Submission by the Australian Catholic Council for Employment Relations to

THE SENATE

STANDING COMMITTEE ON EDUCATION, EMPLOYMENT
AND WORKPLACE RELATIONS

inquiry concerning the

Fair Work Amendment (Small Business-Penalty Rates Exemption) Bill 2012

Introduction

1. The *Fair Work Amendment (Small Business-Penalty Rates Exemption) Bill 2012* (the Bill), introduced by Senator Xenophon, proposes a fundamental change to the national award safety net system. If enacted it would remove penalty rates from the awards covering small businesses (as defined) in the restaurant, catering and retail industries and would reduce the rights and incomes of many low paid and vulnerable workers. The rationale for the Bill is that these pay cuts will lead to increased employment in the firms covered by the proposed legislation.

2. This submission by the Australian Catholic Council for Employment Relations (ACCER) opposes the Bill under five broad headings:
    a) The Bill fails to recognise the detrimental impact of unsocial working hours.
    b) The Bill proposes unfairness and discrimination.
    c) The rationale of the Bill is not supported by evidence or economic analysis.
    d) The Bill proposes a morally unacceptable means of promoting employment opportunities.
    e) The objective of the Bill has been rejected: the *Work Choices* experience.

3. ACCER is an agency of the Australian Catholic Bishops Conference which advises the Bishops on employment issues within the Catholic Church and in society in general and which acts as a public advocate for employment policies that are consistent with Catholic Social Teaching. The Catholic Church is one of the largest employers in Australia. ACCER's response to the issues raised by the Bill and other employment legislation and policies is informed by the Statement made by the Australian Catholic Bishops Conference on 25 November 2005 in relation to the Commonwealth Government's then pending *Workplace Relations Amendment (Work Choices) Bill 2005*. We will return to the Statement.

4. ACCER is particularly interested in the matter raised by the Bill because it is relevant to ACCER's public advocacy on behalf of low paid workers and their families. ACCER has long participated in minimum wage cases in Fair Work Australia and its predecessors to advocate for increased wages for low paid workers. It has argued that the National Minimum Wage and other low wage rates have become poverty wages for low income working families.

5. Many safety net wage rates have failed to provide a true and fair safety net. The nature and purpose of a safety net is to provide an acceptable standard of living. A safety net wage (supplemented by family transfers where applicable) should be sufficient to meet the needs of low paid workers, including those with family responsibilities. It should provide an acceptable standard of living and enable them to live in dignity. The wage safety net does not have to cover exceptional cases, but it must cover ordinary and foreseeable cases and circumstances. Having regard to the sizes of Australian families ACCER has argued that the needs should be calculated by reference to the position of families with two children. The wage has to be sufficient to cover a family of two adults and two children, where the second parent stays at home to care for the children, and to cover a sole parent with two children, where the parent will necessarily incur child care expenses. It would not be acceptable to set a wage that is sufficient for one of these families, but not for the other. Both are within the ordinary and expected scope of a safety net. Of course, a single worker without family responsibilities is also within the scope of the wages safety net, but because family transfers are not sufficient to cover all of the additional needs of dependants (and are not intended to do so), primary emphasis must be given to workers with family responsibilities.

6. Therefore, it should not be necessary for a parent to work on weekends or at nights in order for the family to achieve an acceptable standard of living. Yet many families depend on the penalty rates for this kind of work in order to make ends meet. By proposing the abolition of penalty rates the Bill threatens the incomes of some of the most vulnerable workers in this country and would drive many of them further into poverty.

The objective and rationale of the Bill

7. The objective and rationale for the Bill is set out in brief terms in the Explanatory Memorandum:

> "The purpose of this bill is to seek a compromise between small business operators and their employees in relation to penalty rates.
>
> The original intention of penalty rates was to compensate employees for hours worked outside the standard Monday to Friday working week. This concept is now largely outdated: thanks to improvements in technology, the development of a global economy and the deregulation of trading hours, many businesses trade over all seven

days. As such, many part time or casual employees consider weekends to be part of their regular hours.

Generally, the Fair Work Act and modern awards do not recognise this shift towards a seven day week. The intention of this bill is to allow small businesses in the hospitality and retail sector, defined as those businesses with fewer than 20 full time and full time equivalent employees, to remain true to the original intention of penalty rates while avoiding the high cost burden during specific days of the week.
To achieve this, the bill states that for small business in those industries, penalty rates do not apply unless an employee has worked for more than ten hours in a day, or more than 38 hours over a seven day period."

8. The Explanatory Memorandum addresses the human rights implications, as required by the *Human Rights (Parliamentary Scrutiny) Act 2011*:

"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 chosen or accepted 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.

While the Bill relates to penalty wages for employees, it 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 also maintains the original intention of penalty rates, which is to financially recognise work performed above and beyond the usual hours of employment. The outcome of the Bill is also 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."

9. In his Second Reading Speech Senator Xenophon said:

"Penalty rates are a contentious subject. There is no doubt that workers deserve a fair day's pay for a fair day's work, and penalty rates have played a part in that concept since the 1950s.

But things have changed in the last sixty years.

In many industries, we now have a seven day working week. While weekend penalty rates were originally intended to acknowledge employees' work outside the standard five-day working week, there are now many employees who consider their ordinary hours to include weekends, evenings and early mornings.

> This bill is an attempt to balance the need for penalty rates and the strain they are placing on small businesses....
>
> Mr Strong [the Executive Director of Council of Small Business Australia] said in the media: "We need a workplace relations system that reflects the realities of the modern world. The current approach to penalty rates has cost the jobs of people who can only work on weekends and was not developed with a view of the needs of the whole community. University students, school students, women who can only work on weekends and others have lost income."
>
> The aim of this bill is to acknowledge that many small business employees are missing out on shifts or even jobs because small businesses simply can't afford to open on days with high penalty rates....
>
> The provisions in this bill state that an employer in the restaurant and catering or retail industries who employs fewer than twenty full-time equivalent employees will not have to pay penalty rates during a week except where employees have worked more than ten hours in a twenty-four hour period or thirty-eight hours in one week.
>
> The aim of this is to compensate employees who work outside the traditional thirty-eight hour week, or over what could reasonably be considered a working day. The definition of a small business as fewer than twenty full-time equivalent employees comes from the definition used by the Australian Taxation Office, as the general consensus in the industry is that the Fair Work Act definition of fifteen FTEs is too low.
>
> These conditions will apply to all relevant current and future modern awards."

10. We contest and comment on a number of matters raised in the Explanatory Memorandum and Second Reading Speech.

11. The Bill refers to the "restaurant and catering industry" and the "retail industry". The terms are not defined and there are no other statutory terms in the principal legislation, the *Fair Work Act 2009*, that would serve that purpose. The intention is to operate on modern awards. The proposed section 155(1) states:

> "A modern award must not include a term that would require or permit an employer that is an excluded small business employer to pay penalty rates to an employee for work performed for the employer unless the work performed consists of more than:
>
> (a) 38 hours of work in total during a week; or
> (b) 10 hours of work during a 24 hour period."

12. There are various awards that may operate in these undefined industries. The *Hospitality Industry (General) Award*, the *Restaurant Industry Award*, the *General Retail Industry Award* and the *Fast Food Industry Award* would be covered, but there is uncertainty about

other occupation-based awards which cover, in part, employees engaged in hospitality and retail; for example, the *Cleaning Services Award*, the *Security Industry Award* and the *Clerks - Private Sector Award*.

The Bishops' Statement of 25 November 2005

13. Proposals such as those contained in the Bill need to be considered in a broader context of workplace rights and responsibilities based on fairness and sound economic assessments. The Statement made by the Australian Catholic Bishops Conference on 25 November 2005 in relation to the Commonwealth Government's *Workplace Relations Amendment (Work Choices) Bill 2005* provides a framework for dealing with the issues raised by the Bill:

> **"Introduction**
>
> 1.The Commonwealth Government's proposals for reforms to Australian employment law have prompted wide debate throughout the country. It is a debate that has caused many of us to reflect on the fundamental values that should underpin our workplaces and society as a whole.
>
> 2. Economic growth is needed to provide prosperity and economic security for all and to provide equity and social cohesion. Economic growth is needed to enhance social justice.
>
> **Catholic Social Teaching**
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> 3. The Catholic Bishops of Australia have been scrutinising the religious and ethical implications of the Commonwealth Government *Workplace Relations Amendment (Work Choices) Bill (2005)*. Given the fact that the Catholic Church is a major employer in Australia, this legislation is of particular interest to us.
>
> We are guided by our own social teaching that offers us ethical principles and terms of reference.
>
> 4. A major concern of Catholic Social Teaching is always the effect legislation has on the poor and vulnerable and its impact on family life. As Pope John Paul II wrote in his encyclical *Laborem Exercens*:
>
> > "…in many cases they [the poor] appear as a *result of the violation of the dignity of work*; either because opportunities for human work are limited as a result of the scourge of unemployment, or because a low value is put on work and the rights that flow from it, especially the right to a just wage and to the personal security of the worker and his or her family." *(Laborem Exercens, 8)*
>
> 5. Our experience emphasises the importance that employment, fair remuneration and job security play in providing a decent life for workers and their families. They are particularly important for those who have limited job prospects and who are vulnerable to economic change. It is not morally acceptable to reduce the scourge of unemployment by allowing wages and conditions of employment to fall below the level that is needed by workers to sustain a decent standard of living.
>
> **Role of Governments**
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> 6. Governments have a responsibility to promote employment and to ensure that the basic needs of workers and their families are met through fair minimum standards.
>
> 7. Catholic Social Teaching recognises and supports a proper balance between the rights and responsibilities of employers and workers. The terms of employment cannot be left wholly to the marketplace. The responsibility of government is to

ensure that there is a proper balance between respective legal rights, especially when bargaining positions are not equal.

Our Concerns

8. Does the proposed national system of employment regulation include the objectives of employment growth, fair remuneration and security of employment? Does it promote truly cooperative workplace relations and ensure the protection of the poor and the vulnerable?

9. We are concerned that the proposed legislation, as it is presently drafted, does not provide a proper balance between the rights of employers and workers in several respects. Changes are necessary to alleviate some of the undesirable consequences of the legislation, especially in regard to its potential impact on the poor, on the vulnerable and on families.

…. [Paragraphs 10 to 13 covered four areas of particular concern: minimum wages, minimum conditions and bargaining, unfair dismissals and the role of unions.]

Conclusion

14. The integration of economic growth and social justice is a fundamental obligation of government. They must be pursued in ways that are fair and equitable to the society as a whole. In this context, our proposals for change to the *Workplace Relations Amendment (Work Choices) Bill 2005* seek to moderate the impact on the poor, the vulnerable and families and limit any consequences on social cohesion."

14. One of the four concerns of the Bishops in the *Work Choices* proposals was the potential for unfair bargaining outcomes under the proposed bargaining system and the possibility that penalty rates could be bargained away:

"**Minimum Conditions and Bargaining**

11. The legislation proposes a major change in the guaranteed safety net for workers and the procedure for making employment agreements. Our concern is that many workers, especially the poor and vulnerable, may be placed in a situation where they will be required to bargain away some of their entitlements. In particular, we refer to overtime rates, penalty rates and rest breaks. The legislation should be amended to provide that these are appropriately protected."

15. We now turn to our reasons for opposition to the Bill.

The Bill fails to recognise the detrimental impact of unsocial working hours

16. A long-standing and well-entrenched provision of awards is the payment of penalty rates for workers who perform their ordinary hours of work in what are commonly described as "unsocial hours". Work in unsocial hours includes evening and night work and work on weekends and public holidays.

17. Awards provide for a range of remuneration in addition to the wage rates for work classifications; and the compensation for working unsocial hours is one of them. This is illustrated in section 139(1) of the *Fair Work Act 2009*, which provides:

"A modern award may include terms about any of the following matters:

(a) minimum wages (including wage rates for junior employees, employees with a disability and employees to whom training arrangements apply), and:
    (i) skill-based classifications and career structures; and
    (ii) incentive-based payments, piece rates and bonuses;
(b) type of employment, such as full-time employment, casual employment, regular part-time employment and shift work, and the facilitation of flexible working arrangements, particularly for employees with family responsibilities;
(c) arrangements for when work is performed, including hours of work, rostering, notice periods, rest breaks and variations to working hours;
(d) overtime rates;
(e) penalty rates, including for any of the following:
    (i) employees working unsocial, irregular or unpredictable hours;
    (ii) employees working on weekends or public holidays;
    (iii) shift workers;
(f) annualised wage arrangements that:
    (i) have regard to the patterns of work in an occupation, industry or enterprise; and
    (ii) provide an alternative to the separate payment of wages and other monetary entitlements; and
    (iii) include appropriate safeguards to ensure that individual employees are not disadvantaged;
(g) allowances, including for any of the following:
    (i) expenses incurred in the course of employment;
    (ii) responsibilities or skills that are not taken into account in rates of pay;
    (iii) disabilities associated with the performance of particular tasks or work in particular conditions or locations;
(h) leave, leave loadings and arrangements for taking leave;
(i) superannuation;
(j) procedures for consultation, representation and dispute settlement."

18. The fact that an industry may be described as a "seven day a week industry" does not disentitle workers to penalty rates for the working of unsocial hours. Penalty rates are payable to workers whether they are employed as shift workers or only perform part of their work (either regularly or occasionally) in unsocial hours. Penalty payments are paid for work in unsocial hours in seven day a week industries, such as health, aged care, policing, emergency services and private security. The claim that retail, for example, has become more of a seven day a week industry does not support a claim that penalty rates should be reduced or removed. Similarly, in the restaurant and catering industries, which have always operated over seven days a week, an increase in the number of businesses opening on weekends would be no reason to reduce or remove penalty rates. The Bill, therefore, proposes treating the restaurant, catering and retail industries differently to other industries that operate during the same time periods.

19. The changes to industry working patterns over recent decades have resulted in changes in some awards to the "spread of ordinary hours" clauses, which are the clauses that regulate the employer's ability to roster an employee for his or her ordinary time. In the retail industry, for example, changes to the spread of hours clauses have reflected substantial changes in shop trading hours. In the *General Retail Industry Award 2010* the spread of hours (at clause 27) is 7.00 am to 9.00 pm Monday to Friday, 7.00 am to 6.00 pm on Saturdays and 9.00 am to 6.00 pm on Sundays. Penalty rates apply to each of those periods, and public holiday work (see clause 29). This award illustrates that industrial regulation can respond to changes in the business environment without prejudice to the right to compensation for ordinary work within unsocial hours.

20. It should be noted that the extension of retail hours across Australia in the last few decades has come in the face of substantial opposition from the proprietors of small businesses who have recognised the detrimental impact that weekend and evening work can have on their own lives.

21. The claim made in the Explanatory Memorandum that the "Bill also maintains the original intention of penalty rates, which is to financially recognise work performed above and beyond the usual hours of employment" is erroneous.

22. Penalty rates compensate for working in unsocial hours. Work on evenings, nights, weekends and public holidays is unsocial because of its impact on a wide range of individual and family arrangements. Rest, recreation and family time are valued and work in unsocial hours precludes workers from these opportunities. The loss of these opportunities is no less important for people who work in activities that are by their nature seven day a week operations.

23. The Bill raises an issue that involves the consideration and application of important values. The intrusion of more and more commercial activities and employment into Sundays, with their religious significance, has been a particular concern to many; but the impact of seven day a week work and evening trading raise more widespread concern in the community. Many have been concerned about the personal, family and social disabilities caused by increases in work unsocial hours. Those disabilities are due, in part, to the importance of sharing periods of rest from work and recreation with family and friends and to the loss of those opportunities when being rostered to work during unsocial hours.

24. In May 2007 the Australian Catholic Social Justice Council (an agency of the Australian Catholic Bishops Conference) published a Pastoral Letter for the Feast of St Joseph the Worker on the subjects of work pressures and the loss of family time. The letter, entitled *Keeping Time: Australian families and the culture of overwork*, included the following observations:

"Over the past two decades there has been a massive encroachment of work into family time. An increasing number are juggling the demands of work with their family commitments. Families struggling to meet rising costs of living and higher levels of household debt have not been as well served by a labour market that has produced more jobs that are low paying, insecure and involve irregular hours.

Two new studies by the Relationships Australia Forum and Human Rights and Equal Opportunity Commission (HREOC) show that after 15 years of economic prosperity, many Australians are disappointed with the results and feel overworked, stressed-out and unhappy.

We are among the most overworked nations in the world, with a very high rating among 18 developed nations on key indicators of work intensification. With 22% of the workforce doing at least 50 hours each week, Australia runs second only to Japan in terms of average working hours. Almost a third of the labour force regularly works on weekends, making Australia second only to Italy. It is revealing that around two million Australians work on Sundays. Around 27% of Australian workers are in casual employment, making us second to Spain in terms of work often characterised by irregular hours and, as a result, an enforced dysfunctional family life.

For some workers, flexible working arrangements may be a benefit. For many, however, the rhetoric of family-friendly workplaces has not been realised. <u>This is particularly true for workers in the retail, hospitality and service industries, who have the most unpredictable hours, are often low paid and have little power when it comes to negotiating hours and conditions.</u>

This is a real problem for families with young children and those with caring responsibilities for elderly family members. People caught in the dilemma of having to work longer and harder in jobs that really upset the normal family routine are entitled to ask, 'Where are the promised benefits of workplace flexibility?'

The studies confirm what many have experienced during two decades of labour market deregulation. The demand to work longer and more irregular hours has upset the balance. There is less time for family functions, difficulty in maintaining networks of friends, little time for religious worship, community events and recreation. More alarming is the direct damage to the family unit in the form of high levels of depression and stress, drug and alcohol problems, strained relations leading to separation and divorce, and reduced child welfare." (Emphasis added, footnotes omitted)

25. In May 2012 the Australian Catholic Social Justice Council referred to similar aspects in another Pastoral Letter for the Feast of St Joseph the Worker, entitled *The Dignity of Work: More than a Casual Concern*. That letter addressed the economic plight of low paid workers and their families and the need to strike a better balance between work and family responsibilities. Low paid casual and irregular work were major concerns.

"The financial pressures and irregular time demands of casual work often interrupt family life and place obstacles in the way of the important aspirations of workers and their families over the course of their lives. Marriage and family life can be harmed when parents juggling round-the-clock shiftwork face the choice of spending enough time with their families or making ends meet....

In a developed nation such as Australia, one would imagine that our wealth and the organisation of our labour market would ensure low paid, vulnerable workers and their families could live in basic dignity. Sadly, this is often not the case.

Pope Benedict XVI, in his 2009 Encyclical *Caritas in Veritate*, reaffirmed the Church's call for 'decent' work:

> "It means work that expresses the essential dignity of every man and woman in the context of their particular society: work that is freely chosen, effectively associating workers, both men and women, with the development of their community; work that enables the worker to be respected and free from any form of discrimination; work that makes it possible for families to meet their needs and provide schooling for their children, without the children themselves being forced into labour; work that permits the workers to organise themselves freely, and to make their voices heard; work that leaves enough room for rediscovering one's roots at a personal, familial and spiritual level; work that guarantees those who have retired a decent standard of living."

The casualisation of work over the past thirty years has not been confined to a few sectors of Australia's labour market. It ranges across retail, accommodation and hospitality, health and social services, education, transport, construction and manufacturing industries.

It is unacceptable that people who work to clothe us, feed us, clean for us, teach us and tend to the sick and those in need should endure poor conditions and have such a low value placed upon their work. It is time to consider the need for more decent pay and conditions for those in insecure work. A new approach is needed that places the dignity of the worker at the centre of labour market policy." (Emphasis added, footnote omitted.)

26. Treating a worker with respect includes striving for a system of employment rights and obligations that promote the kind of objectives identified by Pope Benedict in the quoted passage from *Caritas in Veritate*; objectives which are drawn from the International Labour Organisation's *Decent Work* agenda. The work that is being performed and the circumstances in which it is being performed must be adequately valued. We refer to the passage in the Bishops' Statement which was taken from Pope John Paul II's encyclical *Laborem Exercens*:

> "…in many cases they [the poor] appear as a *result of the violation of the dignity of work*; either because opportunities for human work are limited as a result of the scourge of unemployment, or because a low value is put on work

and the rights that flow from it, especially the right to a just wage and to the personal security of the worker and his or her family." *(Laborem Exercens, 8,* emphasis in original*)*

27. This year's Social Justice Statement by the Australian Catholic Bishops will be published on 21 September 2012 under the title *The Gift of Family in Difficult Times: The social and economic challenges facing families today*. The statement will "consider the social and economic structures of our society that impact in a significant way on the majority of families – reducing time together, making it harder to make ends meet financially, and sometimes undermining the bonds of marriage and family life" (Archbishop Denis Hart, President, Australian Catholic Bishops Conference, circular letter, 2 July 2012).

28. The foregoing passages on the impact of work on family and social relations emphasise the disabilities associated with the performance of work during evenings, nights, weekends and public holidays and the need for penalty rates. Of course, the payment of penalty rates cannot remedy the problems identified, but penalty rates can provide fair and just compensation for some of them. We accept, of course, that a wide range of work in these unsocial hours is, and will continue to be, necessary to meet the community's economic and social needs. The setting of payments for those evident disabilities should continue to be the function of the industrial arbitrator.

The Bill proposes unfairness and discrimination

29. The proposed loss of penalty rates would have a major and often devastating impact on many low paid workers and their families. This will compound the situation where the National Minimum Wage and other award rates provide only poverty wages. Workers who rely on penalty rates to help make ends meet would be left without any compensation. The burden of the proposed measure is imposed on low paid workers and their families. This is unfair and discriminatory.

30. Awards made under the *Fair Work Act* are required, among other things, to comply with the "modern awards objective" in section 134 (1), which includes:

> "FWA must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:
>
> ….
>
> (e) the principle of equal remuneration for work of equal or comparable value;...."

31. Sections 134 and 139 (quoted earlier) mean that a "fair ... safety net" is not limited to the wage rate set for work classifications, but to the whole range of matters that may be included in an award: wages, other kinds of remuneration and the various conditions of employment have to be *fair*.
32. The exclusion of a class of employees from a generally applicable entitlement, by reference to the size of the employer's operation and in circumstances where they

experience the same kinds of working conditions and disabilities, cannot be fair. The proposal in the Bill fails the fairness test. If the Bill is enacted the award safety net system would be severely compromised.

33. The Bill not only fails the fairness test, it also fails the discrimination test. We do not agree with the conclusion in the Explanatory Memorandum that the "Bill is compatible with human rights as it does not negatively impact on the rights to work or the rights in work". That conclusion follows from a reference to several terms of the *International Covenant on Economic, Social and Cultural Rights*, which has been ratified by Australia.

34. The *International Covenant on Economic, Social and Cultural Rights* is a treaty adopted by the United Nations which requires each of its State parties "to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures" (Article 2.1). The rights recognised in the covenant include employment, economic and social rights. Article 7 covers a range of employment rights:

> "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:
>
> (a) Remuneration which provides all workers, as a minimum, with:
>
> (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
>
> (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;
>
> (b) Safe and healthy working conditions;
>
> (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;
>
> (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays"

35. This obligation on the Commonwealth is not limited to discrimination such as gender, race and religious discrimination, as the words "without distinction of any kind" make clear. Legislation in compliance with this obligation would operate to ensure equal wages *and* remuneration for work of equal value. It is patently clear that the Bill proposes different, unequal, forms of remuneration for people who do the same work in the same circumstances.

36. There are several passages in the reasoning in the Explanatory Memorandum that require comment. The document states:

> "While the Bill relates to penalty wages for employees, it 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....The outcome of the Bill is also intended to support and encourage greater employment within small businesses."

37. The first two sentences in this extract appear to draw a distinction between "wages and remuneration" and "penalties", with the suggestion that penalties are not remuneration. We submit this is erroneous: penalty rates are a kind of remuneration. The sentences also appear to rely on a distinction between a right of a worker and the obligation of an employer. This is an impermissible distinction: the proposal impinges on the right of a worker to be paid for the performance of work.

38. The third sentence claims that the proposal does not affect "public holidays". This is in apparent reference to the terms of Article 7 (d) of the covenant, but it misses the point that the Bill covers public holiday penalties and does not preserve them for a particular class of workers.

39. The fourth sentence suggests that discriminatory treatment may be justified by some other objective; in this case the encouragement of employment in small businesses. This is impermissible. To allow this kind of consideration would undermine the protections intended by the convention.

40. The conclusion in the Explanatory Memorandum that the "Bill is compatible with human rights as it does not negatively impact on the rights to work or the rights in work" is, in our submission, erroneous. The Bill does discriminate. It is clear that the Bill places workers in small businesses, as defined, in the restaurant, catering and retail industries in a less favourable position than those employed elsewhere in the same industry and does so by reference to a factor, ie the number of employees in the employer's undertaking, that is irrelevant to the proper valuation of work and the circumstances in which it is performed. It also treats workers in these three industries less favourably than workers in other industries who work in similar circumstances. Furthermore, if the intention is to cover occupational awards that partly cover the three industries (see paragraph 12, above), the Bill would provide for lower, and discriminatory, rates of remuneration for cleaners, clerks and security workers who are employed in the exempted part of those industries.

The rationale of the Bill is not supported by evidence or economic analysis

41. The rationale for the proposed legislation is that lower wages bills for the exempt businesses will promote employment opportunities. Neither the Second Reading Speech nor the Explanatory Memorandum provide any evidentiary basis or economic analysis for

this claim. There is a reference in the Second Reading Speech to several aspects of a Benchmarking Report by Restaurant and Catering Australia, but that material does not assist in assessing the potential impact of the Bill. There is no reference to the retail industry.

42. The abolition of penalty rates would result in very large windfall gains for employers, adding very substantially to the profitability of their businesses. The impact that this would have on wages, the prices for meals, goods and services, staffing levels, competition between employers (including between exempt and non-exempt employers) and employment levels is most uncertain and highly contentious. There is no basis given for forming any view as to how employment levels may respond. Nor is there any analysis of the adverse personal, family, social and economic costs of such a major cut in the incomes of so many Australian workers.

The Bill proposes a morally unacceptable means of promoting employment opportunities

43. To the extent, if any, that there would be an employment effect as a result of the abolition of penalty rates, it would come as a result of the losses suffered by low paid workers in these three industries.

44. We submit it is morally unacceptable to impose this kind of selective burden on low paid workers and their families. It is a similar issue to that addressed by the Bishops in their Statement on *Work Choices* when they said: "It is not morally acceptable to reduce the scourge of unemployment by allowing wages and conditions of employment to fall below the level that is needed by workers to sustain a decent standard of living"

45. It is immoral to hold back wage increases or drive wages down below a decent level on account of economic circumstances when there are other ways to promote job protection and the creation of employment opportunities, ways that are consistent with an equitable sharing of the burden of creating and sustaining jobs. The burden of creating jobs, including low paid jobs, should not be imposed on those who are in or near poverty and who are least capable of bearing the economic costs.

46. Unemployment is a scourge, but it must be addressed in an appropriate way: "Governments have a responsibility to promote employment and to ensure that the basic needs of workers and their families are met through fair minimum standards" (Bishops' Statement).

47. Rather than seeking to impose selective burdens on low paid workers, governments, and (in the present case) the Parliament, should be considering the ways in which the costs of

employment can be reduced, at a cost to the broader community, without reducing fair minimum standards for low paid and vulnerable workers.

48. The progressive abolition of payroll tax is an obvious measure. Payroll tax (which is imposed by the States) is a tax on employment. Increases in the State thresholds would reduce the costs of employing labour for more small businesses. Income tax on the National Minimum Wage, which is currently 8.2%, has the effect of increasing labour costs and also operates as a tax on employment. Changes in these taxes would promote employment opportunities and spread the costs across the community rather than imposing them on low paid and vulnerable workers and their families. A review of employer on-costs might also be undertaken with a view to reducing the costs of employment without prejudice to fair safety net wages and conditions of employment.

The objective of the Bill has been rejected: the *Work Choices* experience

49. The Bill proposes a more fundamental change to penalty rates than that enacted under the *Work Choices* legislation of 2005 (see *Workplace Relations Amendment (Work Choices) Act 2005*). Under *Work Choices* penalty rates could be bargained away without any or any adequate compensation, whereas the Bill would directly remove established award rights to penalty rates for many workers. The error of *Work Choices* in regard to penalty rates (and some other provisions) was corrected by legislation introduced in 2007.

50. On 4 May 2007 the then Prime Minister, John Howard, announced that the *Work Choices* legislation would be amended to protect various award conditions and ensure that they could not be bargained away without adequate compensation. His statement, *A Stronger Safety Net for Working Australians*, read, in part:

> "It was never the Government's intention that it should become the norm for penalty rates or other protected conditions to be traded off without proper compensation.
>
> The Government understands there is some concern in the community that the removal of penalty rates and other protected conditions without fair compensation might occur, with adverse consequences for final take-home pay.
>
> Therefore the Government is today unveiling a stronger safety net for working Australians with the introduction of a Fairness Test that will guarantee that entitlements such as penalty rates and public holiday pay are not traded off without adequate compensation."

51. The 2007 amendments made it clear that penalty rates are an inherent part of the remuneration entitlements of Australian workers, that they should be part of award safety net and that, if a variation of award entitlements is available by a collective or an individual agreement, any change in penalty rates should be offset by proper compensation. We submit that there has been a broad consensus on these matters in the debate and legislative

changes since 2007. The Bill challenges that consensus without providing any substantive grounds for doing so.

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