



Australian
**Small Business and
Family Enterprise**
Ombudsman

19 July 2017

Senator Gavin Marshall
Committee Chairperson
Senate Education and Employment Committees
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Senator Marshall

RE: EDUCATION AND EMPLOYMENT REFERENCE COMMITTEE – PENALTY RATES

Thank you for the opportunity to make a submission to your inquiry regarding penalty rates. We welcome this inquiry as an avenue for objectively considering the issue of penalty rates in Australia. The Fair Work Commission decision in February 2017 to reduce Sunday penalty rates in retail, fast food, hospitality and pharmacy awards prompted a range of reactions including draft bills in the Australian Parliament based on a view that reviews of penalty rates should prohibit decreases in rates.

We support the independent review process and evidentiary basis of the Fair Work Commission and support the continuation of its role in this area. We consider that a general lack of understanding of the nature of penalty rates has created a distortion in thinking surrounding these matters. This leads to generalised arguments that a reduction in penalty rates is unfair to employees.¹ These arguments fail to understand the distinction between base hourly rates and the nature of penalty rates. More importantly pay rates have evolved beyond penalty rates to concepts of loaded rates through use of Enterprise Bargaining Agreements (EBAs) by larger business and unions. Often the comparison of penalty rates, as an extension of the modern awards system, to loaded rates used in Enterprise Bargaining Agreements (EBAs) misses the fundamental argument for loaded rates.

Loaded rates provide flexibility and simplicity to employers in recognition of the complex nature of awards and the changing nature of work. This recognises that the “nine to five”, “Monday to Friday” working week is changing for a number of industries. As consumers and customers increasingly expect business to service them on extended hours, this often requires a 24 hours a day, 7 day a week operational basis for the business. Similarly, as businesses access and compete in global markets for customers, they are transforming their operations to meet these customer needs and expectations. Loaded rates recognise the imposition placed on workers for working a greater range of hours per day as well as treating every day of the week the same.

¹ The fundamental principle for paying penalty rates is to create a disincentive to employers making staff work unsociable hours. The Fair Work Commission concluded that in modern Australia, in the retail, hospitality, fast food and pharmacy sectors, society wants businesses open these hours, justifying a reduction in penalty rates to align with reducing disincentives to business.

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We note that the terms of reference also extend to considering the better off overall test (BOOT). As it currently operates, the requirement ensures that all employees covered by an Enterprise Bargaining Agreement (EBA) must be better off overall as compared to their award entitlements. We believe that the BOOT test when applied to the overall cohort represents a fair comparison mechanism. However, when it is used to apply to specific instances of an individual worker, there will always be opportunity to find a worker who is worse off. This undermines the practical application of a BOOT principle to EBA assessments.

We would extend this further, as we believe comparisons between EBAs and the award system are unhelpful. EBAs have developed beyond base hourly rates and penalty rates to apply 'loaded rates' which incorporate compensatory allowances for workers and other award-based concepts, into a simpler blended rate in exchange for a more uniform application of that rate to a working week. This evolution is based on incorporating flexibility for employers regarding when their workers will be utilised in the business. Fixing penalty rates in EBAs to award rates would diminish the flexibility achieved through EBAs and represents a backward step for all businesses.

The Fair Work Commission expressed the view that access to loaded rates by small business may provide an appropriate solution² to a more level playing field with larger businesses with the suggestion of including a loaded rates schedule in modern awards. We would suggest an alternative approach which would be to consider allowing small businesses to access the terms and conditions agreed by large businesses and unions in relevant EBAs in the same sector on the same operating conditions. This would have to include hours of operation and trade to create a level playing field for large and small business operating the same hours in the same markets. Overall, we consider that a general misunderstanding of the legal basis for penalty rates has created some distortions in the workplace relations debate in Australia. It is important to move the debate beyond penalty rates and to focus on extending the benefits of EBAs to small business.

We hope these comments assist you and we would be pleased to further discuss these matters with you. Please feel free to contact either myself or Mr James Strachan

Yours sincerely,

Kate Carnell AO

Australian Small Business and Family Enterprise Ombudsman

² [2017] FWCFB 1001 at Page 22 'It seems to us that, subject to appropriate safeguards, schedules of 'loaded rates' may make awards simpler and easier to understand, consistent with the considerations in s.134(1)(g). Schedules of 'loaded rates' would also allow small businesses to access additional flexibility without the need to enter into an enterprise agreement.'