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President Gerardine (Ged) Kearney
Secretary Sally McManus

Ref: D No. 075/2017

18 July 2017

Committee Secretary
Senate Education and Employment Committees
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Committee Secretary,

RE: Education and Employment References Committee Inquiry regarding Penalty Rates

This submission to the education and employment references committee inquiry on penalty rates wishes to make the ACTU's position clear.

1. The Australian retail sector, due to the higher than average rates on unionization, has, by international standards, among the best wages and conditions for retail sector workers.
2. The Australian trade union movement supports the Better Off Overall test and seeks to ensure that it is consistently applied in order that workers may bargain with clarity.
3. That the total dollar outcome for the hours worked is the outcome which most impacts workers take home pay.

The productivity commission inquiry into the economic structure and performance of the Australian retail industry (2011) found that Australian retail workers were paid, when all benefits were taken into account, 27% higher than comparable retail workers in the United States and 29% higher than retail workers in the UK. This is additionally reinforced by the findings of a 2014 inquiry that found that, in real terms (2013 US dollars) the average hourly labour costs for Australian retail workers were around $5 an hour higher than UK workers and $7 higher than US workers. On this measure, Australian workers also outstripped those in Spain and were broadly comparable to workers in the Netherlands. Australian retail workers are, in real terms, among the best paid in the world.

Australian retail workers have bargained for tangible benefits as part of many of their agreements. These benefits, such as guaranteed 10 hour weekly minimums for part time employees, additional leave entitlements for illness, caring responsibilities, domestic violence leave and rostering provisions are voted on by the employees who decide together with a range of pay outcomes and other benefits they constitute a desirable suite of pay and conditions that are different from and better than those provided by the award.

Nothing prevents small business from accessing enterprise bargaining however they may decide they do not wish to do so. According to HR consultants Workplace Partners:

When an Enterprise Agreement comes into force, the applicable Modern Award would generally no longer apply (with the exception of minimum wages).

For an Enterprise Agreement to be approved by Fair Work Australia it must pass the Better Off Overall Test (BOOT); the terms in the Enterprise Agreement must be better than the applicable Modern Award.

Some businesses may benefit from such an arrangement, but in our experience the numbers are limited. The majority of retail store owner's, especially smaller retailers, may in fact be worse off.

The application of the Better Off Overall Test (BOOT) must be consistent in order to ensure that workers and their employers can enter bargaining with the same understanding about what the parameters are for the negotiations. We are aware of cases, such as the Super Retail group EBA, where the Fair Work Commission determined a non-union agreement that reduced Sunday loadings and had a much lower base rate than the Coles agreement, that was latter deemed to not pass the BOOT, was found to be BOOT compliant.

When workers negotiate a higher base rate for their work per hour and in exchange give up some part of their penalty rate loadings they do so on the basis of being better off overall at the end of the relevant pay period. If we use the case studies provided by HR consultant Workplace Partners we can see how negotiated rates that increase the hourly base rate and decrease the weekend penalty rate can still result in increases to take home pay.

Case 1 *– Susan (employee) works as a part time retail employee and the workplace has used the template agreement as provided by Business SA & the SDA. Susan works 25 hours per week which is inclusive of 5 hours on Saturdays weekly.*

Using the voluntary ***Enterprise Agreement****, Susan would be paid 20 hours x $20.01 (minimum payable under the Enterprise Agreement) + 5 hours x $20.01 (Saturday loading is nil as per Enterprise Agreement). This brings the total weekly wage payable to Susan to $500.25.*

Under the current ***Retail Award*** *(Level 1), Susan would be paid 20 hours x $18.52 (minimum Award wage) + 5 hours x $23.15 (rate inclusive of Saturday loading prescribed in Award). This brings the total weekly wage payable to Susan to $486.15.*

Case 2 *– Trevor (employee) works part time in retail and his employer has put in place the template enterprise agreement as provided by Business SA & SDA. Trevor works 30 hours per week which includes 6 hours Saturday every fortnight.*

Using the voluntary ***Enterprise Agreement****, Trevor would be paid 48 hours x $20.01 (minimum payable under the Enterprise Agreement) +6 hours x $20.01 (Saturday*

https://workplacepartners.com.au/2015/03/26/smoke-mirrors-sa-retailers-get-landmark-penalty-deals/
http://www.pc.gov.au/inquiries/completed/retail-industry/submissions/sub074.pdf
http://www.pc.gov.au/inquiries/completed/retail-industry/report/20-retail-industry-appendixc.pdf

loading is nil as per Enterprise Agreement). This brings the total fortnightly wage payable to Trevor to $1080.54.

*Under the current **Retail Award** (Level 1), Trevor would be paid 48 hours x $18.52 (minimum Award wage assuming he does not evenings) + 6 hours x $23.15 (rate inclusive of Saturday loading prescribed in Award). This brings the total fortnightly wage payable to Trevor to $1027.86*

Of course small business does not take up such agreement because they recognize that despite lowering penalty rates the trade is that the workers must be better off overall and this is not the aim of the lobby seeking cuts to penalty rates.

It is important to note that if, in the application of the BOOT, the Fair Work Commission determines that workers are not Better Off Overall, then it is an unintended consequence and it must be incumbent on the employer to remedy the situation by returning to bargaining with an improved offer.

The notion that small businesses are unfairly disadvantaged by enterprise agreements made elsewhere is an opportunistic attack on the wages of workers in small business.

While in their submission to the 2011 Productivity Commission inquiry into the economic structure and performance of the Australian retail industry the Council of Small Business Organisations of Australia (COSBOA) highlighted the cost of labour as a threat, it was only in relation to their fears that the internet would allow consumers to purchase from international competition and bypass local small business and thus wages would be part of cost competition. There were no concerns about bargaining and no issues raised about penalty rates, however, interest rates, high rents, exchange rates and delivery speeds were all issues raised by COSBOA that would impact the retail industry.

For decades we have seen employer lobby groups the retail sector attempt to justify cuts to penalty rates through spurious claims about employment benefits and changing community attitudes. The reality is that some employers are simply looking to increase their profitability and are prepared to do so at the expense of their workforce.

It would appear to us that while the rationale has changed from foreign competition to the bargaining system the overarching aim of driving down wages has not changed.

What has changed between 2011 and 2017 is that we now have a conservative government that is prepared to indulge the idea of cutting penalty rates as a means of increasing the profitability of the retail sector. Their reliance on the failed trickle down economic theory of the 1980's has left them exposed as out of touch and ignorant to the low pay crisis that Australian workers now face. Multiple members of the coalition government have espoused the notion of a cut to penalty rates and have at times attempted to muddy the waters by suggesting that bargained agreements that leave workers better off overall are somehow equivalent to a cut in penalty rates. This is demonstrably not the case. A cut is an impost that benefits one side at the expense of the other whereas a negotiated bargain is agreed to have value by both sides. Whether the argument of those wanting to cut penalty rates is about employment, small vs big business or industry flexibility the desired outcome is the same; a cut to penalty rates and the take home pay of working people.

https://workplacepartners.com.au/2015/03/26/smoke-mirrors-sa-retailers-get-landmark-penalty-deals/
http://www.pc.gov.au/inquiries/completed/retail-industry/submissions/sub074.pdf
http://www.pc.gov.au/inquiries/completed/retail-industry/report/20-retail-industry-appendixc.pdf

We contend that unilateral cuts to penalty rates leave workers worse off and that bargaining does not advantage one size of employer over another in relation to the negotiation of wages and conditions assuming the BOOT is consistently applied.

Yours sincerely

Sally McManus
Secretary

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http://www.pc.gov.au/inquiries/completed/retail-industry/submissions/sub074.pdf
http://www.pc.gov.au/inquiries/completed/retail-industry/report/20-retail-industry-appendixc.pdf