

SENATOR NICK XENOPHON'S DISSENTING REPORT

1.1 Small businesses in Australia are an integral part of the very fabric of our society and economy. They are the businesses which many Australians are first employed by and they are the first to lend their support to local communities, particularly in regional communities. According to the Council of Small Business Organisations of Australia, as at 30 June 2011, 93 per cent of retail businesses were small and 84 per cent of businesses in the accommodation, café and restaurant industries were small.¹

1.2 Unfortunately, small businesses face a multitude of challenges today. Patchy consumer sentiment and spending, the high Australian dollar, increasing input costs (particularly electricity costs) and increasing labour costs have all contributed to a difficult operating environment. A benchmarking survey conducted by Restaurant and Catering Australia revealed that 18 per cent of small restaurant and catering businesses were closed on weekends - which equates to the loss of approximately 3000 jobs – due to the financial burden of paying penalty rates. Restaurant and Catering Australia also revealed:

We expect that we have had further reductions in staff numbers, given that 70.9 per cent of the respondents to our survey... reported that they would be further reducing staff numbers as wage costs increased. One-third of the businesses also reported that they intended to close their businesses on weekends or public holidays as a result of those increases in costs.²

1.3 The importance of small businesses cannot be underestimated, nor can their vulnerability in a soft economy. The Fair Work Amendment (Small Business – Penalty Rates Exemption) Bill 2012 ('the bill') aims to give small businesses employing less than 20 people in the retail and hospitality sector an exemption from paying penalty rates unless the employee has worked for more than 10 hours in a 24 hour period or 38 hours in the week.

1.4 There was some debate amongst submitters as to the accuracy of data presented regarding labour market conditions. The Australian Council of Trade Unions agreed that meaningful data collection is required:

Senator XENOPHON: You referred to some industry specific ABS data and said you do not support the assertions of Restaurant and Catering from their surveys. Do you think there is some useful work to be done to establish a consensus as to what job losses there have been and how many businesses have

1 Council of Small Business Australia, *Submission 352*, p. 2.

2 Mr John Hart, Chief Executive Officer, Restaurant and Catering Australia, *Proof Committee Hansard*, 7 December 2012, p. 30.

closed down on Sundays in that small business, restaurant and catering, and retailing sector?...

Mr Lyons: We would never oppose the collection of meaningful data. It is always better from an industrial participant's view and a public policy process that we have all got the facts.³

Recommendation

1.5 That the Federal Government establish a mechanism to collect and report on labour market conditions in a timely manner.

1.6 The bill seeks to recognise that Australia has moved away from the traditional Monday to Friday work week and it is not uncommon for a 38 hour work week to span weekends. Therefore the rationale for paying penalty rates on weekends which form part of an ordinary 38 hour work week is less justifiable, particularly in the small business context. The unique pressures on small businesses are reflected in the provisions of this bill. It is not intended that the bill be extended in any circumstances to businesses with more than 20 full time equivalent employees.

1.7 As was recently stated in the Sydney Morning Herald:

Economic growth without a significant population increase requires a flexible workforce to be paid fair and affordable wages. When laws prevent this and impose out-dated standards to the detriment of job creation and higher incomes for all, it is time for modernisation.⁴

1.8 The Productivity Commission has provided valuable guidance in terms of how to set penalty rates, explaining that:

In principle, penalty rates in awards should not be set in excess of the minimum necessary to avoid unfair or unduly harsh treatment of employees, and an efficient level of penalty rates would be one which is just sufficient to induce people with appropriate skills to voluntarily work the relevant hours. Some workers may be very comfortable with (or even prefer) weekend and evening work and, for these people, the additional pay incentive may not need to be as large as exists under the current penalty rate structure. If work at existing penalty rates is keenly sought, this may also be suggestive of those rates being higher than is necessary to compensate workers for working at times that are inconvenient.⁵

1.9 It is clear from the submissions received and exchanges at the committee's public hearing that the concept of penalty rates evokes a strong reaction from the community. I welcomed the debate that took place because the reality is small

3 Senator Nick Xenophon and Mr Tim Lyons, Assistant Secretary, Australian Council of Trade Unions, *Proof Committee Hansard*, 7 December 2012, p. 42.

4 Sydney Morning Herald, Editorial, 11 February 2013, p. 8.

5 Productivity Commission, *Economic Structure and Performance of the Australian Retail Industry*, Report No. 56, 2011, p. 341.

businesses are struggling and something must be done to ensure these businesses remain in operation and continue to provide jobs.

1.10 However, I was disappointed that of the 30-odd pages in the committee's majority report only four pages were dedicated to reflecting the arguments in favour of the bill.

1.11 Furthermore calls for an additional hearing were not heeded by the committee. Despite this I believe some valuable contributions have been made during the course of the inquiry.

The concept of a weekend

1.12 This bill was introduced in order to acknowledge the changing nature of business trading hours, and the special needs of small businesses and their employees. It was argued by some that this bill sought to eliminate the concept of a weekend. Unions NSW submitted:

Whilst there have been significant increases in business hours in the last 50 years, Unions NSW does not believe that this makes the concept of the weekend or public holiday redundant.⁶

1.13 This position was countered by Restaurant and Catering Australia:

I point out that a number of the submissions made by the trade union movement make some points about this bill abolishing the weekend as we know it. That is far from the truth. This is nothing about abolishing the weekend. What it is really about is ensuring that small businesses can manage their business and have profitable operations. The only way to do that is to make sure that the business model that they have is something that actually works.⁷

1.14 Restaurant and Catering Australia continued:

When you have, in some cases, low-skilled employees on hourly rates of over \$45 an hour you can understand why these small business entrepreneurs are concerned.⁸

1.15 As the Explanatory Memorandum states, the Fair Work Act and modern awards do not (generally) recognise this shift towards a seven day week:

The intention of this bill is to allow small businesses in the hospitality and retail sector... to remain true to the original intention of penalty rates while avoiding the high cost burden during specific days of the week.⁹

6 Unions NSW, *Submission 416*, p. 6.

7 Mr Greg Parkes, Workplace Relations Director, Restaurant and Catering Australia, *Proof Committee Hansard*, 7 December 2012, p. 30.

8 Mr Greg Parkes, Workplace Relations Director, Restaurant and Catering Australia, *Proof Committee Hansard*, 7 December 2012, p. 30.

9 Explanatory Memorandum, Fair Work Amendment (Small Business – Penalty Rates Exemption) Bill 2012, p. 2.

1.16 In fact, Mr John Hart, CEO, Restaurant and Catering Australia, told the committee that since recent minimum wage increases some employers are now 'paying hourly wage rates during the week they used to pay employees inclusive of all penalty rates under the pre-modern award system on Sundays'.¹⁰ He provided an example of a casual waiter in Brisbane who in 2008 earned \$17.87 an hour on Sundays and in 2012 earns \$25.93 an hour on Sundays. The same employee will now earn \$22.00 an hour Monday to Friday for shifts between 10am and midnight.

Recompense for working 'unsociable hours'

1.17 The Shop Distributive and Allied Employees' Association told the committee about an analysis of Australian and international literature regarding the effect of working unsociable hours:

For employees, the adverse effects include physical and mental health problems, psychological distress, job satisfaction, poor work-life balance and work-family strain. For families, there is a record of higher marital discord and marital dissolution, more parenting stress, poorer education and social outcomes for children, higher adolescent depression and anxiety, poorer cognitive outcome and poorer mental health...¹¹

1.18 Penalty rates were implemented in order to compensate the employee from working unsocial hours and for the associated adverse effects listed above. However, even more significant adverse effects could be attributable to a person who is not employed. This bill seeks to prevent small businesses closing down and therefore to allow workers to enjoy a regular income. This would have particular relevance to employees who would find working on weekends more convenient, especially university students.

1.19 The committee received a number of submissions from small businesses who attributed rising labour costs as the reason fewer staff are employed and for shifts being cut short. For example, multiple franchisees shared the views of this submitter:

I wish to provide my full support for the passage of this Bill through Parliament as my labour costs have blown out since the introduction of the Restaurant Industry Award regulated wages and penalty rates. Accordingly I have cut back staff hours and employed less senior staff. If penalty rates were abolished not only would my business be more viable on weekends I would employ more staff and open longer hours. People expect us to be open every day and night yet this can only be achieved if it is commercially viable to trade through de-regulation of the mandatory penalty rates applied under the Modern Industrial Award System.¹²

10 Restaurant and Catering Australia, Response to Question taken on notice, 7 December 2012 (received 14 January 2013).

11 Ms Daniela De Martino, National Industrial Officer, Shop, Distributive and Allied Employees' Association, *Proof Committee Hansard*, 7 December 2012, p. 13.

12 The Coffee Club (Sandgate), *Submission 946*. See also Taco Bell Melton, *Submission 949* and Burroso's, *Submission 933*.

The current regulatory environment

1.20 A considerable amount of time was devoted to examining the current regulatory environment and whether it was appropriate for the legislature to interfere with the jurisdiction of Fair Work Australia.

1.21 The ACTU argued that:

If passed, this Bill would remove existing wages and entitlements that have been determined by an independent tribunal established by the Parliament for the purpose of determining such matters....There is no basis for Parliament to override this process for a section of the economy.¹³

1.22 However, the Australian Chamber of Commerce and Industry disagreed:

The Committee will be aware that these businesses have a personal face. They are largely micro businesses, many of whom are run by families and owners (who) put in their own hours to keep open the doors. They sacrifice time with their own families to run businesses during the day servicing the demands of customers and consumers, only to return home at night to do the paperwork. They run on tight margins and many have mortgaged their own homes to take on a risk which ultimately provides for jobs in the community. Small businesses should not be taken for granted and their costs pressures, whatever their sources, need to be taken seriously and if required, assisted by changes in the law.¹⁴

1.23 There were also concerns amongst small businesses that the objectives in section 3 of the *Fair Work Act 2009* do not afford sufficient protection to small businesses. Restaurant and Catering submitted that:

The Fair Work Act also has in its objectives that there should be special consideration of the needs of small- and medium-sized businesses. The problem with the Fair Work Act and its objectives is that it does not go far enough in relation to what looking after the special needs of small- and medium-sized businesses means. We think this is an opportunity for the Senate and the parliament to put something in place to help small businesses continue on so that they evolve into larger and more profitable businesses.¹⁵

1.24 It is therefore clear from a small business perspective that it is not only desirable but necessary for Parliament to legislate for a more realistic operating environment for small businesses. Given penalty rates have been a common feature in Australia's labour market since the 1970s it is time that a review of their effectiveness and suitability be undertaken particularly in the small business context.

1.25 With this in mind, any legislated changes must be phased in over a period of five years in order to allow small businesses to make the necessary changes to their

13 ACTU, *Submission 231*, p. 3.

14 Australian Chamber of Commerce and Industry, *Submission 106*, p. 6.

15 Mr Greg Parkes, Workplace Relations Director, Restaurant and Catering Australia, *Proof Committee Hansard*, 7 December 2012, p. 30.

hiring and staffing arrangements. Consideration should also be given to whether new arrangements for weekend work should apply to new employees only. However, it must not be forgotten that there are small businesses already on a knife's edge, and therefore must be given some form of relief in order to continue operating in the short to medium term.

Recommendation

1.26 That the bill be passed with a five year phase-in period.

Senator Nick Xenophon