Business Council of Australia

SUBMISSION

Senate Standing Committee on Education and Employment

Inquiry into Penalty Rates

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Business Council of Australia ABN 75 008 483 216

Contents

The Business Council of Australia is a forum for the chief executives of Australia's largest companies to promote economic and social progress in the national interest.

About this submission

This is the Business Council's submission to the Senate Standing Committee on Education and Employment's inquiry into penalty rates.

The submission addresses the inquiry's terms of reference, including:

- claims that many employees working for large employers receive lower penalty rates under their enterprise agreements on weekends and public holidays than those set by the relevant modern award, giving those employers a competitive advantage over smaller businesses that pay award rates
- the operation, application and effectiveness of the Better Off Overall Test (BOOT) for enterprise agreements made under the Fair Work Act 2009
- the desirability of amending the Fair Work Act 2009 to ensure that enterprise agreements do not contain terms that specify penalty rates which are lower than the respective modern award
- the provisions of the Fair Work Amendment (Pay Protection) Bill 2017
- any other matter related to penalty rates in the retail, hospitality and fast-food sectors.

Recommendations

The Business Council recommends that:

1. The Committee rejects proposals to amend the Fair Work Act 2009 to ensure that enterprise agreements do not contain terms that specify penalty rates which are lower than the respective modern award. This includes the Fair Work Amendment (Pay Protection) Bill 2017.

2. The Committee examines the current impediments to efficient and effective bargaining resulting from the current application of the BOOT and how these impediments could be overcome through a reformulation of the current test.

Summary

- The workplace relations system, including different methods of setting pay must work for the full range of Australian businesses and their workforces, if all Australian businesses are to be competitive.
- This means that the modern awards system, enterprise bargaining and other forms of agreement-making must all be fit for purpose.
- The central concept of Australia's industrial relations system is achieving fairness and productivity by enterprise level bargaining based on a safety net of minimum terms and conditions (section 3 of the Fair Work Act 2009). Importantly, the level of minimum wages and conditions should encourage bargaining and promote flexible, modern work practices and the efficient and productive performance of work (section 134 of the Fair Work Act 2009). This requires award provisions to be seen as part of the minimum safety net which can be modified by enterprise level agreements. Award penalty provisions need to be seen in that light.

- Concerns regarding the competitiveness of employers operating under the award system in relation to penalty rates should not be dealt with through amendments to the Fair Work Act 2009 that further restrict enterprise bargaining.
- The Fair Work Commission's recent decision in relation to the adjustment of Sunday penalty rates under the Fast Food, Hospitality, Retail and Pharmacy Awards that commenced on 1 July 2017 will assist in enhancing the competitiveness of small business. It will also encourage greater employment opportunities at times which attract an additional award premium.
- In addition, the concept of a 'loaded rate' schedule in awards for small business will be given further consideration by the Fair Work Commission as a means of providing greater simplicity and flexibility for small businesses in relation to penalty rates.
- Enterprise bargaining has been a cornerstone of Australia's workplace relations system since the 1990s and it is critical for future competitiveness, job creation and wages that it remains efficient and effective for businesses and their employees. It should be about employers, employees and their representatives sitting down together and looking at current circumstances, the best outcome for workers and the company in light of these circumstances, and coming to a collective decision.
- There are now significant and growing risks for large businesses engaging in enterprise bargaining, which is becoming increasingly adversarial and subject to regulation and the outcomes of a tribunal rather than collective decision-making.
- Enterprise bargaining has been in decline across the private sector in recent years and this is particularly pronounced in the sectors that this inquiry is focused on – the retail, hospitality and fast food sectors.
- This trend has been exacerbated by the BOOT, which is now making enterprise bargaining administratively cumbersome, challenging and high-risk, particularly for enterprises with a large workforce.
- Following the Coles decision, the BOOT is now being applied on a stricter basis to identify individual employees who do not pass the test.
- This application of the test works against reasonable trade-offs across a range of monetary and non-monetary benefits. It is a very high bar, and inherently inflexible, to require every single employee to be better off under an enterprise agreement in all foreseeable situations. It will often mean the award model must be carried into the enterprise agreement. The trade-offs that can be negotiated between employers and employees across different entitlements are diminished.
- It also places a much more onerous evidentiary burden on employers, particularly large employers with a significant national presence. This can include tens of thousands of employees working a range of shift patterns in hundreds of locations across every state and territory of Australia.
- It makes it extremely difficult for these enterprises to bargain with any kind of certainty that the wages and conditions that they are proposing will ultimately pass the test in the eyes of the Commission or be resistant to appeal. This can occur even when the terms have been the result of good faith bargaining between an employer and union, and a large majority of voting employees support the agreement.
- This does not appear to have been the intention of the legislation and is not consistent with employers' early experience of the Fair Work Commission's application of the test. Notwithstanding the focus on each employee under section 193(1) of the Fair Work Act, the explanatory memorandum suggests that the test will generally be able to be applied to classes of employees. The explanatory memorandum also suggests that it

would not be necessary for the Fair Work Commission to enquire into individual employee's circumstances.

- The most effective solution providing the greatest certainty would be to clarify the meaning of the test by making legislative amendments to section 193 to better reflect the overall aspect of the test and the need to take into account the workforce *on the whole* in assessing whether it passes the test. Agreements should be approved if, on an overall basis, employees covered by the agreement on the whole are better off under the agreement compared to the award.

Introduction

The Business Council understands the competitiveness concerns expressed by some small businesses and industry groups operating under the award. But these concerns should not be addressed through legislative amendments that would further restrict enterprise bargaining. All businesses should comply with minimum standards and should have the capacity to modify award provisions through simple processes provided their employees are better off under the alternative arrangements.

In the Business Council's view, there are three ways in which the competitiveness of all businesses and in turn their capacity to offer additional employment can be promoted:

1. Detailed consideration of 'loaded rates' under the award system to better support small business.

2. The Fair Work Commission's adjustment to Sunday penalty rates under the Fast Food, Hospitality, Retail and Pharmacy Awards that commenced on 1 July 2017.

3. Ensuring that enterprise bargaining remains effective and efficient for business and workers.

Consideration of 'loaded rates' for small business

The Fair Work Commission has recently indicated that it will consider the issue of a 'loaded rate' for small business. That is, a rate which is higher than the applicable minimum hourly rate in the award and is paid for all hours instead of certain penalty rates.

In its recent penalty rates decision (AM2014/305), the Full Bench expressed a number of views in this regard, including:

- subject to appropriate safeguards, schedules of 'loaded rates' may make awards simpler and easier to understand
- schedules of 'loaded rates' would also allow small businesses to access additional flexibility without the need to enter into an enterprise agreement
- insertion of 'loaded rates' schedules in modern awards may have a positive effect on award compliance
- any loaded rate and the associated roster configuration, would, of course, need to be relevant to the needs of industry and employees.

The Full Bench has flagged an iterative process in consultation with relevant stakeholders to consider 'loaded rates' for small business. Small business groups have expressed their support for further consideration of this proposal. It would be appropriate for this proposal

to be given detailed consideration in terms of how it may enhance flexibility and competitiveness for small businesses.

Adjustments to Sunday penalty rates

The Business Council has supported the Fair Work Commission's recent decision to adjust penalty rates under the Fast Food, Hospitality, Retail and Pharmacy Awards. We support this decision on the basis that it will provide opportunities for small businesses to open longer hours, provide additional shifts for workers and create new jobs.

Based on considerable evidence and deliberation, both the Productivity Commission and the Fair Work Commission expressed their view that adjusting Sunday penalty rates can create more jobs, more hours and more opportunities for small business.

With small and medium businesses losing 14,000 jobs last financial year and youth unemployment running at over 20 per cent in some regions, Australia needs every business possible to keep creating jobs. The clear, four-year path set out by the Commission to progressively adjust Sunday penalty rates should assist in this task.

It is essential that penalty rates continue to be set independently by the Commission, free of political interference and be carefully considered in relation to the objects of the Fair Work Act and the modern awards objective.

We support the principle that people working casually, overtime, unusual shifts or unsociable hours should be paid a premium, but we must also recognise that the community's view about what constitutes unsociable hours has shifted in recent decades as have expectations of the availability of goods and services.

Penalty rates should no longer be seen as a means to discourage employers operating at certain times. They should be seen as a fair level of compensation for the inconvenience of working hours that many would not prefer to work. In this context, it is important to note that the Commission's decision adjusts rather than abolishes penalty rates. In all cases except fast food, workers still earn a higher rate on Sunday than on Saturday – up to 175 per cent.

The need for efficient and effective enterprise bargaining

Enterprise bargaining was introduced in the 1990s through the efforts of the Hawke and Keating governments and it has been a cornerstone of the workplace relations framework.

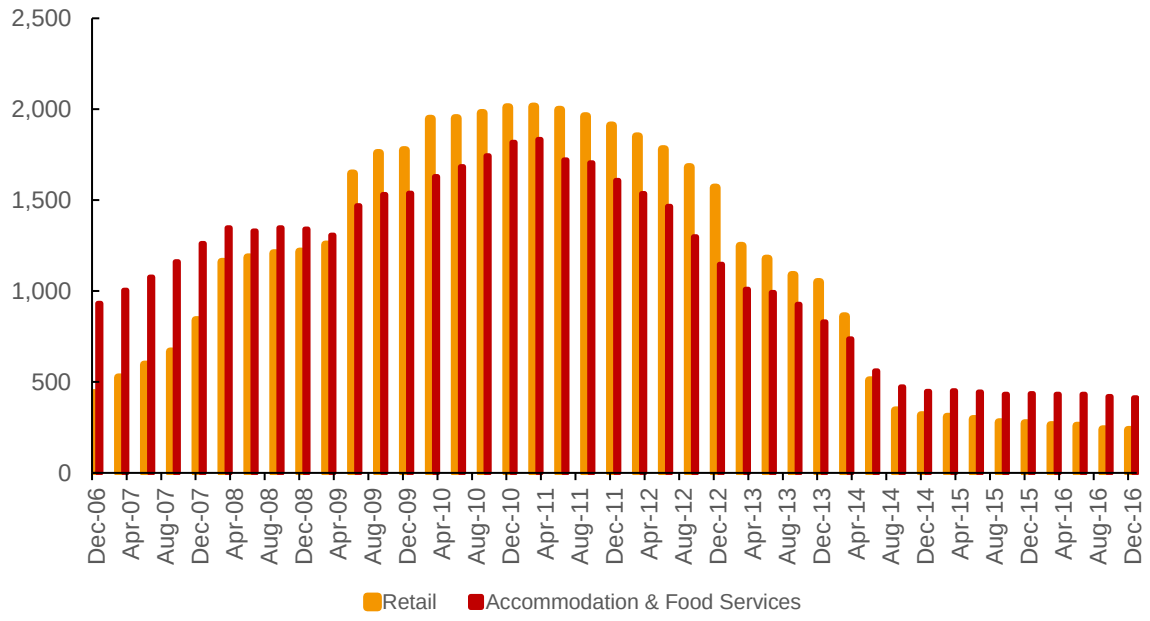
When enterprise bargaining was established, its purpose was to agree wages and conditions that match the individual circumstances of employers and employees, while retaining the benefits of collective action for employees.

The objectives of the Fair Work Act place specific emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations in order to achieve productivity and fairness. At its heart, enterprise bargaining should be about employers, employees and their representatives sitting down together and looking at current circumstances, what's good for workers and what's good for the company in light of those circumstances, and coming to a collective decision.

This is particularly important in sectors that employ a large number of Australian workers and are subject to increasing competitive pressures. For example, the retail sector employs over 1.3 million people and paid wages and salaries of almost $44 billion last year. It faces major competitive pressures from online shopping, new international entrants to the Australian market and the changing preferences of consumers.

There are now significant and growing risks for large businesses engaging in enterprise bargaining, which is becoming increasingly adversarial and subject to regulation and the outcomes of a tribunal rather than collective decision-making. Data from the Department of Employment shows a decline in the number of private sector agreements in recent years. This trend is particularly evident in the sectors of interest to this inquiry such as retail and fast food as illustrated in Figure 1.

Figure 1: Current Enterprise agreements in selected sectors[1]



Source: Department of Employment, Trends in Federal Enterprise Bargaining, 24 April 2017.

Operation, application and effectiveness of the BOOT

The current construction and interpretation of the BOOT is a significant factor in the increasing risks, uncertainty and regulatory burden of enterprise bargaining.

In *Hart v Coles*, the Full Bench of the Fair Work Commission confirmed that *each* employee must be better off overall under the terms of a proposed agreement, against the relevant modern award.

Feedback from workplace relations practitioners suggests that following the Coles decision, the test is now being applied, on a stricter line-by-line basis to identify individual employees who do not pass the test.

[1] This includes all wage agreements that are current on the last day of the quarter.

This places a much more onerous evidentiary burden on employers, particularly large employers with a significant national presence. This can include tens of thousands of employees working a range of shift patterns in hundreds of locations across every state and territory of Australia.

This does not appear to have been the intention of the legislation and is not consistent with employers' early experience of the Fair Work Commission's application of the test. The explanatory memorandum suggests that the test will generally be able to be applied to classes of employees. The explanatory memorandum also suggests that it would not be necessary for the Fair Work Commission to enquire into individual employee's circumstances. There are examples of Fair Work Commissioners who appear to have interpreted the test in these broad terms (see Exhibit 1).

Despite this, the current wording of section 193(1) of the Fair Work Act suggests the test apply to "each award covered employee, and each prospective award covered employee", as opposed to classes of employees or the workforce on the whole.

Exhibit 1 – Selected Fair Work Commissioner comments on the BOOT

Beechworth Bakery Employee Co Pty Ltd T/A Beechworth Bakery (AG2016/3647), Deputy President Sams

> It is trite to observe that an agreement does not necessarily fail the BOOT because employees do not receive weekend penalty rates, public holiday loadings or any other Award term or condition. Such a simplistic test would be to adopt an incorrect approach to the exercise of ensuring employees (and prospective employees) are 'better off overall' under the Agreement, rather than the relevant reference instrument. It is not an exercise in which the Commission 'negotiates' with the parties over remotely unlikely 'what if' scenarios about implausible or fanciful work patterns or rosters which the employer has never utilised and never intends to. This would be a barren and wasted exercise, perhaps of some obscure academic novelty, but of no practical utility.
>
> The BOOT is a balancing exercise - not a 'line by line' comparison.

NTEU v UNSW [2010] (FWAA 9588), Lawler VP

> It is trite to observe that awards typically contain both monetary and non-monetary terms and conditions. Obviously enough, the BOOT calls for an overall assessment. Comparing monetary terms and conditions is, at the end of the day, a matter of arithmetic. There is an obvious problem of comparing apples with oranges when it comes to including changes to non-monetary terms and conditions into the "overall" assessment that is required by the BOOT. In such circumstances the Tribunal must simply do its best and make what amounts to an impressionistic assessment, albeit by taking into account any evidence about the significance to particular classes of employees covered by the Agreement of changes to particular non-monetary terms that render them less beneficial than the equivalent non-monetary term in an award. In my view, it may also be relevant to consider the terms of any existing agreement and whether there is a relevant change of position when compared to that existing agreement.

This construction and interpretation of the test is now making enterprise bargaining administratively cumbersome, challenging and high-risk, particularly for enterprises with a large workforce.

It makes it extremely difficult for these enterprises to bargain with any kind of certainty that the wages and conditions that they are proposing will ultimately pass the test in the eyes of the Commission or be resistant to appeal. This can occur even when the terms have been the result of good faith bargaining between an employer and union, and a large majority of voting employees support the agreement.

The operation of the current test also works against reasonable trade-offs across a range of monetary and non-monetary benefits. It is a very high bar, and inherently inflexible, to require that every single current employee and prospective employee is better off under an enterprise agreement in all foreseeable situations.

It will often mean the award model must be carried into the enterprise agreement. The flexibilities and trade-offs between different wages and conditions including penalty rates, leave entitlements and other rates, which could be obtained are diminished and costs increased.

This will leave some businesses in the position where they will simply not be able to engage in enterprise bargaining in any meaningful way. Although they can be forced to bargain through a majority support determination, they cannot be forced to agree to anything. It will preclude business from pursuing greater flexibility with its workforce to respond to prevailing commercial pressures.

Some businesses will have existing enterprise agreements which cannot be renewed because of problems with the test – both employers and employees are in an impossible position. They cannot make a new enterprise agreement in similar terms.

The problems with the test come on top of the existing limitations in enterprise bargaining such as clauses restricting business and managerial decisions, greatly diminishing the incentives for enterprises to bargain. The Business Council highlighted these issues in its submission to the Productivity Commission inquiry into the workplace relations framework.

Undertakings and assurances are not working

There is another issue which has received less public attention, but is nonetheless problematic. Employers have sought to overcome some of the rigidities of the test by offering commitments to conduct reconciliations of overall earnings against the award over a period (say up to 12 months). This is less than ideal for a range of reasons – including that it effectively requires an employer to run two payrolls – but it at least offered a solution.

However, the Commission has now reduced the period over which the reconciliations must be conducted – with one of the key decisions in 2015 requiring reconciliations each pay cycle. In January 2017, the Full Bench handed down a decision in United Voice - Queensland Branch v MSS Security Pty Limited T/A MSS Security Pty Limited. In the decision, the Full Bench concluded that an undertaking to perform even a monthly reconciliation against the award was not sufficient to mean the agreement passed the test due to the slight time lag.

This may be contrasted with the annualised salary provisions in the Banking, Finance and Insurance Award 2010 and the Clerks—Private Sector Award 2010 which provides for a reconciliation over 12 months.

A genuine 'overall' test

The most effective solution providing the greatest certainty would be to make legislative amendments to section 193 that better reflect the overall aspect of the test and the need to take into account the workforce *on the whole* in assessing whether it passes the test.

Agreements should be approved if, on an overall basis, employees covered by the agreement on the whole are better off under the agreement compared to the award.

The Fair Work Commission could still consider a number of factors including flexibility and productivity improvements, fairness to employees and the relative size and significance of positive and negative impacts on employees. Combined with the necessity for majority employee approval and extensive safeguards to ensure the agreement is genuine, this would still provide appropriate protection for employees, and encourage innovation and business improvement.

Proposals to legislate penalty rates into enterprise bargaining

Amending the Fair Work Act 2009 to ensure that enterprise agreements do not contain terms that specify penalty rates which are lower than the respective modern award or through the provisions of the Fair Work Amendment (Pay Protection) Bill 2017 would be another disincentive for businesses and unions to undertake enterprise bargaining and undermine the objects of the Act.

It would make enterprise bargaining so rigid and award-driven that many businesses would have no real choice but to default to the awards system. It would also prevent unions from offering to trade away entitlements that their workers consider less valuable. The scope for bargaining would be substantially narrowed.

It would also substantially raise compliance costs and uncertainty for business. Despite having an enterprise agreement in operation, businesses would need to continuously monitor awards to ensure that their enterprise agreement is compliant.

Section 206 of the Fair Work Act requires that the base rate of pay payable under an agreement not be less than the base rate of pay in the modern award (if one applies) and national minimum wage order. The BOOT also acts as a safeguard to ensure that employees covered by an enterprise agreement are better off overall. As noted above, the BOOT is already proving to be an overly onerous test that is challenging for large businesses with national operations.

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