



**AFEI submission to  
Senate Education, Employment and Workplace Relations  
Legislation Committee Inquiry — Fair Work Amendment  
(Small Business-Penalty Rates Exemption) Bill 2012**

**24 September 2012**

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

AFEI welcomes the proposed legislation, which seeks to provide some small employers in the retail and hospitality sectors with relief from the unsustainable penalty rate provisions in their modern awards. However the performance and viability of employers of all sizes in these and other sectors suffer from these damaging provisions. As a consequence the employment of workers is also subject to their negative impacts.

### **Why is legislative change needed?**

Given the unsuccessful attempts thus far by employers to vary modern award penalty rate provisions through the *Fair Work Act 2009* (Cth) in its current form, legislative reform may be the only avenue by which these essential changes can be achieved.

In our view, however, the proposed legislative changes extending only to employers with businesses in the restaurant and catering or retail industries with fewer than 20 full time or full-time equivalent employees does not go far enough. Reform is also required for employers facing unsustainable penalty rates in other sectors where modern awards either introduced penalty rates where previously none applied or increased them significantly beyond pre modern award levels. Moreover, more recognition must be given to the changing nature of work patterns in Australia, in particular, the ever-increasing emergence of the 7-day trading week. In our view, legislative reform that targets sectors where penalty rates regimes have previously applied, but are no longer relevant in a contemporary economy and are in fact detrimental, such as in the fast food sector, is also necessary.

To achieve this, penalty rates for weekend work should not apply where these hours form part of the worker's ordinary, not overtime, hours. Further the introduction of a "cut off" point at 20 employees has the potential to introduce distortion and unintended consequences in the labour market.

In making modern awards where whole sectors were subsumed into 'one size fits all' awards, provisions previously negotiated or arbitrated to meet the specific circumstances of a particular industry were applied to industries and enterprises where this award history was of no relevance. Previous industrial instruments in NSW, for example, provided recognition for viable penalty rates for Sunday trading in the retail sector; the importance of casual work at sustainable penalty rates on weekend and public holidays in industries such as hospitality, amusements and leisure; and recognition of essential early morning work in highly varied industry sectors such as private sector commuter ferries, milk vendors, baking and fish marketing.

The Amusement, Events and Recreation Award 2010 ("AERA") is one example of a modern award which has introduced significant increases in penalty rates and minimum engagement periods for casual employees in the amusement and recreation industry for work on weekends and public holidays. It is already apparent that by the end of the award transitional period the increases will be unsustainable for the industry. In NSW cost increases will range from 45% for Sundays and 145% for public holidays. In other states many sectors of the amusement and recreation industry were award free and the adverse impact of the AERA penalties there is even greater.

In this and other modern awards the prevailing industry specific award provisions were often ignored during award modernisation with the result that hours of work, classifications and penalties in modern awards are not viable for many employers. However the ability to seek realistic variations to awards has been constrained by the tests imposed by Fair Work Australia in its application of s 157 and s 134 of the FWA. The result has been that too many modern award provisions represent a great leap backwards into more restrictive, less flexible and more costly arrangements. These regressive changes reflect what unions want but not what the economy needs.

It would be expected that the modern award review currently underway is the appropriate means by which to correct some of the costly deficiencies in modern awards. However there is little certainty about the utility of the modern award review in addressing the problem of unsustainable penalty rates in the modern retail related and hospitality awards. Fair Work Australia's obligation to conduct the review arises under Items 6 and 7 of Schedule 5 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) ("Transitional Act"). On 29 June 2012, a Full Bench of Fair Work Australia handed down its decision concerning its powers under Item 6 of Schedule 5 to the Transitional Act should be exercised.<sup>1</sup>

At paragraph [88] of their decision the Full Bench imposed a threshold jurisdictional criterion for applications seeking variations concerning award content dealt with by the Tribunal during the award modernisation process. The Full Bench stated:

*In circumstances where a party seeks a variation to a modern award in the Review and the substance of the variation sought has already been dealt with by the Tribunal in the Part 10A process, the applicant will have to show that there are cogent reasons for departing from the previous Full Bench decision, such as a significant change in circumstances, which warrant a different outcome.*

Employers have already made many unsuccessful applications to vary modern awards in an attempt to rectify costly and inappropriate provisions, including penalty rate provisions. There is a high level of frustration among employers with these processes, especially as there does not seem a wide understanding from many members of Fair Work Australia of the damage inflicted in sectors such as retail and hospitality by the creation of modern awards.

The higher penalty rates were inserted into the modern retail related and hospitality awards despite the Senate led amendments to the *Fairwork (Transitional Provisions and Consequential Amendments) Bill 2009*, which

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<sup>1</sup> Modern Awards Review 2012- Decision [2012] FWAFB 5600

required the AIRC in continuing and completing the award modernisation process to have regard to:

- a. the state of the national economy;
- b. the likely effects on the national economy of any modern award that the Commission is considering, or proposing to make, with special reference to likely effects on the level of employment and inflation; and;
- c. the likely effects on the relevant industry or industry sector of any modern award that the Commission is considering, or proposing to make, including on **productivity, labour costs and the regulatory burden on business**. (Our emphasis).

In addition the consolidated Ministerial request issued by the then Minister for Employment and Workplace Relations, Julia Gillard, of 29 May 2009 required that the award modernisation request was to be read in conjunction with Part 10A of the Act. In particular mention is made of s.576A of the Act and acknowledge that modern awards:

- a. must be simple to understand and easy to apply and must reduce the regulatory burden on business;
- b. together with any legislated employment standards, must provide a fair minimum safety net of enforceable terms and conditions of employment for employees;
- c. must be economically sustainable and promote flexible modern work practices and the efficient productive performance of work;
- d. must be in a form that is appropriate to a fair and productive workplace relations system that promotes collective enterprise bargaining but does not provide for statutory individual employment agreements; and
- e. must result in a certain, stable and sustainable modern awards system for Australia.

The creation of modern awards is not intended to:

- disadvantage employees;
- **increase costs for employers.** (Our emphasis)

As AFEI submitted to the 2012 Review of the Fair Work Act, these modern award objectives have not been met.<sup>2</sup> Where adverse outcomes from the provisions of modern awards cannot be remedied within Fair Work Australia, then legislative reform of the Fair Work Act is required.

### **Why weekend penalty rates are unnecessary**

Penalty rates originated in the early stages of wage fixing where the concept of standard hours were those worked Monday to Friday by male breadwinners working to support a family. Penalty rates were imposed as compensation to employees for working non-standard hours, and to deter employers from using workers outside those hours.

Our economy, society and hours worked have changed significantly since weekend penalty rates were first inserted in awards nearly a century ago.<sup>3</sup> Consumers now demand 24/7 services. The areas of strongest growth in the labour force have been in jobs for women and in part time work for both men and women. There has been a relative decline in male full time employment.<sup>4</sup> Households are now characterised by two income earners, not solely supported by a single male earner working 9-5 Monday to Friday.<sup>5</sup>

The number of hours worked has been declining overall with greater proportions of part time workers in the workforce.<sup>6</sup> However the proportion of workers reporting they work only Monday to Friday has increased from 63% 1993 to 69% in 2009 (the period this data has been measured by the ABS).<sup>7</sup>

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<sup>2</sup> AFEI Submission to Fair Work Act Review Panel 17 February 2012

<sup>3</sup> [1919] 13 CAR 437; [1947] 58 CAR 610

<sup>4</sup> Australian Bureau of Statistics 1301.0 - Year Book Australia, 2012;

<sup>5</sup> Australian Bureau of Statistics (ABS) 4442.0 - Family Characteristics, Australia, 2009-10

<sup>6</sup> ABS 6342.0 Working Time Arrangements 2009 Table 11

<sup>7</sup> ABS 6342.0 Working Time Arrangements 1993 Table 1

Weekend workers are not, in the main, those who have worked a “standard” Monday to Friday work week and are then required to perform additional work on weekends. Regular working hours have become dispersed over the seven days of the week.<sup>8</sup> Workers who have more than one job are more likely to be working part time or casual and are more likely to work on weekends. 71% of single job holders work weekdays only compared with 42% of multiple job holders who work weekdays only with 57% working weekends as well.<sup>9</sup>

The ABS reported that of the 37% of employed people who usually worked on the weekend, almost two-thirds (65%) were following their preference for working some or all of their hours on the weekend.<sup>10</sup>

People who usually worked on the weekend and preferred to work on the weekend were a diverse group. For example, 30% of people who usually worked on the weekend and preferred to work on the weekend were casual employees, 26% were owner managers, 59% were male, 26% were aged 15-24 years, and 17% were aged 55 years or older.<sup>11</sup>

In considering the factors which may influence the extent to which 'non-traditional' patterns are worked within an industry, the ABS identified the nature of the work undertaken (e.g. seasonality in farming), the preferences of its consumers, levels of competition operating within the industry, negotiated entitlements and obligations (i.e. conditions of employment), the demographic profile and personal preferences of its workers. It further offered an opinion on the attraction value of high penalty rates on the weekend for workers.<sup>12</sup>

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8 Australian Industrial Relations Commission Working Hours Case July 2002 Print PR072002

9 ABS Working Time Arrangements 2009

10 ABS 4102.0 - Australian Social Trends, Dec 2009 Working Patterns

11 op cit

12 op cit

By way of example the ABS points to the accommodation and food services industry:

*72% of people working in the very casualised and competitive Accommodation and food services industry usually worked on the weekend. Working mainly in this industry, 89% of bar attendants, 88% of hotel/motel managers and 83% of chefs usually worked on the weekend. In sharp contrast, only 8% of people employed in the Financial and insurance services industry usually worked on the weekend. This marked difference partly reflects heightened weekend demand for many services supplied by the Accommodation and food services industry.<sup>13</sup>*

The reasons for weekend work – consumer demand, nature of the services provided and levels of competition – have become entrenched parts of these industries and operate to make weekend work essential for the survival of their industries. Yet they are penalised by the penalty rates imposed decades ago with the then rationale of confining the working week to Monday to Friday. If high penalty rates are in fact required to attract weekend workers then in their own commercial interest, employers will offer these. However as is discussed below, the current high labour costs including weekend penalties are operating to reduce job growth and hours worked in these sectors.

It is well established that the retail and hospitality workforce is predominantly part time and casual and available for work on weekends. For example:

*The use of part-time and casual employment has enabled the industry to become more flexible in response to changes in the business cycle, seasonality and other peak demand periods. Many younger individuals choose to work part-time while they are completing secondary or further education, and predominantly in the case of women, while they are caring for young children. This is particularly true for part-time workers in the sector who tend to be younger and also more likely to be female than in other industries.<sup>14</sup>*

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<sup>13</sup> op cit

<sup>14</sup> Australian Fair Pay Commission Research Report 1/2009 Accommodation, Cafés and Restaurants Industry Profile page 11

And

*Relative to the workforce as a whole, the retail industry contains high proportions of women, young people and part-time workers. Some 58 per cent of Retail trade employees are female, one-third are aged 15 to 24 years and 48 per cent work part time.<sup>15</sup>*

As the Productivity Commission observed:

*In principle, penalty rates in awards should not be set in excess of the minimum necessary to avoid unfair or unduly harsh treatment of employees, and an efficient level of penalty rates would be one which is just sufficient to induce people with appropriate skills to voluntarily work the relevant hours. Some workers may be very comfortable with (or even prefer) weekend and evening work and, for these people, the additional pay incentive may not need to be as large as exists under the current penalty rate structure. If work at existing penalty rates is keenly sought, this may also be suggestive of those rates being higher than is necessary to compensate workers for working at times that are inconvenient.<sup>16</sup>*

However the Fair Work Act and modern awards have been structured around the notion of “standard” hours and employment as the preferred model for regulation, with heavy penalties imposed for work outside “standard” hours. This has been done in response to the continuing union campaign against non standard work, instead of responding to the changed demands of the community and the operational needs of industry.

As a consequence sectors such as retail and hospitality which have relatively high labour costs, low profit margins and lower output and employment growth now have additional costs imposed through the provisions of modern awards. The effect will be that these regulated, unsustainable employment conditions will worsen the sectors’ already poor performance and make it even more vulnerable to the low cost on-line suppliers with adverse implications for employment.

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<sup>15</sup> Australian Fair Pay Commission Research Report 7/2009 Retail Trade Industry Profile page 6

<sup>16</sup> Productivity Commission 2011 Economic Structure and Performance of the Australian Retail Industry Report no. 56, Canberra page 341

## **The impact of penalty rates on employment in the retail and hospitality sectors**

The Productivity Commission report into the retail sector found that it had one of the highest labour costs relative to sales revenue in the world. It operates on low profit margins and has low value added per person in comparison to other industries.<sup>17</sup> Similarly Australian Fair Pay Commission research reported high labour costs as a proportion of operating costs, lower profit margins, and higher levels of business insolvency in these sectors.<sup>18</sup> The sectors also have high proportions of workers paid at award rates, reflecting their limited capacity to provide above award wages.<sup>19</sup>

The sectors are characterised by a large number of small employers - most retail businesses are small businesses with almost half of employing businesses employing four or less workers<sup>20</sup>

These sectors are not able to withstand additional labour cost pressures. Retail jobs in circumstances of reduced demand have yet to return to pre GFC levels, having declined by 4% since 2007; shedding 22,000 jobs over the past year and 28,000 in the previous year. Numbers employed in the accommodation and food services sector also fell in the past year, reflecting the condition of the poorly performing tourism industry.<sup>21</sup>

Poor demand conditions and high labour costs are also contributing to the very high levels of underemployment in these sectors. There is a concentration of underemployed workers in retail trade, accommodation and food services, administrative and support services which have consistently accounted for over 40% of all underemployed workers. The underemployment rate in the retail sector is currently estimated to be over

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17 Productivity Commission op cit page 41

18 Australian Fair Pay Commission 2009 Accommodation, Cafés and Restaurants Industry Profile Research Report 1/09; Australian Fair Pay Commission 2009 Retail Trade Industry Profile Research Report 7/09

19 FWA Statistical Report, February 2012, Tables 6.5 & 7.2

20 Productivity Commission op cit page 32

21 ABS 6291.0.55.003 Labour Force, Australia, Detailed, Quarterly, Table 04. Employed persons by Industry - seasonally adjusted

14% and over 19% in the hospitality/accommodation sector compared to an all industry average of 7%.<sup>22</sup>

The slower jobs growth and decrease in overall hours offered to employees in these sectors, along with the adjustment of trading hours are indicative of the cost impact of modern awards which is now to be exacerbated by the new penalty rate regime. As the Productivity Commission observed: *The biggest single industry concern in relation to the retail award modernisation process is the impact on penalty rates and, as a further consequence, on the trading hours flexibility of employers.*<sup>23</sup>

The outcome in these sectors in response to labour cost increases will inevitably be further reductions in jobs, available work hours, and careful management of rosters to avoid paying penalty rates.

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<sup>22</sup> ABS 61050D0004\_201201 Australian Labour Market Statistics, Jan 2012

<sup>23</sup> Productivity Commission op cit page 336