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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

Fair Work Amendment (Restoring Penalty Rates) Bill 2018

EXPLANATORY MEMORANDUM

and

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Circulated by authority of
The Hon Bill Shorten MP

Fair Work Amendment (Restoring Penalty Rates) Bill 2018

OUTLINE

The Fair Work Amendment (Restoring Penalty Rates) Bill 2018 will ensure that modern awards cannot be varied to reduce the take-home pay of an employee. This includes any reduction in take-home pay as a result of a reduction in penalty rates or the hours to which penalty rates apply. It will also prevent, from the date of commencement, determinations arising from the Fair Work Commission decision 4 yearly review of modern awards— Penalty Rates (AM2014/305) from taking effect. The Bill preserves the independence of the Fair Work Commission but appropriately guides the exercise of its discretion to ensure wages are not cut.

FINANCIAL IMPACT

The bill will have no financial impact.

NOTES ON CLAUSES

Clause 1: Short title

1. This clause provides for the Act to be cited as the Fair Work Amendment (Restoring Penalty Rates) Act 2018

Clause 2: Commencement

2. This clause provides for the commencement of the whole of the Act to be the day after the Act receives the Royal Assent.

Clause 3 – Schedules

3. This clause provides that each Act specified in a Schedule to this Act is amended or repealed as is set out in the applicable items in the Schedule. Any other item in a Schedule to this Act has effect according to its terms.

Schedule 1 – Amendments

Fair Work Act 2009

4. The Fair Work Commission's power to vary modern awards is found in section 157 of the Fair Work Act 2009 (the Fair Work Act). See generally Part 2.3 of Chapter 2 of the Fair Work Act in relation to modern awards. The Schedule amends the Fair Work Act so that the Fair Work Commission, in exercising its powers to vary modern awards, cannot vary a modern award so that the effect of the variation would, or would be likely to, reduce the take-home pay of any employee.

Item 1 and 2 - Section 12 (definition of reduction in take-home pay) and (definition of take-home pay)

5. Item 1 amends the definitions of reduction in take-home pay and take-home pay in the Fair Work Act by reference to the new subsection 135A(4) and 135A(5).

Item 3 – At the end of Division 2 of Part 2-3

6. This item inserts a new subsection 135A in Division 2 of Part 2-3 which requires that, in exercising its powers under this Part, the Fair Work Commission cannot vary a modern award such that an employee's, or prospective employee's, take-home pay is reduced.

7. The effect of the amendment is to prevent a variation of a modern award that would, or would be likely to, reduce the take-home pay of any employee. This includes any reduction as a result of changes to penalty rates or to the hours to which penalty rates apply.

8. It does not require individual employees to provide evidence to the Fair Work Commission of actual loss of take-home pay.

9. Subsection 135A(3) provides that any determination of the Fair Work Commission made on or after 21 June 2017 that would result, or would be likely to result, in a cut to take-home pay under a modern award, is of no effect from the date of commencement of this section. The effect of this amendment is that, from the date of the commencement of the section, determinations issued pursuant to decision AM2014/305 will have no effect, and penalty rates will be restored to the level they were at as of 30 June 2017. The restoration of penalty rates does not give rise to any retrospective liability.

10. Subsection 135A(4) defines take-home pay as the pay an employee actually receives, or would receive if increases in the modern award minimum wage were included in the employee's pay:

- (a) including wages and incentive-based payments, and additional amounts such as allowances and overtime; but
- (b) disregarding the effect of any deductions that are made as permitted by section 324 of the Fair Work Act 2009.

11. This amendment ensures that modern awards are a safety net for the take-home pay of employees currently under the award and of prospective employees under the award.

12. For the avoidance of doubt, the definition of take-home pay makes it clear that all employees under modern awards are to receive the full benefit in their take-home pay of any increase to the modern award minimum wage. For example, the Fair Work Commission may not vary a modern award so as to phase in a cut to penalty rates by offsetting that cut against any annual increases in the modern award minimum wage.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Fair Work Amendment (Restoring Penalty Rates) Bill 2018

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

The Fair Work Amendment (Restoring Penalty Rates) Bill 2018 will ensure that modern awards cannot be varied to reduce penalty rates or the hours to which penalty rates apply if the variation is likely to result in a reduction in the take-home pay of an employee. It will restore penalty rates to the levels they were at prior to the 2017 cuts which arose from decision AM2014/305, and will prevent the further cuts which are scheduled for 1 July 2018, 2019 and 2020 from taking effect.

Human rights implications

The bill is not detrimental to any applicable rights or freedoms.

The bill positively engages with the Article 7 of the International Covenant on Economic, Social and Cultural Rights. Article 7 requires that State Parties recognise the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular, remuneration that provides all workers with fair wages, a decent living and rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

Under the Fair Work Act, the Fair Work Commission must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant safety net of terms and conditions. In making or varying modern awards, the Fair Work Commission must take into account the modern awards objective (see subsection 134(1) of the Fair Work Act).

Item 1 of Schedule 1 to the Bill amends the Fair Work Act to include a new requirement that variation of modern awards cannot reduce penalty rates or the hours to which penalty rates apply if this would result in a reduction in the take-home pay of an employee. This amendment promotes the right to fair wages and in particular recognises the need, as provided for in the modern awards objective, to fairly compensate employees who work long, irregular, unsocial hours, or hours that could reasonably be expected to impact their work/life balance and enjoyment of life outside of work.

Conclusion

This bill is compatible with human rights because it advances the protection of human rights.

The Hon Bill Shorten MP

