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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

**FAIR WORK AMENDMENT
(PENALTY RATES EXEMPTION FOR SMALL BUSINESSES) BILL 2015**

EXPLANATORY MEMORANDUM

(Circulated by authority of Senator David Leyonhjelm and Senator Bob Day)

FAIR WORK AMENDMENT (PENALTY RATES EXEMPTION FOR SMALL BUSINESSES) BILL 2015

OUTLINE

The purpose of this Bill is to reduce regulation of the relationship between small businesses and their employees by reducing instances where certain small businesses are required to pay penalty rates.

The original intent of penalty rates was to compensate employees for hours worked outside the standard Monday to Friday working week. This view is now largely outdated: thanks to improvements in technology, the development of a global economy and the deregulation of trading hours, many businesses trade seven days a week while others take the equivalent of weekend breaks on other days.

As a result, many employees, particularly part time and casual employees, regard weekends as part of their regular hours.

The *Fair Work Act 2009* and modern awards have not kept up with this fundamental change.

This Bill intends to allow small businesses (defined as comprising fewer than 20 employees) in the restaurant and catering, retail and hospitality industries, as specified in the *Hospitality Industry (General) Award 2010*, to operate viably and employ staff, especially on weekends.

Such businesses will still be required to pay penalty rates in certain circumstances, but will be able to avoid the burden of penalties imposed merely for employing staff on specific days of the week.

To achieve this, the Bill states that for small business in the specified industries, modern awards cannot require penalty rates to apply unless at least one of three conditions are met: the work is in addition to ten hours of work in a day, the work is on a public holiday, or the work is on a weekend and in addition to 38 hours of work over a seven day period.

NOTES ON CLAUSES

Clause 1: Short title

1. This clause is a formal provision and specifies the short title of the Bill, once enacted, may be cited as the *Fair Work Amendment (Penalty Rates Exemption for Small Businesses) Act 2015*.

Clause 2: Commencement

2. This clause provides for the commencement of the Act 12 months after the day on which the Act receives Royal Assent.

The delay in commencement is to allow an orderly period of adjustment for industry.

Clause 3: Schedules

3. This clause states that each Act specified within a Schedule under this Bill would be amended or repealed as set out by the provisions of this Bill according to its terms.

Schedule 1

Item 1

4. This item inserts a new defined term of '*excluded small business employer*' into the *Fair Work Act 2009*. This term is defined in subsection **23AA(1)** of the Bill.

Item 2

5. In accordance with the intent of the Bill to improve employment and business opportunities, and to align the definition of a small business employer with that of an excluded small business employer, this item amends the definition of a small business employer in subsection **23(1)** such that a small business employer is an employer who employs fewer than 20 employees (rather than 15).

Item 3

6. This item inserts a new section **23AA**. Subsection **23AA(1)** defines an 'excluded small business employer' as an employer who employs fewer than 20 employees in the restaurant and catering, hospitality or retail industries.

Subsection **23AA(2)** states that, for the purpose of calculating the number of employees employed by the employer at a particular time, all employees employed by that employer in the industry at that time are to be counted other than casuals (unless they are employed on a regular and systematic basis).

Subsection **23AA(3)** provides that, for the purpose of calculating the number of employees, associated entities within the same industry are taken to be one entity.

Item 4

7. This item ensures that awards applying to excluded small businesses comply with the intent of the Act by adhering to section **155A** as addressed by item 5.

Item 5

8. This item inserts a new section **155A** into the Act to define the terms dealing with penalty rates payable by excluded small business employers. Section **155A** states that a modern award must not include a term that would require an excluded small business employer to pay penalty rates to an employee in those industries specified, unless the work is in addition to ten hours of work in a 24 hour period, the work is on a public holiday, or the work is on a weekend and in addition to 38 hours of work over the relevant week.

Item 6

9. This item inserts a new **Part 3** in **Schedule 1** to the *Fair Work Act 2009* (which deals with application, saving and transitional provisions relating to amendments of the Act). **Part 3** includes a definition of amended Act, and that commencement means commencement of this Part. This item also states that section **155A** of the amended Act applies in relation to a modern award that is in operation on or after commencement, whether or not the award was made before commencement.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Fair Work Amendment (Penalty Rates Exemption for Small Businesses) Bill 2015

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Bill

This Bill amends the *Fair Work Act 2009* to state that ‘excluded small business employers’ (employers who employ fewer than 20 full-time equivalent staff in the restaurant and catering, hospitality or retail industries) cannot be required by an existing or future modern award to pay penalty rates unless the work is in addition to ten hours of work in a day, the work is on a public holiday, or the work is on a weekend and in addition to 38 hours of work over a seven day period.

Human rights implications

The right to work and rights in work are contained in articles 6(1), 7 and 8(1)(a) of the International Covenant on Economic, Social and Cultural Rights. These articles refer to the right of an individual to freely choose or accept work, and include the right not to be deprived of work unfairly. More specifically, these articles also include the right to earn a fair wage and equal remuneration for work of equal value.

The Bill does not impinge upon the right of employees to earn either fair wages or equal remuneration. It only affects the circumstances in which certain employers will be required to pay penalties above the base wage. It also does not affect remuneration for public holidays. This Bill maintains the payment of penalty rates to financially recognise work performed above and beyond the usual hours of employment. The outcome of the Bill is intended to support and encourage greater employment within small businesses.

The Bill does not affect any further human rights in relation to employment.

Conclusion

The Bill is compatible with human rights as it does not negatively impact on the rights to work or the rights in work.

Senator David Leyonhjelm and Senator Bob Day