Submission to the Senate Education, Employment and Workplace Relations Committee inquiry into the Fair Work Amendment (Small Business- Penalty Rates Exemption) Bill 2012.

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Job Watch Inc

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1 Introduction

Job Watch Inc (**JobWatch**) welcomes the opportunity to make a submission to the Senate Education, Employment and Workplace Relations Committee inquiry into the Fair Work Amendment (Small Business - Penalty Rates Exemption) Bill 2012 (**the Bill**).

JobWatch strongly opposes any measures that decrease the rights of workers to obtain adequate pay for working outside standard work hours such as late night and/or weekend work.

JobWatch does not accept the premise outlined in the Bill's Explanatory Memorandum (**EM**) being that because employees who work in the retail, restaurant or catering industry are routinely required to work outside standard work hours, they therefore should not "be required or permitted" to be paid penalty rates under the modern award when working those hours.

The EM explains the rationale underpinning the Bill as being "to seek a compromise between small business operators and their employees in relation to penalty rates". JobWatch submits that the Bill does not actually provide for any compromise in relation to penalty rates. Alternatively, JobWatch contends that the current modern award system as it stands already provides for an acceptable means by which employees and employers can compromise in relation to penalty rates by way of Individual Flexibility Arrangements.

If enacted, the Bill will severely disadvantage employees who work in the retail, restaurant and catering industries and will likely have the greatest negative affect on those employees who are already vulnerable and disadvantaged such as employees who are typically unskilled, uneducated, young, lacking security of employment due to their casual employment status or ineligibility for unfair dismissal protection and who are not usually members of a union[1].

These employees have no contractual bargaining power and so rely entirely on the federal minimum safety net of entitlements (**safety net**) for their

[1] For example, for the period 1/1/10 to 30/6/12, JobWatch's database statistics indicate that approximately 12% of our callers across all industries are employed on a casual basis but in the Café/Accommodation/Restaurant sector that number increases to approximately 32%. Further, according to JobWatch's database, reported union membership is at less than 2% in that sector.

income. The Bill, if enacted, will figuratively poke holes in the safety net and already vulnerable and disadvantaged employees will fall through the safety net and be worse off.

On this basis, JobWatch's recommendation is that the Bill should not be enacted because employees should not be penalised if, through no fault of their own, they happen to work for a small business employer in a particular sector or industry.

Recommendation: The Bill should not be enacted regardless of any amendments that may be proposed.

The focus of JobWatch's submission will be on the following:

- The need for equal pay protection for employees whether they are working for a small or large business;
- The need for continued protection of penalty rates for employees working non-standard hours such as on weekends and late nights;
- Alternative recommendations to achieve the stated purpose of the Bill as set out in the EM; and
- Unintended consequences.

2 About JobWatch

2.1 Core Activities

JobWatch is an employment rights community legal centre which is committed to improving the lives of workers, particularly the most disadvantaged. It is an independent, not-for-profit organisation which is a member of the Federation of Community Legal Centres (Victoria).

JobWatch was established in 1980 and is the only service of its type in Victoria. The centre receives State and Commonwealth funding to do the following:

a) Provide information and referral to Victorian workers via a free and confidential telephone information service;

b) Engage in community legal education through a variety of publications and interactive seminars aimed at workers, students, lawyers, community groups and other organisations;

c) Represent and advise disadvantaged workers; and

d) Conduct law reform work with a view to promoting workplace justice and equity for all Victorian workers.

2.2 Database of JobWatch's callers: key characteristics

JobWatch is well-placed to contribute to this Inquiry. Since 1999, we have maintained a comprehensive database of our callers. To date we have collected over 150,000 records. We start a new record for each new caller or for callers who have contacted us before but who are calling about a new matter. One record may canvass multiple workplace issues including, for example, contract negotiation, discrimination, personal leave and maternity leave. Our database allows us to report on our callers' experiences and enables us to track any changes in demographic trends.

Of relevance to this Inquiry, our records indicate the following:

a) The vast majority of our callers are not union members; and

b) Since 1 January 2010, nearly 40% of our callers were working for employer's in the retail, restaurant and hospitality industries (which includes the catering industry).

3 Overview of the Bill and Penalty Rates

Currently, there is no distinction in modern awards between award safety net entitlements payable to employees working for small business employers or large employers.

The Bill proposes that where an employer is classified a small business employer, that is, an employer with less than 20 "full-time or full-time equivalent" employees in the retail, restaurant and catering industry, it will not

be required or even permitted to pay penalty rates.[2] There is no definition provided in the Bill to establish what the term "penalty rates" encompasses.

For example, it is unclear whether the Bill intends to conflate penalty rates and other increased rates or allowances such as overtime rates. In the Bill, the term "penalty" appears to possibly encompass any additional payment paid to an employee above the base rate of pay and therefore would include any penalties paid for working weekends, late nights, shift penalties, allowances, loadings as well as overtime hours worked.

Clause 155A(1) of the Bill provides that an employer who is a small business employer in the retail, restaurant and catering industries would not be required or even permitted under a modern award to pay penalties to employees unless they worked more than 38 hours in a week or did more than 10 hours of work in a 24 hour period. The Bill therefore seems to confuse the concepts of overtime rates of pay with penalties payable for working, for example, weekends or late nights which are currently payable regardless of the length of time an employee has worked. This issue should be clarified.

4 Potential Exploitation

JobWatch submits that, if the Bill is enacted, there will be serious potential for exploitation by employers regarding the way they structure their businesses and engage staff. Essentially, employers will be able to manufacture a situation where the will never have to pay penalty rates.

For example, the Bill is ambiguous in terms of determining whether an employer is deemed a small business employer. There is no definition provided of what is meant by the term "full-time equivalent employees".[3] The term is not used in the *Fair Work Act 2009* (Cth) (**FW Act**) or modern awards and it is therefore unclear what the Bill proposes to mean by the term "full-time equivalent employees".

If the term simply means it includes other employees whose hours of work add up to the full-time equivalent hours of 20 employees i.e. 760 hours, then clearer wording should be used. This, in turn, would mean that the Bill would only apply to those employers that are genuinely a small business as defined by the Bill, i.e. a business with less than 20 full-time equivalent employees.

[2] Clause 155A of the Bill.
[3] Clause 155A(3)(a) of the Bill.

However, if a full-time equivalent employee means any individual employee who works 38 hours per week regardless of their status of employment (e.g. permanent or casual) this would be open to abuse by employers who will strategically ensure that their employees do not individually work in excess of 37.5 hours per week or for more than 10 hours in a 24 hour period.

As it stands, under the current wording of the Bill, an employer could employ hundreds or even thousands of staff and ensure each staff member works less than 38 hours per week so as to qualify as an excluded small business employer and therefore avoid paying penalty rates. This situation would clearly be untenable but is likely to occur should the Bill be enacted.

5 Undermining the Safety Net

The Bill further undermines the principles of minimum safety net entitlements because employees working in the affected industries will not know from pay period to pay period the actual amount of their take home pay. In other words, employees will not be able to rely on a set minimum income because they will not know whether penalties will be payable.

The Bill is ambiguous as to when the counting of less than 20 full-time or full-time equivalent employees will take place as it does not define what is meant by “at a particular time”.[4] It is unclear as to whether the particular clause is referring to the time that the employee performs the work that would otherwise attract penalties or to the conclusion of the relevant pay period. This concern is further exacerbated given the nature of the particular industries affected by the Bill which traditionally have a high turn-over of staff, a high casualisation of staff and the number of employees employed at any given time may also vary widely depending upon peak trading seasons or even the days of the week on which an employee works.

Not only is this is problematic in that it would be confusing for small business employers to determine the correct rate of pay at any given time thus creating a further regulatory burden on small businesses and exposing them to the risk of prosecution by the Fair Work Ombudsman, it also leads to uncertainty as to what an employee can expect to be paid for the hours of work they perform.

It is untenable that an employee may not know from pay period to pay period what their minimum pay entitlement may be. The current wording of the Bill

[4] Clause 155A(3) of the Bill.

clearly undermines the principles of the safety net one of the purposes of which is to ensure minimum pay entitlements are clearly defined and, above all, secure.

5.1 Associated Entities

Additionally, clause 155A(4) of the Bill states that full-time and full-time equivalent employees of an associated entity of an employer will be counted in determining whether the employer is a small business employer for the purposes of the Bill. However, associated entities of an employer will only be relevant where the business of the associated entity is also operating in the retail, restaurant or catering industry.

JobWatch submits that it is entirely arbitrary and indefensible that a large employer in an industry other than the retail, restaurant or catering industry that is an associated entity of an employer in the retail, restaurant or catering industry is excluded from having its employees counted.

This is untenable because businesses that are not genuinely small businesses when taking into account employees employed by associated entities in other industries will still not be required or permitted to pay penalty rates.

6 The Need for Penalty Rates and Unintended Consequences

The modern awards to be affected by the Bill are:

- General Retail Industry Award 2010;
- Hospitality Industry (General) Award 2010; and
- Restaurant Industry Award 2010.

None of these modern awards provide for any overtime entitlements for casual employees. This view is supported by the Fair Work Ombudsman.[5]

[5] Fair Work Ombudsman website, Retail Industry http://www.fairwork.gov.au/industries/retail/pay/pages/overtime.aspx Restaurants Industry: http://www.fairwork.gov.au/industries/restaurants-and-cafes/pay/pages/overtime-rates.aspx Hospitality Industry (catering): http://www.fairwork.gov.au/industries/accommodation-liquor-and-gaming/pay/pages/overtime.aspx

Given employers in these industries regularly engage employees on a casual basis, should the Bill be enacted a substantial number of employees engaged in these industries will not be entitled to any penalty rates whatsoever.

Therefore casual employees will only ever be entitled to a basic minimum rate of pay regardless of the number of hours they work or when they work those hours. The only exception would be when an employee works more than 38 hours in a week or does more than 10 hours of work during a 24 hour period, as they then may be entitled to a late night trading penalty or a weekend penalty rate if they were working those hours within the relevant time frame as provided by the modern award.

In addition, the Bill provides clearly that this exclusion will only apply to modern awards. However, the modern awards that cover the retail, restaurant and catering industries all rely on transitional provisions where, for many businesses, the minimum rate of pay and penalty rates are subject to phasing due to transitional arrangements introduced as part of the award modernisation process. Therefore, pre-modern award penalty rates continue to be relevant in determining the minimum penalty rate that applies and will be relevant up until the 1 July 2014[6]. The Bill fails to mention how its proposed amendments will interact with those transitional award provisions provided by the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* thereby potentially adding a further level of confusion and uncertainty.

7 The Need for Compromise

The EM proposes that the Bill is intended "to seek a compromise between small business operators and their employees in relation to penalty rates". However, the effect of the wording of clause 155A(a) of the Bill undermines this premise. The wording of clause 155A(a) provides that a modern award must not include a term that would "*require or permit*" a small business employer to pay penalties. Therefore, a modern award would not even allow a compromise to be entered into such as say where an employer offered to pay some penalties or a portion of some penalties.

Surely, this must be unintentional as what purpose could there be in

[6] Fair Work Ombudsman, Guidance Note 7 Transitional Arrangements in Modern Awards, http://www.fairwork.gov.au/about-us/legal/guidance-notes/pages/default.aspx

preventing or attempting to prevent an employer from offering better terms and conditions than the safety net minimums? If the effect of the term is intentional, then it is antithetical to the concepts of freedom of contract and the free market economy. Either way, it should not become law.

If a compromise on penalty rates is genuinely sort or required by an employer or employee, JobWatch submits that the current modern award system already permits the use of Individual Flexibility Arrangements to vary the terms of modern awards, including in relation to penalty rates, so there is actually no need for the Bill in this respect.

Recommendation: The Bill should not be enacted regardless of any amendments that may be proposed.

JobWatch would welcome the opportunity to discuss any aspect of this submission.

Yours sincerely,

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