



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

Dear Committee Secretary

INQUIRY INTO THE FAIR WORK AMENDMENT (SMALL BUSINESS – PENALTY RATES EXEMPTION) BILL 2012

I am writing to you in regards to the Inquiry into the Fair Work Amendment (Small Business – Penalty Rates Exemption) Bill 2012 ('the Bill').

As the state government agency responsible for providing comprehensive business advice and alternative dispute resolution services to small businesses in Western Australia ('WA'), the Small Business Development Corporation ('SBDC') welcomes the opportunity to comment on this proposed reform as part of the modern award system.

The SBDC advocates for fairness and equity for the small business sector, particularly to level the playing field in relation to competing with larger businesses. In general, the proposal to reform penalty rates is likely to have a positive impact on small businesses in the retail and hospitality industries, allowing them to open additional hours and be more competitive overall.

Size of the retail and hospitality industries

The Bill proposes that small businesses in the retail and hospitality industries that are covered by the federal industrial relations system be exempted from paying penalty rates unless an employee works more than ten hours a day or more than 38 hours over a seven day period.

According to the latest data from the Australian Bureau of Statistics (ABS), there were 12,739 small businesses involved in retailing in WA as at June 2011.¹ Of these, 5,742 did not employ any staff while the remaining 6,997 employed between one and 20 staff members. In the accommodation and food industry, the ABS reports that in June 2011 there were 5,757 small businesses in WA, with 2,056 non-employing and 3,701 employing up to 20 people.

¹ Australian Bureau of Statistics, "Counts of Australian Businesses, including Entries and Exits, June 2007 – June 2011", Catalogue No. 8165.0.

The SBDC understands that the federal industrial relations system applies to employers that are trading, financial or foreign corporations, with all other employers generally covered by the applicable state based system.

Unlike Queensland, South Australia, Tasmania or New South Wales, WA continues to maintain a separate industrial relations system. This makes WA quite unique in the fact that it is possible that neighbouring retail or hospitality businesses in Perth could potentially be paying their employees under different awards depending on the industrial relations system they belong to.

As it currently is, when comparing the awards for the hospitality and retail industries in WA, businesses under the federal system are required to pay 150% or 175%² of the ordinary wage for weekend overtime respectively, compared to those under the state awards where 200% of the ordinary wage is payable for weekend overtime work.³

It has been estimated by the WA Department of Commerce that more than one third of WA employees are covered by the state based industrial relations system, with all others falling under the federal system.⁴ The vast majority of employing businesses in the state system would be micro to small businesses.

The shift to seven day trading in WA

The SBDC understands that penalty rates were historically introduced as a means of compensating individuals for working unsociable hours rather than spending time with their family, friends or attending religious activities.

However, operating after hours and on weekends is considered standard business practice for restaurants and cafés these days. As a means of compensating for the higher wages costs resulting from opening on Sundays and public holidays, many such businesses charge customers a surcharge on these days.

Recently, the SBDC provided input into the WA Government's response to the Federal Government's proposal to exclude restaurants and cafés from the Australian Consumer Law's rules on component pricing. In the SBDC's opinion, requiring cafés and restaurants to stipulate the final dollar amount per item on a menu is unnecessary and quite costly as businesses may need to produce and use separate menus for different trading days. The SBDC believes that an adequate level of protection for consumers would be the requirement for menus to have a statement about the surcharge for Sundays and public holidays on a prominent part of the menu and using a percentage that is a whole and even number for ease of calculating final costs.

² General Retail Industry Award 2010, Hospitality Industry (General) Award 2010, Restaurant Industry Award 2010.

³ Restaurant, Tearoom and Catering Workers' Award, Shop and Warehouse (Wholesale and Retail Establishment) State Award 1977.

⁴ WA Department of Commerce, "State Industrial Relations Coverage in WA: How many employees are covered?", Government of Western Australia, 2010, available from: <<http://www.innovation.gov.au>>. [Accessed 14 September 2012].

In relation to retailing in WA, there has been a gradual change in recent years in the hours that consumers wish to shop, with increased demand for retailers to be open extended hours and on weekends. The SBDC also notes that many people (such as students or those wishing to work more than one job) prefer after hours and/or weekend work.

In WA, there has also been a growing appetite for deregulated trading hours, to bring the state into line with other parts of the country. As a result, the Barnett Government has since 2008 made incremental changes to retail trading regulations to extend opening hours, culminating in the recent introduction of Sunday trading for all general retail shops in the Perth metropolitan area.

Penalty rates and the impact on small business retailers

As consumers demand more flexibility in the hours they are able to shop, small business retailers are faced with having to pay penalty rates to their employees for overtime and weekend work. Under the current system, the high wages costs faced by small businesses on weekends means that many may choose to not embrace the new retailing regime in WA as they simply cannot afford it.

According to Ms Janine Allis, founder of Boost Juice, franchisees across Australia are cutting back on their weekend opening hours because of high labour costs. She indicated that this is particularly a problem in Perth where there is the additional pressure of staff shortages:

"The labour cost is already high there and add to that your two and a half times for penalty rates and it doesn't make sense to open".⁵

Ms Allis claims that in some cases junior workers as young as 15 are being paid \$30 an hour on weekends – putting significant financial pressure on small retailers in order to both attract and retain staff.

Similar sentiments have been expressed in relation to the hospitality industry. Mr John Hart, Chief Executive Officer of Restaurant and Catering Australia, was recently quoted as saying that more members are shutting down on weekends as they cannot afford to pay the higher wages specified in the awards.⁶

Further to this, the Premier of WA, the Hon Colin Barnett MLA, was quoted earlier this year as saying that double time penalty rates in the retail and hospitality sectors were too high and would stop some employers benefitting from the new trading regime.⁷ He suggested that penalty rates be restricted to 50 per cent of the usual wage.

⁵ Korporaal, G., "High penalty rates putting squeeze on business, says Boost Juice chief", *The Australian*, 6 September 2012, p. 26

⁶ Stafford, P., "Xenophon proposes bill to exempt small businesses from paying penalty rates", *SmartCompany*, 15 August 2012. Available from <http://smartcompany.com.au> [Accessed 13 September 2012]

⁷ Macdonald, K., "Penalty rates irk Barnett", *The West Australian*, 23 February 2012. Available from <http://www.thewest.com.au> [Accessed 13 September 2012]

Another consequence of the current penalty loading provisions is the impact it has on annual wages costs for small businesses and their eligibility for payroll tax. Currently in WA the payroll tax exemption threshold is an annual wages bill of \$750,000. For wages bills above this amount, a payroll tax of 5.5 per cent is payable by the employer. Removing the requirement to pay penalty rates may reduce the overall wages bill for some small businesses and may bring them under the payroll tax exemption threshold, which in turn could stimulate business growth. The ability for small business operators to employ even one additional staff member could result in better customer service or simply enable the business owner to take time off from the business.

Potential future impacts

If the Bill is introduced, the SBDC believes there will be an immediate cost saving for those small businesses that fall under the federal industrial relations system. This financial benefit will better enable small businesses to expand their business operations and/or allow them to take advantage of the extended trading regime in WA. This will provide consumers with greater choice and enhance competition.

Removing the requirement to pay penalty rates may also create more jobs in the retail and hospitality industries, especially at less desirable times when business operators may not wish to work themselves. As mentioned previously, employment at these times is often preferred by students and individuals seeking a second job.

The SBDC also believes that as a consequence of changes to the federal award, there may be additional pressure on the WA Government to reform penalty rates and modernise the relevant state awards.

On the other hand, the SBDC also identifies that there may be a number of negative impacts for businesses as a result of implementing this reform:

- A competitive advantage will arise for those incorporated businesses falling under the federal awards system which will not have to pay penalty rates and the businesses that remain in the state system which will continue to incur penalty loadings. This is likely to increase the number of incorporated businesses able to afford to open on Sundays and potentially enable them to increase their market presence and widen their customer base. As a result, more small business operators in WA may choose to incorporate their business in order to access the federal award and avoid paying penalty rates.
- This competitive advantage may also impact on the ability of small businesses to attract and retain staff. In WA, small businesses are already experiencing difficulties in finding and keeping adequately skilled staff. As the penalty rate exemption proposed in the Bill would only apply to businesses with less than 20 employees, job seekers may actively seek employment with bigger retailers such as Coles and Woolworths in order to access weekend penalty rates, further exacerbating the labour shortage challenges confronting small businesses.
- Small business operators may also be faced with an additional level of administration as they will need to ensure they have adequate systems in place to monitor employee rosters and pay correct amounts.

- Some restaurants and cafés may continue to charge Sunday and public holiday surcharges even though they no longer have the added cost of employee penalty rates, thereby taking advantage of customers.

SBDC Position

The SBDC acknowledges the high wages costs currently faced by small businesses involved in retailing and hospitality in WA and the financial advantage that would arise as a result of exemptions from the penalty rate system as proposed in the Bill. This financial benefit may encourage more small businesses to participate in the seven day trading regime, as called for by consumers.

As noted in this submission, the lack of definitive numbers of small businesses falling under the federal industrial relations system means it is difficult to accurately quantify what the impacts will be for these businesses as well as those under the state system.

Given this, the SBDC recommends that a detailed cost-benefit analysis or Regulatory Impact Analysis be undertaken before the Bill is considered further. As part of this analysis, the impact on small businesses under both the federal and state systems should be thoroughly investigated, with particular attention given to those jurisdictions like WA that have both state and federal awards in place. Without such an assessment, the SBDC is not able at this stage to provide any more than in-principle support for the Bill.

Yours sincerely

David Eaton
SMALL BUSINESS COMMISSIONER

20 September 2012