Queensland Council of Unions

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

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Introduction

The Queensland Council of Unions (QCU) approaches matters pertaining to the labour market as being quite separate from the operation of other markets. The labour market differs quite distinctly from other markets as it sets the price of labour for thinking, feeling human beings who are capable of making informed decisions and indicating specific preferences for when they wish to work (Isaac 2007).

The QCU supports the submission made by the ACTU on 27 September 2012 in relation to this Bill. The ACTU submission, consistent with this submission, identifies that conditions applying to some of Australia's lowest paid workers have been the subject of the deliberation of independent tribunals over many years. To use parliament to undermine those well established conditions would be without merit or in particular any mandate.

The Bill in question seeks to differentiate between small and large business by adopting an arbitrary number of employees to determine whether or not an employees take home pay is reduced. We know from such arbitrary measure being associated with redundancy payments that there are fundamentally unfair outcomes. Thankfully, to most people redundancy does not occur that often, however to set up an arrangement that perpetuated such an inequity on an on-going, daily basis would be unsustainable. If for no other reasons, the Bill should be defeated because of its unfairness and arbitrary nature.

Aside from the inequity that would be created by the setting of an arbitrary number of employees to be employed in a workplace to establish such a fundamental entitlement, the proposal to remove or reduce penalties needs to be considered in the context of a long and unsuccessful campaign by employers for their removal. This submission outlines previous efforts to remove or reduce penalty rates, principally within the hospitality industry and how in the context of the current parliament there is absolutely no mandate to, or indeed wisdom in, making such a reduction to working Australians' livelihoods.

In addition to the contextual positioning of this proposal, the QCU opposes the Bill based on the detriment to the lowest paid and most vulnerable members of the Australian workforce. There is no justification now, just as there has previously not been any justification, for the reduction of wages payable to Australian workers.

History of attempts to remove penalty rates

There is nothing new to an attack on penalty rates paid to Australian workers for working unsociable hours. In fact, such attacks are most notable by their monotonous regularity. In the 1980s penalty rates were held up by advocates of labour market deregulation as a major impediment to productivity (Hancock 1999). The Australian Hotels Association (AHA) made the first of the most recent attacks on penalties paid to hospitality employees in the early 1990s.

A further well-publicised and reported attempt by hospitality employers to remove penalty rates occurred towards the end of last century. Amongst other matters, the Workplace Relations Act that was introduced in 1996 placed a limitation on the matters that could be contained in awards. It would appear to the chagrin of the AHA, penalty rates were one of those matters that were allowed to continue in existence in awards. The AHA attempted to use the award simplification process to seek to remove penalty rates from the Federal Hotels Awards for the second time in a decade (AIRC 1997). Again the AHA was unsuccessful in the removal of penalty rates in an arbitral environment where the public interest was required to be applied and evidence was required before the Commission rather than empty rhetoric.

The opportunity has existed for employers to enter into agreements to annualise salaries and otherwise negotiate on the issue of penalty rates for close on 20 years, since the adoption of enterprise bargaining as the primary focus of wage determination in Australia. It assumed that much of the push for the removal of penalty rates is being driven by the hospitality industry. However employers within the hospitality industry have demonstrated a reluctance to embrace negotiation of enterprise agreements preferring to remain on the award (Knox 2009). It would follow that some employers within the hospitality industry favour the outright removal of penalties rather than reasonable recompense or trading-off penalties in return for a higher hourly rate.

The suggestion that the removal of penalties is preferred to bargaining for their replacement is further reinforced by the experience that surrounded the use of Australian Workplace Agreements (AWAs) immediately following the WorkChoices legislation. The No Disadvantage Test (NDT) that had been in place since the advent of enterprise bargaining in Australia had also been adopted as a mandatory requirement for statutory individual contracts (AWAs) when they were introduced by the Workplace Relations Act in 1996. Later, when the Howard Government had control of the Senate, the NDT was replaced with the Fairness Test by the initial WorkChoices legislation. As a result, AWAs were used to attack penalty rates without sufficient recompense to employees (Sappey et al 2006; Watts and Mitchell 2008; Knox 2009; Knox 2011). Examination of AWAs that occurred during this “pure” WorkChoices era demonstrate that individual contracts were used by employers to remove penalties and drive down employee earnings (Watts and Mitchell 2008; Knox 2009; Saville et al 2009; Elton and Pocock 2008). This phenomenon of the use of WorkChoices AWAs being used to remove penalties was best demonstrated by Spotlight in 2006, when AWAs that would have been perfectly allowable under the legislation removed all penalties for an additional 2 cents an hour (Workplace Express 2006).

The atrocities that were brought about by the WorkChoices legislation caused the Howard Government to reintroduce the NDT for the approval of AWAs (Watts and Mitchell 2008; Knox 2009). The reinstatement of the NDT did not save the Howard Government and many attribute their loss of the 2007 election to the worst aspect of the WorkChoices legislation and it also provided the incoming Labor Government with the mandate to repeal those offensive aspects of WorkChoices (Watts and Mitchell 2008; Elton and Pocock 2008). The corollary of the defeat of WorkChoices by parliament is that this parliament has no mandate to seek to do what could not be done by employers during the Howard Government, either by arbitration or by individual agreements. Moreover the fate of the former member for Bennelong, being one of two Australian Prime Ministers to lose their seat, might well serve as a warning to other politicians who consider reducing working conditions is a good policy position.

Impact on employees of the removal of penalty rates

It is curious, if not perverse, that many of the proponents of the reduction and removal of penalty rates rely upon employee preferences to justify their case (Dawkins, Rungie and Sloane 1986; Deery and Mahony 1995). Not only are such claims spurious they are completely counter-intuitive. There is no credible evidence of a preference among employees for the reduction in penalties (Deery and Mahony 1995). Quite the contrary a credible study has established that "weekend work and particularly Sunday work involved significant sacrifices" and that it was "hardly surprising that these people would want premium rates of pay to compensate them for the social and domestic inconvenience of being called upon to do Sunday work" (Deery and Mahony 1995).

There should also be no doubt that the removal of penalty rates has the effect of a decrease in wages for those employees who rely upon them to make ends meet. The rhetoric of those who would abolish penalty rates is that they are an impediment to employment but there has been little in the way of evidence to prove this to be the case. Employment and unemployment in Australia has proven to be quite independent of the type of industrial regulation in place at the time. It is more probable that the relationship between penalty rates and unemployment is that employers are more likely to take advantage of high levels of unemployment to enforce a removal of conditions such as penalty rates when they have a ready pool of unemployed willing to accept substandard conditions (Deery and Mahony 1995).

The other deleterious effect of the removal of penalty rates is that those employees who rely upon penalties as part of their income will be required to work longer to meet their existing commitments. A further potential impost on employees needs to be considered in terms of Australia's record of working hours. Australia has been and continues to be notorious within the ranks of OECD nations for excessive working hours (Isaac 2006; Richardson 1999). The side effect of a reduction in penalties would be greater pressure on working Australians to work even more hours in order to provide an income that can support dependents.

Employees who rely heavily on penalties are usually located within those industries where the greatest proportion of employees is dependent on the award as the primary source of rates of pay and conditions of employment. A possible explanation for the reliance on the award system by employers in the retail and hospitality industries is a desire for a level playing field (Knox 2009). In price sensitive industries the effect of the removal of penalty rates for a portion of the industry would result in an undoubted race to the bottom. It would naive in the extreme to think that pressure would not be placed on the removal of penalty rates for employees of larger employers, who would be competing against employers with a distinct economic advantage. It is also highly unlikely that smaller employers would be in any way motivated to expand employment under such a regime.

Conclusion

The QCU supports other organisations that have made submissions opposing this Bill. There is neither justification nor mandate for the proposal to limit or remove penalties to all or part of the Australian

workforce. Conditions that have been developed by tribunals and collective bargaining ought not to be removed by law, particularly when there is such a paucity of contextual justification.

On behalf of Queensland employees the QCU asks the Senate to reject the Bill. No one has voted or will vote to remove conditions of employment and quite to the contrary, recent federal election results demonstrate that there is no desire for such an approach.

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