



Queensland Nurses' Union

Inquiry into the

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

Submission to the
Senate Education, Employment and Workplace
Relations Committees

September, 2012



Introduction

The QNU thanks the Senate Education, Employment and Workplace Relations Committee (the Committee) for providing this opportunity to comment on the *Fair Work Amendment (Small Business – Penalty Rates Exemption) Bill 2012* (the Bill). At the outset, the QNU makes it clear that we strongly oppose any moves to withdraw, restrict or reduce penalty rates in restaurants, catering, retail or any other industry where these entitlements currently exist. Our submission relates to the issue of penalty rates in general and more specifically the protection of these entitlements in nursing.

We emphasise here the critical role that penalty rates play not only in retail and hospitality but also in supporting the income for the nursing workforce. Our members work under considerable physical and emotional stress that places them at risk across a range of workforce injuries and illnesses within a continuous shift regime.

The QNU believes that penalty rates adequately compensate workers for the effects of working unsocial, irregular hours and should not be altered in any way that undermines or undervalues the payment of these entitlements. It is within this context that we address the matters relevant to nurses and nursing work currently under consideration by the Committee.

We ask the Committee to read this submission in conjunction with that of our state peak body, the Queensland Council of Unions (QCU).

About the QNU

Nurses and midwives¹ are the largest occupational group in Queensland Health and one of the largest across the Queensland government. The QNU - the union for nurses and midwives - is the principal health union in Queensland. The QNU covers all categories of workers that make up the nursing workforce in Queensland including registered nurses, registered midwives, enrolled nurses and assistants in nursing who are employed in the public, private and not-for-profit health sectors including aged care.

Our more than 50,000 members work across a variety of settings from single person operations to large health and non-health institutions, and in a full range of classifications from entry level trainees to senior management. The vast majority of nurses in Queensland are members of the QNU.

¹ Throughout this submission the terms ‘nurse’ and ‘nursing’ are taken to include ‘midwife’ and ‘midwifery’ and refer to all levels of nursing and midwifery including Registered Nurses and Midwives, Enrolled Nurses and Assistants in Nursing.

Penalty Rates and ‘Unsociable Hours’

It has long been the catchcry of employers, their associations and occasionally academics² that penalty rate payments for work performed outside the traditional ‘normal’ hours no longer serve the original purpose in attracting labour to work during unattractive, unsocial hours. Over time, changes in the composition of the workforce, reductions in the length of the standard working week and working year, and more ‘flexible’ work patterns ostensibly provide grounds for removing penalty rates from industrial agreements and awards. Indeed, the Explanatory Memorandum to the Bill (2012) suggests that because we operate in a globalised 24/7 economy, the concept of penalty payments is ‘now largely outdated’.

Although there appears to be an idea that workers should now be available to work around the clock at the behest of employers, the expectation remains that work outside the standard weekly hours should be duly compensated. The payment of penalty rates has never been justified on the basis of the availability of labour. Its primary rationale lies principally on the grounds that it acts as compensation to employees for the inconvenience of working non-standard hours. Because teenagers in the fast food or retail industry have little choice but to work outside school hours does not mean that their claim for premium rates for evening and weekend work is any less valid. Penalty rates are about equity in employment as well as labour supply regardless of the size of the employer’s business. They have a social impact as well as an economic one (Deery & Mahony, 1995).

A reduction or withdrawal of penalty rates for work performed outside standard hours would leave the way open for employers to make even more use of part-time and casual labour at the expense of full time or permanent workers. In this regard, the recent inquiry into insecure work in Australia was revealing in its findings. At present 40% of Australian workers are employed in insecure working arrangements (Independent Inquiry into Insecure Work in Australia, 2012).

The new divide in the Australian workforce is between those who are in full-time permanent employment and those who work on the periphery in various insecure arrangements of casual, contract or labour hire. Many do not know the hours they will be required to work from week to week, often juggle multiple jobs and are frequently in low paid positions in restaurants, catering or retail. According to the report from the Inquiry

Their work is not a “career”; it is a series of unrelated temporary positions that they need to pay rent, bills and food. For them, flexibility is not knowing when and where they will work, facing the risk of being laid off with no warning, and being required to fit family responsibilities around unpredictable periods of work (Independent Inquiry into Insecure Work in Australia, 2012).

² See for example Dawkins, P. (1985) and Wooden, M. (1995)

The proposed changes to penalty rates will greatly increase the ability of employers to exercise ‘flexibility’ in the workplace by requiring employees, many of whom are already vulnerable, to work at times and rates of pay that suit the business, not necessarily those that suit workers with caring responsibilities or those who prefer to work in some form of standard hours arrangement. ‘Flexibility’ for businesses cannot be at the expense of the personal lives and incomes of the workforce.

Penalty Rates in the Federal Industrial Tribunal

The push to remove penalty rates in the hospitality industry has a long history that found momentum in the move away from centralised wage fixation under conciliation and arbitration towards enterprise bargaining.

In 1993, the Australian Hotels Association (AHA) sought a review of penalty rates pursuant to the Structural Efficiency Principle to substitute the existing weekend and public holiday percentage loadings with flat hourly dollar amounts. The AIRC rejected the 1993 AHA application, but decided to reduce the Saturday and Sunday penalty rate for casuals (*Hotels, Resorts and Hospitality Industry Award 1992*).

The AIRC also considered penalty rate provisions in the Public Holidays case (*Hospitality Industry - Accommodation, Hotels, Resorts and Gaming Award 1995*, Prints P1349 and P2284) upheld on appeal (Print P4079) in June, 1997 that dealt with, among other things, the wages payable to casual employees who work on public holidays. In this case, Mahon (C) decided, following the Public Holidays Test Case decision (*Public Holidays, re*, Print L9178) to increase the wages payable to casual employees who work on public holidays by 25 per cent. The AHA appealed, arguing that because there were special circumstances applicable to the tourism and hospitality industries, the AIRC should treat them differently.

In dismissing the appeal, the Full Bench accepted that there was a high level of casualisation in these industries and that an increase in rates would have a significant cost impact on employers, but these factors were not sufficient to warrant a departure from the general approach to be adopted as a result of the proper application of the Public Holidays Test Case (Print P4079).

Further, in 1998, a Full Bench of the (then) Australian Industrial Relations Commission (AIRC) dismissed an application by the AHA to reduce penalty rates on Sundays and public holidays in the hospitality industry on the grounds that the AHA had 'failed to establish a proper basis for varying the penalty rate provisions in the manner it proposes' (*Hospitality Industry - Accommodation, Hotels, Resorts and Gaming Award 1998 Penalty Rates Decision*,

1998 p. 11). Here, the Full Bench found that the AHA's evidence in relation to the employment impact of reduced penalty rates was 'equivocal'.

This Full Bench decision on penalty rates was important to employees generally. It signalled to all parties that the AIRC was not persuaded that there had been any significant change in attitudes about the acceptability of employees working during what society regarded as unsocial hours. Thus although these decisions are now somewhat dated, they indicate that employers have not been able to adequately demonstrate before federal tribunals that the reduction or withdrawal of penalty rates is acceptable to the general working public. The Bill, aimed at small businesses, again targets low income workers who are already vulnerable to the demands of employers and the labour market. Any changes to penalty rates in hospitality and retail would no doubt fuel moves to introduce similar reductions in other industries.

Penalty Rates in Nursing

Although the Bill proposes changes to penalty rates affecting small businesses in restaurants, catering and retail, we recognise that undermining wages and conditions in one or two strategic industries may invariably lead to similar moves in sectors such as health that also operate according to extended hours in predominantly continuous shift patterns. As the largest occupational profession within the health sector, nurses may become vulnerable to this type of proposal. Of particular concern are nurses working in primary health and general practice where there are less than 20 employees and who are reliant on modern awards.

Nurses are the most geographically dispersed health professionals in Queensland and indeed Australia, working independently or collaboratively to provide professional and holistic care in a range of circumstances. Nurses advocate for the patient as a whole person within a complex health system. At every site and level of the nurse-patient relationship nurses facilitate and mediate the competing demands of patients, families, carers, the environment at points of immediate care, the system and society to achieve the best possible outcomes.

Nurses provide continuity of care for patients 24 hours a day, seven days a week. To undertake this vital role, many work according to a continuous shift roster. The majority of full time permanent nurses have no choice but to work some night duty and this leaves them vulnerable to fatigue, the effects of which are well documented.³ Nurses are also employed in primary health care and general practice

³ See for example Rogers et al. (2004), Muecke (2005), National Occupational Health and Safety Council (2005) and Dorrian et al. (2008).

This is coupled with the ageing of the nursing workforce. Between 2005 and 2009, the proportion of employed nurses aged 50 years and over increased from 35.8% to 36.3%. In 2009, the average age of nurses was 44.3 years (Australian Institute of Health and Welfare, 2011). The ageing process, the nature of the work and the continuous shift pattern combine to place nurses at a significant risk of workplace illness and injury (Cohen, 2006). The provision of health services is an ongoing essential service. The majority of nurses have no choice but to work the rotating shift system with its consequent negative effects on their health and family and social relationships. The payment of shift penalties is a justifiable compensation for the disruption to their personal life.

At the same time as the debate around payment of penalty rates takes place, there is an impending nursing and midwifery workforce crisis and it could seriously affect patient care. With the predicted baby boomer retirement bulge many nurses are expected to retire within the next 5 – 10 years. Australia is likely to experience limitation in the delivery of high quality health services as a consequence of workforce shortages, particularly nurses where a shortfall of 109,000 positions is predicted (Health Workforce Australia, 2012). With an estimated 2,500 new beds coming on line in Queensland Health between 2006 and 2016 not enough nurses have been allocated to staff them (Queensland Health Workforce Unit, 2007).

Every effort needs to be made to enhance the profession of nursing so that more students enter universities and TAFEs to train. Any moves to compromise the ability of nurses to attract penalty rates for working shiftwork will detract from the profession, make it more difficult to recruit and retain a nursing workforce and contribute to already heavy workloads.

The workplace health and safety of nurses is intrinsic to ensuring patient safety. Poor work environments that do not protect nurses from work stress, accidents and injury contribute substantially to nursing turnover, estimated to cost around \$150,000 per nurse (Chan et al., 2004). Each additional patient allocated to the nursing workload increases the likelihood of patient death (Aiken et al., 2002) patient falls, respiratory infections, and patient complaints (Yang, 2003). Nurses working shifts of 12.5 hours or more are three times more likely to make an error, and working more than 40 hours a week increases the risk of error (Rogers, 2004).

The consequences of shiftwork are well documented. Because nurses work extended, unpredictable hours with a lack of regular breaks they are more likely to experience elevated fatigue levels. Night duty rotations are common, particularly in specialist units where nurses must maintain careful and astute observations of their vulnerable patients. Fatigue can negatively affect nurses' health, quality of performance and thus patient care. The effects of fatigue may be exacerbated for nurses over 40 years of age (Muecke, 2005).

The QNU and Queensland Health recently entered into an enterprise agreement that included amongst other matters an increase in the Sunday night/Monday morning shift penalty rate from 20% to 25%. This increase was supported by Directors of Nursing who have experienced ongoing difficulties in staffing these shifts. Clearly, there is still sound evidence

that many nurses are unwilling to work at these inopportune times because of the impact on their personal lives, health and wellbeing.

Therefore we strongly oppose any attempts to alter, restrict or withdraw current rights to penalty payments in the restaurant, catering or retail sectors as this may have flow on effects into other industries. Such a move in the health industry would not only act as a disincentive to staff working beyond standard hours, it would significantly reduce their take home pay and undermine their important contribution to the health of all Australians.

The QNU stands in support of our colleagues, other unions and our peak bodies in resisting the passage of this Bill in the parliament.

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