



# Unions NSW Submission to the Senate Inquiry into the Fair Work Amendment (Small Business – Penalty Rates Exemption) Bill 2012

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Senate Education, Employment and Workplace Relations  
Committees

**9 October August 2012**

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## **1. Unions NSW**

1.1 Unions NSW welcomes the opportunity to make a submission to the *Inquiry into the Fair Work Amendment (Small Business – Penalty Rates Exemption) Bill 2012* (The Bill)

1.2 Unions NSW is the peak body for unions in NSW. It has 64 affiliated unions, 10 affiliated regional trades and labour councils and represents approximately 600 000 union members. Unions NSW is governed by an elected executive who are assisted in the day-to-day operations of the organisation by a small team of officers and support staff.

1.3 Our affiliated unions cover the spectrum of the workforce, stretching from workers in finance to footwear and construction to communications. Unions NSW is the largest member based organisation for workers in NSW.

## **Concerns with the wording of the Bill**

Unions NSW is strongly opposed to the removal of penalty rates, regardless of industry or size of employer. Before submitting evidence on the importance of penalty rates for working Australians, Unions NSW would first like to submit some concerns around the wording of the Bill.

## **2. *The Bill would abolish penalty rates for all***

2.1 It is clearly stated in the Explanatory Memorandum that the Bill's intention is to remove the requirement of small businesses in retail and hospitality to pay penalty rates to employees who work on public holidays and weekends. However, the wording of the Bill suggests that removal of penalty rates will have a much wider affect than just on small businesses.

2.2 Section 155A of the Bill states:

*(1) A modern award must not include a term that would require or permit an employer that is an excluded small business employer to pay penalties rates to an employee...*

2.3 The requirement for employers to pay penalty rates is included in the relevant modern awards of retail and hospitality employees. Within these Modern Awards, there is no variation on conditions based on the size of the employer. As such, the wording of the Bill to ‘not include a term...’ would effectively require the removal of the entire clause relating to penalty rates. As such, no employee working in hospitality or retail would have an award entitlement to penalty rates for work on weekends, public holidays, or late at night.

2.4 Unions NSW would not support changes to the Bill that would seek to reflect the intention as per the Explanatory Memorandum. Unions NSW is opposed to the intentions of the Bill as well as the content of the Bill. The purpose of the above point is purely to highlight the inconsistency within the Bill itself.

### **3. The scope of the Bill is unclear**

3.1 The *Small Business – Penalty Rates Exemption Bill* defines an excluded small business.

3.2 Section 155(a) of the Bill states:

*An employer is an excluded small business employer at a particular time if, at that time, the employer employs fewer than 20 employees in:*

- a) the restaurant and catering industry; or*
- b) the retail industry.*

3.3 The Bill’s Explanatory Memorandum states the intention of the Bill is to “allow small businesses in the hospitality and retail sector” to avoid the burden of penalty rates.

3.4 There is a difference between the restaurant, catering and retail industries, and the hospitality and retail sector. These variations in scope create uncertainty around what employees will be affected and what employees are intended to be affected. This raises questions over the inclusion of employees covered by awards such as the *Hair and Beauty Industry Award 2010* or the *Fast Food Industry Award 2010*.

3.5 The Bill does not provide any detail regarding the Modern Awards that will be affected by the Bill. By only stating that those employers in the restaurant, catering and retail industries will be exempt; the Bill does not stipulate how staff associated to these industries may be affected. The lack of detail could mean that staff who are not performing a retail or hospitality function, but who work for an employer whose main function is in retail or hospitality, will no longer receive their previous penalty rate entitlements. For example, a cleaner working for a small shop or an administrative assistant working for a small restaurant.

3.6 The lack of prescription in the Bill widens its effect. In conjunction with concerns the Bill will lead to the removal of entire penalty rates clauses from Awards, Unions NSW is concerned the Bill will impact a significantly large number of workers.

3.7 Unions NSW would not support the Bill if the coverage was more prescriptive. The purpose of the above points is to raise concerns regarding the potentially broad interpretation of Bill's scope. However, Unions NSW reiterates its opposition to the Bill in its entirety.

#### **4. Inconsistency of 'small business' definition**

4.1 Unions NSW would like to highlight the inconsistency of the Bill's "small business" definition with definitions contained in other relevant legislation.

4.2 The *Fair Work Act*, for the purposes of unfair dismissal, defines the meaning of a small business employer.

4.3 Section 23 of the *Fair Work Act* states:

*A national system employer is a small business employer at a particular time if the employer employs fewer than 15 employees at that time.*

4.4 This definition requires all employees to be counted. Casuals are counted if they are employed on a regular and systematic basis.

- 4.5 The *Small Business – Penalty Rates Exemption Bill* defines a small business employer as an employer who “employs fewer than 20 employees”. Under this definition only full-time and full-time equivalent employees need to be counted.
- 4.6 This definition is not consistent with the *Fair Work Act*.
- 4.7 The *NSW Retail Trading Act 2008* offers a definition of small retail business for the purpose of exemptions for restricted trading days. A small business employer is defined as a business that employs four or less employees. Amendments currently before the NSW Parliament are seeking to increase this definition to five employees or less.
- 4.8 The variations between these definitions create confusion for employers and employees.
- 4.9 Unions NSW would not support the Bill even if amendments were made to the definition of small business.

## **5. The Bill’s exclusion of casuals**

- 5.1 The Bill’s “20 employees or less” definition for small business employers only allows for full-time and full-time equivalent employees to be counted. This definition does not take into consideration the reliance that many retail and hospitality employers have on peripheral staff that work part-time hours and are employed on a part-time or casual basis.
- 5.2 As highlighted above the Bill’s definition is not consistent with the *Fair Work Act*.
- 5.3 The definition used in the Bill would potentially allow “medium sized” businesses to receive exemptions from paying penalty rates. The nature of many retail and hospitality workplace means that the majority of staff are generally not employed on full-time hours. For example, a retail store of 50 staff may only employ 5 full-time staff, with the rest of the staff working part-time hours around peak business times. While “business size” is often a debated term, Unions NSW argues that businesses with 50 casual staff are not a “small business”. However, under the Bill, such a business would qualify as a small business and would not be required to pay any of its staff penalty rates.

5.4 The Bill does not pay appropriate consideration to the employment arrangements of many retail and hospitality businesses. This will again increase the scope of the Bill. Unions NSW reiterates its opposition to the Bill in its entirety.

## **Importance of Penalty Rates**

### ***6. Weekends and public holidays are still traditional ‘days of rest’***

6.1 The Bill’s Explanatory Memorandum justifies the removal of penalty rates for small businesses in retail and hospitality by arguing that “many businesses trade over all seven days [of the week]”.

6.2 Whilst there have been significant increases in business hours in the last 50 years, Unions NSW does not believe that this makes the concept of the weekend or public holidays redundant. Penalty rates were established and have been continuously applied in awards and enterprise agreements as compensation for the social costs placed on employees who work on weekends and public holidays.

6.3 Unions NSW submits that increased business operating hours have not eliminated the social costs imposed on employees who work on weekends. A weekend that falls on a Saturday and Sunday remains the norm for the majority of Australian workers. Additionally, a Monday to Friday week also remains the normal operation hours of schools.

6.4 Employees who work on weekends will generally find themselves working whilst their friends, partners and extended family are not. Additionally, employees with children who work weekends will find themselves working on the only two days of the week that their children are not in school.

6.5 Weekends continue to be the time of week that organised sporting games and activities are played. Depending on an individual’s religion, Saturday or Sunday remains a day of rest and worship where religious services are conducted. Weekends also remain the time of week when large scale community events, markets, fairs and fetes are held.

6.6 Employees who work on weekends are unable to participate in many, if not all, of these events. This is the social cost that penalty rates seek to compensate. In addition to the individual social

costs, society must also consider the costs to families when employees are unable to be involved in their children's or partner's sport and/or community activities.

6.7 Unions NSW would also like to note that the social events and opportunities that employees who work weekends miss out on have not changed significantly over the past 65 years that penalty rates have been in operation. Unions NSW does acknowledge that more people now work on weekends than 65 years ago, but these employees continue to be a significant minority.

6.8 Similar to weekends, work conducted on a public holiday bares a significant social cost to the individual worker. Public Holidays remain a day when the majority of the Australian workforce is not at work. As such, many families and friends use this opportunity to socialise and celebrate.

6.9 A number of public holidays also have a significant cultural and/or religious meaning to individuals. The removal of penalty rates on these days diminishes the value of such holidays.

## ***7. Definitional confusion between penalty rates and overtime rates***

7.1 The Bill attempts to limit the payment of penalty rates to circumstances where a person has worked over 38 hours in a week or 10 hours in a shift. Unions NSW argues that the payment of a higher rate of pay in these circumstances is actually describing the circumstances in which overtime is paid. As discussed above, the scope of this Bill is unclear however, most Modern Awards pay an overtime rate of pay in the conditions stipulated above.

7.2 Overtime payments compensate workers with a higher hourly rate of pay when they work in excess of the normal hours. As mentioned above, penalty rates were introduced to compensate an employee who is required to work outside the standard Monday to Friday working week.

7.3 The two concepts of overtime and penalty rates are different, and this is acknowledged in awards and enterprise agreements.

7.4 Unions NSW is unaware of any proposals to alter employee's entitlements to overtime. As such Unions NSW finds it unnecessary for this legislation to confuse "overtime" with "penalty rates".

## **8. Importance to supplement low wages**

8.1 Employees working in the retail, restaurant and catering industries are generally considered to be some of the lowest paid workers in Australia. There are of course exceptions to this, however the majority of award reliant employees in these industries are low paid.

8.2 Unions NSW believes the first and foremost aim of penalty rates is to compensate employees for the social and economic disadvantages of working on weekends and/or public holidays.

However, penalty rates have also come to play a role in supplementing the wages for the lowest paid, award reliant workers in Australia.

8.3 For example:

Under the *General Retail Industry Award 2010*, a Retail Employee Level 1 permanent employee working 38 hour a week earns \$666.10 a week as a flat rate. If during this 38 hour week the employee works an 8 hour shift on a Sunday, his/her weekly wage will increase to \$806.32 for the week.

8.4 The Henderson Poverty line sits at \$652.43 a week for a couple with one child and \$863.68 a week for a couple with two children. The above example demonstrates how close to the poverty line employees in retail live. Depending on the personal and family circumstances of an individual, the rates of pay provided in retail, catering and restaurant awards may place them below the poverty line. In some instances, penalty rates provide these employees with a wage that places them at or above the poverty line.

8.5 Regardless of whether an employee is above or below the poverty line, it cannot be denied that penalty rates do make a significant impact on the take home pay of these employees. For many employees who regularly work weekend and public holiday shifts, this additional money in their weekly pay has become a part of their weekly budgets. The removal of penalty rates will result in a direct loss in take home pay of many employees. This will have a significant impact on their weekly and family budgets.

## **Implications of Bill**

## **9. Precedence set by such a Bill**



- 9.1 The removal of penalty rates in the hospitality, restaurant and catering industries, undermines the concept of weekends and public holidays as a whole. As submitted earlier, the weekend remains the only time where the majority of employees in Australia don't work and the time of the week when children are not at school. There is a significant social cost associated with working on a weekend, which penalty rates compensate.
- 9.2 If penalty rates are removed from employees who work in the retail, restaurant and hospitality industries, then the social impacts of weekend and public holiday work are undermined. Such changes would relegate employees in these industries as second class citizens whose weekends are considered "not as valuable" as other employees who receive penalty rates or who are not required to work on weekends.
- 9.3 Unions NSW is concerned that whilst the Bill undermines the value of the weekend for retail, catering and hospitality employees, it also undermines the concept of the weekends and public holidays as a whole. Unions NSW believes that if weekends and public holidays are no longer valued as important social times for employees in the retail, hospitality and restaurant industries, it won't be long before other sectors of the economy begin to lobby for the removal of penalty rates from their sectors also.
- 9.4 The Bill's Explanatory Memorandum justifies the removal of penalty rates with the argument that business trading hours have increased. Unions NSW is concerned that if the removal of penalty rates can be justified on these terms, then no employee is safe from being requested to work additional hours on normal pay. Australian employment is becoming increasingly service based and as such we could see the removal of penalty rates from all areas of the service industry where there is a demand or need for business to operate on the weekend. Unions NSW believes that this will negatively impact employees and society.

## ***10. Pressure placed on families and childcare needs***

- 10.1 Weekend and public holiday work has a significant effect on families who have caring responsibilities for children. The lack of formal education on these days means that when parents need to work on weekends, they need to be placed in childcare. Weekend childcare is

often unavailable in many areas and when it is, it is considerably more expensive than mid-week care.

- 10.2 The removal of penalty rates on weekends and public holidays would lead to greater financial pressure being placed on employees with caring responsibilities. The removal of penalty rates will see the financial burden of weekend work placed onto employees through increased childcare costs.
- 10.3 With the removal of penalty rates, and the increased financial pressure that weekend childcare will place on families, it can be assumed that pressure will be placed on childcare providers to reduce their costs on weekends. Unions NSW is concerned that this will create a domino effect in relation to the removal of penalty rates with childcare centres arguing that the only way that costs are able to be reduced are through the removal of penalty rates for staff.
- 10.4 Unions NSW is concerned that the removal of penalty rates from the hospitality and retail industry will see a flow on affect into industries such as childcare.

## **11. *No right to refuse weekend work***

- 11.1 The Fair Work Act provides employees the right to refuse work on public holidays. The Fair Work and this Bill do not provide any opportunity for employees to refuse weekend work.
- 11.2 The removal of penalty rates from employees of small businesses, remove much of the incentive for employees to work on weekends and public holidays. The social and financial impacts of working on a weekend or public holidays will no longer be compensated. In relation to weekend work, this may lead some employees to rethink their priorities when it comes to working on weekends and public holidays. Especially when it comes to the additional financial costs of childcare, weekend work without penalty rates may no longer be feasible.
- 11.3 Any proposal to remove penalty rates on weekends should also provide employees with the right to refuse weekend work.
- 11.4 Unions NSW would not support the removal of penalty rates even if employees were given the right to refuse to work on weekends.

- 11.5 What Unions NSW intends to highlight from this point is that employees should be empowered in their workplaces, and not have the financial and social burdens of weekend work forced upon them.

## **12. Interaction with NSW Retail Trading Amendment Bill**

- 12.1 Unions NSW is concerned about the Bill's interaction with the *NSW Retail Trading Amendment Bill* (The NSW Bill) that is currently before the NSW Parliament. The NSW Bill is proposing to lift the restrictions placed on retail businesses' from trading on restricted days of trading. If both Bills are passed through their respective Parliament's their interaction will see the dramatic erosion of the rights of retail workers.
- 12.2 Currently in NSW there are five days that retail shops are to be kept closed. These are known as restricted trading days and are: Good Friday, Easter Sunday, Anzac Day (before 1pm), Christmas Day and Boxing Day.
- 12.3 The NSW Bill provides an exemption for medium sized shops to open on restricted trading days. In order to qualify for the exemption the shop must not have more than 20 people working in the shop on the day of restricted trading and must not have had more than 100 people working in the shop for the preceding 20 days. The Bill stipulates that all staff working on the restricted trading day must have freely elected to work.
- 12.4 The NSW Bill also provides an exemption for retail businesses of all sizes to employ staff on a restricted trading day if the only business activities being undertaken are preparations for trading on a day following a restricted trading day. The shop must be staffed by employees who have freely elected to work.
- 12.5 The NSW Bill provides an exemption to all retail shops to trade on Boxing Day, given staff have freely elected to work.

- 12.6 Small retail employers who are exempt from paying penalty rate under the *Fair Work Amendment (Small Business – Penalty Rates Exemption) Bill 2012* will also be exempt from closing their shops on restricted trading days under the *NSW Retail Trading Bill*.
- 12.7 The interaction between the two Bills will require employees to work on noteworthy public holidays such as Christmas Day and Anzac Day (before 1pm) without an entitlement to penalty rates.
- 12.8 The NSW Bill allows for only employees who have “freely elected to work” to staff retail stores on restricted trading days. Unions NSW submits that the highly casualised nature of retail work makes refusing work on a public holiday difficult for many employees. Many casual retail employees fear losing shifts or hours if they refuse work when it is offered, this is a particular concern when there is a staffing shortage. The insecure nature of many employees’ jobs in retail acts as an element of coercion into working on public holidays.
- 12.9 The NSW Bill will increase the number of public holidays that retail employees work on. At the same time the *Fair Work Amendment (Small Business – Penalty Rates Exemption) Bill 2012* will prevent these employees from being appropriately compensated. These two Bills will see a significant erosion of the rights of retail employees.

### **13. Conclusion**

- 13.1 Unions NSW opposes any Bill that seeks to remove an employee’s right to receive penalty rates for work performed on a weekend of public holiday. Unions NSW opposes the *Fair Work Amendment (Small Business – Penalty Rates Exemption) Bill 2012*.