vecci
FOR BUSINESS. FOR YOU.

Victorian Employers' Chamber of Commerce and Industry
ABN 37 650 959 904
486 Albert Street
East Melbourne
Victoria 3002 Australia
GPO Box 4352 Melbourne
Victoria 3001 Australia
Telephone: 03 8662 5333
Facsimile: 03 8662 5462
vecci@vecci.org.au
www.vecci.org.au

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Committee Secretary
Senate Education, Employment and Workplace Relations
Committees
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Committee Secretary

RE: FAIR WORK AMENDMENT (SMALL BUSINESS – PENALTY RATES EXEMPTION) BILL 2012

The Victorian Employers' Chamber of Commerce and Industry (VECCI) is Victoria's leading and most influential employer group. An independent, non-government body, VECCI services 15,000 businesses each year.

Our membership base is diverse, with involvement from all levels and sectors of industry including:

- Manufacturing;
- Health and Community;
- Business Services;
- Hospitality;
- Construction;
- Transport;
- Retail; and
- Tourism.

VECCI is a member of the Australian Chamber of Commerce and industry (ACCI), which develops and advocates policies that are in the best interests of Australian business, the economy and the wider community. VECCI is pleased to have had the opportunity to make a submission regarding the *Fair Work Amendment (Small Business –Penalty Rates Exemption) Bill 2012* ("the Bill").

The Bill warrants support because it seeks to address an issue of fundamental importance for small businesses in the restaurant and catering industry and the retail industry, namely the cost of doing business. The Bill is seeking to address the unwarranted and detrimental outcome the process of award modernisation produced for small businesses in these industries, leaving them with higher wage costs.

Pursuant to section 138 of the *Fair Work Act 2009* ("the Act"), there was the requirement for modern awards to include the terms "*necessary to achieve the modern awards objective*". The modern awards objective includes:

- The need to promote flexible modern work practices, efficient and productive performance of work (s.134(1)(d));

- the principal of equal remuneration for work of equal or comparable value(s.134(1)(e));

- the likely impact of any exercise of modern award hours on business, including on productivity, employment costs and the regulatory burden (s.134(1)(f));

- the likely impact of any exercise of modern award powers on employment growth, inflation, sustainability, and competitiveness of the national economy (s.134(1)(h)).

The modern awards have failed to deliver in relation to these objectives by delivering a penalty rate structure whereby, for example:

1. The cost of labour varies depending on what time of the day it is performed and the day of the week;

2. A worker on a Sunday no more productive than a worker on a Friday is compensated at double the rate of pay;

3. Business are required to pay higher rates simply because of their hours of trade which they may have limited capacity to influence because of the industry in which they operate or consumer demand and spending patterns;

4. Businesses that had previously operated at certain times of the day or week can either no longer afford to do so or, if they continue to do so, either now operate with less staff or at a loss during those times.

Award Modernisation failed small business. The Review of modern awards by Fair Work Australia ("FWA") now required by the Act will also most likely fail small business if one considers the 29 June 2012 statement of FWA (Modern Awards Review 2012 [2012] FWAFB 5600 (29 June 2012)at paragraph [99]:

> *in the context of this review, the tribunal is unlikely to revisit issues considered as part of the Part 10A award modernisation process unless there are cogent reasons for doing so, such as a significant change in circumstances which warrants a different outcome.*

It therefore seems unlikely that FWA will be inclined to change the penalty rate regime introduced into the various modern awards which commenced on 1 January 2010. Adopting such a position will not address the fact that the award modernisation process has had a destructive effect on small business.

While it is acknowledged that FWA will simply be carrying out its functions pursuant to a deficient piece of legislation, it highlights the fundamental problems with that legislation. The Bill is the only effective way to address the issues facing small business in the restaurant, catering and the retail industries because it proposes amendments that would make an immediate and real difference for small businesses in those industries.

The great failing of the Act is that it was designed to operate on the basis "unsocial, irregular or unpredictable hours" plus work on weekends, public holidays and shifts **must** attract penalty rates

because they are imposition on **all** workers and that **all manner of businesses** can afford to pay a premium to operate during such times.

The Act and the modern award system do not recognise that in the modern economy some workers can actually only work at certain times and do not regard them as an imposition because they actually fit in with other aspects of their lives. They also do not recognise that certain businesses have to operate during certain times.

Why should such workers who need or choose to work at such times be entitled to a greater rate of pay simply because the times they choose and prefer to work, and in some cases, can only work, happen to fall on a weekend? Equally, why should some businesses that have to trade on weekends or at night or on public holidays such as tourism operators, café owners, restaurateurs and publicans and accommodation providers be penalised because they have to operate during these hours?

What is required is a rational and sensible debate about making penalty rates relevant to the modern economy and fair to everybody, not just employees. On 18 September 2012, the Federal Government in effect submitted to the modern awards review that weekends and public holidays remain sacrosanct. If this is the case, why does it not have the same view when it comes to trading hours? Would the Minister for Workplace Relations support a situation whereby a product is double the price on a Sunday compared to the price it can be purchased for on a Friday? If the response to that question is "no", then on what basis can the requirement to pay double the cost of labour on a Sunday be justified if the business is legitimately trading on both days?

The Federal Government's has adopted a "head in the sand" position that fails to take into account the movement towards a 24-hour a day, seven days a week society with accompanying economic activity. In its 18 September 2012 submission, it relied on views expressed in 1919, 1947, 1949 and 1950. With respect, Sundays are no longer regarded in the same way now as it was in those times and consumers now expect to be able to shop and dine out on public holidays. The workplace relations system should therefore operate in a way that reflects the way in which businesses have to operate and employees can choose to work.

The Bill proposes that penalty rates have regard to **the number of hours** worked on a day or during a 38-hour week as opposed to **when** those hours are worked. This is a concept warranting serious consideration. Students may only be able to work at night, or on the weekend due to their study commitments but this does not necessarily mean that they warrant receiving a penalty rate. Similarly, if parents, particularly women, are returning to the workforce and can only work at particular times due to other domestic commitments, this should not automatically result in an entitlement to a penalty rate. Likewise, if working parents and other full time employees can only shop or enjoy a meal out at night or on the weekend, should not they be able to access the full range of choices that others who do not work during the week enjoy instead of being denied this because it is too expensive for some businesses to operate? These things should be discussed and debated.

At very least, the bill highlights the need for a sensible and reasoned debate about penalty rates without accompanying hysteria suggesting that to even discuss them indicates a desire for a "race to the bottom" or a "return to WorkChoices". Small business men and women operating retail businesses in the face of competition from online shopping and large corporations together with café and restaurant owners and operators ought to be able to put forward their points of view without being demonised. They are so very often the lifeblood of their local communities, providing employment opportunities and stimulating related economic activity.

Neither governments nor pieces of legislation create jobs, incomes or opportunities. These things are created by business activity and that is why there should be an openness to debating ways in which more people can operate a business and more people can earn a wage and build a career.

The Bill makes a worthwhile contribution because it seeks to address issues of significance for small business but it could be improved by a broadening of its scope so that it extends to all industries, including tourism and accommodation. VECCI urges the Committee to consider extending the proposed exemption to all business of less than 20 employees.

In their current form however, the amendments proposed by the Bill should be supported as they are a very good start.

Yours sincerely

Richard Clancy
Executive Director
Industry Policy and Workplace Relations Services