Fair Work Amendment (Small Business – Penalty Rates Exemption) Bill 2012 – DEEWR

As discussed on Friday 1 February 2013, please find following further information in relation to a question taken on notice at the Senate Committee hearing into this Bill on 7 December 2012. In particular, you sought information on the extent to which gaps in the application of award-based penalty rates that resulted from the Work Choices legislation (as referred to in our initial response) continue under the Fair Work system.

In our earlier response we explained that federal system employers that commenced operations after 27 March 2006 were not generally bound by pre-reform federal awards and therefore not required to pay award penalty rates, but that such employers and their employees who are now covered by a modern award are transitioning to modern award penalty rates.

Modern awards cover the vast majority of federal system employers that were not covered by a pre-reform federal award due to having commenced trading after Work Choices. The objective of the award modernisation process, as set out in the award modernisation request, was to create a "comprehensive" set of modern awards covering industries and occupations that have historically been award-regulated. As a result modern awards, such as the *Restaurant Industry Award 2010* and the *General Retail Industry Award 2010*, have broad industry coverage and can be expected to cover employers and their employees that would ordinarily have been covered by pre-reform federal awards. In addition, the *Miscellaneous Award 2010* is expressed to cover employees who are not covered by another modern award (excluding managerial and professional employees who have not traditionally been award-covered, and employees in an industry covered by a modern award who do not fall within a classification in that award).

The Office of the Fair Work Ombudsman has reported only very limited instances of becoming aware of gaps in modern award coverage: junior lawyers in South Australia and the possibility that cleaners engaged by a manufacturer to clean offices attached to the manufacturing plant may not be covered by either the *Manufacturing and Associated Industries and Occupations Award 2010* or the *Miscellaneous Award 2010* (in the case of the cleaners, there is some doubt as to whether they were covered by a pre-modernised award).

In the Department's view, having consulted with the Office of the Fair Work Ombudsman and the Fair Work Commission, the award modernisation process (which consolidated more than 1500 awards into 122 industry and occupation modern awards) has achieved widespread coverage of traditionally award-regulated employees, and any remaining gaps in coverage are very much exceptions to the rule.

In relation to workplace agreements, our earlier response indicated that in the period between the commencement of Work Choices and 6 May 2007 (when the 'Fairness Test' was introduced), federal system employers could enter into workplace agreements which could exclude award penalty rates without providing compensation.

Department statistics indicate that there were 8,263 collective workplace agreements made during this period covering 843, 444 employees. Of those agreements, 2443 agreements (29.6%) covering 286,301 employees (33.9%) specifically excluded weekend penalty rates, and 715 agreements (9.5%), covering 45,523 employees (5.4%) had public holiday work paid at ordinary rates. The Department does not have data concerning whether these agreements provided compensation in

lieu of the penalty rates excluded (e.g. a loaded base rate of pay), or the adequacy of any compensation provided. All collective agreements made during the pre-Fairness Test period have now passed their nominal expiry date. Any such agreements that remain in operation are therefore able to be terminated unilaterally through an employee applying to the Fair Work Commission. DEEWR does not have access to data on how many collective workplace agreements made during this period are still in operation.

DEEWR also does not have data on how many individual workplace agreements (i.e. Australian Workplace Agreements) are currently still operational. However, we suspect the numbers would be extremely small. To give you some indication, ABS Employee Earnings and Hours data on AWA's for May 2010 indicates that 0.1% of employees in Retail Trade and 0.7% of employees in Accommodation & Food Services were covered by federally registered individual agreements. Any remaining AWA's made during the pre-Fairness Test period would make up a small subset of those agreements and would all have passed their nominal expiry dates. As such, they would be capable of being terminated unilaterally by the employee giving notice to the employer before applying to the Fair Work Commission for a decision terminating the instrument after 90 days.

The 'Fairness Test' applied to collective and individual workplace agreements lodged from 7 May 2007 until 27 March 2008 (after which time the 'No Disadvantage Test' was re-introduced). The 'Fairness Test' required that agreements which modified or removed 'protected award conditions', including penalty rates, without providing 'fair compensation' were either varied to provide such compensation or terminated. In respect of the particular employees the Committee is concerned about (i.e. employees who were not award-covered but were performing work of a kind that would ordinarily be covered by an award), the 'fairness test' would have required the Workplace Authority to 'designate' an appropriate award for the purpose of performing the test.

The Fairness Test included a number of possible barriers to employees receiving adequate compensation for the removal of penalty rates:

- It was not applied to AWAs made with employees on annual salaries of less than $75,000.
- In determining whether a workplace agreement provided 'fair compensation' for the removal of penalty rates, the former Workplace Authority took into account non-monetary benefits to which a money value could reasonably be assigned and which were of significant value to the employee (e.g. a car space or child care).
- The Workplace Authority could also, in 'exceptional circumstances' and where it was not considered contrary to the public interest, have regard to the industry, location or economic circumstances of the employer and the employment circumstances of the relevant employees when considering whether a workplace agreement provided fair compensation, including where the 'workplace agreement was part of a reasonable strategy to deal with a short-term crisis in, and to assist in the revival of, the employer's business'.

There were 7,043 collective workplace agreements made, covering 653,721 employees, during the 'Fairness Test' period. Of those agreements, 1830 agreements (26%), covering 113,954 employees (17.4%) specifically excluded weekend penalty rates, and 1221 agreements (17.3%), covering 44,920 employees (6.9%), paid ordinary rates for public holiday work. The Department does not have any

meaningful data concerning the type (e.g. monetary or non-monetary) or adequacy of any compensation provided in lieu of award-based penalty rates excluded from these agreements. The majority of workplace agreements made during the 'Fairness Test' period have now passed their expiry date (6262 agreements – 88.9%), and are capable of being terminated unilaterally through an employee applying to the Fair Work Commission. DEEWR does not have access to data on how many collective workplace agreements made during this 'Fairness Test' period are still in operation.