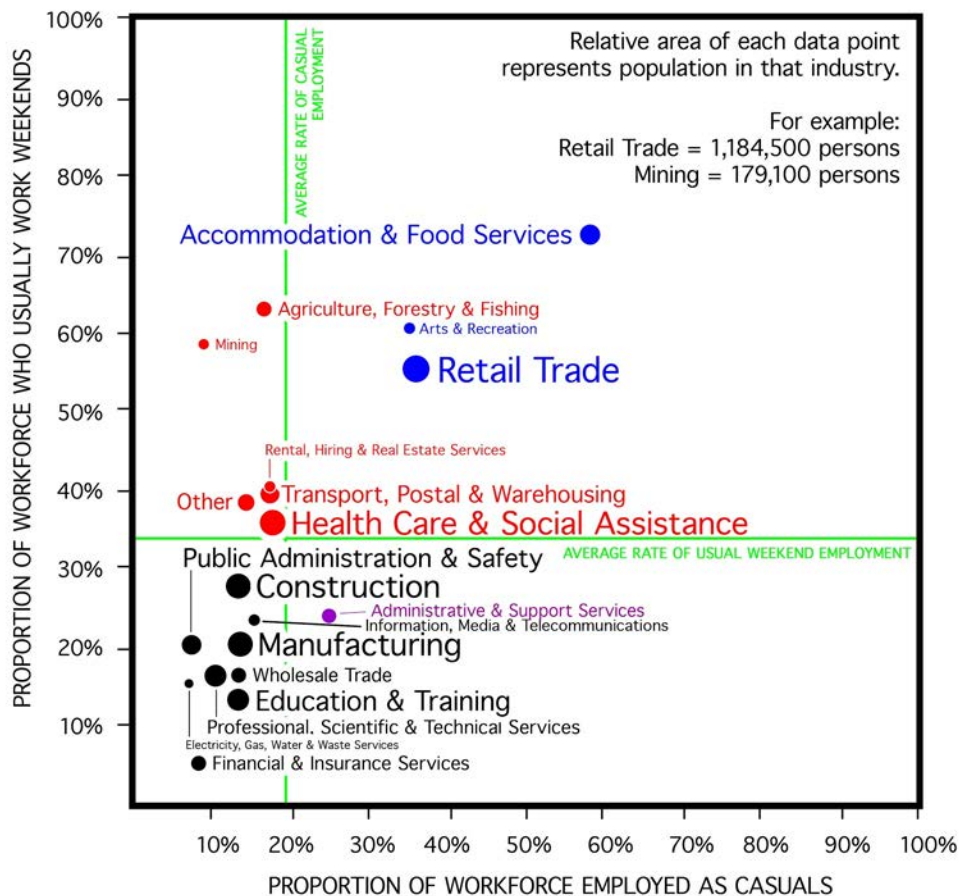
$$\begin{aligned} 200 / 125 &= 1.60 \\ 1.60 - 1 &= 0.60 \\ 0.60 \times 100 &= 60 \end{aligned}$$

Thus, 60% is the “Effective Penalty Rate For Casuals” for that shift in the award, if the casual loadings are always assumed to multiply the post-penalty rate by 125%.

These two worked equations finally provide us with a way to accurately compare permanent and casual rates (in both “ordinary hours” situations as well as penalty-attracting situations) to test for equity, either using the principle that penalties should be identical between casual and permanent staff, or that casual staff are *always* entitled to the 25% loading as a *multiplier*.

SECTION E: INDUSTRIES EXPOSED TO CASUALISATION AND PENALTIES

Figure 1: Industries by weekend employment, casualisation and population



Source: *Patterns In Work* - ABS (2009)¹⁵

The above chart sets out which industries are particularly exposed to casual loadings and penalty rates (this is assumed from the rate of weekend work). The industries in blue are most exposed, and I will focus particularly on them in the following analysis. From this “blue” sector, I will refer to the following modern awards:

- General Retail Industry Award
- Fast Food Industry Award (which almost exactly replicates both the Restaurant Industry Award and the Hospitality Industry [General] Award, only differing in that the Restaurant award receives 25% less [*non-multiplying*] for casual Public Holiday penalties)
- Amusement, Events & Recreation Award (excluding Exhibition Employees)
- Alpine Resorts Award

¹⁵ “Patterns In Work” - ABS (Dec 2009), p.3 -

([http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/LookupAttach/4102.0Publication10.12.096/\\$File/41020_Patterns_inwork.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/LookupAttach/4102.0Publication10.12.096/$File/41020_Patterns_inwork.pdf))

- Travelling Shows Award

I believe that this covers most of the workers in the “blue” sector, excepting arts workers, who I believe are chiefly private contractors, and therefore very difficult to acquit in this study.

The “magenta” sector, which includes industries that have an above average casualisation rate, but not a preponderance of weekend work, is solely populated by the Administrative And Social Services industry, which I will not deal with on the grounds that it is a far too complex an industry to summarise into particular modern awards.

For the “red” sector, which represents industries that have an above average preponderance of weekend work, but a below average preponderance of casualisation, I will refer to the following modern awards:

- Mining Industry Award
- Timber Industry Award (Forestry employees only)
- Aquaculture Award (which deals largely with Fishery)

These awards cover most of the outlying industries in that sector. The Pastoral Award is far too complex and balkanised to be included in this study.

Finally, we have the “black” sector, typified by low casualisation and low weekend-work regimes. I have chosen a handful of these awards to compare and contrast conditions within less exposed industries with the more exposed service industries. These include the following modern awards:

- Manufacturing & Associated Industry & Occupations Award
- Security Services Industry Award

Figure 1 rather neatly demonstrates that weekend work and casualisation are very matched phenomena in the Australian employment scene. Discounting the rather idiosyncratic industries of Mining and Agriculture, Forestry And Fishing, one can easily trace a curve across the chart that links casualisation and weekend work.

Further, an ABS study from 2009 also states that, overall, permanent employees are employed on weekdays (against casuals) by a factor approaching 2 to 1, whereas on weekends, those ratios are reversed, and also that youth and females are disproportionately represented in casual work.¹⁶

I would especially remark on overrepresentation of youth in casualised weekend work. I believe, through a great deal of personal anecdotal evidence, that young workers are greatly disadvantaged (perhaps by inexperience) at understanding WR provisions, awards, penalties, casual rates and other industrial matters, and are thus easy prey to the inequities of casualisation in particular.

¹⁶ *ibid.*, p.2

SECTION F: TEN AWARDS COMPARED FOR WAGE RATES, PENALTIES AND LOADINGS

Figure 2: Hourly rates at particular moments broken down by permanency and casuality, with calculations for effective casual loadings and effective penalty rates for casuals, by modern award

		MONDAY TO FRIDAY				SATURDAY				SUNDAY				PUB HOL
		1pm	8pm	11pm	3am	1pm	8pm	11pm	3am	1pm	8pm	11pm	3am	
MINING INDUSTRY AWARD Classification: Level 1	Permanent Hourly Rate	\$19.07	\$21.93	\$21.93	\$21.93	\$38.15	\$38.15	\$38.15	\$28.61	\$38.15	\$38.15	\$38.15	\$38.15	\$47.68
	% above Ordinary Hours	0%	15%	15%	15%	100%	100%	100%	50%	100%	100%	100%	100%	150%
	Casual Hourly Rate	\$23.84	\$27.41	\$27.41	\$27.41	\$47.68	\$47.68	\$47.68	\$35.76	\$47.68	\$47.68	\$47.68	\$47.68	\$59.61
	% above Ordinary Hours	25%	43.5%	43.5%	43.5%	150%	150%	150%	87.5%	150%	150%	150%	150%	212.5%
	Effective Casual Loading	25%	25%	25%	25%	25%	25%	25%	25%	25%	25%	25%	25%	25%
		Effective Penalty Rate for Casuals	0%	15%	15%	15%	100%	100%	100%	50%	100%	100%	100%	150%
MANUFACTURING & ASSOCIATED INDUSTRIES & OCCUPATIONS AWARD Classification: C11	Permanent Hourly Rate	\$18.64	\$21.44	\$21.44	\$21.44	\$27.96	\$27.96	\$27.96	\$27.96	\$37.27	\$37.27	\$37.27	\$37.27	\$46.59
	% above Ordinary Hours	0%	15%	15%	15%	50%	50%	50%	50%	100%	100%	100%	100%	150%
	Casual Hourly Rate	\$23.30	\$26.80	\$26.80	\$26.80	\$34.94	\$34.94	\$34.94	\$34.94	\$46.59	\$46.59	\$46.59	\$46.59	\$58.24
	% above Ordinary Hours	25%	44%	44%	44%	87.5%	87.5%	87.5%	87.5%	150%	150%	150%	150%	212.5%
	Effective Casual Loading	25%	25%	25%	25%	25%	25%	25%	25%	25%	25%	25%	25%	25%
		Effective Penalty Rate for Casuals	0%	15%	15%	50%	50%	50%	50%	100%	100%	100%	100%	150%
SECURITY SERVICES INDUSTRY AWARD Classification: Level 1	Permanent Hourly Rate	\$18.95	\$24.64	\$24.64	\$24.64	\$28.43	\$28.43	\$28.43	\$28.43	\$37.90	\$37.90	\$37.90	\$37.90	\$47.38
	% above Ordinary Hours	0%	30%	30%	30%	50%	50%	50%	50%	100%	100%	100%	100%	150%
	Casual Hourly Rate	\$23.69	\$29.37	\$29.37	\$29.37	\$33.16	\$33.16	\$33.16	\$33.16	\$42.64	\$42.64	\$42.64	\$42.64	\$52.11
	% above Ordinary Hours	25%	55%	55%	55%	75%	75%	75%	75%	125%	125%	125%	125%	175%
	Effective Casual Loading	25%	19%	19%	19%	16.5%	16.5%	16.5%	16.5%	12.5%	12.5%	12.5%	12.5%	10%
		Effective Penalty Rate for Casuals	0%	24%	24%	40%	40%	40%	40%	80%	80%	80%	80%	120%
TIMBER INDUSTRY AWARD Classification: Level 4 (Forestry)	Permanent Hourly Rate	\$18.64	\$21.43	\$21.43	\$21.43	\$27.96	\$27.96	\$27.96	\$27.96	\$37.27	\$37.27	\$37.27	\$37.27	\$46.59
	% above Ordinary Hours	0%	15%	15%	15%	50%	50%	50%	50%	100%	100%	100%	100%	150%
	Casual Hourly Rate	\$23.30	\$26.09	\$26.09	\$26.09	\$32.61	\$32.61	\$32.61	\$32.61	\$41.93	\$41.93	\$41.93	\$41.93	\$51.25
	% above Ordinary Hours	25%	40%	40%	40%	75%	75%	75%	75%	125%	125%	125%	125%	175%
	Effective Casual Loading	25%	21.5%	21.5%	21.5%	16.5%	16.5%	16.5%	16.5%	12.5%	12.5%	12.5%	12.5%	10%
		Effective Penalty Rate for Casuals	0%	12%	12%	40%	40%	40%	40%	80%	80%	80%	80%	120%
GENERAL RETAIL INDUSTRY AWARD Classification: Level 1	Permanent Hourly Rate	\$18.52	\$23.15	\$24.07	\$24.07	\$23.15	\$27.78	\$27.78	\$27.78	\$37.05	\$37.05	\$37.05	\$37.05	\$46.31
	% above Ordinary Hours	0%	25%	30%	30%	25%	50%	50%	50%	100%	100%	100%	100%	150%
	Casual Hourly Rate	\$23.15	\$23.15	\$28.71	\$28.71	\$25.01	\$32.41	\$32.41	\$32.41	\$37.05	\$41.67	\$41.67	\$41.67	\$50.94
	% above Ordinary Hours	25%	25%	55%	55%	35%	75%	75%	75%	100%	125%	125%	125%	175%
	Effective Casual Loading	25%	0%	19%	19%	8%	16.5%	16.5%	16.5%	0%	12.5%	12.5%	12.5%	10%
		Effective Penalty Rate for Casuals	0%	0%	24%	24%	108%	40%	40%	60%	80%	80%	80%	120%
FAST FOOD INDUSTRY AWARD Classification: Level 1	Permanent Hourly Rate	\$18.52	\$18.52	\$20.38	\$21.30	\$23.15	\$23.15	\$23.15	\$23.15	\$27.79	\$27.79	\$27.79	\$27.79	\$46.31
	% above Ordinary Hours	0%	0%	10%	15%	25%	25%	25%	25%	50%	50%	50%	50%	150%
	Casual Hourly Rate	\$23.15	\$23.15	\$25.01	\$25.93	\$27.79	\$27.79	\$27.79	\$27.79	\$32.42	\$32.42	\$32.42	\$32.42	\$50.94
	% above Ordinary Hours	25%	25%	35%	40%	50%	50%	50%	50%	75%	75%	75%	75%	175%
	Effective Casual Loading	25%	25%	22.5%	21.5%	20%	20%	20%	20%	16.5%	16.5%	16.5%	16.5%	10%
		Effective Penalty Rate for Casuals	0%	0%	8%	12%	20%	20%	20%	40%	40%	40%	40%	120%
AMUSEMENT, EVENTS & RECREATION AWARD Classification: Grade 3*	Permanent Hourly Rate	\$18.64	\$18.64	\$18.64	\$18.64	\$18.64	\$18.64	\$18.64	\$18.64	\$27.96	\$27.96	\$27.96	\$27.96	\$46.59
	% above Ordinary Hours	0%	0%	0%	0%	0%	0%	0%	0%	50%	50%	50%	50%	150%
	Casual Hourly Rate	\$23.30	\$23.30	\$23.30	\$23.30	\$23.30	\$23.30	\$23.30	\$23.30	\$32.61	\$32.61	\$32.61	\$32.61	\$51.25
	% above Ordinary Hours	25%	25%	25%	25%	25%	25%	25%	25%	75%	75%	75%	75%	175%
	Effective Casual Loading	25%	25%	25%	25%	25%	25%	25%	25%	16.5%	16.5%	16.5%	16.5%	10%
		Effective Penalty Rate for Casuals	0%	0%	0%	0%	0%	0%	0%	40%	40%	40%	40%	120%
AQUACULTURE INDUSTRY AWARD Classification: Level 3	Permanent Hourly Rate	\$18.72	\$21.53	\$21.53	\$24.34	\$23.39	\$23.39	\$23.39	\$23.39	\$28.07	\$28.07	\$28.07	\$28.07	\$46.79
	% above Ordinary Hours	0%	15%	15%	30%	25%	25%	25%	25%	50%	50%	50%	50%	150%
	Casual Hourly Rate	\$23.39	\$26.21	\$26.21	\$29.02	\$23.39	\$23.39	\$23.39	\$23.39	\$28.07	\$28.07	\$28.07	\$28.07	\$46.79
	% above Ordinary Hours	25%	40%	40%	55%	25%	25%	25%	25%	50%	50%	50%	50%	150%
	Effective Casual Loading	25%	21.5%	21.5%	19%	0%	0%	0%	0%	0%	0%	0%	0%	0%
		Effective Penalty Rate for Casuals	0%	12%	12%	24%	0%	0%	0%	20%	20%	20%	20%	100%
ALPINE RESORTS AWARD Classification: Level 3***	Permanent Hourly Rate	\$18.64	\$18.64	\$18.64	\$18.64	\$18.64	\$18.64	\$18.64	\$18.64	\$18.64	\$18.64	\$18.64	\$18.64	\$46.59
	% above Ordinary Hours	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	150%
	Casual Hourly Rate	\$23.30	\$23.30	\$23.30	\$23.30	\$23.30	\$23.30	\$23.30	\$23.30	\$23.30	\$23.30	\$23.30	\$23.30	\$46.59
	% above Ordinary Hours	25%	25%	25%	25%	25%	25%	25%	25%	25%	25%	25%	25%	150%
	Effective Casual Loading	25%	25%	25%	25%	25%	25%	25%	25%	25%	25%	25%	25%	0%
		Effective Penalty Rate for Casuals	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	100%
TRAVELLING SHOWS AWARD Classification: Grade 3	Permanent Hourly Rate	\$18.64	\$18.64	\$18.64	\$18.64	\$18.64	\$18.64	\$18.64	\$18.64	\$18.64	\$18.64	\$18.64	\$18.64	\$27.96
	% above Ordinary Hours	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	50%
	Casual Hourly Rate	\$23.30	\$23.30	\$23.30	\$23.30	\$23.30	\$23.30	\$23.30	\$23.30	\$23.30	\$23.30	\$23.30	\$23.30	\$23.30**
	% above Ordinary Hours	25%	25%	25%	25%	25%	25%	25%	25%	25%	25%	25%	25%	25%**
	Effective Casual Loading	25%	25%	25%	25%	25%	25%	25%	25%	25%	25%	25%	25%	-17%**
		Effective Penalty Rate for Casuals	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%**

KEY TO TEXT COLOURS

Under \$20
per hour

\$20 to \$29.99
per hour

\$30 to \$39.99
per hour

\$40 to \$49.99
per hour

\$50 to \$59.99
per hour

Italics Figures in italics relate to an hourly rate that is extrapolated from either a shift allowance or some other allowance to which most employees working at this time would be entitled.

* For the purpose of this analysis, this award excludes "exhibition employees", whose award is almost exactly mirrored by the "Travelling Shows Award".

** Excepting Queensland Show Day, Christmas Day and Good Friday, which attract a more traditional Public Holiday penalty, identical to that listed for the "Alpine Resorts" award for Public Holidays.

*** This award also includes a third stream alongside Permanent and Casual employees, known as Seasonal employees. These employees trade away Recreational Leave for a 8.33% loading on the permanent rate, but attract all other benefits of permanency

Source: Fair Work Australia modern awards¹⁷

¹⁷ Award determinations 2014 - Fair Work Australia -

(<http://www.fairwork.gov.au/awards-and-agreements/awards/list-of-awards>)

The above chart, and its data, will represent the source data for all the following charts. Wage rates were primarily sourced from the relevant modern awards, were rechecked using wage calculation factsheets provided by Fair Work Australia, and, in cases of ambiguity, were checked again by direct communication with Fair Work Australia. Wage rates in dollar figures can be assumed to be correct to within a few cents, whereas percentages were rounded to the nearest half of a percent.

I have attempted in *Figure 2* to detail, by using carefully selected time moments across the working week, to demonstrate modern award penalty regimes as they cross into more or less penalty-attracting hours worked. For example, on weekdays, many awards allow either for 2, 3 or 4 different “shifts” (to use an imprecise term in this context) across the 24-hour period, each attracting either a different penalty or a different shift allowance. On each day, 1pm can be considered to describe standard hours for that day. Public holidays can be said to not include differentiation by time, so it is represented by one time column.

As regards each award, I have chosen a classification that near as possible describes a semi-skilled worker without formal qualification. However, I have also been led to describe an “ordinary hours” base rate (Monday to Friday, 1pm) that approximately matches in amount across awards (to a tolerance of about 3%), so that inequalities in higher penalty-attracting and higher casual-loading-attracting moments can be meaningfully compared.

Thus, to use an extreme example, although the Manufacturing Award and the Travelling Shows award are identical for casuals in “ordinary hours” at 1pm on Monday to Friday, by the time we get to a Public Holiday, the Manufacturing Award delivers almost 2 ½ times the rate of the Travelling Shows Award.

In order to help provide a quick visual reference for these differences, I have also colour-coded the data by hourly rate, and listed the awards by relative generosity, so that one can easily see the profligate greens and blues at the higher end of the award spectrum being invaded by the parsimonious reds and pinks at the lower end.

Whilst at the bottom of the chart, I also invite you to discover the most startling piece of data therein, where the Public Holiday rate for casuals in the Travelling Shows Award is *less* than the permanent rate, and attracts an Effective Casual Loading of *minus 17%*.

For the following three sections, I will narrow down the awards represented still further to six, on the basis that I don’t want to double up on similarly recompensed awards, and also want to provide clear and noticeable examples of contrast.

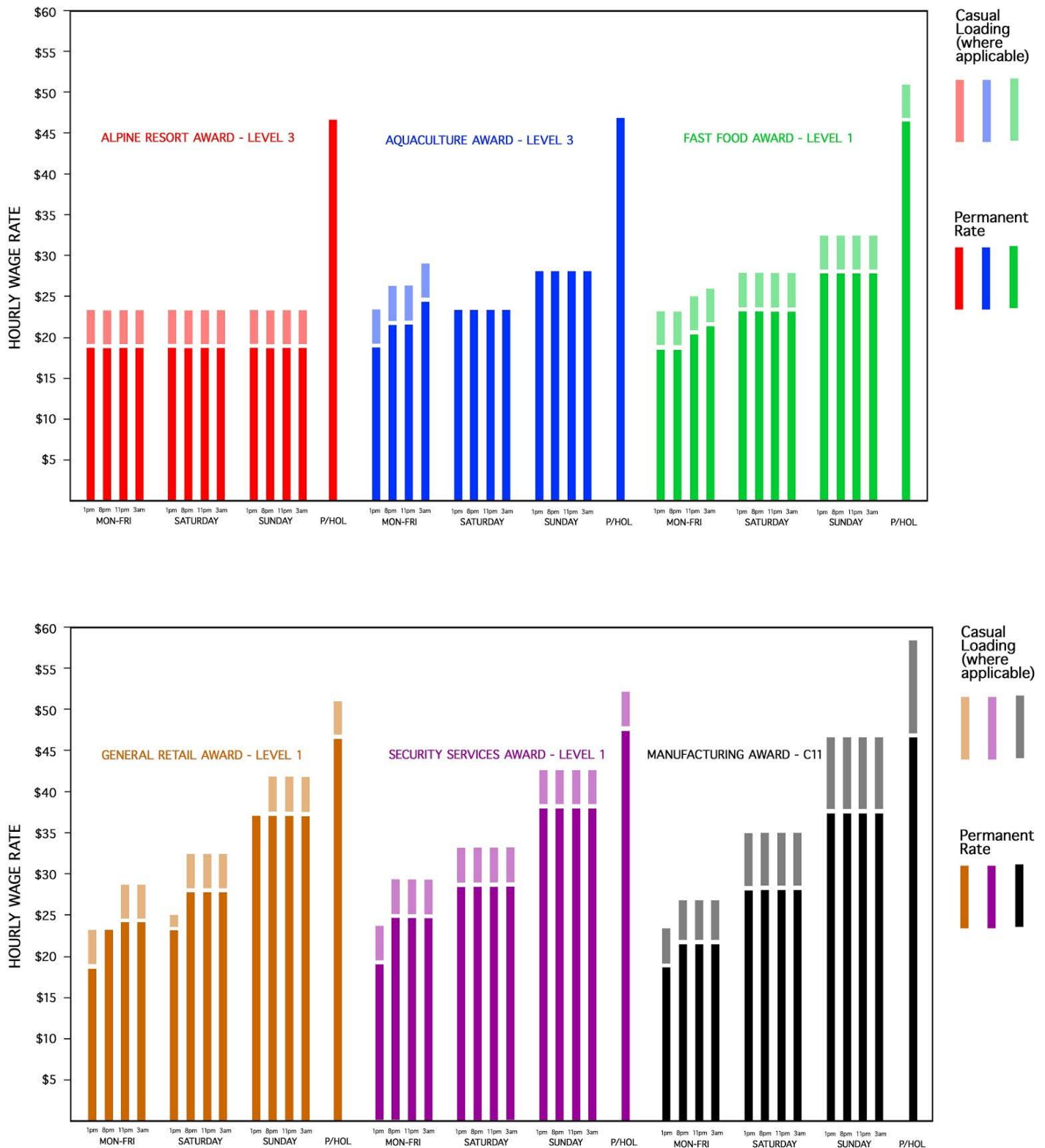
These six awards, in order from least favourably treated (generally) to most, are:

- Alpine Resorts Award (which, except for Public Holiday penalties, is identical to the Travelling Shows Award)
- Aquaculture Award
- Fast Food Industry Award
- General Retail Industry Award

- Security Services Award
- Manufacturing Award (which, except for Sunday rates, closely mirrors the Mining Award)

SECTION G: HOURLY RATE BY MOMENT AND AWARD, INCLUDING CASUAL LOADING WHERE APPLICABLE

Figure 3: Hourly wage rate by award, by moment, across six modern awards, inc. casual loadings



Source: Figure 2, above

Figure 3, whilst not yet deriving Effective Casual Loading and Effective Penalty Rate For Casuals, already demonstrates some significant disparities between award conditions, which can be easily observed:

- 1) Discounting the Public Holiday rate, observe how flat the Alpine Resort Award is, as it attracts no penalty at all. Further note how the awards become increasingly “raked” or “progressed” by penalties across the series, until arriving at the Security Services and Manufacturing Awards.
- 2) Note that the Manufacturing Award shows proportionally larger and commensurate casual loadings across the moment spread, whereas all other casual loadings are either at an almost constant dollar amount or reduced from that amount.
- 3) Observe that casual loadings are discarded in all of the Saturday and Sunday rates for the Aquaculture award, as well as in standard (1pm) hours for Sunday and evening (8pm) hours for weekdays in the Retail Award.
- 4) Note that casual loadings in standard hours for Saturday in the Retail Award back to a 10% (*non-multiplying*) rate.

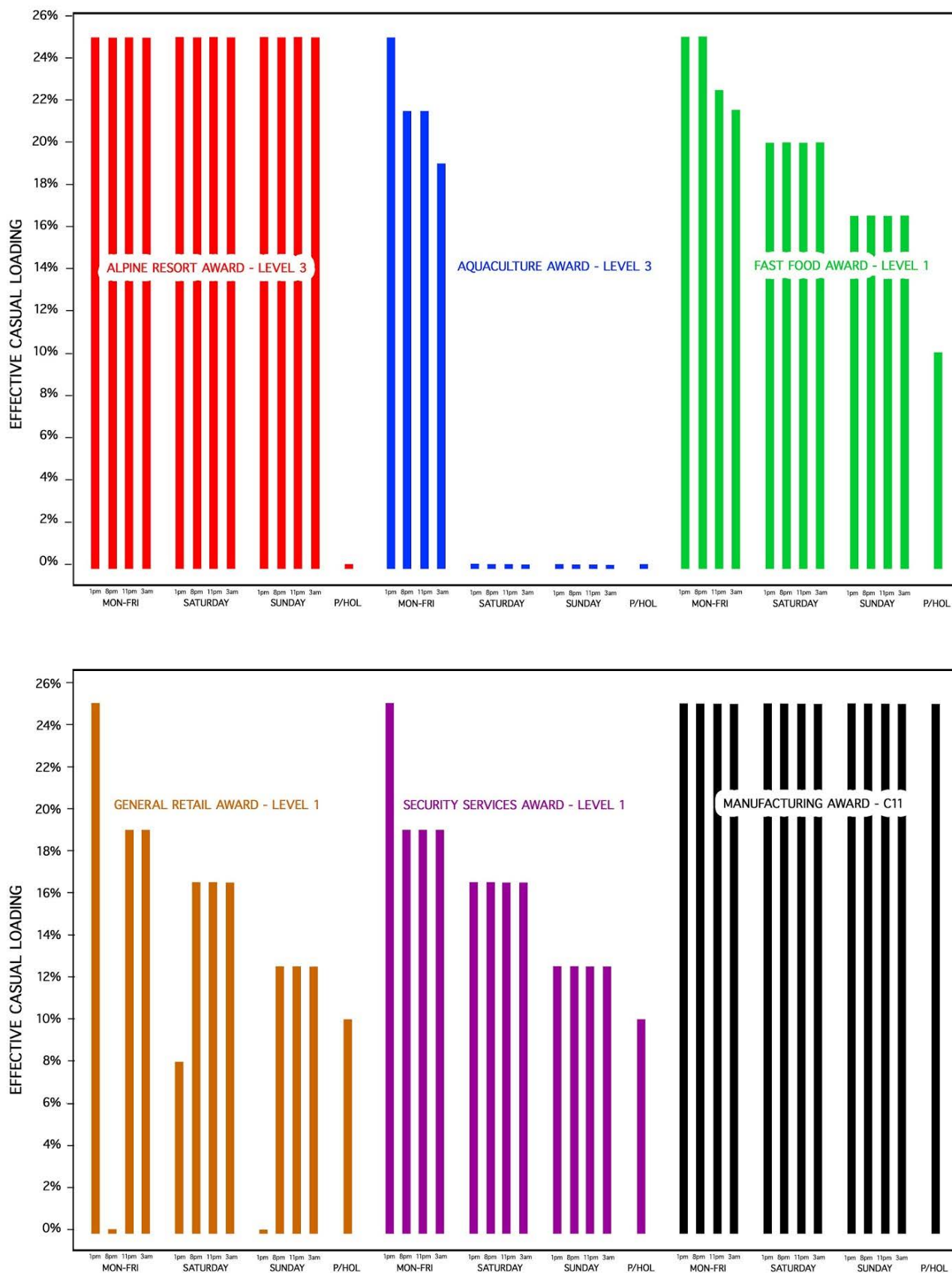
Figure 3, when considered from the basis that all of the first data columns in each award (representing “ordinary hours” hourly wages, sometimes referred to as the “base rate”) are matched to within 3% clearly demonstrates several species of inequity between awards that typify the Australian WR system as it currently stands. Excluding the Manufacturing Award, which fully acquits casual loadings post-penalty at a 125% *multiplier*, as well as offering more generous Saturday and Sunday penalties (50% and 100% respectively) all the other five awards show distortions of either penalty rate or casual loading principles, or a combination thereof.

The most common distortion here is discounting of the casual loading in respect of penalties, which occurs in four of the awards represented (excepting Manufacturing and Alpine Resorts), either by treating the 25% loading as a *non-multiplier*, or not even hitting this rate, by actively discounting leave loadings during various moments (here represented by the 10% *non-multiplying* loading at 1pm Saturdays in the Retail Award). Further, there are several examples of the casual loading being discounted to *zero*, thus being totally obliterated within the permanent penalty rate. Two moments in the Retail Award achieve this; further, *all* weekend moments within the Aquaculture award achieve this.

The final distortion is the inequitable way in which even permanent penalty rates are awarded, as shown by the relative “raking” of the permanent rates across each data point within each award, a tendency which is amplified by the *non-multiplying* casual loadings that sit atop them.

SECTION H: EFFECTIVE CASUAL LOADING BY MOMENT AND AWARD

Figure 4: Effective Casual Loadings, by award, by moment, across six modern awards



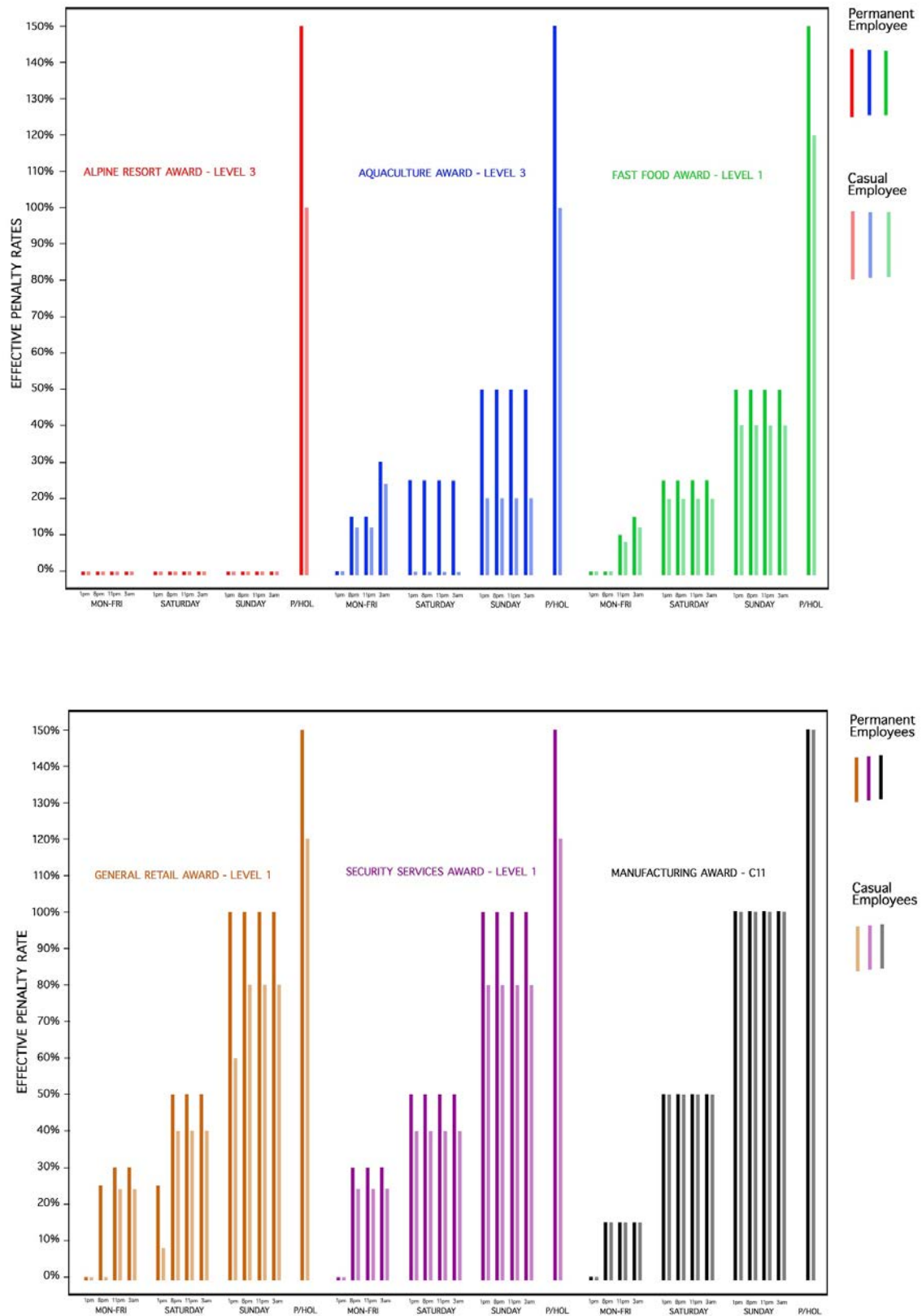
Source: Figure 2, above

Referring to *Figure 4*, one may be forgiven for imagining an equivalence between the Alpine Resorts and the Manufacturing Award, but this is purely a distortion. That is to say, whilst the complete domination of the 25% Effective Casual Rate in the Manufacturing Award reflects a fully integrated 25% *multiplying* casual loading across all moments, the similar effect generated in the Alpine Resorts Award is an artefact of the fact that (other than Public Holidays), no penalties at all are awarded, so that these are just iterations of the basic 25% loading on any “ordinary hours” rate, which, in most service industry awards, is the only time classification that will attract full recompense at 25% *multiplying* loading.

Of the other three awards, we may point out that Sundays and Public Holidays all attract an Effective Casual Loading that falls below the 19-20% prescribed in the 1970s (and thus, by extrapolation, are only commensurate with the component of Casual Loading calculations that account for Recreational and Sick Leave, discounting all other considerations) and that Public Holiday Effective Casual Loadings either match or fall below the 10% prescribed in the original determinations from the 1920s. For the moments here where Effective Casual Loadings are *zero*, we find ourselves back in the pre-1920s era where such casual protections were completely unknown.

SECTION H: EFFECTIVE PENALTY RATES FOR PERMANENTS AND CASUALS BY MOMENT AND AWARD

Figure 5: Effective Penalty Rate For Permanents and Casuals, by award, by moment, across six modern awards



Source: Figure 2, above

Viewing the data for these six awards through the prism of Effective Penalty Rate, as in *Figure 5*, draws us much closer to the discussion that the Productivity Commission seeks, that of penalty rates in general. It can be easily here observed that (excluding the Manufacturing Award) all permanent penalty rates are effectively discounted in the casual regime, usually in the order of one fifth, but occasionally more.

In fact, in the least generous penalty rate and casual rate regimes here represented (Alpine Resorts Award and Aquaculture Award), it would be reasonable to argue that all pretence of equity and principle have been abandoned.

Let us move beyond those more extreme manifestations of the penalty rate and casual loading distortions to focus on the two awards that stand in for the Retail and Hospitality sector, i.e. - Retail Award and Fast Food Award (remembering that the Fast Food Award very closely aligns with both the Restaurant Award and the Hospitality Award), for the reason that this sector is disproportionately used by lobbies to argue the case of penalty rate reduction.

It is a commonplace these days, and will probably be invoked in other submissions to the Inquiry, that Hospitality, Restaurant and Retail businesses are commonly confronted with Public Holiday penalties of 150%, Sunday penalties of 50% to 100% and Saturday penalties of 25% to 50%. However, since weekend workers in these sectors are overwhelmingly represented by casuals over permanents, it is more accurate to acquit them thus:

- Public Holiday Effective Casual Penalties: 120%
- Sunday Effective Casual Penalties: 40% to 80%
- Saturday Effective Casual Penalties: 20% to 40% (with a significant cohort of daytime Saturday Retail workers receiving only 8%)

In fact, to look at it from another perspective, if one were an employer in the retail or food/hospitality sectors, one would be delinquent *not* to employ casuals on weekends and public holidays, because they can often be had at discounted rates, as well as attracting less prohibitive termination regulation.

SECTION I: SUMMARY AND CONCLUSION

I have used the perhaps unfashionable principle of equity as my lodestar in exploring the practical and regulatory impacts of both penalty rates and casual loadings in the Australian modern award system. And, as WR advocacy moves inexorably to a commonwealth system, and moves away from its traditional state-based systems, this system, dually governed by the FWC modern awards and the NES, must be seen as the main game in effecting any equity-based reforms.

Whilst the term "equity" can be dealt as a generalised and abstract nexus, it is perhaps worth a moment to single out a few ways in which inequitable relationships, in my belief, cohere in the current system:

- 1) The equity between employer and employee. Whilst some lobbies will like to foster competition and conflict between employer and employee as a necessary driver of economic margin-making

and progression, I differ. I propose, instead, that fair-dealing and good-faith relationships between employer and employee do not mitigate against productivity and economic efficiency. Therefore, systems that tend toward exploitation of vulnerable groups, such as semi-skilled retail and hospitality workers, by distortion of casual loading and penalty rate principles, are neither ethical nor sustainable.

2) The equity between a casual worker and a permanent. Whilst these arrangements continue to price permanent workers out of penalty-attracting times, and, conversely, price casual workers out of penalty-free times, we will continue to create attractors of exploitation, whereby both groups will be worse off than if (as in the Manufacturing and Mining awards) the true, consistent and fully iterated calculation of both penalty rates and casual loadings aligns with their original objectives.

3) The equity between an ordinary-hours worker and an evening, night-time, weekend or public holiday worker. As long as the decades-long trend of discounting the remuneration of workers outside ordinary hours continues on the current trajectory, we will continue to see the flight of work in general from its traditional weekday base, and into cheaper regions of the week. The social effects are considerable, the effects on income levels are perverse, and even those currently encamped around ordinary hours will be driven to greater exploitation.

Equity can also be viewed as a principle of economic theory in general. Even post-Keynesian and neo-liberal economic commentators tend to argue that the best economic structures demand that economic actors negotiate the best responses to economic frictions when distortions, sinks and repelling forces are quieted. Thus, phenomena such as perverse incentives, rent-seeking, subsidies, trade tariffs and the like, when reduced, lead to a higher yield stabilisation of the economy. So, with distortions in wages, especially if one assumes, as I do, that it is unreasonable, especially in a high-unemployment cycle, to assume that employer and employee are equal actors in negotiating economic outcomes.

SECTION J: RECOMMENDATIONS

It is a commonplace for lobbies or interest groups to industrial inquiries to argue ambit claims that far exceed actual expectations, in order to shift the bargaining or compromise position to their favour. I will, however, take an approach that coheres with good faith, and present my recommendations tiered by priority (which should also be taken to reflect short to mid term achievability).

Whilst it is tempting to seek that some of the ambits of casual loading and penalty rates be migrated to the NES, in order that they should apply across all awards, I am wary of recommending this, in general, for fear that NES provisions can be easily legislated away in the future by federal parliamentary fiat, whereas award changes always tend to have a more cumulative, long-standing and independent tenure, and also tend to common law principles of precedent and testing of argument.

PRIORITY ONE RECOMMENDATION: That no further cuts be made to penalty or casual loadings across moment of the week in any award. This is, in effect the status quo, and would hardly

represent a legitimate recommendation if it weren't commonly perceived that the Inquiry is a stalking horse for diminution for penalty and casualisation benefits.

PRIORITY TWO RECOMMENDATION: That, in addition to the previous recommendation, all weekend permanent penalties, despite award, should be brought up to the following minima:

- Saturday: 25%
- Sunday: 50%
- Public Holiday: 150%

PRIORITY THREE RECOMMENDATION: That, in addition to the previous recommendations, all casual loadings, across all awards and all moments, should be calculated at at least 25% *non-multiplying*.

PRIORITY FOUR RECOMMENDATION: That, in addition to the previous recommendations, all casual loadings, across all awards and all moments, should be calculated at 25% *multiplying*, or, to put it another way, that 25% casual loadings should always be calculated as a *multiplier* after other penalties and allowances are acquitted.

PRIORITY FIVE RECOMMENDATION: That, in addition to the previous recommendations, the Saturday and Sunday permanent penalties be increased to at least (in line with Manufacturing Award and Mining Award arrangements):

- Saturday: 50%
- Sunday 100%

PRIORITY SIX RECOMMENDATION: That, in addition to the previous recommendations, that all evening (6pm to midnight) and night-time work (midnight to 6am) be further *multiplier* penalised at the following rates:

- Evening: 15%
- Night: 30%

I commend the arguments above to the Commission, and look forward to the Commission's response. I also look forward to the opportunity, if granted, to personally make the case to the commission at an agreed time.

Duncan Edward Graham
March 2015.