



## **Parliament of Victoria**

# **Select Committee Inquiry into Penalty Rates and Fair Pay**

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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 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 Victorian 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.

## Introduction

Traditionally, it has been the 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 tradition and cut modern award penalty rates for Sundays and public holidays in the retail and hospitality industries (**the Decision**) after finding they no longer were a "fair and relevant" safety net.

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".

Essentially, 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 passed.

The cuts entailed:-

- Full-time and part-time retail workers' Sunday penalty rates were cut from 200 per cent to 150 per cent and 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 while there was no change in the rate for casual workers.

JobWatch is concerned about the Decision to the extent that any decision to reduce minimum pay and entitlements for the lowest paid workers is anathema to 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.

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.

## Statistical analysis

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

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

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

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

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

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**

<b>Gender</b>	<b>Count</b>	<b>Percentage of total calls</b>
Female	<b>4172</b>	<b>55.57%</b>
Male	<b>3335</b>	<b>44.43%</b>

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**

<b>Age</b>	<b>Count</b>	<b>Percentage of total calls</b>
Under 15	<b>1</b>	<b>0.01%</b>
15 - 18	<b>71</b>	<b>0.95%</b>
19 - 24	<b>726</b>	<b>9.67%</b>
25 - 34	<b>2141</b>	<b>28.52%</b>
35 - 44	<b>1939</b>	<b>25.83%</b>

45 - 59	<b>2030</b>	<b>27.04%</b>
60 +	<b>448</b>	<b>5.97%</b>

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.**

<b>Region</b>	<b>Count</b>	<b>Percentage of total calls</b>
Metropolitan	<b>5975</b>	<b>79.59%</b>
Rural	<b>1286</b>	<b>17.13%</b>

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.**

<b>Region</b>	<b>Male</b>	<b>Percentage of total calls</b>	<b>Female</b>	<b>Percentage of total calls</b>
Metropolitan	<b>2644</b>	<b>44.31%</b>	<b>3322</b>	<b>55.68</b>
Rural	<b>585</b>	<b>45.59%</b>	<b>698</b>	<b>54.40%</b>

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.

## **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 because the Decision has yet to be 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 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, which enterprise agreements are required to pass to be approved by the FWC, as the modern award safety net is now much lower. In other words, the bar has been lowered for the approval of enterprise agreements 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.

## **Possible safeguards and federal legislative changes**

### **1. Transitional arrangements**

- a) The Decision should only apply to new employees and not existing employees. Existing employees who are dismissed because they are entitled to the old penalty rates would be entitled to make either an unfair dismissal claim or a general protections dispute termination claim under the *Fair Work Act 2009* (Cth) (**FW Act**) or a complaint of employment activity discrimination under the *Equal Opportunity Act 2010* (Vic). With additional funding, JobWatch would be in a position to represent any Victorian worker who found themselves in this situation.
- b) Alternatively, the FWC should be empowered to make take home-pay orders in relation to the Decision so that no worker need be worse off. 'Take-home pay' is the pay an employee or outworker actually receives after tax and certain deductions such as salary sacrifice arrangements, and includes wages, allowances, incentive-based payments and overtime.

During the transition to modern awards if the FWC was satisfied that an employee, or a class of employees, to whom a modern award applied had suffered an award modernisation-related reduction in take-home pay, the FWC could make a take-home pay order requiring the payment of an amount or amounts to the employee or employees that the FWC considered appropriate to remedy the situation.

The federal parliament could empower the FWC to make take-home pay orders to ameliorate any reduction in pay suffered by workers as a result of the Decision.

- c) The Decision should also be phased in over a long period of time, such as 5 years, so that the impact of the Decision is minimised and off-set by likely wage increases over that same period. For example, when the FW Act commenced, any increases or decreases in modern awards as compared to pre-modern awards were phased in over a 5 year period from 1 January 2010 until 31 December 2014.

### **2. Office of the Work Place Rights Advocate – Version 2**

In 2005, in response to the Howard government's WorkChoices legislation, the then Victorian state Labour government set up the Office of the Workplace Rights Advocate (OWRA) to provide information about, and promote and monitor the development of, fair industrial relations practices in Victoria. At the time, JobWatch successfully assisted OWRA to perform its functions.

One of OWRA's functions was essentially to 'name and shame' employers who were using the WorkChoices legislation (e.g. Australian Workplace Agreements) to cut the minimum pay of its employees. JobWatch suggests that OWRA version 2 or a similar agency be created with relevant immunities (e.g. from defamation etc) and, with the assistance of JobWatch, set out to 'name and shame' in parliament those employers taking advantage of the Decision en masse.

Whilst small to medium enterprises should not be targeted, there are a number of large retail and fast food chains (e.g. McDonalds and the like) that might consider the reputational impact of mass pay cuts to their lowest paid workers.

With the assistance of JobWatch, OWRA version 2 could be up and running quickly and inexpensively and would make target employers think twice before implementing the penalty rates cuts authorised by the Decision.

### **3. Employment Contracts Small Claims Industrial Division**

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 would be entitled to make a claim for damages for breach of contract in a common law court, e.g. the Magistrates Court of Victoria, or, if it was so empowered, at the Victorian Civil and Administrative Tribunal (VCAT).

#### **Case study – Breach of contract**

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.

On this basis, JobWatch recommends that a specialist Employment Contracts Small Claims Industrial Division be set up at either the Magistrates Court of Victoria or VCAT to hear such claims expeditiously, inexpensively and without the need for lawyers or recourse to the strict rules of evidence.

This concept would at least empower 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.

### **4. Long Service Leave Act 1992 (Vic)**

In April 2016, JobWatch made a submission to the Victorian government's review of the *Long Service Leave Act 1992 (Vic)* suggesting that when employees take long service leave, they should be paid the same as what they would have been paid had they been at work. In other words, long service leave pay should not just be calculated using the employee's base rate of pay, as is the current situation, but should include penalties etc.

If this were the case, because of the averaging provisions in the *Long Service Leave Act 1992 (Vic)*, an employee who takes long service leave after the Decision takes

effect should still obtain some of the benefit of the penalty rates they were paid prior to the Decision so long as they were paid penalty rates within 5 years of going on long service leave.

Therefore JobWatch again recommends that the *Long Service Leave Act 1992 (Vic)* be amended to include penalties in the calculation of an employee's long service leave entitlement. This amendment would go some way to ameliorating the negative effects of the Decision.

Thank you for considering our submission.

Please contact Ian Scott/Zana Bytheway on 9662 9458 if you have any queries.

Yours sincerely,

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