Parliament of Australia

Senate Standing Committees on Education and Employment

Penalty Rates

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About JobWatch

Job Watch Inc (**JobWatch**) is an employment rights community legal centre which is committed to improving the lives of workers, particularly the most vulnerable and disadvantaged. It is an independent, not-for-profit organisation which is a member of the Federation of Community Legal Centres (Victoria).

JobWatch was established in 1980 and is the only service of its type in Victoria. The centre is funded by State and Federal funding bodies to do the following:

a) provide information and referrals to Victorian, Tasmanian and Queensland workers via a free and confidential telephone information service (TIS);

b) engage in community legal education through a variety of publications and interactive seminars aimed at workers, students, lawyers, community groups and other appropriate organisations;

c) represent and advise vulnerable and disadvantaged workers; and

d) conduct law reform work with a view to promoting workplace justice and equity for all workers.

Since 1999, JobWatch has maintained a comprehensive database of the callers who contact our telephone information service. To date we have collected approximately 200,000 caller records with each record usually canvassing multiple workplace problems including, for example, contract negotiation, discrimination, bullying and unfair dismissal. Our database allows us to follow trends and report on our callers' experiences, including the workplace problems they face and what remedies, if any, they may have available at any given time. JobWatch currently responds to approximately 10,000 calls per year.

The contents of this submission are based on the experiences of callers to and clients of JobWatch and the knowledge and experience of JobWatch's legal practice. Case studies have been utilised to highlight particular issues where we have deemed it appropriate to do so. The case studies which we have used are those of actual but de-identified callers to JobWatch's TIS and/or legal practice clients.

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2) JobWatch recommends that the *Fair Work Act 2009* be amended to allow individual employees disadvantaged by an EA to apply to the Fair Work Commission for orders that they be put back on the relevant modern award.

3) JobWatch recommends that where enterprise agreements have passed their nominal expiry date, unless there is evidence that bargaining for a new agreement is taking place or that the agreement would still pass the Better Off Overall Test, the Fair Work Commission should on its own motion terminate the agreement so the relevant modern award is re-activated.

4) JobWatch recommends that an independent body be established to provide impartial advice to employees about proposed enterprise agreements.

5) JobWatch recommends better funding for enforcement bodies including the Office of the Fair Work Ombudsman and JobWatch.

6) JobWatch recommends that the *Fair Work Act 2009* be amended to clarify that contractual entitlements to award-related matters may be pursued as small claims in the Industrial Division of the Federal Circuit Court.

7) JobWatch recommends that the penalty rates decision be set aside and that an object or purpose be added to the FWC's functions such that it expressly does not have the power to reduce wages

2) Introduction

Unlike most comparable countries, Australia has had the benefit of sustained economic growth over several decades. Despite this, in recent years Australian wage growth has stagnated to the point that economists are warning that the effect on demand could have detrimental effects across the whole economy. The ability of Australian households to service historically high levels of private debt is also increasingly fragile as a result.

The severity of the problem is vividly demonstrated by recent extraordinary statements from the Governor of the Reserve Bank, Philip Lowe, urging workers to demand pay rises in the interests of the economy as a whole.[1]

a) The penalty rates decision and the role of the Fair Work Commission

It is common ground across much of the political spectrum that the benefits of economic growth will not necessarily be distributed effectively and fairly by the action of the market alone, especially in regard to wages, and that mechanisms are needed to ensure that this happens.

In Australia, the Fair Work system is probably the most important such mechanism, and increasingly so as union membership continues to decline, and effective collective bargaining is available to fewer and fewer workers. Accordingly, it has been a key role of the Fair Work Commission (**FWC**) and its predecessors to increase minimum wages in line with the cost of living.

However, on 23 February 2017, the FWC broke with this tradition and cut modern award (MA) penalty rates for Sundays and public holidays in the retail and hospitality industries (**the Decision**).

The special five-member full bench, headed by President Iain Ross, concluded that "deterrence is no longer a relevant consideration in the setting of weekend and public holiday penalty rates", and that they no longer were a "fair and relevant" safety net. In making the Decision, the FWC formed the view that the extent of the "disutility" of working on Sundays is much less than in times past.

The Decision cut full-time and part-time retail workers' Sunday penalty rates from 200 per cent to 150 per cent, while casuals had their loading reduced from 200 per cent to 175 per cent. Full-time and part-time hospitality workers' Sunday penalty rates were cut from 175 per cent to 150 per cent.

The Decision did not provide for a compensatory increase in the base rates of the affected awards, effectively cutting pay across the industries they cover.

It is JobWatch's view that to cut wages for some of Australia's lowest-paid workers, in a time of sustained economic growth and amid calls from economic authorities to increase wages, is inconsistent with the role of the FWC, and defies sound economic principles.

[1] http://www.abc.net.au/news/2017-06-29/rba-governor-philip-lowe-goes-marxist/8662228

b) The effect of wage cuts on employment

The effect of cutting penalty rates on employment was a contested point among the parties making submissions related to the Decision.

Employer group submissions to the FWC stressed the purported employment benefits of lower rates, but the Decision itself stated that "[a]ny potential positive employment effects from a reduction in penalty rates are likely to be reduced due to substitution and other effects."

Employer groups also suggested that lower weekend penalties would result in longer weekend opening hours, but the FWC recognised that this would largely be counterbalanced by the "substitution" effect noted above, which refers to the tendency of any additional spending on one day of the week to result in reduced spending on other days.

Union submissions to the FWC also noted that increased employment in one sector often leads to decreased employment in competing sectors. For example, extra jobs in the restaurant sector may come out of jobs in the food retail sector.

In JobWatch's view, there is little evidence linking wage cuts to jobs growth. Employers employ as many employees as they need, not as many as they can afford. JobWatch accepts the mainstream view that in fact, the primary driver of employment is demand, which in turn is driven by wage *growth*. Each individual employer may want cheaper labour, but they want their customers – who work for somebody else – to be well paid.

It is JobWatch's view that the argument that decreasing penalty rates creates employment is not well founded.

JobWatch is concerned about the Decision because it reduces minimum pay and entitlements for the lowest paid workers. This is inconsistent with the concept of a minimum wage and a set of award safety net entitlements.

JobWatch is hopeful that either the Full Court of the Federal Court, which will eventually judicially review the Decision, will quash the Decision or that a private members bill seeking to overturn the Decision will be voted into law by the federal parliament. In the meantime, JobWatch makes the following comments and recommendations.

c) Statistical analysis

The JobWatch Industry Report 2015-2016 captures data from callers specific to their industry. Callers from retail represent the second largest industry group, with callers in hospitality coming in as the fifth largest industry group. Combined, this represents a very significant proportion of the JobWatch caller base (21%). This JobWatch caller base will be adversely affected by the Decision and JobWatch feels compelled to state their case and ameliorate the outcome for these low paid vulnerable workers.

The information on the following pages provides an overview of the employment industry, status, gender, age and regional distribution of callers to JobWatch over the 2015-16 financial year.

Table 1: Top 5 Industries of Callers to JobWatch in the Period of 1 July 2015 to 30 June 2016

Employment Status	Count	Percentage of total calls
Health and Community Services	**1101**	**14.69%**
Retail Trade	**998**	**13.32%**
Property & Business Services	**658**	**8.78%**
Personal & Other Services	**621**	**8.29%**
Hospitality	**565**	**7.54%**

Table 2: Employment Status of Callers to JobWatch in the Period of 1 July 2015 to 30 June 2016

Employment Status	Count	Percentage of total calls
Casual Part Time	**648**	**8.63%**
Casual Full Time	**364**	**4.85%**
Independent Contractor	**195**	**2.60%**
Fixed Term Contract	**103**	**1.37%**
Apprentice/Trainee	**102**	**1.36%**

1012 callers identified as casual employees, 195 callers identified as independent contractors, 103 callers were on fixed term contracts and 102 callers were apprentices or trainees.

Casual employees, independent contractors, fixed term contract employees and apprentices/trainees are vulnerable workers because they lack certainty that they have ongoing employment. This fear of losing their job often results in them being reluctant to enforce their legal rights.

Table 3: Gender of Callers to JobWatch in the Period 1 July 2015 to 30 June 2016

Gender	Count	Percentage of total calls
Female	**4172**	**55.57%**
Male	**3335**	**44.43%**

4172 callers (approximately 55% of callers) were female, while 3335 callers (approximately 44%) were male.

Table 4: Age of Callers to JobWatch in the Period of 1 July 2015 to 30 June 2016

Age	Count	Percentage of total calls
Under 15	**1**	**0.01%**
15 - 18	**71**	**0.95%**
19 - 24	**726**	**9.67%**
25 - 34	**2141**	**28.52%**
35 - 44	**1939**	**25.83%**
45 - 59	**2030**	**27.04%**
60 +	**448**	**5.97%**

2938 callers (approximately 39% of callers) were aged between 15 and 34. 1939 callers (approximately 25% of callers) were aged between 35 and 44, while 2030 callers (approximately 27% of callers) were aged between 45 and 59. 448 callers (approximately 5% of callers) were aged 60 and over.

Table 5: Regional Distribution of Callers to JobWatch in the Period 1 July 2015 to 30 June 2016.

Region	Count	Percentage of total calls
Metropolitan	**5975**	**79.59%**
Rural	**1286**	**17.13%**

5975 callers (approximately 79% of callers) worked and/or lived in metropolitan areas of Victoria. 1286 callers (approximately 17% of callers) worked and/or lived in rural Victoria.

Table 6: Regional Distribution of Callers to JobWatch in the Period 1 July 2015 to 30 June 2016.

Region	Male	Percentage of total calls	Female	Percentage of total calls
Metropolitan	**2644**	**44.31%**	**3322**	**55.68**
Rural	**585**	**45.59%**	**698**	**54.40%**

Of the 5966 callers living and/or working in metropolitan areas 2644 (approximately 44%) were male, while 3322 callers (approximately 55%) were female. Similarly, of the 1283 callers living and/or working in rural areas, 585 (approximately 45% were male) and 698 (approximately 54%) were female.

d) Economic and social impact on workers

Based on the above statistical analysis of calls to JobWatch's TIS in 2015/16, the Decision will clearly have a substantial impact on the take home pay of award reliant employees that work on Sundays and Public holidays especially in relation to women (55% of calls), young workers (39% of calls) and workers in regional Victoria (17% of calls).

Unfortunately, we do not have any specific case studies as yet because the nature of our TIS is that workers only call when they have a problem. Workers likely to be affected have not called to date as the Decision has just been implemented. We anticipate that we will receive a large number of calls when the Decision takes effect.

JobWatch receives a large number of calls from employees who are being underpaid, during the 2015/2016 financial year 8.37% of calls related to underpayment issues. Unfortunately, many of these workers are already the victims of wage theft and so will not notice or be affected by the Decision.

JobWatch is also concerned that, in making the Decision, the FWC has indirectly reduced the "Better Off Overall Test" (BOOT), which enterprise agreements (EAs) are required to pass in relation to the employer's workforce as a whole in order to be approved by the FWC, as the MA safety net is now much lower. In other words, the bar has been lowered for the approval of EAs, which will likely have a negative impact on wage increases in enterprise bargaining. Therefore, the unintended consequences and flow-on effects of the Decision are of great concern to JobWatch.

3) Questions referred to the Committee

a) 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.

It is JobWatch's view that these claims are unlikely to have any basis.

The usual effect of the BOOT, in JobWatch's experience, is that multiple entitlements such as penalties, overtime and allowances are bundled into a single higher hourly rate for the purposes of clarity and simplicity, and in exchange for other flexibilities of value to the employer.

This would normally result in a *higher* wages bill overall, despite any reduction in penalties, so no competitive advantage would be conferred in relation to wages.

In any case, there is no reason why small businesses cannot use EAs. Union presence is not essential to the process of negotiating an agreement, as employees can choose their own representatives or represent themselves, and therefore can initiate bargaining.

JobWatch recommends that small to medium enterprises that cannot afford or are reluctant to become a member of a peak employer group who can assist them with collective bargaining, should be able to obtain basic assistance from the Fair Work Ombudsman, who should be funded to provide this assistance. Likewise, agencies such as JobWatch can assist employees with the bargaining process, including the appointment of bargaining representatives.

Recommendation 1: That the Fair Work Ombudsman should be funded to provide basic assistance with collective bargaining to small to medium enterprises, and agencies such as JobWatch should be funded to assist employees with bargaining in such enterprises.

b) The operation, application and effectiveness of the Better Off Overall Test (BOOT) for enterprise agreements made under the *Fair Work Act 2009*.

i) The test

The BOOT ostensibly requires that "*each* award covered employee, and *each* prospective award covered employee, for the agreement would be better off overall if the agreement applied to the employee than if the relevant MA applied to the employee [emphasis added]" (*Fair Work Act 2009* s193(1)).

However, this requirement is somewhat weakened by s 193(7), which provides that "if a class of employees to which a particular employee belongs would be better off if the agreement applied to that class than if the relevant MA applied to that class, the FWC is entitled to assume, in the absence of

evidence to the contrary, that the employee would be better off overall if the agreement applied to the employee."

This provision seems to allow agreements that make particular workers worse off, despite belonging to a "class of employees" that is made better off, provided no evidence of this was before the FWC at the time the agreement was approved. An example of this would be the effect of a penalty trade-off against base-rate on weekend-only workers. In other words, if the EA pays all employees a base rate that is higher than the award rate in lieu of penalties, overtime and other allowances, then a weekend-only worker would likely be worse off under the EA.

JobWatch suggests that the *Fair Work Act 2009* be amended to allow individual employees disadvantaged by an enterprise agreement to apply to FWC for orders that they are put back on the relevant MA, subject to a clear objective test as to when this would occur, for example "an employee is significantly disadvantaged by the EA". The provision could give an example of significant disadvantage such as "an employee earns 10% less per hour compared to the award", and the meaning could be fleshed out in case law.

This would avoid the cost, inconvenience and uncertainty of having the FWC consider whether to set aside an entire existing EA and possibly wasting the time and money spent bargaining. It would also avoid situations where there are threats to terminate an EA so that all employees fall back to the relevant MA, as could potentially happen with the existing Coles EA.

Recommendation 2: That the Act be amended to allow individual employees disadvantaged by an EA to apply to the FWC for orders that they be put back on the relevant MA.

ii) Ghost agreements

A more serious issue related to the BOOT is so-called 'ghost agreements', which passed the BOOT (or its earlier equivalents) at the time they were approved, but now pay less than the relevant MA due to improvements in the award in the meantime. At present, if such agreements have not been replaced or terminated, they are still in force even if they have passed their nominal expiry date many years ago.

JobWatch suggests that where agreements have passed their nominal expiry date (a maximum of four years from approval), unless there is evidence that bargaining for a new agreement is taking place or that the EA still would pass the BOOT, the FWC should on its own motion terminate the EA so the MA is re-activated.

Recommendation 3: That where agreements have passed their nominal expiry date, unless there is evidence that bargaining for a new agreement is taking place or that the EA still would pass the BOOT, the FWC should on its own motion terminate the EA so the relevant MA is re-activated.

iii) Ensuring good bargains

Another BOOT issue relates to claims that some unions negotiating EAs are not necessarily acting in the best interests of employees but are seeking advantage for their members in collusion with employers. Even if this has occurred in the past; ultimately, these agreements must be voted for by the relevant employees in the particular workforce at the time and therefore must receive a majority of support.

If there is evidence that employees are not getting good advice from the relevant union, there should be an independent body funded to provide impartial advice to employees about whether the proposed agreement is a good bargain for them. With additional funding, JobWatch would be well placed to provide this service.

Recommendation 4: That an independent body be established to provide impartial advice to employees about proposed Enterprise Agreement.

c) 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

This concept has merit so long as the EA has penalty rates in it. In other cases, EAs should still be able to increase the base rate to cover penalty rates so long as the BOOT is met. It is JobWatch's view that it would not be desirable to remove this capability, which may defeat one of the central objectives of the collective bargaining system by making EAs unattractive to employers. The purpose of EAs is to adapt employment terms and conditions to meet the needs of the particular enterprise, subject to the BOOT.

d) The provisions of the Fair Work Amendment (Pay Protection) Bill 2017

This Bill proposes to amend the *Fair Work Act 2009* (the Act) to require that EAs must contain any penalties, overtime rates and loadings (including casual loadings) found in an applicable award, each of which must be as good as or better than the award rate.

The Bill does not address the present issue of reduced penalty rates, and has the possibly unintended consequence of undermining the collective bargaining system in the same way as the similar proposal above at point (c).

e) Any other matter related to penalty rates in the retail, hospitality and fast food sectors.

i) Underpayment

Unfortunately, in JobWatch's experience, the real competitive advantage for employers in these industries comes all too often from paying less than the applicable award, regardless of the existence or level of any applicable penalty rates.

JobWatch recommends better funding for enforcement bodies including the Office of the Fair Work Ombudsman and JobWatch.

Recommendation 5: Better funding for enforcement bodies including the Office of the Fair Work Ombudsman and JobWatch.

On the following page is a selection of de-identified case studies selected from JobWatch's casework, which are typical of the underpayment issues frequently encountered by callers and clients of JobWatch.

Case Study: Deana

Deana worked as a cleaner in a large hotel. Her boss sexually harassed and underpaid her. When she asked to be paid properly and to be "on the books", her boss pulled her aside and asked her how badly she really wanted the money, and whether she was prepared to "please" him in return for higher (minimum) wages. She found out later that he was a sub-contractor running one particular franchise that was part of a large commercial cleaning business with many franchises across Australia. There were no official records of how much she was being underpaid, and he was not providing her with payslips.

Case Study: Ali

Ali was an international student who worked at a petrol station, cash-in-hand. He met his boss through a friend. He had his boss's first name, phone number and email address, but no other details. He was not paid for any of the hours that he worked. As he was concerned that he did not understand his visa work conditions, he resigned. His employer told Ali that if he pressed his claim for payment he would report Ali to the immigration authorities. Eventually, he found out that the petrol station was a franchise business. His employer refused to answer his calls.

Case Study: Meredith

Meredith took her first job at the franchise location of a nationwide burger store. She was informed that she would be undertaking a traineeship, to which she agreed. She never heard back from the training organisation and never received any training. However, she was consistently paid as though the training was occurring. On her resignation two years later she found that the training arrangement had been put through but cancelled within six months. She calculated the extent of her underpayment to be $8000.

Case study: Madeline

Madeline worked at a franchise location of a popular restaurant chain. She reported to the FWO that she was regularly paid only $10 an hour. She further claims that payslips provided on her repeated request were forged to show a higher amount - $12.65. She is adamant that all her co-workers are also being underpaid and denied payslips. However, the FWO has referred Madeline to JobWatch after the FWO's voluntary dispute resolution approach was not successful in resolving her dispute with her former employer.

Case study: Joshua

Joshua is an international student who worked as a waiter in a café. He was underpaid and not provided with payslips. When JobWatch sent a letter of demand to his boss at the café's address, it was returned to sender. It subsequently became apparent to us that the business has closed down and that, as the business was never registered, there is no way of finding who the holder of the business was. Joshua knows the boss' name and surname but we are unable to find an address for service of documents. Joshua is very frustrated that he cannot enforce his employment rights.

ii) Employment contracts

It is worth noting that all employees have a contract of employment, i.e. a contract of service, whether in writing or not. Many contracts of employment have the employee's rates of pay, including penalties and allowances, as terms of the contract.

Therefore, if an employer of such an employee cuts the employee's pay in line with the Decision, the employee may be entitled to make a claim for damages for breach of contract in a common law court such as the Magistrates Court of Victoria.

Case study: Sally

Sally works as a barista in an inner-city café. Upon accepting the position, Sally signed a contract stating that she would receive $20 per hour for her work. Recently, Sally's employer informed her that because she is only 17 years old, she is only entitled to $13 per hour under the relevant Award. She has been told that her pay will be adjusted accordingly.

However, such entitlements may also be pursued by employees more conveniently in the Federal industrial jurisdiction as "safety net contractual entitlements" under the Act.

Where an employee has a contractual entitlement to an award-related subject-matter, it is currently unsettled law as to whether that subject-matter must also be dealt with by an applicable award for that entitlement to be a safety net contractual entitlement, and therefore enforceable under the Act.

JobWatch recommends that the Act be amended to clarify that contractual entitlements on award-related matters may be pursued as small claims in the Industrial Division of the Federal Circuit Court regardless of whether the applicable award deals with the matters, so that such claims may be heard expeditiously, inexpensively and without the need for lawyers or recourse to the strict rules of evidence.

This concept would at least empower existing employees to attempt to recover the penalties that they have lost as a result of the Decision. JobWatch would be well placed to advise and assist such employees to attempt to recover their unpaid wages.

Recommendation 6: That the Act be amended to clarify that contractual entitlements to award-related matters may be pursued as small claims in the Industrial Division of the Federal Circuit Court.

4) Conclusion

As noted in the introduction, a key role of the FWC and its predecessors is to act as a mechanism to distribute the benefits of increasing productivity, and relevantly to the present issue, including by increasing wages in line with cost of living. The objects of the FWC are defined in the Act to include those of the Act itself, which include "national economic prosperity and social inclusion for all Australians", "enabling fairness" and "ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions" (s 3). It has not been its role to reduce wages based on cultural criteria such as the social or religious significance of Sundays. It is not clear that such reasoning is even consistent with the FWC's objects.

In JobWatch's view, decisions about such cultural issues are a job for parliament, which Australian voters can approve or disapprove of at the ballot box.

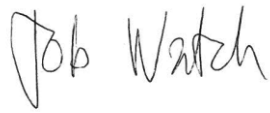
The Federal Court will soon review the Decision. JobWatch recommends that the Decision be set aside and that an object or purpose be added to the FWC's functions such that it expressly does not have the power to reduce wages.

> **Recommendation 7:** That the penalty rates decision be set aside and that an object or purpose be added to the FWC's functions such that it expressly does not have the power to reduce wages.

Thank you for considering our submission.

Please contact Zana Bytheway/Ian Scott on if you have any queries.

Yours sincerely,



Job Watch Inc
Per: Ian Scott