



FairWork  
Commission

# DECISION

*Fair Work Act 2009*

s.156 - 4 yearly review of modern awards

## **4 yearly review of modern awards – Penalty Rates – Transitional Arrangements** (AM2014/305)

JUSTICE ROSS, PRESIDENT  
VICE PRESIDENT CANTANZARITI  
DEPUTY PRESIDENT ASBURY  
COMMISSIONER HAMPTON  
COMMISSIONER LEE

MELBOURNE, 5 JUNE 2017

*4 yearly review of modern awards – penalty rates – hospitality and retail sectors – transitional arrangements*

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## ABBREVIATIONS

ABI	Australian Business Industrial and the New South Wales Business Chamber
ACCI	Australian Chamber of Commerce and Industry
Act	<i>Fair Work Act 2009 (Cth)</i>
ACTU	Australian Council of Trade Unions
AFEI	Australian Federation of Employers and Industries
AHA	Australian Hotels Association
Ai Group	Australian Industry Group
AIRC	Australian Industrial Relations Commission
ARA	Australian Retailers Association
CCIQ	Chamber of Commerce and Industry Queensland
CCIWA	Chamber of Commerce and Industry of Western Australia
Commission	Fair Work Commission
<i>Clubs Award</i>	<i>Registered and Licensed Clubs Award 2010</i>
<i>Fast Food Award</i>	<i>Fast Food Industry Award 2010</i>
<i>Hospitality Award</i>	<i>Hospitality Industry (General) Award 2010</i>
Hospitality Employers	Australian Hotels Association and the Accommodation Association of Australia
<i>Hospitality and Retail Awards</i>	<i>Hospitality, Restaurant, Retail, Fast Food and Pharmacy Awards</i>
NRA	National Retail Association
PC Final Report	<i>Productivity Commission Inquiry Report: Workplace Relations Framework</i>
<i>Pharmacy Award</i>	<i>Pharmacy Industry Award 2010</i>
Pharmacy Guild	The Pharmacy Guild of Australia
RAFFWU	Retail and Fast Food Workers Union
RCI	Restaurant and Catering Australia
<i>Restaurant Award</i>	<i>Restaurant Industry Award 2010</i>
Retail Associations	Australian Retailers Association, National Retail Association and Master Grocers Australia
<i>Retail Award</i>	<i>General Retail Industry Award 2010</i>
Review	4 yearly review of modern awards
SDA	Shop, Distributive and Allied Employees Association
Small Business Ombudsman	Small Business and Family Enterprise Ombudsman
TPCA Act	<i>Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth)</i>
Transitional Review	Transitional (or 2 year) review of modern awards under Item 6 of Schedule 5 to the <i>Fair Work (Transitional Provisions and Consequential Amendments) Act 2009</i>

## 1. Introduction

[1] On 23 February 2017 we issued a decision (the *Penalty Rates decision*)<sup>1</sup> dealing with the weekend and public holiday penalty rates and some related matters in a number of modern awards in the hospitality and retail sectors. The modern awards in question are:

- Fast Food Industry Award 2010 (the Fast Food Award);
- General Retail Industry Award 2010 (the Retail Award);
- Hospitality Industry (General Award 2010 (the Hospitality Award);
- Pharmacy Industry Award 2010 (the Pharmacy Award);
- Registered and Licensed Clubs Award 2010 (the Clubs Award); and
- Restaurant Industry Award 2010 (the Restaurant Award).

[2] Specifically, the *Penalty Rates decision* determined that the existing Sunday penalty rates in the *Hospitality, Fast Food, Retail and Pharmacy Awards* did not achieve the modern awards objective, as they do not provide a fair and relevant minimum safety net.

[3] Broadly speaking the effect of the *Penalty Rates decision* was to reduce Sunday penalty rates to 150 per cent for full-time and part-time employees and to 175 per cent for casual employees, in the *Hospitality, Fast Food, Retail and Pharmacy Awards*, as shown in Table 1 below. Except in the *Fast Food Award*, we did not propose a reduction in the Sunday penalty rates to the same level as the Saturday penalty rates, noting that for many workers Sunday work has a higher level of disutility than Saturday work, though the extent of the disutility is much less than in times past.

**Table 1**  
**Proposed changes to Sunday penalty rates in the *Hospitality and Retail Awards***

Award	Sunday Penalty Rate	
	Current	Proposed
<b><i>Hospitality Award</i></b> Full-time and part-time employees: (no change for casuals)	175 per cent 175 per cent	150 per cent 175 per cent
<b><i>Fast Food Award</i></b> (Level 1 employees only) Full-time and part-time employees: Casual employees:	150 per cent 175 per cent	125 per cent 150 per cent
<b><i>Retail Award</i></b> full-time and part-time employees: Casual employees:	200 per cent 200 per cent	150 per cent 175 per cent
<b><i>Pharmacy Award</i></b> (7.00 am – 9.00 pm only) Full-time and part-time employees: Casual employees:	200 per cent 225 per cent	150 per cent 175 per cent

[4] In relation to the *Fast Food Award*, for reasons associated with the preferences of the relevant employees and the limited impact of Sunday work upon those employees (see Chapter 7.5 of the *Penalty Rates decision*), we decided to reduce the Sunday penalty rate, for Level 1 employees from 150 per cent to 125 per cent (for full-time and part-time employees) and from 175 per cent to 150 per cent (for casual employees). We did not propose to change the Sunday penalty rate for Level 2 and 3 employees. Level 2 and 3 employees are, generally speaking, regarded as ‘career’ employees with the major chains whereas casual and part-time crew members (Level 1 employees) are usually regarded as ‘non-career’ employees.

[5] The *Penalty Rates decision* also reduced the public holiday penalty rates in the *Hospitality and Retail Awards* (except for the *Clubs Award*).<sup>2</sup> In essence, the existing rates for full-time and part-time employees were to be reduced from 250 per cent to 225 per cent and the public holiday rates for casuals were set at 250 per cent.

[6] In addition to the changes to Sunday penalty rates the Full Bench decided to vary some of the penalty provisions in relation to early/late night work in the *Restaurant* and *Fast Food Awards*.<sup>3</sup> In particular, we decided to vary the span of hours which attracted the 15 per cent loading in the *Restaurant* and *Fast Food Awards* such that the loading applies to work performed between midnight and 6.00 am (not 7.00 am as it is at present). We also decided to vary the *Fast Food Award* to provide that the 10 per cent evening work loading applies to work between 10.00 pm and midnight (as is currently the case in the *Restaurant Award*), on the basis that the existing 9.00 pm threshold for the payment of the evening work loading was simply an error.

[7] In our subsequent decision of 17 March 2017<sup>4</sup> we decided that the changes to the late night penalties would commence on 1 July 2017. The basis of that decision was our acceptance of a submission put by the Shop, Distributive and Allied Employees Association (SDA) that the objective of establishing a simple and easy to understand modern award system is best served by the establishment of generally consistent transitional arrangements arising from the *Penalty Rates decision*.

[8] This decision deals with the implementation of our decision to reduce Sunday and public holiday penalty rates in certain Hospitality and Retail sector modern awards. We also deal with the future conduct of a range of other proceedings. We begin by referring to some provisional views we expressed in the *Penalty Rates decision* regarding the implementation of the Sunday penalty rate reduction.

## **2. The *Penalty Rates decision* – provisional views**

[9] In the *Penalty Rates decision* we observed that a substantial proportion of the employees covered by the modern awards which were the subject of the proceedings are ‘low paid’ (within the meaning of s.134(1)(a)) and that the award variations proposed would be likely to reduce the earnings of some of those employees and have a negative effect on their relative living standards and on their capacity to meet their needs. At [2000] of that decision we said:

‘The immediate implementation of all of the variations we propose would inevitably cause some hardship to the employees affected particularly those who work on Sundays. There is plainly a need for appropriate transitional arrangements to mitigate such hardship.’

[10] The various submissions before us at that time gave little attention to the implementation of any variations to penalty rates arising from the proceedings. Consequently, we invited further

submissions on the appropriate transitional arrangements. To assist those parties who wished to make submissions as to the form of such transitional arrangements we expressed some provisional views (at [2021] of the *Penalty Rates decision*), as follows:

- (i) Contrary to the views expressed by the Productivity Commission we do not think it appropriate to delay making any changes to Sunday penalty rates for 12 months, at which time the reductions apply in full. The Productivity Commission's proposal imposes an unnecessary delay on the introduction of any reduction in Sunday penalty rates and would give rise to a sharp fall in earnings for some affected employees.

The Productivity Commission suggests that a 12 month delay would allow the affected employees to 'review their circumstances' so that they 'can seek other jobs, increase their training and make other labour market adjustments'.

As we have mentioned, the employees affected by these changes are low paid and have limited financial resources. It is unlikely that they will be able to afford the costs associated with increasing their training.

Further, workers in the Accommodation and Food Services and Retail sectors have lower levels of educational attainment than the total workforce, which is likely to limit their capacity to obtain other employment. As noted in the Peetz and Watson Report:

'... while a majority of tertiary students who are employed work in either retail or hospitality (i.e. accommodation and food services) industries, this does not mean that most people who work in those industries are tertiary students. Nor does it indicate that they are not in need ...

Pay rates in retail therefore affect not only tertiary students but also a significant number of other people who are likely to be dependent on earnings from this industry as their principal or sole source of income.'

- (ii) If 'take home pay orders' are an available option then they may mitigate the effects of a reduction in Sunday penalty rates. But we do not favour any general 'red circling' term which would preserve the current Sunday penalty rates for all existing employees. A consequence of such a term would be that different employees of the one employer may be employed on different terms and conditions. Such an outcome would add to the regulatory burden on business (a relevant consideration under s.134(1)(f)).
- (iii) The reductions in Sunday penalty rates should take place in a series of annual adjustments on 1 July each year (commencing 1 July 2017) to coincide with any increases in modern award minimum wages arising from Annual Wage Review decisions.
- (iv) As to the number of annual instalments, the 5 annual instalment process which accompanied the making of the modern awards is too long for present purposes. It will be recalled that the Award Modernisation Full Bench was dealing with an array of award provisions that were the subject of transitional arrangements including minimum wages, whereas we are only dealing with one provision, Sunday penalty rates. It is likely that at least 2 instalments will be required (but less than 5 instalments). The period of adjustment required will depend on the extent of the reduction in Sunday penalty rates, the availability of 'take home pay orders' and the circumstances applying to each modern award. The most significant reduction is for full-time and part-time employees covered by the Retail Award (from 200 per cent to 150 per cent), it follows that a longer period of adjustment may be required in this award, than for the other awards before us.<sup>5</sup> (references omitted)

[11] We issued directions on 23 February 2017 seeking submissions from interested parties in respect of the above provisional views. Some 32 submissions were received from interested parties (with 17 further submissions in reply). A list of the submissions received is set out at [Attachment A](#).

[12] In a [Statement](#)<sup>6</sup> issued on 5 April 2017 a series of Questions on Notice were put to parties in respect of a range of issues relating to the implementation of the *Penalty Rates decision*. The Questions on Notice are set out at [Attachment B](#). The submissions received, including the responses to the Questions on Notice, were summarised in a [Background Document](#) issued on 5 May 2017.<sup>7</sup> Parties were afforded an opportunity to make oral submissions at a hearing held on 9 May 2017.

[13] It is convenient to deal with a number of general issues covered in the submissions, before turning to the specific circumstances pertaining to each of the modern awards.

### 3. The General Issues

[14] The general issues canvassed in the submissions may be conveniently categorised as follows:

- the ‘reconsideration’ of the *Penalty Rates decision*;
- the ‘onus’ issue;
- the power to make transitional arrangements and discretionary considerations;
- take home pay orders;
- the ‘red circling’ proposal; and
- delayed implementation.

[15] We now turn to deal with each of the ‘general issues’.

#### 3.1 ‘Reconsideration’ of the *Penalty Rates decision*

[16] In its submission of 24 March 2017 United Voice “reserved its rights in respect of the efficacy of the finding that cuts should be made to penalty rates” and contended in its alternative submission in relation to transitional arrangements, that the Sunday penalty rate reduction in the *Hospitality Award* ‘should not be implemented’. The basis for this proposition is the conclusion in the *Penalty Rates decision* that a substantial proportion of the employees affected are ‘low paid’, that the proposed variations ‘are likely to reduce the earnings of those employees and have a negative impact on their relative living standard and their capacity to meet their needs’ and that the cuts to Sunday penalty rates for permanent employees under the *Hospitality Award* would have an ‘adverse impact’ on the earnings of these employees.<sup>8</sup>

[17] United Voice also drew attention to the following aspect of our decision:

‘...it needs to be borne in mind that the primary purpose of such penalty rates is to compensate employees for the disutility associated with working on Sundays rather than to address the needs of the low paid. The needs of the low paid are best addressed by the setting and adjustment of modern award minimum rates of pay (independent of penalty rates).’<sup>9</sup>

[18] In respect of the above observation United Voice submits that ‘it is incorrect to conclude that because penalty rates are directed at disutility it is inappropriate or unnecessary to consider the needs of the low paid as provided for by s 134(1)(a) in this review’ and, further, that:

‘The fact that the Act requires the Commission to consider the needs of the low paid when setting minimum wages does not relieve the Commission of its function to properly consider the needs of the low paid as part of the four yearly review, and in consideration of the applications made by employer proponents for reductions to penalty rates.’

[19] The Australian Council of Trade Unions (ACTU) advances a submission in similar terms and calls on the Fair Work Commission (the Commission) ‘to make no orders to implement the proposed reductions in Sunday penalty rates’, on the basis that:

‘. . . implementing the Decision would be inconsistent with the objects of (the Act) which include providing workplace laws that are fair to working Australians. . . and with the modern awards objective which requires that the Commission ensure that the minimum safety net is fair and relevant, including taking into account the ‘relative living standards and the needs of the low paid.’<sup>10</sup>

[20] The Federal Opposition advanced a general submission, contending that the Commission’s decision to cut penalty rates in the *Retail, Hospitality, Pharmacy* and *Fast Food Awards* should be ‘set aside’. Three broad lines of argument were advanced in support of the submission put:

- (i) the *Penalty Rates decision* ‘does not give appropriate weight to the direct impact on workers of cutting penalty rates and reducing their take home pay’;<sup>11</sup>
- (ii) any variation of a modern award which results in the reduction of take home pay is inconsistent with the legislative purpose of s.134(1)(da) of the Act;<sup>12</sup> and
- (iii) there are no transitional arrangements which could ameliorate the impact of the penalty rate cuts or prevent significant disadvantage to the employees affected by the *Penalty Rates decision*.<sup>13</sup>

[21] The State Governments of Queensland<sup>14</sup>, South Australia<sup>15</sup>, Victoria<sup>16</sup> and Western Australia<sup>17</sup> also opposed any reduction to penalty rates, as did the ACT<sup>18</sup> and NT<sup>19</sup> Governments. The NSW Opposition<sup>20</sup>, the Tasmanian Opposition<sup>21</sup> APESMA<sup>22</sup> and the Retail and Fast Food Workers Union (RAFFWU)<sup>23</sup> also opposed the implementation of the *Penalty Rates decision*.

[22] In addition to the three points identified above a range of other considerations were advanced in support of the general proposition that the *Penalty Rates decision* should be ‘set aside’ or ‘not implemented’, including the adverse impact of reductions in penalty rates on the gender pay gap, collective bargaining and the economy.

[23] The Australian Industry Group (Ai Group) oppose the setting aside of the *Penalty Rates decision* and submit that the parties advancing that proposition have not demonstrated that:

- there exists a misapprehension of the law or of the facts;
- a lack of natural justice was afforded to a party; or
- the Full Bench failed to afford an opportunity to be heard on an issue.

[24] In the course of its submission Ai Group refer to a number of authorities in support of the general proposition that a court or tribunal will only consider setting aside its decision in limited circumstances.<sup>24</sup> In particular, Ai Group drew our attention to the following passage from the



judgement of the Full Federal Court in *Wenkart v Pantzer (No 3)*<sup>25</sup> where it was held that in order to set aside a decision:

‘What must be demonstrated is that the Court has apparently proceeded upon the basis of some misapprehension of the facts or of the relevant law. The Court should not allow a party to re-agitate arguments already put and dealt with under the guise of an application that the Court reconsider its judgment.’<sup>26</sup>

[25] Ai Group also submits that parties seeking to set aside the *Penalty Rates decision* have failed to discharge the heavy burden required and are seeking to set aside the *decision* so that they may re-put earlier submissions against the reduction in Sunday penalty rates.

[26] Australian Business Industrial and the New South Wales Business Chamber (jointly ABI) submit it is inappropriate for the Commission to re-open, or for the parties to re-litigate, the matters that have been determined in the *Penalty Rates decision*<sup>27</sup> and that the Commission is not empowered to vary or revoke its decision pursuant to s.603(3) of the *Fair Work Act 2009* (the Act).<sup>28</sup> ABI also submits that if a party believes the Commission has improperly exercised its functions in the *Penalty Rates decision* or that the decision is affected by some error, then it should seek judicial review of the decision in the Federal Court.<sup>29</sup>

[27] In relation to the last point we note that United Voice has indicated its intention to seek judicial review of the *Penalty Rates decision* alleging jurisdictional error.<sup>30</sup> Further, on 4 May 2017, the SDA filed a further submission advising of its intention to seek judicial review of any determinations the Commission may make giving effect to the *Penalty Rates decision*.<sup>31</sup>

[28] The Pharmacy Guild of Australia (Pharmacy Guild)<sup>32</sup>, Retail Associations<sup>33</sup>, Australian Federation of Employers and Industry (AFEI)<sup>34</sup> and Australian Chamber of Commerce and Industry (ACCI)<sup>35</sup> also submit that the Commission should reject the submissions which ask us to revoke or not implement the *Penalty Rates decision*.

[29] Those parties who contend that we should ‘set aside’ or not implement the *Penalty Rates decision* did not identify the source of the power to take the action proposed.

[30] Section 603 of the Act sets out the Commission’s power to vary or revoke decisions:

### **603 Varying and revoking the FWC’s decisions**

(1) The FWC may vary or revoke a decision of the FWC that is made under this Act (other than a decision referred to in subsection (3)).

Note: If the FWC makes a decision to make an instrument, the FWC may vary or revoke the instrument under this subsection (see subsection 598(2)).

(2) The FWC may vary or revoke a decision under this section:

(a) on its own initiative; or

(b) on application by:

(i) a person who is affected by the decision; or

- (ii) if the kind of decision is prescribed by the regulations—a person prescribed by the regulations in relation to that kind of decision.

(3) The FWC must not vary or revoke any of the following decisions of the FWC under this section:

- (a) a decision under Part 2-3 (which deals with modern awards)
- (b) a decision under section 235 or Division 4, 7, 9 or 10 of Part 2-4 (which deal with enterprise agreements);
- (c) a decision under Part 2-5 (which deals with workplace determinations);
- (d) a decision under Part 2-6 (which deals with minimum wages);
- (e) a decision under Division 3 of Part 2-8 (which deals with transfer of business);
- (f) a decision under Division 8 of Part 3-3 (which deals with protected action ballots);
- (g) a decision under section 472 (which deals with partial work bans);
- (h) a decision that is prescribed by the regulations.

Note: The FWC can vary or revoke decisions, and instruments made by decisions, under other provisions of this Act (see, for example, sections 447 and 448).

[31] Subsection 603(1) confers a discretion to vary or revoke ‘a decision of the FWC that is made under this Act (other than a decision referred to in subsection (3))’. Subsection 603(3)(a) expressly excludes decisions under Part 2-3 of the Act. The *Penalty Rates decision* is a decision under Part 2-3 of the Act, it follows that s.603 does not provide a source of power for the revocation of that decision.

[32] Given that the legislature may be said – by the enactment of s.603 – to have turned its mind to the circumstances in which a Commission decision may be varied or revoked, it may be that the common law principles referred to by Ai Group are impliedly excluded.<sup>36</sup> However, for the reasons which follow, it is not necessary for us to determine whether there is an implied power to revoke a decision and, if there is, the circumstances in which the power may be exercised.

[33] As we have mentioned, those who contend that we should ‘set aside’ or not implement the *Penalty Rates decision* advance three broad lines of argument in support of that proposition (see [20] above). We propose to deal with each of those in turn.

[34] The first proposition is that the *Penalty Rates decision* gave either no weight or insufficient weight to the impact on the affected employees of cutting penalty rates. In essence, it is said that the Full Bench failed to take into account the ‘relative living standards and the needs of the low paid’, as it was required to do by s.134(1)(a). In our view, there is no substance to this proposition.

[35] Chapter 3.2 of the *Penalty Rates decision* deals with the statutory framework and, relevantly, the Full Bench observes that:

- the modern awards objective applies to the Review (at [113]); and

- s.134(1)(a) requires that the Commission take into account ‘relative living standards and the needs of the low paid’ (at [165]).

[36] Further, the impact of the proposed reductions in penalty rates upon affected employees was expressly considered in the context of each of the relevant modern awards:

- the *Hospitality Award*
  - United Voice’s lay witness evidence: [784]–[815];
  - s.134(1)(a): [817]–[824] and [886].
- the *Fast Food Award*
  - the SDA called no lay witness evidence in respect of the impact upon employees of the proposed reduction in penalty rates;
  - s.134(1)(a): [1356]–[1359].
- the *Pharmacy Award*
  - SDA and APESMA lay witness evidence: [1815]–[1821];
  - s.134(1)(a): [1826]–[1830].
- the *Retail Award*
  - SDA lay witness evidence: [1623]–[1654];
  - s.134(1)(a): [1656]–[1661].

[37] In addition to the fact that s.134(1)(a) was expressly considered and taken into account, it needs to be borne in mind that the Act accords no particular primacy to any one of the s.134 considerations and, further, while the Commission must take into account the matters set out at s.134(1)(a)–(h), the relevant question is whether the modern award, together with the NES, provides a fair and relevant minimum safety net of terms and conditions. In respect of the *Hospitality, Fast Food, Retail and Pharmacy Awards*, the *Penalty Rates decision* determined that the existing Sunday penalty rates did not achieve the modern awards objective, as they did not provide a fair and relevant minimum safety net.

[38] The second broad line of argument in support of the contention that the *Penalty Rates decision* be set aside or not implemented is the proposition that any variation of a modern award which results in the reduction of take home pay is inconsistent with the legislative purpose of s.134(1)(da) of the Act. This argument is advanced by the Federal Opposition at paragraphs 1.2.3–1.2.4 of its submission:

‘In 2013, the Gillard Government amended the modern awards objective to ensure that the Commission, in varying modern awards, must take into account the need to provide additional remuneration for employees working outside normal hours, such as employees working overtime or on weekends.’<sup>37</sup> At the time, the Minister for Workplace Relations, Bill Shorten, said

“Our bill makes it clear that this Labor government believes in the value and utility of penalty rates...”

It was never contemplated that the legislation would allow variations of modern awards to result in a reduction of the safety net. While we respect the independence of the Commission, any variation of a modern award which results in the reduction of take-home pay is unacceptable and inconsistent with the intention of the Parliament.’<sup>38</sup>

[39] The proper construction of s.134(1)(da) was the subject of detailed consideration in the *Penalty Rates decision* (see [184]–[203]), relevantly for present purposes, the Full Bench said (at [193]–[198]):

‘As mentioned, s.134(1)(da) speaks of the ‘need’ to provide additional remuneration. We note that the minority in *Re Restaurant and Catering Association of Victoria* (the *Restaurants 2014 Penalty Rates decision*) made the following observation about s.134(1)(da):

“...the objective requires additional remuneration for working on weekends. As the current provisions do so, they meet this element of the objective.” (emphasis added)

To the extent that the above passage suggests that s.134(1)(da) ‘*requires* additional remuneration for working on weekends’, we respectfully disagree. We acknowledge that the provision speaks of ‘the *need* for additional remuneration’ and that such language suggests that additional remuneration is required for employees working in the circumstances identified in paragraphs 134(1)(da)(i) to (iv). But the expression ‘the need for additional remuneration’ must be construed in context, and the context tells against the proposition that s.134(1)(da) *requires* additional remuneration be provided for working in the identified circumstances.

Section s.134(1)(da) is a relevant consideration, it is *not* a statutory directive that additional remuneration must be paid to employees working in the circumstances mentioned in paragraphs 134(1)(da)(i), (ii), (iii) or (iv). Section 134(1)(da) is a consideration which we are required to take into account...

Importantly, the requirement to take a matter into account does not mean that the matter is necessarily a determinative consideration. This is particularly so in the context of s.134 because s.134(1)(da) is one of a number of considerations which we are required to take into account. No particular primacy is attached to any of the s.134 considerations. The Commission’s task is to take into account the various considerations and ensure that the modern award provides a ‘fair and relevant minimum safety net’.

A further contextual consideration is that ‘overtime rates’ and ‘penalty rates’ (including penalty rates for employees working on weekends or public holidays) are terms that *may* be included in a modern award (s.139(1)(d) and (e)); they are not terms that *must* be included in a modern award. As the Full Bench observed in the *4 yearly review of modern awards – Common issue – Award Flexibility decision*:

“... s.134(1)(da) does not amount to a statutory directive that modern awards must provide additional remuneration for employees working overtime and may be distinguished from the terms in Subdivision C of Division 3 of Part 2-3 which *must* be included in modern awards...”

Further, if s.134(1)(da) was construed such as to *require* additional remuneration for employees working, for example, on weekends, it would have significant consequences for the modern award system, given that about half of all modern awards currently make no provision for weekend penalty rates. If the legislative intention had been to mandate weekend penalty rates in all modern awards then one would have expected that some reference to the consequences of such a provision would have been made in the extrinsic materials.’ (references omitted)

[40] Contrary to the submission put, we are not persuaded that the terms of s.134(1)(da), construed in context, support the proposition that there is no power to vary a modern award if such a variation results in a reduction in take home pay.

[41] Further, the modern awards objective is that the Commission ensure that modern awards, together with the NES, ‘provide a fair and relevant minimum safety net of terms and conditions’. As observed in the *Penalty Rates decision*, fairness in this context is to be assessed from the perspective of the employees *and employers* covered by the modern award in question and the word ‘relevant’ is intended to convey that a modern award should be suited to contemporary circumstances.<sup>39</sup> The notion that the terms and conditions in modern awards can never be reduced, if such a variation results in a reduction in take home pay, seems inconsistent with the key concepts inherent in the modern awards objective. For the reasons given we are not persuaded that there is any substance in the proposition advanced.

[42] The third line of argument is that there are no transitional arrangements which could ameliorate the impact of the penalty rates reductions so as to prevent significant disadvantage to the employees affected.

[43] We accept that while the transitional arrangements determined in this decision will ameliorate the adverse impact of our decision upon the employees affected, it will not remove that impact and the implementation of the variations we propose (albeit over an extended time period) are still likely to reduce the earnings of the employees affected. The phased reductions in Sunday penalty rates that we intend to make will be implemented at the same time as the implementation of any increases arising from the Annual Wage Review decision. This will usually mean that the affected employees will receive an increase in their base hourly rate of pay at the same time as they are affected by a reduction in Sunday penalty rates. As such, the take home pay of the employees concerned may not reduce to the same extent as it otherwise would – but it is also important to acknowledge that they will receive a reduction in the earnings they would have received but for the implementation of the *Penalty Rates decision*. Accordingly, any Annual Wage Review increase cannot be said to ameliorate the impact of our decision. It is the phased implementation of the Sunday penalty rate cuts which provides a degree of amelioration.

[44] However, while we accept that the reductions we have determined will adversely impact employees, that is a matter that we have already considered and balanced in the *Penalty Rates decision* and it is not a basis upon which we would propose to ‘set aside’ or ‘not implement’ the *Penalty Rates decision*. Nor are we persuaded that the range of other considerations advanced in support of the general proposition provide a sufficiently cogent basis for adopting the course proposed. Each of these matters was considered in the *Penalty Rates decision*.

[45] For the reasons given, we reject the proposition that we should set aside or not implement the *Penalty Rates decision*.

### 3.2 The onus issue

[46] In its reply submission ACCI submits that:

‘The burden of proof...should lie with any party wishing to depart from the Commission’s provisional view...Unions and those supporting them must bear the burden of convincing the Commission that it should depart from its provisional views on implementation.’<sup>40</sup>

[47] The proposition advanced is misconceived, for two reasons.

[48] First, the views expressed in the *Penalty Rates decision* in respect of the transitional arrangements for the implementation of the reductions in Sunday penalty rates were *provisional*

views only. As we have mentioned, the submissions before us at that time had given little attention to the implementation of any variations to Sunday penalty rates arising from the proceedings. Nor was this issue the subject of any significant oral argument. In these circumstances the *provisional* views were provided to assist those parties who wished to make submissions as to the form of the transitional arrangements. We note that United Voice, the SDA and a number of employer organisations have proposed transitional arrangements which differ from the *provisional* views we have expressed. The *provisional* views were not provided with the intention of creating an additional hurdle for those who wished to express a contrary view.

[49] Second, it is doubtful how far the notion of onus of proof is relevant at all to Commission proceedings,<sup>41</sup> as Woodward J observed in *McDonald v Director – General of Social Security*,<sup>42</sup> in respect of administrative tribunals, generally:

‘The first point to be made is that the onus (or burden) of proof is a common law concept, developed with some difficulty over many years, to provide answers to certain practical problems of litigation between parties in a court of law. One of the chief difficulties of the concept has been the necessity to distinguish between its so-called "legal" and "evidential" aspects.

The concept is concerned with matters such as the order of presentation of evidence and the decision a court should give when it is left in a state of uncertainty by the evidence on a particular issue.

The use outside courts of law of the legal rules governing this part of the law of evidence should be approached with great caution. This is particularly true of an administrative tribunal which, by its statute "is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate"

Such a tribunal will still have to determine practical problems such as the sequence of receiving evidence and what to do if it is unable to reach a clear conclusion on an issue, but it is more likely to find the answer to such questions in the statutes under which it is operating, or in considerations of natural justice or common sense, than in the technical rules relating to onus of proof developed by the courts. However these may be of assistance in some cases where the legislation is silent.’<sup>43</sup>

[50] We acknowledge that in *inter partes* adversarial proceedings (such as applications for equal remuneration orders under Part 2-7<sup>44</sup> or for orders, under s.418, that industrial action stop<sup>45</sup>) applicants may be said to bear the burden of persuading the Commission as to the existence of the requisite jurisdictional facts. But, whatever may be the position with respect to *inter partes* proceedings, these are 4 yearly review proceedings. Section 156 imposes an obligation on the Commission to review all modern awards. The Review is conducted on the Commission’s own motion and is not dependent upon an application by an interested party. The Review is plainly distinguishable from *inter partes* proceedings.

[51] The Commission’s task in the Review is to determine whether a particular modern award achieves the modern awards objective. If a modern award is not achieving the modern awards objective then it is to be varied such that it only includes terms that are ‘necessary to achieve the modern awards objective’ (s.138).

[52] Also, as we said in the *Penalty Rates decision*<sup>46</sup> variations to modern awards must be justified on their merits and the extent of the merit argument required will depend on the circumstances. But that observation is not intended to import the common law notion of onus or burden of proof. Ultimately, the Commission must be satisfied that a modern award is not achieving the modern awards objective and requires variation.

[53] To some extent Review proceedings may be said to be analogous to the determination by a court of the proper meaning and effect of an industrial instrument. In the Review it is for the Commission to determine whether a modern award achieves the modern awards objective, informing itself as it sees fit. Similarly, in construing the proper meaning and effect of an industrial instrument, the question for determination is a matter for the court. As White J observed in *NTEU v La Trobe University*:<sup>47</sup>

‘It is appropriate to commence by reference to the University’s submission with respect to onus. The University submitted that the appellant had borne the onus at first instance of establishing that its construction of cl 74 was correct and, accordingly, that the issue raised on the appeal was whether it had discharged that onus.

In my opinion, it is inappropriate to approach the determination of the appeal on that basis. As the primary Judge recognised, the question before him was one of construction, that is, the determination of the proper meaning and effect of cl 74. Questions of that kind do not involve an onus in the sense of the moving party having to discharge an evidentiary or persuasive burden. That is because there is but one correct construction of cl 74. That construction does not vary according to which of the parties to the litigation is the moving party. To hold that the moving party has an onus is to suppose that there is an available meaning for the moving party to displace. That is an erroneous view.’<sup>48</sup>

### 3.3 The power to make transitional arrangements and discretionary considerations

[54] In the *Penalty Rates decision* we expressed a concluded view as to the need to provide appropriate transitional arrangements, in the following terms:

‘The immediate implementation of all of the variations we propose would inevitably cause some hardship to the employees affected, particularly those who work on Sundays. There is plainly a need for appropriate transitional arrangements to mitigate such hardship...

We have given some consideration to the form of the transitional arrangements to apply to the reductions in Sunday penalty rates we propose. We have concluded that appropriate transitional arrangements are necessary to mitigate the hardship caused to employees who work on Sundays.’<sup>49</sup>

[55] One of the questions on notice put to all parties in the present proceedings was in the following terms:

‘It appears to be common ground that the Commission should take steps to mitigate the impact of the Decision on the affected employees.

*Does any interested party take a different view?’*

[56] Ai Group,<sup>50</sup> ACCI,<sup>51</sup> the Pharmacy Guild<sup>52</sup> and the SDA<sup>53</sup> responded by acknowledging that we should take steps to mitigate the impact of the reduction in penalty rates on the affected employees, though they differed as to how this was to be done. Of the principal parties, only RCI<sup>54</sup> expressed a contrary view. It proposed the full implementation of the *Penalty Rates decision* from no later than 1 July 2017.<sup>55</sup>

[57] We have considered the submissions made and confirm the views expressed in the *Penalty Rates decision* that there is a need for appropriate transitional arrangements to mitigate hardship.

[58] We note that in response to Question 3.1, no party contended that we lacked the requisite power to make appropriate transitional arrangements. It seems to us that such a power necessarily follows from the terms of the modern awards objective, that is, fairness requires that the reductions in Sunday penalty rates be subject to appropriate transitional arrangements.<sup>56</sup>

[59] What then is to guide the exercise of the Commission's discretion in the determination of appropriate transitional arrangements?

[60] At paragraph [43] of its submission, Ai Group submits that in determining the transitional arrangements for the reduction in penalty rates, the Full Bench must act consistently with:

- ‘(a) its statutory charter, including the exercise its powers under the FW Act in a manner that is fair and just (see section 577(a) of the FW Act);
- (b) its principle that fairness is assessed from the perspective of both employer and employee (and not simply from the perspective of the employee) (see Penalty Rates Decision at [37], [117], [118], [151], [885], [1701], [1877], [1948]);
- (c) the objects of the relevant Part (see section 578(a) of the FW Act);
- (d) the merits of the matter (see section 578(b) of the FW Act);
- (e) its findings and conclusions in the Penalty Rates Decision;
- (f) the evidence in the proceedings;
- (g) the extent of the reductions in the existing Sunday penalty rates; and
- (h) the approach adopted by other Full Benches to the staggered introduction of reductions in penalty rates.’<sup>57</sup>

[61] We put a question on notice to all parties setting out the above extract from Ai Group's submission and asking whether any interested party held a contrary view.

[62] The Hospitality Employers agreed with Ai Group and did not advance a contrary view. ABI generally agreed with the proposition advanced by Ai Group but added that the Commission had an obligation to ensure that any transitional arrangements meet the modern awards objective and are included only to the extent necessary to meet that objective (as required by s.138 of the Act).

[63] The SDA accepted that in fixing appropriate transitional arrangements we must act consistently with the matters identified in subparagraphs (a), (c), (d), (e), (f) and (g) of Ai Group's submissions. The SDA did not agree that we must (or should) act consistently with the matters described in subparagraphs (b) and (h).

[64] United Voice agreed that the matters identified in subparagraphs (a) to (g) of Ai Group's submission are relevant to the task of determining appropriate transitional arrangements for both Sunday and public holiday penalty rate reductions. In respect of subparagraph (b), United Voice submitted that the position of the employees affected was particularly relevant, but did not put it more highly than that.<sup>58</sup> As to the matter identified in subparagraph (h), United Voice submits that while the decisions of other Full Benches may be illustrative, the relevant considerations may be quite different between previous cases and this case.



[65] We agree with ABI that any transitional arrangements must meet the modern awards objective and must only be included in a modern award to the extent necessary to meet that objective. It seems to us that this is the overriding statutory requirement and accordingly it is our central focus.

[66] As to the s.134 considerations (set out in s.134(1)(a)–(h)) our findings in the *Penalty Rates decision* in respect of those matters will be relevant and, further, the setting of transitional arrangements will require a particular focus on:

- relative living standards and the needs of the low paid (s.134(1)(a));
- the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden (s.134(1)(f)); and
- the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards (s.134(1)(g)).

[67] We also agree with the proposition that we must perform our functions and exercise our powers in a manner which is ‘fair and just’ (as required by s.577(a)) and must take into account the objects of the Act and ‘equity, good conscience and the merits of the matter’ (s.578).

[68] As to the other matters identified by Ai Group, we agree that the evidence and our findings and conclusions in the *Penalty Rates decision* are relevant; as is the extent of the reductions in existing Sunday penalty rates.

[69] We also agree with the proposition that fairness is a relevant consideration, given that the modern awards objective speaks of a ‘fair and relevant minimum safety net’. Contrary to the SDA’s submission, fairness in this context is to be assessed from the perspective of both the employees *and* employers covered by the modern award in question.<sup>59</sup> While the impact of the reductions in penalty rates on the employees affected is a plainly relevant and important consideration in our determination of appropriate transitional arrangements, we agree with Ai Group that it is not appropriate to ‘totally subjugate’ the interests of the employers to those of the employees.<sup>60</sup>

[70] Contrary to Ai Group’s submission, we reject the proposition that we ‘must act consistently with ...the approach adopted by other Full Benches to the staggered introduction of reductions in penalty rates’ (para (h) at [61] above).

[71] Although the Commission is not bound by principles of *stare decisis* it has generally followed previous Full Bench decisions. In another context three members of the High Court observed in *Nguyen v Nguyen*:

‘Where a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong. The occasion upon which the departure from previous authority is warranted are infrequent and exceptional and pose no real threat to the doctrine of precedent and the predictability of the law: see *Queensland v The Commonwealth per Aickin J at 620*.’<sup>61</sup>

[72] While the Commission is not a court, the public interest considerations underlying these observations have been applied with similar, if not equal, force to appeal proceedings in the

Commission.<sup>62</sup> As a Full Bench of the Australian Industrial Relations Commission observed in *Cetin v Ripon Pty Ltd (T/as Parkview Hotel) (Cetin)*<sup>63</sup>:

‘Although the Commission is not, as a non-judicial body, bound by principles of stare decisis, as a matter of policy and sound administration it has generally followed previous Full Bench decisions relating to the issue to be determined, in the absence of cogent reasons for not doing so.’<sup>64</sup>

[73] However, as observed by the Full Bench in the *Preliminary Jurisdictional Issues decision*, while it is appropriate to take account of previous decisions relevant to a contested issue arising in the Review, it is necessary to consider the context in which those decisions were made. The particular context may be a cogent reason for *not* following a previous Full Bench decision, for example:

- the legislative context which pertained at that time may be materially different from the Act;
- the extent to which the relevant issue was contested and, in particular, the extent of the evidence and submissions put in the previous proceeding will be relevant to the weight to be accorded to the previous decision; or
- the extent of the previous Full Bench’s consideration of the contested issue. The absence of detailed reasons in a previous decision may be a factor in considering the weight to be accorded to the decision.

[74] Ai Group contended that in considering the appropriate transitional arrangements in the matters before us we should apply the reasoning of the majority in the *2014 Restaurants Penalty Rates decision*.<sup>65</sup> In that matter, the decision was handed down on 14 May 2014 and on 4 June 2014 a determination<sup>66</sup> was made to vary the award so as to reduce the level of penalty rates payable to certain casual employees for Sunday work, to take effect on 1 July 2014 (some 7 weeks after the substantive decision). No reasons were given for the decision to implement the reduction in penalty rates on 1 July 2014, without any transitional provisions.

[75] We reject the proposition advanced by Ai Group, for three reasons. First, the determination of appropriate transitional arrangements is a discretionary decision which depends on the relevant context. The determination of such issues in other cases is of limited assistance. The policy considerations which underpin the proposition that a previous Full Bench decision should usually be followed is more apposite to the determination of legal issues – such as the proper construction of the Act – not discretionary decisions.

[76] Second, the legislative context was different – the *2014 Restaurants Penalty Rates decision* was determined in the Transitional Review and, third, the issue of appropriate transitional provisions does not appear to have been the subject of much debate in those proceedings (a point conceded by Ai Group<sup>67</sup>) and nor were any reasons given for the operative date determined.

[77] As mentioned above, the findings and conclusions in the *Penalty Rates decision* are relevant to our determination of appropriate transitional arrangements. Certain findings and conclusions were specific to particular modern awards (and we refer to them when we turn to deal with each modern award) and others generally applied to each of the modern awards before us. It is convenient to mention here the three general findings and conclusions. They relate to the

employment effects of the proposed reductions in Sunday penalty rates; the relative disutility of Sunday work; and the conclusion as to whether the existing rates met the modern awards objective.

(i) *Employment effects*

[78] In the substantive proceedings a number of expert witnesses gave evidence in relation to the employment effects of penalty rates. This material is dealt with in Chapter 6.3 of the *Penalty Rates decision* and on the basis of that evidence we concluded that ‘reducing penalty rates may have a modest positive effect on employment’.<sup>68</sup>

[79] In respect of a number of particular modern awards we indicated that the employer lay evidence supported that general conclusion:

- *Hospitality Award* (at [829])
- *Retail Award* (at [1666])
- *Pharmacy Award* (at [1835])

[80] In relation to the *Fast Food Award* the *Penalty Rates decision* noted that there was a paucity of direct evidence from industry participants about the employment effects of reducing the Sunday penalty rate<sup>69</sup> and concluded that;

‘On the basis of the common evidence . . . a reduction in the Sunday penalty rate in the *Fast Food Award* (from 150 per cent to 125 per cent) is likely to lead to some increase in employment, albeit only a modest increase.’<sup>70</sup>

[81] A number of the submissions advanced by employer organisations in these proceedings contend that a shorter transition period will result in positive employment effects materialising earlier. While this is so, the above findings from the *Penalty Rates decision* need to be borne in mind. In particular, the views expressed about the potential for positive employment effects consequent upon a reduction in Sunday penalty rates were somewhat muted and cautious. As such, the force of the various employer submissions which rely on positive employment effects to support a shorter transition period are somewhat diminished.

[82] However, it is relevant to note that the findings in the *Penalty Rates decision* in respect of the positive effect of a reduction in Sunday penalty rates were not limited to the employment effects. In particular, we concluded that the evidence supported the proposition that a reduction in penalty rates is likely to lead to:

- increased trading hours on Sundays and public holidays;
- a reduction in the hours worked by some owner operators;
- an increase in the level and range of services offered on Sundays and public holidays;  
and
- an increase in overall hours worked.

(ii) *The relative disutility of Sunday work*

[83] As observed in the *Penalty Rates decision*, the issue in the substantive proceedings was whether the relevant modern award(s) prescribed a Sunday penalty rate that provide a ‘fair and relevant minimum safety net’ and that:

‘A central consideration in this regard is whether a particular penalty rate provides employees with ‘fair and relevant’ compensation for the disutility associated with working at the particular time(s) to which the penalty attaches.’<sup>71</sup>

[84] The common evidence in respect of the relative disutility of weekend work (and, relevantly, Sunday work) is dealt with in Chapters 6.1 and 6.2 of the *Penalty Rates decision*. On the basis of that evidence we concluded that:

‘There is a disutility associated with weekend work, above that applicable to work performed from Monday to Friday. Generally speaking, for many workers Sunday work has a higher level of disutility than Saturday work, though the extent of that disutility is much less than in times past.’<sup>72</sup>

[85] The above conclusion was relied on in respect of each of the 4 modern awards in which it was decided to reduce Sunday penalty rates.

[86] In respect of the *Hospitality Award* we said (at [860]):

‘We now turn to matter (i), the extent of the disutility of, relevantly, Sunday work. In addition to the findings set out in Chapter 6, the lay witness evidence led by United Voice spoke to the adverse impact of weekend work on the ability of hospitality sector employees to engage in social and familial activities. While for some of those witnesses Sunday work had a particularly adverse impact, most simply referred to the impact of weekend work and did not distinguish between Saturday and Sunday work.’<sup>73</sup>

[87] As to the *Fast Food Award* we said (at [1376] – [1378] and [1388] – [1390]):

‘As mentioned in Chapter 3, compensating employees for the disutility associated with working on weekends is a primary consideration in the setting of weekend penalty rates. Assessing the extent of the disutility of working at such times or on such days (issue (i) above) includes an assessment of the impact of such work on employee health and work-life balance, taking into account the preferences of the employees for working at those times. In the Fast Food industry, Sunday work is not associated with a higher rate of safety incidents (i.e. number of reported incidents divided by number of employees working).

The Ai Group survey provides a useful source of information on employee disutility associated with Sunday work. The Ai Group employee survey results show a marked difference in the willingness to work some or more hours on a Sunday based on age (see Chart 45). Almost three in four respondents (73 per cent) aged under 21 years of age were willing to work some or more hours on a Sunday, compared to just over half (56 per cent) employees aged 21 years or older. The responses to a number of other, related, survey questions also show a strong correlation to the age of the respondent, namely:

- Preferred day to work: generally speaking, the preference for working only weekdays (i.e. Monday to Friday) – and by inference the preference to not work on weekends – increased with age. Twice as many respondents aged 21 years and over (54 per cent) preferred not to work on weekends compared to those aged 14 to 20 years (26 per cent).

- Negative impact of Sunday work: a significantly higher proportion of respondents aged 21 years and over (55.1 per cent) reported some or a lot of negative impact of working on Sundays on spending time with family and friends, compared to respondents aged 14 to 20 years (42.3 per cent). Almost three times as many employees aged 21 years and over (15.4 per cent) reported a lot of negative impact, compared to those aged 14 to 20 years (5.2 per cent). Similarly, just over half (51.2 per cent) of respondents aged 14 to 20 years reported ‘no impact of working on Sundays on spending time with family and friends, compared to 39 per cent of respondents aged 21 years and over.

It is also likely that the correlation between the reported experiences and preferences and age is influenced by the student status of the employee respondent. In this regard we note that 73.4 per cent of full-time students indicated that they would work some or more hours on a Sunday, if offered.<sup>1203</sup> Full-time students also indicated a much stronger preference for working a mix of weekdays and weekends (70.3 per cent) than non-students (41.7 per cent).<sup>74</sup>

...

The central issue is whether the existing Sunday penalty rate provides a ‘fair and relevant minimum safety net’. In relation to level 1 employees we have concluded that the existing Sunday penalty rate is neither fair nor relevant. The evidence as to the work preferences and experiences of level 1 employees leads us to conclude that the existing penalty rate overcompensates those employees for the level of disutility associated with Sunday work. That evidence supports a reduction in the Sunday penalty rate, for level 1 employees, from 150 per cent to 125 per cent.

The position in respect of level 2 and 3 employees is quite different. There is a clear distinction between the reported preferences and experiences of level 1 employees (using those aged 14 to 20 years as a proxy), and those employees classified at levels 2 and 3. In terms of reported preferences, level 1 employees (compared to level 2 and 3 employees) are more likely to express a preference for weekend work (either weekends only or a mix of weekdays and weekends) and a willingness to work some or more hours on a Sunday.

In terms of their reported experiences, level 2 and 3 employees (compared to level 1 employees) are more likely to report some or a lot of negative impact from working on Sundays on spending time with family and friends and less likely to report no impact of working on Sundays on spending time with family and friends.<sup>75</sup>

[88] As to the *Retail Award* we said (at [1678] – [1679]):

‘We now turn to matter (i), the extent of the disutility of, relevantly, Sunday work. In addition to the findings set out in Chapter 6, the lay witness evidence led by the SDA spoke to the adverse impact of weekend work on the ability of retail sector employees to engage in social and family activities.

While for some of those witnesses Sunday work had a particularly adverse impact, others simply referred to the impact of weekend work and one said that the intrusion into their social activities of Saturday and Sunday work was ‘about the same’.<sup>76</sup>

[89] As to the *Pharmacy Award* we said (at [1851]):

‘We now turn to matter (i), the extent of the disutility of, relevantly, Sunday work. In addition to the findings set out in Chapter 6, the lay witness evidence led by the SDA and APESMA (albeit limited) spoke to the adverse impact of weekend work on the ability of pharmacy employees to engage in social and family activities.’<sup>77</sup>

[90] The finding that the relative disutility of Sunday work (as opposed to Saturday work) is ‘much less than in times past’ informed our conclusion that the existing Sunday penalty rates in the *Hospitality, Fast Food, Retail and Pharmacy Awards* do *not* provide a fair and relevant safety net. We now turn to that conclusion.

**(iii) Modern awards objective**

[91] In relation to the *Hospitality, Fast Food, Retail and Pharmacy Awards*, the *Penalty Rates decision* expressed consistent findings as to the modern awards objective, namely that the existing Sunday penalty rates are neither fair nor relevant.<sup>78</sup> The decision in respect of these 4 modern awards was summarised at [53] of the *Penalty Rates decision*:

‘We have decided that the existing Sunday penalty rates in 4 of the modern awards before us (the *Hospitality, Fast Food, Retail and Pharmacy Awards*) do not achieve the modern awards objective, as they do not provide a fair and relevant minimum safety net.’<sup>79</sup>

[92] The finding that the existing Sunday penalty rates in the *Hospitality, Fast Food, Retail and Pharmacy Awards* do *not* achieve the modern awards objective (because they do not provide a fair and relevant safety net) is a consideration which plainly supports the timely implementation of the reduction in Sunday penalty rates in these awards.

**3.4 Take-home pay orders**

[93] We now turn to the issue of ‘take-home pay orders’. In short, the purpose of a take-home pay order is to compensate an employee for any reduction in their pay as a result of the making of a modern award or the transitional arrangements in a modern award. The relevant statutory provisions are not without a degree of complexity.

[94] Take-home pay orders are dealt with in the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the TPCA Act), as modified by the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009* (the TP Regulations). Take-home pay orders can only be made under Part 3, item 9 of Schedule 5 to the TPCA Act in respect of a ‘modernisation-related reduction in take-home pay’. An employee suffers a ‘modernisation-related reduction in take-home pay’ in the prescribed circumstances, which include that the reduction in take-home pay is attributable to the Part 10A award modernisation process (item 8(3)(d)) or to certain variations to modern awards to deal with residual issues arising from the award modernisation process (item 8A(4)(e)).<sup>80</sup> Persons employed after the commencement of the modern award are not eligible for an item 9 take-home pay order (items 8(3)(b) and 8A(4)(c)).

[95] The Commission is also empowered to make take-home pay orders under clauses in modern awards, based on the model transitional provisions inserted in awards by the *Award Modernisation Decision* of 1 September 2009<sup>81</sup>. In the *Award Modernisation Decision* the Full Bench stated that the model transitional provisions were designed to protect the take-home pay of those workers affected by the introduction of modern awards, as well as those affected by the operation of transitional provisions in those awards, being transitional provisions which provided for ‘a phased reduction in pre-modern award conditions’.<sup>82</sup>

[96] The take-home pay order clause included in the modern awards which were the subject of the *Penalty Rates decision* is in the following terms:

‘Neither the making of this award nor the operation of any transitional arrangements is intended to result in a reduction in the take-home pay of employees covered by the award. On application by or on behalf of an employee who suffers a reduction in take-home pay as a result of the making of this award or the operation of any transitional arrangements, the Fair Work Commission may make any order it considers appropriate to remedy the situation.’

[97] Item 13A of Part 3A was inserted in Schedule 5 to the TPCA Act to ensure the validity of these transitional provisions, and was given retrospective operation from 1 January 2010 to align with the commencement of modern awards. The *Fair Work (Transitional Provisions and Consequential Amendments) Amendment Regulations 2010 (No. 1)* (the TP Amendment Regulations) amended the TP Regulations to insert Part 3A in Schedule 5 to the TPCA Act (new regulation 3B.04).

[98] Item 13A provides that modern awards may include terms that give the Commission power to make a take-home pay order where an employee has suffered a reduction in take-home pay, where that reduction is a result of the making of a modern award or the operation of any transitional arrangements in relation to the award (whether or not the reduction is a modernisation-related reduction in take-home pay).

[99] The Explanatory Statement to the TP Amendment Regulations provides as follows:

*Regulation 3B.04 modifies Schedule 5 of the Act to ensure that modern awards can contain provisions which confer power on FWA to make take-home pay orders.*

*The AIRC, as part of the award modernisation process, included transitional provisions in modern awards allowing FWA to make take-home pay orders. The award take-home pay provisions allow FWA to make orders to remedy reductions in an employee’s take-home pay caused by the making of the modern award or the operation of transitional arrangements in the award.*

*The Government is concerned to ensure that it is not open to argue that the take-home pay provisions in modern awards are invalid because, as a statutory body, FWA only has the powers conferred on it by statute (not by the terms of an award). The protection afforded by such provisions in modern awards assists in ensuring that the award modernisation process does not result in the take-home pay of employees being reduced. Consequently, the Government considers it desirable that there be no doubt about the validity of such provisions in modern awards. This regulation removes any such doubt.*

*Regulation 3B.04 modifies Schedule 5 to the Act by inserting new Part 3A which validates provisions in modern awards that confer power on FWA to make take-home pay orders (this is achieved by new item 13A). New item 13A ensures that modern awards have always been able to confer power on FWA to make take-home pay orders remedying reductions in take-home pay suffered by an employee or class of employees because of the making of a modern award or the operation of transitional arrangements in the award. The new item allows award terms to confer power on FWA to remedy reductions in take-home pay even if those reductions are not a ‘modernisation-related reduction in take-home pay’ within the meaning of the Act.*

*New item 13A is intended to allow modern awards to include terms protecting the take-home pay of a broader class of employees than the take-home pay provisions in Part 3 of Schedule 5 to the Act. Modern awards include provisions allowing new employees (i.e. those employed after the commencement of the modern award) to obtain a take-home pay order with respect to reductions in take-home pay that occur as a result of the transitional arrangements in the award (a reference to the phasing in of differences between the pay rates in pre-modernised awards and modern awards)*

*This is different to the take-home pay provisions in Part 3 of Schedule 5 which require the employee to be employed in the same position as the position he or she was employed in immediately before the modern award came into operation (see item 8(3)(b) of Schedule 5 to the Act). The validation of these provisions in modern awards furthers the commitment made by the Government that the award modernisation process not reduce the take-home pay of employees.<sup>83</sup>*

**[100]** Item 13A of the TPCA Act and the take-home pay order clauses in modern awards are limited to reductions in take-home pay suffered by employees as a result of the award modernisation process, including as a result of any transitional arrangements phasing in differences between the pay rates in pre-modernised awards and modern awards. Item 13A was inserted to address both the inclusion of take-home pay order terms in modern awards, and their scope, which expands the class of employees eligible to seek a take-home pay order to include employees employed after the commencement of modern awards (who are not eligible for a take-home pay order under Part 3, item 9 of Schedule 5 to the TPCA Act).

**[101]** Any reductions in take-home pay arising from the *Penalty Rates decision* will not be attributable to the award modernisation process or any residual issues arising from that process, but, rather, will result from the variation of specified modern awards as part of the 4 yearly review of modern awards. It follows that take-home pay orders are not available to mitigate the impact of the proposed reduction in Sunday (or public holiday) penalty rates.

**[102]** One of the questions on notice put to all parties in the present proceedings was in the following terms:

‘It seems to be common ground that the take home pay order provisions of the TPCA Act are *not* an available option to mitigate the impact of the reductions in penalty rates set out in the Penalty Rates decision.

Does any interested party take a different view?’

**[103]** No party expressed a view contrary to that posed in the question. Ai Group<sup>84</sup>, ACCI<sup>85</sup>, the Hospitality Employees<sup>86</sup>, ABI<sup>87</sup>, the Pharmacy Guild<sup>88</sup>, RCI<sup>89</sup>, the SDA<sup>90</sup> and United Voice<sup>91</sup> all submitted that the take-home pay provisions of the TPCA Act were not an available option to mitigate the impact of the reductions in penalty rates.

**[104]** We note that the Small Business and Family Enterprise Ombudsman (Small Business Ombudsman) submitted that ‘at the end of the transition period, the Fair Work Commission should consider granting take-home pay orders for individuals to mitigate the effects of any gap that remains between the amounts of their earnings with and without application of the Sunday penalty rate’.<sup>92</sup>

**[105]** We put a question on notice to the Small Business Ombudsman in the following terms:

‘What is the source of the Commission’s power to make the take home pay orders proposed?’

**[106]** No response was received. Given the lack of response and our view as to the scope of the power conferred by the TPCA Act and TP Regulations to make take-home pay orders we do not propose to adopt the Small Business Ombudsman’s proposal.

**[107]** We also put a question on notice to the Australian Government in the following terms:



‘Is there any present intention to amend the *Fair Work Act 2009 (Cth)* to provide the Commission with a discretion to make take-home pay orders that may mitigate the impact upon affected employees of a variation to a modern award?’

[108] The Australian Government’s response did not directly address the question put but we took it from the response given that it had no present intention to amend the Act to provide the Commission with the discretion to make take-home pay orders. In the Background Paper published on 5 May 2017 we stated that if our assumption was incorrect then the Australian Government should inform us of its position at the hearing on 9 May 2017. No further response was received from the Australian Government and it made no oral submissions at the hearing on 9 May 2017.

[109] In summary then, the position is that ‘take-home pay orders’ are *not* an available option to mitigate the impact of the reductions in penalty rates determined in the *Penalty Rates decision* and the Australian Government has no present intention to amend the Act to provide the requisite power to make such orders.

### 3.5 *The red circling proposal*

[110] ‘Red circling’ refers to the practice of preserving the status quo for existing employees and only imposing a particular change on employees engaged after a specified date. In the present context it would mean an award term which would preserve the current Sunday and public holiday penalty rates for all existing employees, but the reduced penalty rates would apply to all new employees.

[111] In the *Penalty Rates decision* we expressed the provisional view that we did not favour any general ‘red circling’ term which would preserve the current Sunday penalty rates for all existing employees, noting that:

‘A consequence of such a term would be that different employees of the one employer would be employed on different terms and conditions. Such an outcome would add to the regulatory burden on business (a relevant consideration under s.134(1)(f)).’<sup>93</sup>

[112] In their written submission of 24 March 2017, the SDA submit that the Commission should establish different transitional arrangements for future employees and existing employees<sup>94</sup> in the *Retail, Fast Food and Pharmacy Awards*. In particular, the SDA proposes that the Commission issue determinations which include the following terms for ‘existing employees’<sup>95</sup>:

‘(a) Following proper and full determination in proceedings of the annual wage review Employers must continue to pay employees the rate of pay prescribed by the relevant Award as at that time for Sunday work (“the preserved rate”) until such time that the rate of pay for Sunday work under the Award equals or exceeds the preserved rate.

(b) Employers will not dismiss, injure in their employment or alter to their prejudice the position of any employee entitled to be paid the preserved rate (including by a reduction in shifts or changes in rosters) by reason of, or for reasons which include, that entitlement.’ (emphasis added)

*Note: At the hearing on 9 May 2017 the SDA advised it no longer relied upon the words ‘Following proper and full determination proceedings of the annual wage review’. It was submitted that the red circling would be fixed by reference to the rates applying as at the date of the decision and any further decision the Commission issues to implement the penalty rates decision.’<sup>96</sup>*

[113] The SDA acknowledge the Commission's provisional view that it does not favour any general 'red circling' preserving the current Sunday penalty rates for existing employees, but submit that '...it is incumbent on the Commission to give substantial weight to s.134(1)(a) when considering appropriate transitional arrangements. This can be achieved by establishing transitional arrangements for existing employees.'<sup>97</sup>

[114] The SDA's submission is directed at the Sunday penalty rate reductions in the *Fast Food, Retail and Pharmacy Awards*.

[115] United Voice took a contrary position, submitting that:

'United Voice does not agree with any 'red circling' provisions in the transitional arrangements. Such arrangements have the potential to create a two-tier workforce. It is undesirable to have employees performing the same work, at the same time, while on different rates of pay. Further, because 'red circled' employees are more expensive, there is a risk that such employees will be rostered to work less hours than newer, less expensive, employees. Further, we are not confident that the proposal at paragraph 14(b) of the SDA submission . . . can properly safeguard 'red-circled' employees from unlawful adverse action.

United Voice does not advance a red circling proposal.'<sup>98</sup>

[116] The RAFFWU agreed with this aspect of United Voice's submissions.<sup>99</sup> The ACTU generally supported the submissions of the SDA and United Voice, but made no specific comment in respect of the red circling proposal advanced by the SDA.<sup>100</sup> Nor did the SDA's proposal receive any direct support from any other party in the proceedings.

[117] The various employer parties and the Fair Work Ombudsman<sup>101</sup> opposed the adoption of a 'red circling' term which would preserve current Sunday penalty rates for existing employees. Ai Group and ABI opposed the SDA's proposal on both jurisdictional and merit grounds.

[118] It is not necessary for us to express a concluded view as to whether there is the requisite power to include a term of the type sought by the SDA in a modern award, as we are not persuaded of the merit of doing so.

[119] Contrary to the submissions advanced by the SDA we are of the view that the introduction of such a term would:

- create significant potential for disharmony and conflict between employees performing the same work at the same time but receiving different Sunday penalty rates (contrary to s.577(d)); and
- make the transition to 'fair and relevant' Sunday penalty rates more complex (adding to the 'regulatory burden' on business (s.134(1)(f)) and making the modern award system less simple and easy to understand (s.134(1)(g)).

[120] As to the second point, the introduction of a term of the type proposed would require employers to apply two different regimes in respect of Sunday penalty rates – the current rates for employees employed as at the date of implementation (i.e. 1 July 2017) (the 'existing employees') and the new rates for employees employed after the implementation date (the 'new employees'). This would be so even if the 'existing employees' had not previously worked on Sundays and hence

could be said to have suffered *no reduction in their take home pay* as a result of the *Penalty Rates decision*. Indeed an employer who had never previously operated its business on a Sunday, but decided to do so in the future, would be obliged to pay ‘existing employees’ a higher Sunday penalty rate than ‘new employees’. We also agree with the submission of United Voice that there is a risk that ‘red circled employees’ may suffer disadvantage in comparison with new employees and that safeguarding such employees may be difficult.

[121] There is also a significant degree of complexity, and uncertainty, in the operation of the proposed term and in particular the duration of the ‘red circling’ arrangement. Paragraph (a) of the proposed term provides that existing employees are paid what is described as ‘the preserved rate’, until ‘such time as the rate of pay for Sunday work under the award equals or exceeds the preserved rate.’

[122] It appears that what is envisaged is that the ‘preserved rate’ is the actual rate of pay existing employees currently receive for Sunday work, which is in turn a function of their existing hourly rate of pay and the current Sunday penalty rate. An adult full-time/part-time employee classified as a Retail Employee Level 1, currently receives \$38.88 per hour for Sunday work (i.e. a base hourly rate of pay of \$19.44 plus ‘an additional 100 per cent loading’ for Sunday work<sup>102</sup>). If the proposed reduction in Sunday penalty rates was implemented immediately the relevant hourly rate for Sunday work would fall to \$29.16 per hour (i.e. \$19.44 base hourly rate of pay and an additional 50% loading for Sunday work).

[123] What is apparently intended is that existing employees continue to receive the preserved rate for Sunday work (\$38.88 per hour in the example above) until such time as ‘the rate of pay for Sunday work under the Award equals or exceeds the preserved rate’. Implicit in the proposal is that the base hourly rates of pay in the relevant awards will increase over time - consequent upon increases in modern award minimum rates of pay in Annual Wage Reviews – such that at some future point in time the award rate of pay for Sunday work will be equal to or exceed the preserved rate of pay. In the example given above this would occur when the base rate of pay for a full-time/part-time adult employee classified as a Retail Employee Level 1 was increased to \$25.92. This is so because \$25.92 plus an additional 50 per cent loading for Sunday work (the new Sunday penalty rate) equals \$38.88 (the ‘preserved rate’).

[124] Hence, the SDA’s proposed ‘red circling’ term would operate until the base hourly rate for a Retail Employee Level 1 has increased by over 33 per cent. While it is not possible to predict with any degree of certainty how long this may take, if one uses the methodology proposed by Ai Group (which implies successive Annual Wage Review adjustments of 2.5 per cent) then allowing for the compounding effect of successive annual increases it would take 12 years. In our view such an extended period is not appropriate.

[125] A further complication may arise if future Annual Wage Review increases were awarded on a basis other than as a uniform percentage adjustment – such as a flat dollar adjustment, or a differential increase with flat dollar adjustments to a certain classification level and percentage increases above that level. If Annual Wage Review increases in modern award wages were made on a basis other than as a uniform percentage adjustment it raises the prospect that the period of operation of the SDA’s proposed ‘red circling’ term may vary depending by classification. This would be so because the base hourly rate for particular classification levels would be adjusted in different ways and hence may exceed the ‘preserved rate’ at different times.

[126] For the reasons given we are not persuaded of the merit of inserting a ‘red circling’ term of the type sought by the SDA in the modern awards which are the subject of these proceedings.

### 3.6 *Delayed implementation*

[127] The *Productivity Commission Inquiry Report: Workplace Relations Framework* recommended that 12 months’ notice be given of any change to Sunday penalty rates, rather than an extended transition process involving staggered small changes:

‘... a particular concern in making any changes to penalty rates is that there will be significant income effects for some people (chapter 14). That suggests an adjustment process so that people can seek other jobs, increase their training and make other labour market choices. An extended transition that involves staggered small changes to Sunday rates would replicate some of the uncertainties and compliance costs associated with award modernisation. Moreover, it would reduce the scope for new employment, increased hours of work for existing employees, workload relief for owners, and the benefits from permanent/casual substitution. A preferred approach would be to give advance notice of a change so that employers and employees can review their circumstances, and then introduce the change in a single step.

Part of this notice period will arise naturally from the workload associated with the FWC’s broader suite of award assessment (chapter 8). It appears unlikely that any decision could be practically implemented before early 2017. If an adjustment period of a year was added, this would provide more than two years before changes were made.’<sup>103</sup>

[128] In the *Penalty Rates decision* we expressed a provisional view which was contrary to the position put by the Productivity Commission, in particular we said:

‘... we do not think it appropriate to delay making any changes to Sunday penalty rates for 12 months, at which time the reductions apply in full. The Productivity Commission’s proposal imposes an unnecessary delay on the introduction of any reduction in Sunday penalty rates and would give rise to a sharp fall in earnings for some affected employees.’<sup>104</sup>

[129] The SDA, United Voice and the ACTU all propose that the implementation of the reductions for Sunday penalty rates in *Hospitality, Fast Food, Retail and Pharmacy Awards* be delayed by a period of two years.

[130] The ACTU submit a delay in implementation is necessary ‘for employees to re-arrange their affairs and mitigate the *Penalty Rates decision*’s impact to the extent possible,’<sup>105</sup> and ‘the fact that the affected employees have limited financial resources, means they should be given more time to seek training and attempt to make alternative arrangements where possible, not less’.<sup>106</sup>

[131] The ACTU further submit that a 2 year delay in implementation (and a subsequent transition period) ‘is consistent with the award modernisation process’<sup>107</sup> and cite the decision of the Award Modernisation Full Bench of 2 December 2009<sup>108</sup> which decided to delay commencement of the changes until 1 July 2010, followed by four annual instalments operating from the first pay period on or after 1 July each year.<sup>109</sup>

[132] In their reply submission<sup>110</sup> the ACTU submit a delay of at least two years before implementation is necessary for the following reasons:

(a) The Commission's primary task is to ensure that modern awards, together with the national employment standards, provide a *fair* and relevant safety net, taking into account the criteria in s134(1) of the FW Act;

(b) Criterion (a), the 'relative living standards and the needs of the low paid' is particularly relevant given the Commission's findings about the harsh impact of the decision on low paid workers, including that many of these workers rely on penalty rates to meet ordinary household expenses. This criterion should be given clear priority over all other considerations in the modern awards objective, particularly as it is known with certainty that the decision will mean a reduction in wages for employees and various adverse effects but any positive effects on employment or service levels are uncertain and speculative;

(c) The Productivity Commission suggested a 12 month delay before any reduction in penalty rates in order to allow time for employees to make alternative arrangements, for example in order to undertake training or otherwise obtain alternative employment. The Commission found that the affected workers have limited capacity to afford training or otherwise obtain alternative employment. Hence, we submit that in the interests of accommodating these workers a longer period of delay than 12 months is necessary;

(d) In the award modernisation process, a full bench of the Australian Industrial Relations Commission decided on 2 December 2009 to commence implementing the changes resulting from the decision on 1 July 2010 followed by four annual instalments, noting that it was *'desirable that before phasing commences there be an opportunity for employers and employees to come to terms with the other changes which might have a significant impact'*;

(e) The Commission has noted a shorter time may be necessary due to the greater complexity of the award modernisation changes. This places greater weight on the impact of the decision on business rather than employees. The ACTU submits that the impact on low paid workers should be given priority; and

(f) The material before the Commission suggests that wage growth is at a record low, inequality is at a 75-year high and the decision will exacerbate the gender pay gap. These factors also point to a period of delay where a series of annual wage increases can provide at least some buffer for implementing a cut to low paid workers' pay.<sup>111</sup> (references omitted)

**[133]** In its submission of 24 March 2017, the SDA submit that '[g]iven that the quantum of the penalty rates cuts under the Awards, it is also appropriate that the commencement of the phased reduction in respect of the Awards be deferred until 1 July 2019'.<sup>112</sup> In its reply submission, the SDA submit that the two year deferral in implementing the proposed reductions in penalty rates is justified for the following reasons:

(a) First, as set out above, in determining appropriate transitional arrangements, the Full Bench must treat the object of mitigating the adverse impacts and hardship on employees of the penalty rate cuts as a matter of central importance and weight in the fixing of transitional arrangements. The initial deferral of the reductions is consistent with this imperative.

(b) Secondly, the deferral will allow the SDA's application in the 2016/2017 Annual Wage Review to be dealt with, and a similar application in the 2017/2018 Annual Wage Review to be prepared and made. In light of the Commission's findings about the adverse effects of the reductions and its conclusion that the *"needs of the low paid are best addressed by the setting and adjustment of modern award minimum rates of pay,"* it would be unfair and unjust for the reductions in penalty rates to commence before the SDA has been able to seek appropriate increases to minimum rates of pay in light of the decision.

(c) Thirdly, as has been noted, it appears to be common ground that take home pay orders are not available to ameliorate the impact on employees. The unavailability of this means of mitigating the hardship to employees strongly militates in favour of the deferral of the reductions in penalty rates.

(d) Fourthly, the following evidence, which was accepted by the Commission, indicates that retail workers will face particular hardship when penalty rates are reduced:

- (i) The relative earnings of workers in the retail industry vis-à-vis all industries has declined;
- (ii) The exposure of retail households to difficult financial circumstances is worse than that of other households;
- (iii) Retail households face greater difficulties in raising emergency funds;
- (iv) The lower earnings of the retail workforce and their greater incidence of being low paid, translate into lower living standards at the household level; and
- (v) The fact that 31-35% of retail workers work on Sundays.

(e) Fifthly, in relation to the GRIA, the Commission has accepted that because employees covered by the award will suffer the largest penalty rate reduction, this may justify a longer period of adjustment for the reductions under that award. For the same reasons, the size of the cuts justifies the deferral contended for by the SDA.<sup>113</sup> (references omitted)

**[134]** In their reply submission, United Voice submit a two year notice period is appropriate because:

- ‘(a) a lengthy notice period is essential to allow low paid hospitality workers to take steps to mitigate the effects of the decision, the proposed period will allow employees to negotiate new hours of work with their employer, save money, find other work, or retrain for new employment;
- (b) the lay evidence called by United Voice during the hearing, and accepted by the Full Bench, demonstrates that hospitality employees are likely to try to find work in other industries in the event of a pay cut, and that they will require training to do so, employees will not be able to take these measures if cuts are introduced too quickly;
- (c) employees have non-work related matters that will require adjustment due to reduction in their income and possible increases in their working hours caused by the cuts in penalty rates. For instance, employees working news [sic] hours will require sufficient notice to arrange for childcare, further, students will also require time to find work that accommodates their study commitments;
- (d) there are long-standing and openly acknowledged problems with compliance with wage laws in the hospitality industry, a lengthy notice period is essential to ensure that employers understand their obligations and the changes to those obligations, including any transitional arrangements; and
- (e) a lengthy notice period will also permit adequate consideration of possible measures to compensate for reductions in penalty rates, such as those proposed by Australian Council of Social Service (ACOSS).<sup>114</sup> (references omitted)

**[135]** APESMA submits that the implementation of the reductions in Sunday penalty rates in the *Pharmacy Award* should be delayed for four years, because:

‘This will provide employees who will suffer significant hardship because of this Decision to rearrange their finances; for Annual Wage Review Decisions to provide some compensation and for those employees to be provided with sufficient time to enter into bargaining with their employers and to reach suitable bargaining agreements.

Such a delay will also provide an opportunity for the Victorian Government’s review to be completed and the current Bills within the Federal Parliament to run their course.

The ACTU and its affiliates are also campaigning around this Decision and we believe that implementation prior to completion of this campaign may ultimately end up in legislation varying the Act and a subsequent requirement to revert to the existing penalties. Such a requirement to return to the current penalties, if they are implemented in the near future, will be extremely disruptive to everyone – employers and employees alike. Therefore, we believe it would be inappropriate to implement the Decision until these processes have run their course.

APESMA agrees that either the SDA or United Voice proposals for transitioning to the new arrangements would be an appropriate way to transition to the lower penalties. However, as indicated earlier, we believe implementation should be delayed to allow the political and campaigning processes to have run their course.’<sup>115</sup>

**[136]** The various employer organisations oppose the imposition of a delay in the implementation of the *Penalty Rates decision*.

**[137]** We have considered the submissions advanced by the ACTU, the SDA and United Voice in support of a two year ‘delay’, ‘deferral’ or ‘notice period’. We acknowledge that the points raised, particularly the need to give significant weight to ‘relative living standards and the needs of the low paid’, are relevant and we have taken them into account; but we are not persuaded that a two year delay is appropriate.

**[138]** The Commission’s statutory obligation is to give effect to the modern awards objective – to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions. We have concluded that the existing Sunday penalty rates in the *Hospitality, Fast Food, Retail and Pharmacy Awards* do *not* achieve the modern awards objective, because among other things, the existing Sunday penalty rates in these awards overcompensate employees for the disutility of Sunday work. Given this conclusion, we are not satisfied that it is appropriate to impose any further delay in the implementation of our decision.

**[139]** We recognise that commencing the implementation of the transition to the new Sunday rates on 1 July 2017 will mean that the affected employees will have had only about four months’ notice of the changes. In these circumstances, it is appropriate that the first step in the transition be smaller than subsequent steps. Consequently, as we set out later in our decision, we have decided that the first step in the reduction in Sunday penalty rates in the *Fast Food, Hospitality, Retail and Pharmacy Awards* will be 5 per cent, effective 1 July 2017. More significant phased reductions will occur in subsequent years. It follows that the impact of the reduction in Sunday penalty rates in the first 12 months will be relatively minor.

**[140]** As to APESMA’s proposal that the reductions in Sunday penalty rates in the *Pharmacy Award* be delayed for four years, we are not persuaded as to the merit of that proposal. Further, the submissions advanced in support of the proposed four year delay ‘to allow the political and campaigning processes to have run their course’,<sup>116</sup> while refreshingly transparent, are without merit.

#### 4. Summary of Relevant Considerations

[141] It is convenient to summarise the matters which are relevant to our determination of the transitional arrangements to apply to the reductions in penalty rates decided in the *Penalty Rates decision*. The relevant considerations may be conveniently grouped into three broad categories:

- the statutory framework;
- the *Penalty Rates decision*; and
- fairness.

[142] Before turning to each of these matters we would observe at the outset that the range of relevant considerations – and the tension between some of the matters we must take into account – means that the determination of appropriate transitional arrangements is a matter that calls for the exercise of broad judgment, rather than a formulaic or mechanistic approach involving the quantification of the weight accorded to each particular consideration.

[143] As to the statutory framework, any transitional arrangements must meet the modern awards objective and must only be included in a modern award to the extent necessary to meet that objective. Further, as to the s.134 considerations (set out in s.134(1)(a)–(h)), the setting of transitional arrangements will require a particular focus on:

- relative living standards and the needs of the low paid (s.134(1)(a));
- the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden (s.134(1)(f)); and
- the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards (s.134(1)(g)).

[144] We must also perform our functions and exercise our powers in a manner which is ‘fair and just’ (as required by s.577(a)) and must take into account the objects of the Act and ‘equity, good conscience and the merits of the matter’ (s.578).

[145] As to the second category, the evidence and our findings and conclusions in the *Penalty Rates decision* are relevant.

[146] The finding that the relative disutility of Sunday work (as opposed to Saturday work) is ‘much less than in times past’ informed our conclusion that the existing Sunday penalty rates in the *Hospitality, Fast Food, Retail and Pharmacy Awards* do *not* provide a fair and relevant safety net. That finding, that the existing Sunday penalty rates in the *Hospitality, Fast Food, Retail and Pharmacy Awards* do *not* achieve the modern awards objective (because they do not provide a fair and relevant safety net), is a consideration which plainly supports the timely implementation of the reduction in Sunday penalty rates in these awards.

[147] A number of the submissions advanced by employer organisations in these proceedings contend that a shorter transition period will result in positive employment affects materialising



earlier. While this may be so, it needs to be borne in mind that the views expressed in the *Penalty Rates decision* about the potential for positive employment affects consequent upon a reduction in Sunday penalty rates, were somewhat muted and cautious. As such, the force of the various employer submissions which rely on positive employment effects to support a shorter transition period are somewhat diminished. We note however that the various employer submissions also rely on other effective effects resulting from the reduction in Sunday penalty rates (discussed at [82] above). These positive effects favour a shorter transition period.

[148] Finally, fairness is a relevant consideration, given that the modern awards objective speaks of a ‘fair and relevant minimum safety net’. Fairness in this context is to be assessed from the perspective of both the employees *and* employers covered by the modern award in question.<sup>117</sup> While the impact of the reductions in penalty rates on the employees affected is a plainly relevant and important consideration in our determination of appropriate transitional arrangements, it is not appropriate to ‘totally subjugate’ the interests of the employers to those of the employees.<sup>118</sup>

[149] In assessing the fairness of transitional arrangements it is relevant to consider the extent of the reduction in penalty rates and the number of employees affected. In this regard we note that the reductions in Sunday penalty rates are more significant in the *Retail* and *Pharmacy Awards* than in the *Hospitality* and *Fast Food Awards*. This is a factor which favours a longer transition period in respect of the *Retail* and *Pharmacy Awards*.

[150] As to the number of employees affected by the penalty rate reductions, one of the questions on notice put to all parties in the present proceedings was in the following terms:

‘Each party is asked to provide an estimate of the number of employees affected by the penalty rate reductions determined in the [*Penalty Rates decision*], by award, and the basis of that assessment.’

[151] The revised background document published on 26 May 2017 summarises the submissions filed in response to the above question, it is not necessary to repeat that material here. Suffice to say that there was a significant variation in the estimates provided, depending on the range of assumptions adopted.

[152] For example, in respect of the *Retail Award* the Retail Employers submit that ‘between 79,833 and 108,831 employees will be affected by the penalty rate reductions under the *Retail Award*.<sup>119</sup> ABI’s estimate is between 71,62 and 164,002 employees.<sup>120</sup> Whereas the SDA contends that the 412,171 persons employed in the ANZSIC industry classification ‘Retail Trade’ (which includes employees covered by the *Retail*, *Fast Food* and *Pharmacy Awards*), whose pay is determined by award only, are affected by the penalty rate reductions ‘irrespective of whether or not they presently perform any hours of work on a Sunday’.<sup>121</sup>

[153] The available data does not allow us to determine the number of employees affected by the penalty rate reductions with any precision. Nor is it necessary that we do so. It suffices to observe that the number will be significant, in respect of each of the awards before us, both in terms of absolute numbers and as a proportion of the employees covered by the relevant awards.

[154] We make the same observation about the monetary impact of the penalty rate reductions on particular employees. The extent of the impact on an individual employee will depend on a number of factors, including:

- whether the employee is paid in accordance with the relevant award or is covered by an enterprise agreement or over award arrangement;
- the frequency with which they work on Sundays and public holidays;
- the number of hours they work on Sundays and public holidays;
- their classification level and employment status (full-time, part-time or casual); and
- the applicable award.

[155] A range of potential adverse impacts were advanced in the proceedings. As a general proposition, the union submissions advance examples which tended to overstate the impact, while the employer submissions understate it. For our part, we accept that the reductions in penalty rates we have determined will have an adverse impact on the award-reliant employees who work at these times and are likely to reduce their earnings and have a negative impact on their relative living standards and on their capacity to meet their needs.

[156] For completeness we mention three matters.

[157] First, the fact that take-home pay orders are *not* an available option is significant and has implications for our consideration of the duration of any transitional period. As we observed in the *Penalty Rates decision*:

‘If ‘take home pay orders’ were available ... then the period over which the reductions are to be phased in may be shorter than it would otherwise be’.<sup>122</sup>

[158] Second, for the reasons given in Chapter 3.5 above we are not persuaded of the merit of inserting a ‘red circling’ term of the type proposed by the SDA in the modern awards which are the subject of these proceedings.

[159] Finally, as set out in Chapter 3.6 above, we are not persuaded that it is appropriate to impose any further delay in the implementation of the *Penalty Rates decision*. However, we recognise that commencing the implementation of the transition to the new Sunday rates on 1 July 2017 will mean that the affected employees will have had only about 4 months’ notice of the changes. Consequently, it is appropriate that the first step in the transition be smaller than subsequent steps.

## **5. The Modern Awards – Sunday Penalty Rates**

[160] A number of general submissions were received in relation to the transitional arrangements and any phasing in of changes to Sunday penalty rates.

[161] The Fair Work Ombudsman submits that any changes should coincide with adjustments to modern awards minimum wages which occur on 1 July each year.<sup>123</sup>

[162] The Small Business Ombudsman proposes a transition over a 24 to 36 month period or two to three adjustments.<sup>124</sup>

[163] The ACTU advanced a general submission in respect of the four modern awards subject to Sunday penalty rate reductions and submits that such reductions should be phased in ‘over at least

three instalments made at the time of the annual wage increase, for example, in instalments of 8%, 8% and 9% from 1 July 2019 onwards'.<sup>125</sup>

[164] We now turn to consider the other award specific transitional arrangements proposed in the various submissions before us.

### 5.1 *Fast Food Award*

[165] A range of proposals have been made by various parties relating to the reduction in Sunday penalty rates in the *Fast Food Award*.

[166] AFEI and the Chamber of Commerce and Industry Queensland (CCIQ)<sup>126</sup> submit that the proposed changes in penalty rates should be implemented in full on 1 July 2017.<sup>127</sup>

[167] ACCI and Business SA<sup>128</sup> submit that there should be no delay in the commencement of adjusted Sunday penalty rates<sup>129</sup> and full implementation should be introduced in not more than two phases.<sup>130</sup>

[168] CCIWA proposes that any reduction in penalty rates should occur in two equal instalments commencing on 1 July 2017 and 1 July 2018.<sup>131</sup>

[169] Ai Group submits that there should be two instalments in the reduction of Sunday penalty rates<sup>132</sup> to balance the needs of employees (to minimise the financial impact) and employers (to remove the burden of overcompensation associated with existing rates).<sup>133</sup> Ai Group submit that two instalments will result in the introduction of the reduction in a fair and just manner;<sup>134</sup> will permit the achievement of the modern award objective of a fair and relevant award in a timely manner; and will permit the implementation of the merits in a timely manner.<sup>135</sup> Further, it will result in a simpler, easier to understand and more stable modern award system.<sup>136</sup>

[170] Specifically, Ai Group submits that the Sunday penalty rate for a full-time or part-time Level 1 employee would reduce to 137.5% commencing on 1 July 2017 and to 125% commencing on 1 July 2018.<sup>137</sup> Casual employees would have their penalty rate reduced to 162.5% commencing 1 July 2017 and to 150% commencing 1 July 2018.<sup>138</sup> Ai Group opposes any proposition to reduce Sunday penalty rates in five instalments of 5 percentage points.<sup>139</sup>

[171] The National Retail Association (NRA) proposes the same penalty rate reduction and transition period as Ai Group.<sup>140</sup>

[172] As we have mentioned, the SDA submits that existing employees should continue to be paid a preserved rate for Sunday work until the rate of pay for Sunday work under the *Fast Food Award* equals or exceeds the preserved rate.<sup>141</sup> The SDA also proposes a phased reduction over three annual instalments commencing on 1 July 2019 for future employees.<sup>142</sup>

[173] Under the SDA proposal, future permanent employees would receive penalty rates of 142% commencing on 1 July 2019, 134% commencing on 1 July 2020 and 125% commencing on 1 July 2021.<sup>143</sup> Future casual employees would receive penalty rates of 167% commencing on 1 July 2019, 159% commencing on 1 July 2020 and 150% commencing on 1 July 2021.<sup>144</sup>

[174] The ACTU proposes that reductions to penalty rates commence on 1 July 2019<sup>145</sup> with an 8% reduction.<sup>146</sup> Further reductions of 8% and 9% would commence on 1 July 2020 and 1 July 2021 respectively.<sup>147</sup>

[175] The range of proposals made by the various parties are summarised in the table below.

**Table 2: summary of proposed transitional arrangements for the *Fast Food Award***

Party	Date	Sunday penalty rate – Level 1 employees only	
		Full-time and part-time	Casual
<a href="#">SDA</a>  <a href="#">ACTU</a> supports the SDA's proposed transition	1 July 2017	150%	175%
	1 July 2018	150%	175%
	1 July 2019	142%	167%
	1 July 2020	134%	159%
	1 July 2021	125%	150%
<a href="#">Ai Group</a>	1 July 2017	137.5%	162.5%
	1 July 2018	125%	150%
<a href="#">National Retail Association</a>	1 July 2017	137.5%	162.5%
	1 July 2018	125%	150%
<a href="#">Chamber of Commerce and Industry Queensland</a>	1 July 2017	125%	150%
<a href="#">AFEI</a>	1 July 2017	125%	150%

[176] We have had regard to the submissions advanced in support of the respective proposals, the considerations identified in Chapter 4 and the evidence, findings and conclusions in respect of the *Fast Food Award* in the *Penalty Rates Decision*. In relation to the evidence, findings and conclusions in the *Penalty Rates decision* we have had particular regard to:

- the overview of the Fast Food industry in Chapter 7.5.2 and of Fast Food industry employees in Chapter 7.5.5;
- the background to the *Fast Food Award* in Chapter 7.5.4;
- the Ai Group employee survey (at [1190]–[1264]) particularly the data on employee preferences (at [1290]–[1306]);
- the findings in relation to the s.134 considerations (see [1347]–[1390]) in particular the impact on low paid employees (at [1356]–[1359]); and
- the conclusions in Chapter 7.5.7.

[177] We have decided that the transitional arrangements set out below for the reduction in Sunday penalty rates in the *Fast Food Award*, are necessary to ensure that the *Fast Food Award* achieves the modern awards objective.

**Full-time and part-time employees – Level 1 only**

1 July 2017	150 per cent → <b>145 per cent</b>
1 July 2018	145 per cent → <b>135 per cent</b>
1 July 2019	135 per cent → <b>125 per cent</b>

**Casual employees (inclusive of casual loading) – Level 1 only**

1 July 2017	175 per cent → <b>170 per cent</b>
1 July 2018	170 per cent → <b>160 per cent</b>
1 July 2019	160 per cent → <b>150 per cent</b>

***Other variations***

[178] In the *Penalty Rates decision* (at [1397]) we invited parties to give consideration as to whether it is necessary to include a term in the *Fast Food Award* similar to clause 34.1A of the *Restaurant Award*. Clause 34.1A of the *Restaurant Award* was inserted as a consequence of the reduction in penalty rates flowing from the *2014 Restaurants Penalty Rates decision*<sup>148</sup> and provides as follows:

**‘34.1A Special condition regarding existing employees**

No existing employee classified as Level 3 or above shall be moved down to pay grade Levels 1 or 2 or be discriminated against in the allocation of work as a result of the variation of clause 34.1 by the Full Bench of the Fair Work Commission in proceedings number C2013/6610.’

[179] Ai Group opposes the insertion of a term in the *Fast Food Award* in similar terms to clause 34.1A, on the basis that such a term is not necessary to achieve the modern awards objective.

[180] The SDA takes a contrary position in its reply submission of 21 April 2017, submitting that:

‘The Commission has invited the parties to indicate whether it is considered necessary to include in the FFIA a term similar to clause 34.1A of the *Restaurants Award*. The AIG has submitted that it opposes the introduction of such a clause. The SDA submits that such a clause should be introduced.

First, notwithstanding the operation of Part 3-1 of the FW Act, the clause would serve an important role in educating employees and employers about the right of employees to not suffer discrimination or disadvantage as a result of the decision.

Secondly, when clause 34.1A of the *Restaurants Award* was introduced a Full Bench determined that it was an appropriate term to be included in a modern award.

Thirdly, the clause is necessary to be included in the FFIA in order for the award to achieve the modern awards objective. Alternatively, if this submission is not accepted, the clause should be introduced pursuant to section 142(1) of the FW Act, which permits the inclusion of “incidental terms.” It is submitted that the clause meets the definition of an incidental term. It is incidental to the terms to be introduced which will introduce differential penalty rates between classification levels, and is essential to making these new terms operate in an appropriate and fair manner.’<sup>149</sup> (references omitted)

[181] The first two points advanced by the SDA are unpersuasive. We acknowledge that such a clause would serve an ‘educative role’, but while such a function may be desirable that, of itself, is insufficient to warrant the insertion of an award term. To comply with s.138 the terms included in a modern award must be ‘necessary to achieve the modern awards objective’. There is plainly a distinction between that which is ‘necessary’ and that which is merely desirable.<sup>150</sup>

[182] As to the SDA’s second point, we note that the decision to insert clause 34.1A in the *Restaurant Award* does not appear to have been the subject of any debate in those proceedings and nor were any reasons given for the insertion of the clause. In such circumstances the insertion of the term in that award is of little assistance in the present proceedings.

[183] The third point advanced by the SDA – that the insertion of such a term is necessary in order for the *Fast Food Award* to meet the modern awards objective – is simply a bald assertion, not an argument.

[184] On the material presently before us we are not persuaded that the insertion of a term similar to clause 34.1A of the *Restaurant Award* is necessary. In the event that the SDA seeks to pursue this matter it may make an application to vary the award and it will be considered in the award stage of the Review.

[185] There are two final matters in respect of the *Fast Food Award*.

[186] The first is that at [1406] of the *Penalty Rates decision* we expressed the *provisional* view that clause 25.5(b) of the *Fast Food Award* be amended, as follows:

**(b) Saturday work**

- (i) A 25% loading will apply for all hours of work on a Saturday for full-time and part-time employees.
- (ii) A 50% loading will apply for all hours of work on a Saturday for casual employees, inclusive of the casual loading.

[187] The variation proposed is to clarify the method for calculating the Saturday rate for casuals such that the ‘default’ method proposed by the Productivity Commissions is adopted (see [1403]–[1405] of the *Penalty Rates decision*). No party opposed the provisional view set out above and the order giving effect to this decision will incorporate the proposed change.

[188] The final matter concerns an NRA proposal to amend clause 26, ‘Overtime’, by deleting the last sentence (see [1407]–[1408] of the *Penalty Rates decision*). The SDA opposed the proposed change and given that the issue has not been the subject of much debate we do not propose to make the change sought. If the NRA wishes to pursue its proposal then it may make an application to vary the award and it will be considered in the award stage of the Review.

**5.2 Hospitality Award**

[189] A range of proposals have been made by various parties relating to the reduction in Sunday penalty rates in the *Hospitality Award*.

[190] CCIQ<sup>151</sup> and AFEI<sup>152</sup> submit that the proposed changes in penalty rates should be implemented in full on 1 July 2017.

[191] The Australian Hotels Association (AHA) submits that the reduction in penalty rates should be phased in over two years commencing with penalty rates of 160% commencing on 1 July 2017 and 150% commencing on 1 July 2018.<sup>153</sup>

[192] ACCI and Business SA<sup>154</sup> submit that there should be no delay in the commencement of adjusted Sunday penalty rates<sup>155</sup> and full implementation should be introduced in not more than two phases.<sup>156</sup>

[193] CCIWA proposes that any reduction in penalty rates should occur in two equal instalments commencing on 1 July 2017 and 1 July 2018.<sup>157</sup>

[194] United Voice submits that any penalty rate reductions should be subject to a two year notice period.<sup>158</sup> United Voice proposes that reductions to penalty rates for permanent employees commence on 1 July 2019<sup>159</sup> with an 8% reduction.<sup>160</sup> Further reductions of 8% and 9% would commence on 1 July 2020 and 1 July 2021 respectively.<sup>161</sup>

[195] ACTU proposes the same penalty rate reduction and transition period as United Voice.<sup>162</sup>

[196] The range of proposals made by the various parties are summarised in the table below.

**Table 3: summary of proposed transitional arrangements for the *Hospitality Award***

Party	Date	Sunday penalty rate
		Full-time and part-time
<a href="#">United Voice</a>  <a href="#">ACTU</a> supports United Voice's proposed transition	1 July 2017	175%
	1 July 2018	175%
	1 July 2019	167%
	1 July 2020	159%
	1 July 2021	150%
<a href="#">Australian Hotels Association and the Accommodation Association of Australia</a>	1 July 2017	160%
	1 July 2018	150%
<a href="#">Chamber of Commerce and Industry Queensland</a>	1 July 2017	150%
<a href="#">AFEI</a>	1 July 2017	150%

[197] We have had regard to the submissions advanced in support of the respective proposals, the considerations identified in Chapter 4 and the evidence, findings and conclusions in respect of the *Hospitality Award* in the *Penalty Rates Decision*. In relation to the evidence, findings and conclusions in the *Penalty Rates decision* we have had particular regard to:

- the overview of the Hospitality sector in Chapter 7.1;
- the background to the *Hospitality Award* in Chapter 7.2.2;

- the evidence of United Voice lay witnesses and the observations about the impact of a reduction in Sunday penalty rates as the relative living standards and the needs of the low paid (at [784]–[824]);
- the evidence that disclosed a range of operational limitations imposed on Sundays, in order to reduce labour costs (at [779]);
- the finding that a lower Sunday penalty rate would increase the level and range of services offered (at [783]);
- the findings in relation to the s.134 considerations (see Chapter 7.2.5); and
- the conclusions in Chapter 7.2.6.

[198] We have decided that the transitional arrangements set out below for the reduction in Sunday penalty rates in the *Hospitality Award*, are necessary to ensure that the *Hospitality Award* achieves the modern awards objective.

#### **Full-time and part-time employees**

1 July 2017	175 per cent → <b>170 per cent</b>
1 July 2018	170 per cent → <b>160 per cent</b>
1 July 2019	160 per cent → <b>150 per cent</b>

### **5.3 Retail Award**

[199] A range of proposals have been made by various parties relating to the reduction in Sunday penalty rates in the *Retail Award*.

[200] AFEI submits that the proposed changes in penalty rates should be implemented in full on 1 July 2017.<sup>163</sup>

[201] The Australian Retailers Association (ARA)<sup>164</sup> and NRA<sup>165</sup> submit that penalty rates should be phased in over two instalments<sup>166</sup> with permanent and casual employees paid 175% (inclusive of casual loading) commencing on 1 July 2017.<sup>167</sup> The penalty rate of permanent employees would then be reduced to 150% commencing on 1 July 2018.

[202] Consistent with ARA and NRA, ABI<sup>168</sup> and CCIQ<sup>169</sup> submit that reductions in penalty rates for casual and permanent employees should be phased in over two stages.<sup>170</sup> ABI proposes that the casual and permanent penalty rates reduce to 175% commencing on 1 July 2017<sup>171</sup> and propose a further reduction to penalty rates for permanent employees to 150% commencing on 1 July 2018. Similarly, the Chamber of Commerce and Industry Western Australia (CCIWA) proposes that any reduction in penalty rates should occur in two equal instalments commencing on 1 July 2017 and 1 July 2018.<sup>172</sup>

[203] ACCI and Business SA<sup>173</sup> also submit that there should be no delay in the commencement of adjusted Sunday penalty rates<sup>174</sup> and full implementation should be introduced in not more than two phases.<sup>175</sup>



[204] As we have mentioned, the SDA submits that existing employees continue to be paid a preserved rate for Sunday work until the rate of pay for Sunday work under the *Retail Award* equals or exceeds the preserved rate.<sup>176</sup>

[205] SDA also proposes that there should be a five year transition period for any penalty rate reductions<sup>177</sup> and that the commencement of the transition period be deferred until 1 July 2019.<sup>178</sup> Under the SDA proposal the reduction in penalty rates for future employees would be phased in over six annual instalments (being a period of five years) commencing on 1 July 2019.<sup>179</sup>

[206] The range of proposals made by the various parties are summarised in the table below.

**Table 4: summary of proposed transitional arrangements for the *Retail Award***

Party	Date	Sunday penalty rate	
		Full-time and part-time	Casual
<a href="#">SDA</a>	1 July 2017	200%	200%
	1 July 2018	200%	200%
	1 July 2019	192%	200%
	1 July 2020	184%	195%
	1 July 2021	176%	190%
	1 July 2022	168%	185%
	1 July 2023	159%	180%
	1 July 2024	150%	175%
<a href="#">ARA</a>	1 July 2017	175%	175%
	1 July 2018	150%	175%
<a href="#">National Retail Association</a>	1 July 2017	175%	175%
	1 July 2018	150%	175%
<a href="#">ABI &amp; NSWBC</a>	1 July 2017	175%	175%
	1 July 2018	150%	175%
<a href="#">Chamber of Commerce and Industry Queensland</a>	1 July 2017	175%	175%
	1 July 2018	150%	175%
<a href="#">AFEI</a>	1 July 2017	150%	175%

[207] We have had regard to the submissions advanced in support of the respective proposals, the considerations identified in Chapter 4 and the evidence, findings and conclusions in respect of the *Retail Award* in the *Penalty Rates Decision*. In relation to the evidence, findings and conclusions in the *Penalty Rates decision* we have had particular regard to:

- the overview of the Retail sector in Chapter 8.1;
- the background to the *Retail Award* in Chapter 8.2.2;

- the evidence of the SDA's lay witnesses and the observations about the impact of a reduction in Sunday penalty rates as the relative living standards and the needs of the low paid (at [1623]–[1661]);
- the propositions drawn from the Retail Employers lay evidence, the Retail Survey and the Sands Report (at [1619]–[1622]);
- the findings in relation to the s.134 considerations (see Chapter 8.2.5); and
- the conclusions in Chapter 8.2.6.

[208] We have decided that the transitional arrangements set out below for the reduction in Sunday penalty rates in the *Retail Award*, are necessary to ensure that the *Retail Award* achieves the modern awards objective.

**Full-time and part-time employees**

1 July 2017	200 per cent → <b>195 per cent</b>
1 July 2018	195 per cent → <b>180 per cent</b>
1 July 2019	180 per cent → <b>165 per cent</b>
1 July 2020	165 per cent → <b>150 per cent</b>

**Casual employees (inclusive of casual loading)**

1 July 2017	200 per cent → <b>195 per cent</b>
1 July 2018	195 per cent → <b>185 per cent</b>
1 July 2019	185 per cent → <b>175 per cent</b>

[209] There is one final matter in respect of the *Retail Award*.

[210] The Retail Associations contend that the decision to reduce the Sunday penalty rate applies equally to shiftworkers under the *Retail Award* and advance the following submission in support of that contention:

‘Despite not being specifically addressed in the Penalty Rates Case decision, the Retail Associations have operated on the basis that the decision to reduce the Sunday penalty rate, applies equally to shiftworkers under the Retail Award.

The Retail Associations make this assumption on the basis of the FWC's findings that the current Sunday penalty rate is neither fair nor relevant, and the disutility of Sunday work has reduced over time. There is nothing before the FWC to suggest that shiftworkers should be treated any differently to permanent employees under the Retail Award.

As such, these submissions of the Retail Associations are intended to apply equally to shiftworkers under the Retail Award. The Retail Associations propose that from 1 July 2017 the rate for shiftwork performed on Sundays be 175% (200% for casuals) of the ordinary time rate.<sup>180</sup>

[211] In response to this submission we posed the following question on notice<sup>181</sup> to the SDA:

5.1 Question for the SDA:

Does the SDA oppose the submission advanced by the Retail Associations? If so, on what basis?

[212] The SDA responded to the question put that it opposed the Retail Employers submission and submitted that:

‘it is an impermissible attempt to invite the Commission to introduce a further reduction to penalty rates which is not the subject of the decision. The Commission has invited the parties to make submissions on transitional matters, not to request further cuts after the substantive case has been conducted.’<sup>182</sup>

[213] We note that there was no evidence in the substantive proceedings as to the number of shiftworkers covered by the *Retail Award*; indeed there was no evidence at all directed specifically at this aspect of the Retail Employers claim. We also note that the Retail Employers did not address this issue in their submissions or otherwise draw attention to the matter.

[214] In the circumstances the appropriate course is for the Retail Employers (or any other interested party) to file an application to vary the *Retail Award* in respect of the Sunday rate applicable to shiftworkers. Such an application would then be determined in conjunction with the SDA’s claim in respect of Saturday and late night rates for casuals.

#### 5.4 *Pharmacy Award*

[215] A range of proposals have been made by various parties relating to the reduction in Sunday penalty rates in the *Pharmacy Award*.

[216] The Pharmacy Guild submits that the change to Sunday penalty rates should be introduced in two equal instalments of 25%.<sup>183</sup> The Sunday penalty rate for permanent employees should be 175% commencing on 1 July 2017 and 150% commencing 1 July 2018.<sup>184</sup> The Pharmacy Guild proposes that the penalty rate for casual employees should be set at 200% commencing on 1 July 2017 and 175% commencing on 1 July 2018.<sup>185</sup> Similarly, CCIWA proposes that any reduction in penalty rates should occur in two equal instalments commencing on 1 July 2017 and 1 July 2018.<sup>186</sup>

[217] ACCI and Business SA<sup>187</sup> submit that there should be no delay in the commencement of adjusted Sunday penalty rates<sup>188</sup> and full implementation should be introduced in not more than two phases.<sup>189</sup>

[218] Consistent with their position in relation to the *Fast Food* and *Retail Awards*, SDA submits that existing employees continue to be paid a preserved rate for Sunday work until the rate of pay for Sunday work under the *Pharmacy Award* equals or exceeds the preserved rate.<sup>190</sup>

[219] The SDA submits that the reduction in penalty rates for ‘future employees’ should be phased in over six annual instalments (being a period of five years) commencing on 1 July 2019.<sup>191</sup>

[220] APESMA agrees with the SDA’s proposal for transitioning to new arrangements in the awards under review.<sup>192</sup>

[221] The range of proposals made by the various parties are summarised in the table below:

**Table 5: summary of proposed transitional arrangements for the *Pharmacy Award***

Party	Date	Sunday penalty rate	
		Full-time and part-time	Casual
<a href="#">SDA</a> <sup>193</sup>  <a href="#">ACTU</a> supports a 2 year delay however their submission does not clarify how the rates will transition from 2019 to reach the proposed rates of 150% / 175%	1 July 2017	200%	225%
	1 July 2018	200%	225%
	1 July 2019	192%	200%
	1 July 2020	184%	195%
	1 July 2021	176%	190%
	1 July 2022	168%	185%
	1 July 2023	159%	180%
	1 July 2024	150%	175%
<a href="#">Pharmacy Guild</a>	1 July 2017	175%	200%
	1 July 2018	150%	175%
<a href="#">ABI &amp; NSWBC</a>	1 July 2017	175%	175%
	1 July 2018	150%	175%
<a href="#">Chamber of Commerce and Industry Queensland</a>	1 July 2017	175%	175%
	1 July 2018	150%	175%

[222] We have had regard to the submissions advanced in support of the respective proposals, the considerations identified in Chapter 4 and the evidence, findings and conclusions in respect of the *Pharmacy Award* in the *Penalty Rates Decision*. In relation to the evidence, findings and conclusions in the *Penalty Rates decision* we have had particular regard to:

- the overview of the Retail sector in Chapter 8.1;
- the background to the *Pharmacy Award* in Chapter 8.3.2;
- Chapter 8.3.3, dealing with the Pharmacy industry
- the evidence of the SDA and APESMA lay witnesses and the observations about the impact of a reduction in Sunday penalty rates as the relative living standards and the needs of the low paid (at [1815]–[1819] and [[1826]–[1830]]);
- the general propositions drawn from the Pharmacy Guild’s lay witnesses (at [1765]–[1769]) and the finding that a reduction in Sunday penalty rates is likely to improve the range of health care services available on Sundays (at [1861]);
- the findings in relation to the s.134 considerations (see Chapter 8.3.5(i)); and
- the conclusions in Chapter 8.3.6.

[223] We have decided that the transitional arrangements set out below for the reduction in Sunday penalty rates in the *Pharmacy Award*, are necessary to ensure that the *Pharmacy Award* achieves the modern awards objective.

**Full-time and part-time employees**

1 July 2017    200 per cent → **195 per cent**  
 1 July 2018    195 per cent → **180 per cent**  
 1 July 2019    180 per cent → **165 per cent**  
 1 July 2020    165 per cent → **150 per cent**

**Casual employees (inclusive of casual loading)**

1 July 2017    225 per cent → **220 per cent**  
 1 July 2018    220 per cent → **205 per cent**  
 1 July 2019    205 per cent → **190 per cent**  
 1 July 2020    190 per cent → **175 per cent**

**6. Public holiday penalty rates**

[224] In the *Penalty Rates decision* we decided to reduce the public holiday penalty rates in the *Hospitality, Restaurant, Fast Food, Retail and Pharmacy Awards* as shown in Table 6 below (in marked up format):

**Table 6**  
**Proposed public holiday penalty rates in the *Hospitality and Retail Awards***

Award title	Public holiday penalty rates (%)	
[1]	Full-time & part-time	Casual
Hospitality Award (cl. 32)	<del>250</del> 225	<del>275</del> 250
Restaurant Award (cl. 34)	<del>250</del> 225	250
Retail Award (cl. 29)	<del>250</del> 225	<del>275/250</del> 250
Fast Food Award (cl. 30)	<del>250</del> 225	<del>275</del> 250
Pharmacy Award (cl. 31)	<del>250</del> 225	<del>275</del> 250

[225] At [2025] of the *Penalty Rates decision* we said:

‘Balancing the need to provide some notice of these changes with our desire to avoid the added complexity of transitional provisions where appropriate, we have decided that the reduction in public holiday penalty rates will commence on 1 July 2017.’

[226] United Voice disagrees with the proposition that the reduction in public holiday penalty rates commence on 1 July 2017 and submits that they should be phased in over the same period it proposes in respect of the reduction in the Sunday penalty rates in the *Hospitality Award*, that is:

- July 2019:            8 per cent reduction

- July 2020: 8 per cent reduction
- July 2021: 9 per cent reduction

[227] In support of the above proposition United Voice submits:

‘... the cuts to the public holiday rate will have similar effect and should be phased in over an identical period. Public holiday loadings provide additional income to low paid workers, for example, at times of the year when they are under financial stress such as the Christmas/New Year period and may rely on this additional income in their financial planning.’<sup>194</sup>

[228] The SDA advances an identical submission.<sup>195</sup>

[229] We have had regard to the submissions made in respect of this issue and to the considerations identified in Chapter 4. Further, we also note that:

- the number and timing of State and Territory declared public holiday vary depending on the particular State or Territory; most public holidays occur in the first 6 months of the year;<sup>196</sup>
- the impact of the reductions in public holiday penalty rates will, in aggregate, be less than the reduction in Sunday penalty rates.

[230] In all the circumstances we are of the view that the reductions in public holiday penalty rates should take effect on 1 July 2017, without any transitional arrangements. It is necessary to vary the *Fast Food, Hospitality, Restaurant, Retail and Pharmacy Awards* in the manner proposed to ensure that those awards achieve the modern awards objective.

## 7. Other matters

[231] There are a number of aspects of the matters before us which are yet to be finalised, in particular:

- (i) the future conduct of the review of penalty rates in the *Clubs Award*;
- (ii) the future conduct of any further proceedings in respect of the *Restaurant Award*;
- (iii) the future conduct of the review of penalty rates in the *Pharmacy Award*;
- (iv) the proposed change in terminology: from ‘penalty rates’ to ‘additional remuneration’;
- (v) the review of the penalty rate provisions in the *Hair and Beauty Award*; and
- (vi) further consideration of the use of ‘loaded rates’.

### (i) The *Clubs Award*

[232] In Chapter 7.3.6 of the *Penalty Rates decision* we concluded that CAI had not established a merit case sufficient to warrant the variation of the *Clubs Award*. We also express the view that there were 2 options in respect of the future conduct of the penalty rates review of the *Clubs Award*:

- Option 1: determinations could be made revoking the *Clubs Award* and varying the coverage of the *Hospitality Award* so that it covers the class of employers and employees presently covered by the *Clubs Award*. Such a course would obviously avoid the need for any further Review proceedings in respect of the *Clubs Award*.
- Option 2: CAI and any other interested party could be provided with a further opportunity to advance a properly based merit case in support of any changes they propose in respect of weekend penalty rates.

[233] At [1000] of the *Penalty Rates decision* we expressed the *provisional* view that option 1 had merit and warranted further consideration. We provided an opportunity for interested parties to express a view as to the future conduct of this aspect to these proceedings and, in particular, invited submissions on the two options set out above.

[234] In correspondence dated 2 May 2017 Clubs Australia (Industrial) indicated a preference for option 1. Whereas in its submission RSL Victoria opposes option 1 and states that it does not intend to ‘agitate any further arguments in support of changes to penalty rates the subject of the Clubs Australia (Industrial) application’.<sup>197</sup>

[235] United Voice submits that Clubs Australia (Industrial) should not be permitted to relitigate its failed claim<sup>198</sup> for variations to weekend penalty rates but acknowledges that option 1 raises ‘quite a different issue’.<sup>199</sup>

[236] The *provisional* views expressed in the *Penalty Rates decision* were just that and we sought further submissions before making any decision on that aspect. In the circumstances the appropriate way forward is for Clubs Australia (Industrial) (or any other interested party) to file an application setting out the course of action it proposes. That application will be allocated to a Full Bench and it will be a matter for that Full Bench, after providing the interested parties with an opportunity to be heard, to determine the future conduct of the matter.

## (ii) **The Restaurant Award**

[237] In Chapter 7.4.6 of the *Penalty Rates decision* we concluded that RCI had not established a merit case sufficient to warrant varying the Sunday penalty rates in this award and made some observations about the future conduct of this aspect of the proceedings:

‘At present the Restaurant Award provides for a 15 per cent loading for work performed between ‘midnight and 7.00 am’. For the reasons given we have decided to vary the span of hours prescribed in clause 34.2(a)(ii) so that the additional 15 per cent loading applies between ‘midnight and 6.00 am’.

As to the claims in respect of the Sunday penalty rate, on the material presently before us we are not satisfied that the variations proposed are necessary to ensure that the modern award sought to be varied achieves the modern awards objective. In short, RCI has not established a merit case sufficient to warrant the granting of the claim.

If these were simply *inter partes* proceedings we would dismiss the RCI claim. But the claim has been made in the context of the Review and s.156 imposes an obligation on the Commission to review each modern award.

We propose to provide RCI (and any other interested party) with a further opportunity to seek to establish that the weekend penalty rates in the *Restaurant Award* do not provide a ‘fair and relevant minimum safety net’. In the event that a party wishes to take up this opportunity, it will need to address the deficiencies in the case put to date, as set out above. In particular, any such case will need to:

- provide material which would enable us to assess the impact of the variations proposed (see [1151]);
- provide evidence as to the effects (in terms of employment and service levels of the reductions in Sunday penalty rates consequent on the *Restaurants 2014 Penalty Rates decision* (see [1152]-1153));
- provide a cogent argument as to why we should depart from the *Restaurants 2014 Penalty Rates decision* in respect of Sunday penalty rates; and
- address the Productivity Commission submissions in relation to the payment of casual loading in addition to weekend penalty rates.

In relation to the provision of additional evidence as to the effects of the 2014 reduction in Sunday penalty rates, we are not suggesting that quantitative evidence (or ‘natural experiment’ evidence) as to the impact of these changes is required. However we do expect significantly more extensive lay evidence as to this issue than was presented in these proceedings.

In relation to the last point, in the event that we were persuaded to depart from the Transitional Review Full Bench decision we put any applicants on notice that the outcome of any further proceedings may result in the acceptance of the Productivity Commission submission such that Sunday penalty rates are varied so that all casuals receive both the Sunday penalty rate applicable to full-time and part-time employees *and* the casual loading.<sup>200</sup>

[238] RCI wrote to the Commission on 24 March 2017 confirming its intention to press its claim in relation to the *Restaurant Award*.<sup>201</sup>

[239] United Voice submits that RCI should not be permitted to relitigate its ‘failed claim’ for the variation of weekend penalty rates.<sup>202</sup>

[240] We are conscious that the view expressed in the *Penalty Rates decision* – that RCI be provided a further opportunity to seek to establish that the weekend penalty rates in the *Restaurant Award* do not provide a ‘fair and relevant minimum safety net’ – was made without the benefit of submissions from the interested parties. In the circumstances the appropriate way forward is for RCI to file an application to vary the *Restaurant Award* setting out the penalty rate variations it seeks. That application will be allocated to a Full Bench and it will be a matter for that Full Bench, after providing the interested parties with an opportunity to be heard, to determine whether RCI is to be provided with a further opportunity to litigate its claim.

### (iii) The *Pharmacy Award*

[241] At [1874]–[1892] of the *Penalty Rates decision* we expressed the view that a number of penalty rates in the *Pharmacy Award* should be reviewed. These rates are the loadings applicable for work performed before 8.00 am, between 7.00 pm to 9.00 pm and from 9.00 pm to midnight on Sundays; Saturday work and work performed before 7.00 am and between 9.00 pm and midnight, Monday to Friday.



[242] The Pharmacy Guild is invited to file an application to vary the *Pharmacy Award* which reflects its views as to the appropriate penalty rates for work performed at the times set out above. That application will be allocated to a Full Bench for hearing and determination.

**(iv) Proposed change in terminology**

[243] The Hospitality Employers initially sought to remove the reference to ‘penalty’ and ‘penalty rates’ in clause 32 of the *Hospitality Award*<sup>203</sup> and insert references to ‘additional remuneration’. A similar variation was proposed by the Pharmacy Guild in respect of the *Pharmacy Award*.<sup>204</sup>

[244] The changes proposed appear to have been sought on the basis that s.134(1)(da)(iii) of the Act speaks of ‘the need to provide *additional remuneration* for ... employees working on weekends’.

[245] In the proceedings to date the submissions in respect of the proposed change in terminology have been very limited and the change is only advanced in respect of two modern awards. The introduction of different expressions (which have the same meaning) in different modern awards is apt to confuse. Such an outcome would not be consistent with ‘the need to ensure a simple, easy to understand ... modern award system’ (s.134(1)(g)). Further, if changes of the type proposed were to be made then, *prima facie*, they should be made in all modern awards which currently provide for ‘penalty rates’ (see generally [901]–[906]). On this basis we invited further submissions in respect of this issue.

[246] A Statement and Directions were issued on 18 April 2017<sup>205</sup> which set out a timetable for submissions in relation to the issue. Some 10 submissions were received in response to the directions (see Attachment A).

[247] Submissions filed in response to the Statement overwhelmingly opposed the proposal: ACTU,<sup>206</sup> APESMA,<sup>207</sup> Health Services Union of Australia (HSU),<sup>208</sup> SDA,<sup>209</sup> Construction, Forestry, Mining and Energy Union (CFMEU),<sup>210</sup> The Maritime Union of Australia (MUA),<sup>211</sup> Australian Nursing and Midwifery Federation (ANMF)<sup>212</sup> and Ai Group.<sup>213</sup>

[248] ABI provided qualified support for the proposed change in terminology noting that it would better align the award terms with the purpose of additional weekend payments. ABI’s support for any change in terminology was predicated on the Commission being satisfied that such a change ‘assists with better meeting the objective of a “*simple, easy to understand, stable and sustainable modern award system*”’.<sup>214</sup>

[249] On 5 May 2017, correspondence was received from the Hospitality Employers and the Pharmacy Guild stating that they no longer pressed their claims for the change in terminology from ‘penalty rate’ to ‘additional remuneration’ in the *Hospitality Award* and the *Pharmacy Award*.<sup>215</sup>

[250] As stated in the *Penalty Rates decision*,<sup>216</sup> the contemporary purpose of ‘penalty rates’ in modern awards is to compensate employees for the disutility associated with working at particular times and deterrence is no longer a relevant consideration. We acknowledge that changing the terminology – from ‘penalty rates’ to ‘additional remuneration’ – provides a better alignment with this contemporary purpose.

[251] But we are not persuaded that such a change would make the modern award system ‘simple’ or ‘easy to understand’ (a relevant consideration under s.134(1)(g)). Indeed such a change may be apt to confuse and may increase the regulatory burden on business (a relevant consideration under s.134(1)(f)). We say this because of the use of the expression ‘penalty rates’ in various other parts of the Act. For example, s.16 defines ‘base rate of pay’ as:

‘(1) The **base rate of pay** of a national system employee is the rate of pay payable to the employee for his or her ordinary hours of work, but not including any of the following:

...(d) overtime and penalty rates’.

[252] An employee’s ‘full rate of pay’ is defined in s.18 as:

‘(1) The **full rate of pay** of a national system employee is the rate of pay payable to the employee, including all of the following:

...(d) overtime and penalty rates’.

[253] Various award and statutory entitlements are determined by reference to an employee’s ‘base rate of pay’ or ‘full rate of pay’. For example, the NES entitlement to annual leave, personal leave, compassionate leave and redundancy payments are all calculated by reference to an employee’s base rate of pay. Payments in lieu of notice of termination are calculated on an employee’s full rate of pay.

[254] If the terminology associated with penalty rates changed it is conceivable that there may be some uncertainty as to how ‘additional remuneration’ is to be treated.

[255] We would also observe that the terminology ‘penalty rates’ is used in s.139(1)(e) - in describing the matters about which terms may be included in a modern award – and in the record keeping obligations specified in the *Fair Work Regulations 2009* (for example see Regulation 3.33(3)(d)).

[256] In the circumstances we do not propose to proceed with the change in terminology.

(v) ***Hair and Beauty Award***

[257] The *Hair and Beauty Award* was the subject of a claim to reduce Sunday penalty rates, by ABI, which was part of these proceedings. In correspondence dated 14 September 2016 ABI stated that its claim in respect of this award was no longer pressed. The weekend penalty rates in the *Hair and Beauty Award* are set out below:

Full-time & part-time employees		Casual employees	
Saturday	Sunday	Saturday	Sunday
133%	200%	133%	200%

[258] In the *Penalty Rates decision* we observed that the existing rates appear to raise issues about the level of the Sunday penalty rate and the penalty rates applicable to casual employees. While the Commission considered that it would be appropriate for these rates to be reviewed, we also noted that there would be significant practical impediments to the Commission acting on its own motion to obtain relevant lay evidence. The Commission sought a proponent for change (and a

contradictor) as a useful means of ensuring that all of the relevant considerations are appropriately canvassed.<sup>217</sup>

[259] On 22 March 2017 Ai Group wrote to the Commission and stated that it represents the Hair & Beauty Industry Association and is prepared to take on the proponent role.

[260] Ai Group is to file an application (on behalf of the Hair and Beauty Industry Association) setting out the changes in penalty rates it proposes. The matter will then be allocated to a Full Bench and listed for programming.

#### (vi) Loaded Rates

[261] A ‘loaded rate’ in this context refers to a rate which is higher than the applicable minimum hourly rate specified in the modern award and is paid for all hours worked instead of certain penalty rates (such as the penalty rates for Saturday and Sunday work).

[262] In the *Penalty Rates decision* we agreed with the view expressed by the Transitional Review Full Bench that there is merit in considering the insertion of appropriate loaded rates into the *Hospitality* and *Retail* awards. We also noted that the *Hospitality Award* already has a form of loaded rate. Clause 27.1 of that award provides that an employer and employee can enter into an alternative arrangement to the payment of the minimum weekly wages, penalty rates and overtime payments prescribed in the award. In essence, and subject to some important safeguards, an employer and employee can enter into an agreement to pay a ‘loaded rate’ which is 25 per cent above the minimum weekly wage instead of penalty rates and overtime.

[263] We went on to make it clear that we were not suggesting that a provision such as clause 27.1 of the *Hospitality Award* is necessarily appropriate for other *Hospitality* and *Retail* awards. But *subject to appropriate safeguards*, schedules to these awards could be developed which provide that if employees are paid a higher (‘loaded’) rate of pay then they would not be entitled to certain penalty payments. We went on to express the view that, subject to the inclusion of appropriate safeguards, ‘loaded rates’ may make awards simpler and easier to understand, consistent with the consideration in s.134(1)(g).

[264] As observed in the *Penalty Rates decision*<sup>218</sup>, we are alive to the potential complexity involved in the task of developing schedules appropriately for loaded rates. Determining an appropriate loaded rate would not be straightforward and it has to be borne in mind that any loaded rate will remain part of the safety net and will have to be fair and relevant.

[265] In the course of its submission ACOSSE proposed that:

‘...the Commission must ensure that the decision does not result in existing or future low-paid employees being worse off in terms of the income they receive for the hours that they work. One option for achieving this outcome is to ensure that any existing or future employees subject to reductions in penalty rates in the affected Awards are paid ‘loaded hourly rates’ to compensate for potential losses of pay.’<sup>219</sup>

[266] We assume that what is proposed is that the minimum hourly rates of pay in the *Fast Food*, *Hospitality*, *Retail* and *Pharmacy Awards* be increased to compensate employees for the penalty rate reductions. It is not clear how such a proposal would operate. Does it only apply to employees

who work on Sundays or is it intended to apply more generally? How are the ‘loaded hourly rates’ to be calculated?

[267] Nor is it clear how ACOSS’s proposal can be said to be consistent with the findings in the *Penalty Rates decision* that, in essence, the additional remuneration received by those employees for working on Sundays is *not* ‘fair and relevant’ because it overcompensates them given the extent of the disutility associated with Sunday work.

[268] We note that the minimum wages objective (see s.284(1)) applies to the variation of modern award minimum wages and ACOSS’s submission makes no attempt to address the various considerations identified in s.284(1)(a) to (c).

[269] On the limited material before us we do not propose to give any further consideration to ACOSS’s proposal. In the event any interested party wishes to advance the proposal (or a variant of it), it may do so by making an application to vary one or more of the modern awards affected by our decision. Any such application will be considered in the award stage of the Review.

[270] The proposition advanced by ACOSS is quite different to what we envisaged at [2063] – [2084] of the *Penalty Rates decision*. We confirm our view that there is merit in considering the insertion of appropriate loaded rates into the relevant awards. We also confirm that the development of loaded rates will be an iterative process undertaken in consultation with interested parties. At [2084] of the *Penalty Rates decision* we indicated that this process would commence after we had determined the transitional arrangements in respect of the reductions in Sunday penalty rates. While this decision determines the relevant transitional arrangements we think it prudent to await the completion of the foreshadowed judicial review before commencing the process of developing loaded rates in the relevant awards.

[271] For completeness, we note, and reject, ACCI’s submission that any further consideration of loaded rates only be instigated on application (by unions or employers) and not on the Commission’s own motion. As the Commission has observed on a number of occasions, modern awards are very different to awards of the past. Modern awards are not made to prevent or settle industrial disputes between particular parties. Rather, modern awards are, in effect, regulatory instruments that set minimum terms and conditions of employment for the employees to whom the modern award applied. Further, the 4 yearly review is to be distinguished from *inter parties* proceedings; it is conducted on the Commission’s own motion and is not dependent upon an application by an interested party.

## 8. Next Steps

[272] This chapter deals with the steps we propose be taken to finalise the matters before us.

### (i) Variation determinations

[273] Draft variation determinations in respect of the Sunday penalty rate provisions in the *Fast Food, Hospitality, Retail and Pharmacy Awards*, the public holiday penalty rate provisions in the *Fast Food, Hospitality, Restaurant, Retail and Pharmacy Awards*<sup>220</sup> and late night penalties in the *Fast Food and Restaurant Awards*<sup>221</sup> will be published shortly. Interested parties will have 7 days to comment on the draft variation determinations before they are finalised.

**(ii) Clubs Award**

[274] Clubs Australia (Industrial) (or any other interested party) is to file an application setting out the course of action it proposes. That application will be allocated to a Full Bench and it will be a matter for that Full Bench, after providing the interested parties with an opportunity to be heard, to determine the future conduct of the matter.

**(iii) Hair and Beauty Award**

[275] Ai Group is to file an application (on behalf of the Hair and Beauty Industry Association) setting out the changes in penalty rates it proposes. The matter will then be allocated to a Full Bench and listed for programming.

**(iv) Pharmacy Award**

[276] The Pharmacy Guild is invited to file an application to vary the *Pharmacy Award* which reflects its views as to the appropriate penalty rates for work performed at the times set out at [238] above. That application will be allocated to a Full Bench for hearing and determination.

**(v) Restaurant Award**

[277] RCI is to file an application to vary the *Restaurant Award* setting out the penalty rate variations it seeks. That application will be allocated to a Full Bench and it will be a matter for that Full Bench, after providing the interested parties with an opportunity to be heard, to determine whether RCI is to be provided with a further opportunity to litigate its claim.

**(vi) The Retail Award**

[278] The Retail Employers (or any other interested party) are to file an application to vary the *Retail Award* in respect of the Sunday rate applicable to shiftworkers. Any such application will be determined in conjunction with the SDA's claim in respect of Saturday and late night rates for casuals.

**(vii) Proposed change in terminology**

[279] The Hospitality Employers initially sought to remove the reference to 'penalty' and 'penalty rates' in clause 32 of the *Hospitality Award*<sup>222</sup> and insert references to 'additional remuneration'. A similar variation was proposed by the Pharmacy Guild in respect of the *Pharmacy Award*.<sup>223</sup> Submissions received in response overwhelmingly opposed the proposal. On 5 May 2017 the Hospitality Employees and the Pharmacy Guild stated that their proposal was no longer pressed.

[280] In the circumstances we do not propose to proceed with the change in terminology. We are not persuaded that such a change would make the modern award system 'simple' or 'easy to understand' (a relevant consideration under s.134(1)(g)).

*(viii) Loaded rates*

[281] We confirm our view that there is merit in considering the insertion of appropriate loaded rates into the relevant awards. We also confirm that the development of loaded rates will be an iterative process undertaken in consultation with interested parties. While this decision determines the relevant transitional arrangements we think it prudent to await the completion of the foreshadowed judicial review before commencing the process of developing loaded rates in the relevant awards. We note, and reject, ACCI's submission that any further consideration of loaded rates only be instigated on application (by unions or employers) and not on the Commission's own motion.

PRESIDENT

*Appearances:*

*C. Dowling, K. Burke, S. Bull and M. Robson* for United Voice.

*S. Moore and Y. Bakri* for the Shop, Distributive and Allied Employees' Association.

*H. Dixon and A. Gotting* for the Australian Industry Group.

*L. Izzo* for Australian Business Industrial and New South Wales Business Chamber.

*N. Tindley* for the Retail Associations.

*S. Wellard* for Pharmacy Guild of Australia, the Australian Hotels Association and the Accommodation Association of Australia.

*S. Barklamb* for the Australian Chamber of Commerce and Industry.

*A. Duc* for Restaurant and Catering Industrial.

*J. Fleming* for the Australian Council of Trade Unions.

*Hearing details:*

Before the Full Bench:

2017.

Melbourne, Brisbane, Sydney and Canberra (video hearing).

9 May.

Conference before Hampton C:

2017.

Sydney and Melbourne (video conference)

21 April.

Printed by authority of the Commonwealth Government Printer  
<Price code J, PR593392>

## Endnotes

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- <sup>1</sup> [\[2017\] FWCFB 1001](#)
- <sup>2</sup> For the reasons set out [\[2017\] FWCFB 1001](#) at [1915]
- <sup>3</sup> See [\[2017\] FWCFB 1001](#) at [1126]–[1137], [1154], [1324]–[1346] and [1391]
- <sup>4</sup> [\[2017\] FWCFB 1551](#)
- <sup>5</sup> [\[2017\] FWCFB 1001](#)
- <sup>6</sup> [\[2017\] FWCFB 1934](#)
- <sup>7</sup> Note the Background Paper was corrected and republished on 26 May 2017 to incorporate comments from parties
- <sup>8</sup> [\[2017\] FWCFB 1001](#) at [824]
- <sup>9</sup> [\[2017\] FWCFB 1001](#) at [823]
- <sup>10</sup> [ACTU submission](#) 24 March 2017 at para 5
- <sup>11</sup> [Federal Opposition submission](#), 24 March 2017 at para 1.1.3
- <sup>12</sup> *Ibid* at paras 1.2.3 – 1.2.4
- <sup>13</sup> *Ibid* at para 4.1.3 and following
- <sup>14</sup> [Qld Government submission](#), 24 March 2017
- <sup>15</sup> [SA Government submission](#), 24 March 2017
- <sup>16</sup> [Victorian Government submission](#), 24 March 2017
- <sup>17</sup> [WA Government submission](#), 24 March 2017
- <sup>18</sup> [ACT Government submission](#), 24 March 2017
- <sup>19</sup> [NT Government submission](#) 27 March 2017
- <sup>20</sup> [NSW Opposition submission](#) 24 March 2017
- <sup>21</sup> [Tasmanian Opposition submission](#) 24 March 2017
- <sup>22</sup> [APESMA submission](#), 24 March 2017 at paras 5–11
- <sup>23</sup> [RAFFWU submission](#) 24 March 2017
- <sup>24</sup> Ai Group submission in reply 21 April 2017 at paras 17–19
- <sup>25</sup> [2013] FCAFC 162
- <sup>26</sup> *Ibid* at [22]; Also see *Davis v Insolvency and Trustee Service Australia (No 2)* (2011) 190 FCR 437 at 439–440, [4] and [6]
- <sup>27</sup> [ABI submission in reply](#), 20 April 2017, at paras 2.6–2.7
- <sup>28</sup> [ABI submission in reply](#), 20 April 2017, at paras 2.8–2.11
- <sup>29</sup> [ABI submission in reply](#), 20 April 2017, at para 2.12
- <sup>30</sup> United Voice submission in reply, 20 April 2017
- <sup>31</sup> [SDA further submission](#) 4 May 2017
- <sup>32</sup> [Pharmacy Guild submission in reply](#) 21 April 2017, at para 2
- <sup>33</sup> Retail Associations submission in reply, 21 April 2017 at para 5
- <sup>34</sup> [AFEI submission in reply](#), 7 April 2017 at para 2
- <sup>35</sup> [ACCI submission in reply](#), 21 April 2017 at paras 9–17
- <sup>36</sup> See *R v Wallis; Ex parte Employers Association of Wool Selling Brokers* (1949) 78 CLR 529 at 550 per Dixon J, an application of the maxim *expressum facit cessare tacitum*. Further, there is a well-established principle that what cannot be done directly cannot be done indirectly, see: *Commonwealth v State of Queensland* (1920) 29 CLR 1 at 15; *Toohey v Gunther* (1928) 41 CLR 181 at 195 and *R v Gough; Ex parte Australasian Meat Industry Employees' Union* (1965) 114 CLR 394 at 422; *Caltex Oil (Aust) Pty Ltd v Best* (1990) 170 CLR 516 at p522–523; see also DK Singh ‘What Cannot be Done Directly Cannot be Done Indirectly: Part I’ (1959) 32 ALR 374 and DK Singh, ‘What Cannot be Done Directly Cannot be Done Indirectly: Part II’ (1959) 33 ALJ 3.
- <sup>37</sup> Bill Shorten (Minister for Employment and Workplace Relations), Fair Work Amendment Bill 2013, Second Reading Speech, 21 March 2013
- <sup>38</sup> Federal Opposition submission 24 March 2017 at paras 1.2.3–1.2.4
- <sup>39</sup> [\[2017\] FWCFB 1001](#) at [117] and [120]

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<sup>40</sup> [ACCI submission](#) 21 April 2017, at para 6–7

<sup>41</sup> *Australian National Railways Commission v Rutjen's* Print N1939, 27 May 1996 per Ross VP, Harrison DP and Larkin C. at p. 11; *Coal and Allied Operations Pty Ltd v AFMEPKIU* (1997) 73 IR 311 at 317–318

<sup>42</sup> (1984) 1 FCR 354

<sup>43</sup> *Ibid* at [356]

<sup>44</sup> *Equal Remuneration Decision 2015* [2015] FWCFB 8200 at [246]

<sup>45</sup> *Coal and Allied Operations Pty Ltd v AFMEPKIU* (1997) 73 IR 311 at 317–318

<sup>46</sup> [\[2017\] FWCFB 1001](#) at [269]

<sup>47</sup> (2015) 254 IR 238

<sup>48</sup> *Ibid* at [103]–[104]

<sup>49</sup> [2017] FWCFB 1001 at [2000] and [2021]

<sup>50</sup> [Ai Group submission in reply and responses to questions on notice](#), 21 April 2017

<sup>51</sup> [ACCI submission in reply and responses to questions on notice](#), 21 April 2017

<sup>52</sup> [Pharmacy Guild, submission in reply and responses to questions on notice](#), 21 April 2017

<sup>53</sup> [SDA, submission in reply and responses to questions on notice](#), 21 April 2017

<sup>54</sup> [Restaurant and Catering Industrial, submission in reply and responses to questions on notice](#), 21 April 2017

<sup>55</sup> We note that [AFEI's written submission](#) of 24 March 2017 also proposed that the changes be implemented 'in full on 1 July 2017'. AFEI was not a principal employer party in the substantive proceedings. See [\[2017\] FWCFB 1001](#) at [302]

<sup>56</sup> We note that, as contended by ABI, the power to insert transitional arrangements may also be derived from subdivision B of Part 2-3 of the Act.

<sup>57</sup> [Ai Group submission](#), 24 March 2017 at para 43

<sup>58</sup> [Transcript](#), 9 May 2017 at PN29265

<sup>59</sup> See [\[2017\] FWCFB 1001](#) at [117]–[119]

<sup>60</sup> [Transcript](#), 9 May 2017 at PN29037

<sup>61</sup> *Nguyen v Nguyen* (1990) 169 CLR 245 at 269; also see *Re v Moore; ex parte Australian Telephone and Phonogram Officers' Association* (1982) 148 CLR 600

<sup>62</sup> *Re Furnishing Industry Association of Australia (Queensland) Limited Union of Employers*, Print Q9115, 27 November 1998 per Giudice J, Watson SDP, Hall DP, Bacon C and Edwards C.

<sup>63</sup> (2003) 127 IR 205 at [48]

<sup>64</sup> *Re Furnishing Industry Association of Australia (Queensland) Limited Union of Employers*, Print Q9115, 27 November 1998 per Giudice J, Watson SDP, Hall DP, Bacon C and Edwards C

<sup>65</sup> [\[2014\] FWCFB 1996](#)

<sup>66</sup> [PR551382](#)

<sup>67</sup> [Transcript](#), 9 May 2017 at PN29303–PN29305

<sup>68</sup> [2017] FWCFB 1001 at [688]

<sup>69</sup> *Ibid* at [1362]

<sup>70</sup> *Ibid* at [1367]

<sup>71</sup> [2017] FWCFB 1001 at [202]

<sup>72</sup> [2017] FWCFB 1001 at [689]

<sup>73</sup> [2017] FWCFB 1001 at [860]

<sup>74</sup> [2017] FWCFB 1001 at [1376]–[1378]

<sup>75</sup> [2017] FWCFB 1001 at [1388]–[1390]

<sup>76</sup> [2017] FWCFB 1001 at [1678]–[1679]

<sup>77</sup> [2017] FWCFB 1001 at [1851]

<sup>78</sup> *Ibid* at [53]–[57], [885], [1388] and [1877]

<sup>79</sup> *Ibid* at [53]

<sup>80</sup> The *Fair Work (Transitional Provisions and Consequential Amendments) Amendment Regulations 2010 (No. 1)* amended the TP Regulations to insert item 8A into Part 3 of Schedule 5, to address modernisation-related reductions in take-home pay from a



variation to a modern award. Item 8A describes new circumstances in which a ‘modernisation-related reduction in take-home pay’ may occur, namely, variations of modern awards made under:

- item 14 of Schedule 5 to the TPCA Act (which provided for a three month period commencing on 1 January 2010 in which Fair Work Australia could vary modern awards to give effect to an award modernisation request); or
- s.157 of the Act provided the variation was made before 1 July 2010.

<sup>81</sup> [2009] AIRCFB 800

<sup>82</sup> [2009] AIRCFB 800 at [20]

<sup>83</sup> *Explanatory Statement, Select Legislative Instrument 2010 No. 77, Fair Work (Transitional Provisions and Consequential Amendments) Act 2009, Fair Work (Transitional Provisions and Consequential Amendments) Amendment Regulations 2010 (No. 1).*

<sup>84</sup> [Ai Group submission](#), 24 March 2017 at paras 7–35

<sup>85</sup> [ACCI submission in reply](#), 21 April 2017 para 65

<sup>86</sup> [Hospitality Employers submission in reply](#) at para 14

<sup>87</sup> ABI and NSWBC submission in reply at para 5.1

<sup>88</sup> Pharmacy Guild submission in reply at para 10

<sup>89</sup> RCI submission in reply at paras 26–27

<sup>90</sup> [SDA submission in reply](#), 21 April 2017 paras 15–17

<sup>91</sup> [United Voice submission in reply](#), 20 April 2017 para 15

<sup>92</sup> [Small Business Ombudsman submission](#), 24 March 2017

<sup>93</sup> [\[2017\] FWCFB 1001](#) at [2021] (ii)

<sup>94</sup> [SDA submission](#), 24 March 2017 at [13] and see generally [14]–[20]

<sup>95</sup> [SDA submission](#), 24 March 2017 at [14]

<sup>96</sup> [Transcript](#), 9 May 2017 at PN28991–PN28994

<sup>97</sup> [SDA submission](#), 24 March 2017 at [15]–[16] and [18]

<sup>98</sup> United Voice submission, 20 April 2017 at [26]–[27]

<sup>99</sup> RAFFWU written submissions, 21 April 2017 at paras 12–13

<sup>100</sup> ACTU submission, 21 April 2017 at para 2

<sup>101</sup> [Fair Work Ombudsman submission](#), 24 March 2017 at p. 1

<sup>102</sup> Clause 29.4(c) of the *Retail Award* [\[MA000004\]](#)

<sup>103</sup> Common Exhibit 1 at p. 495

<sup>104</sup> [\[2017\] FWCFB 1001](#) at [2021]

<sup>105</sup> ACTU submission, 24 March 2017 at [10]

<sup>106</sup> ACTU submission, 24 March 2017 at [13]

<sup>107</sup> ACTU submission, 24 March 2017 at [14]

<sup>108</sup> Award Modernisation Decision [2009] AIRCFB 800, 2 September 2009, at [30]

<sup>109</sup> ACTU submission, 24 March 2017 at 14.

<sup>110</sup> ACTU reply submission, 21 April 2017 at [5]

<sup>111</sup> ACTU reply submission, 21 April 2017 at [5]

<sup>112</sup> [SDA submission](#), 24 March 2017 at para 10(b)

<sup>113</sup> [SDA submission in reply](#), 21 April 2017 at para 46

<sup>114</sup> [United Voice submission in reply](#) 20 April 2017 at [8]

<sup>115</sup> [APESMA submission](#), 24 March 2017 at [20]–[22]

<sup>116</sup> [APESMA submission](#), 24 March 2017 at [23]

<sup>117</sup> See [\[2017\] FWCFB 1001](#) at [117]–[119]

<sup>118</sup> [Transcript](#), 9 May 2017 at PN29037

<sup>119</sup> Retail Employers submission 21 April 2017 at [43]

<sup>120</sup> [ABI and NSWBC Submission in reply](#) at para 5.1

<sup>121</sup> [SDA submission in reply](#), 21 April 2017 at paras 4–12

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- <sup>122</sup> [\[2017\] FWCFB 1001](#) at [2020]
- <sup>123</sup> [Fair Work Ombudsman submission](#), 24 March 2017 at p. 1
- <sup>124</sup> [Small Business Ombudsman](#), 23 March 2017. Further, [Mr David Wedgwood](#) submits that there should be a reduction in penalty rates over a four year period of five equal instalments commencing on 1 July 2017. In the alternative, Mr Wedgwood proposes a one-fifth reduction in 2017, 2018 and 2019, but with a final variation of two-fifths of the change in 2020.
- <sup>125</sup> ACTU submission, 24 March 2017 at [14]
- <sup>126</sup> [CCIQ submission](#), 24 March 2017 at p. 2
- <sup>127</sup> [AFEI submission](#), 27 March 2017 para 2
- <sup>128</sup> [Business SA submission](#), 24 March 2017
- <sup>129</sup> [ACCI submission](#), 24 March 2017 at paras 4–7
- <sup>130</sup> [ACCI submission](#), 24 March 2017 at para 13(c)
- <sup>131</sup> [CCIWA submission](#), 24 March 2017 at para 3
- <sup>132</sup> [Ai Group submission \(amended\)](#), 3 April 2017 at para 51(a)
- <sup>133</sup> [Ai Group submission](#), 3 April 2017, para 51(a)
- <sup>134</sup> [Ai Group submission](#), 3 April 2017, para 51(a)
- <sup>135</sup> [Ai Group submission](#), 3 April 2017, para 51 (b) and (c)
- <sup>136</sup> [Ai Group submission](#), 3 April 2017, para 51(i)
- <sup>137</sup> [Ai Group submission](#), 3 April 2017, para 3(b)
- <sup>138</sup> [Ai Group submission](#), 3 April 2017, para 3(b)
- <sup>139</sup> [Ai Group submission](#), 3 April 2017, para 52and
- <sup>140</sup> [NRA amended submission](#), 27 March 2017, para 4
- <sup>141</sup> [SDA submission](#), 24 March 2017 at para 14(a)
- <sup>142</sup> [SDA submission](#), 24 March 2017 at para 10(b)
- <sup>143</sup> [SDA submission](#), 24 March 2017 at para 20
- <sup>144</sup> [SDA submission](#), 24 March 2017 at para 20
- <sup>145</sup> [ACTU submission](#), 24 March 2017 at para 14
- <sup>146</sup> [ACTU submission](#), 24 March 2017 at para 14
- <sup>147</sup> [ACTU submission](#), 24 March 2017 at para 14
- <sup>148</sup> [2014] FWCFB 1996
- <sup>149</sup> [SDA submission in reply](#), 21 April 2017 at 92
- <sup>150</sup> [2017] FWCFB 1001 at [133]–[136]
- <sup>151</sup> [CCIQ submission](#), 24 March 2017 at p2
- <sup>152</sup> [AFEI submission](#), 27 March 2017 at para 2
- <sup>153</sup> [AHA submission](#), 24 March 2017 at para 7
- <sup>154</sup> [Business SA submission](#), 24 March 2017
- <sup>155</sup> [ACCI submission](#), 24 March 2017 at para 4
- <sup>156</sup> [ACCI submission](#), 24 March 2017 at para 13(c)
- <sup>157</sup> [CCIWA submission](#), 24 March 2017 at para 3
- <sup>158</sup> [United Voice submission](#), 24 March 2017 at para 15
- <sup>159</sup> [United Voice submission](#), 24 March 2017 at para 19
- <sup>160</sup> [United Voice submission](#), 24 March 2017 at para 19
- <sup>161</sup> [United Voice submission](#), 24 March 2017 at para 19
- <sup>162</sup> [ACTU submission](#), 24 March 2017 at para 14
- <sup>163</sup> [AFEI submission](#), 27 March 2017 at para 2
- <sup>164</sup> [ARA submission](#), 24 March 2017 at para 4
- <sup>165</sup> [ABI submission](#), 24 March 2017 at para 3(b)

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- <sup>166</sup> [NRA submission](#), 27 March 2017 at para 3
- <sup>167</sup> [NRA submission](#), 27 March 2017 at para 3
- <sup>168</sup> [ABI submission](#), 24 March 2017 at para 1.3(c)
- <sup>169</sup> [CCIQ submission](#), 24 March 2017 at p. 2
- <sup>170</sup> [ABI submission](#), 24 March 2017 at para 1.3(c)
- <sup>171</sup> [ABI submission](#), 24 March 2017 at para 1.3(c)
- <sup>172</sup> [CCIWA submission](#), 24 March 2017 at para 3
- <sup>173</sup> [Business SA submission](#), 24 March 2017
- <sup>174</sup> [ACCI submission](#), 24 March 2017 at para 4
- <sup>175</sup> [ACCI submission](#), 24 March 2017 at para 13(c)
- <sup>176</sup> [SDA submission](#), 24 March 2017 at para 14(a)
- <sup>177</sup> [SDA submission](#), 24 March 2017 at para 10(a)
- <sup>178</sup> [SDA submission](#), 24 March 2017 at para 10(b)
- <sup>179</sup> [SDA submission](#), 24 March 2017 at para 20
- <sup>180</sup> Retail Associations Submission, 24 March 2017 at [53]–[55]
- <sup>181</sup> See Statement issued 5 April 2017 at Attachment B, Question 5.1
- <sup>182</sup> SDA submission in reply, 21 April 2017 at [53]
- <sup>183</sup> [Pharmacy Guild submission](#), 24 March 2017 at para 6
- <sup>184</sup> [Pharmacy Guild submission](#), 24 March 2017 at para 7
- <sup>185</sup> [Pharmacy Guild submission](#), 24 March 2017 at para 8
- <sup>186</sup> [CCIWA submission](#), 24 March 2017 at para 3
- <sup>187</sup> [Business SA submission](#), 24 March 2017
- <sup>188</sup> [ACCI submission](#), 24 March 2017 at para 4
- <sup>189</sup> [ACCI submission](#), 24 March 2017 at para 13(c)
- <sup>190</sup> [SDA submission](#), 24 March 2017 at para 14(a)
- <sup>191</sup> [SDA submission](#), 24 March 2017 at para 20
- <sup>192</sup> [APESMA submission](#), 24 March 2017 at para 23
- <sup>193</sup> [APESMA](#) propose a 4 year delay but support the SDA model for transitioning
- <sup>194</sup> [United Voice submission](#), 24 March 2017 at para 17
- <sup>195</sup> [SDA submission](#), 24 March 2017 at [23]
- <sup>196</sup> [\[2017\] FWCFB 1001](#) at [1898]
- <sup>197</sup> RSL Victoria submissions 24 March 2017 p. 3
- <sup>198</sup> [United Voice submission](#), 24 March 2017 at para 61
- <sup>199</sup> [Transcript](#), 9 May 2017 at PN29252
- <sup>200</sup> [\[2017\] FWCFB 1001](#) at [1154]–[1159]
- <sup>201</sup> [RCI submission](#), 24 March 2017
- <sup>202</sup> [United Voice submission](#), 24 March 2017 at para 61
- <sup>203</sup> [MA000009](#)
- <sup>204</sup> [MA000012](#)
- <sup>205</sup> [\[2017\] FWCFB 1933](#)
- <sup>206</sup> [ACTU submission](#), 8 May 2017 at para 2
- <sup>207</sup> [APESMA submission](#), 8 May 2017 at para 3
- <sup>208</sup> [HSU submission](#), 8 May 2017 at para 3
- <sup>209</sup> [SDA submission](#), 8 May 2017 at para 15
- <sup>210</sup> [CFMEU submission](#), 11 May 2017 ([MA000071](#) and [MA000029](#))
- <sup>211</sup> [MUA submission](#), 8 May 2017, at para 6

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<sup>212</sup> [ANMF submission](#), 5 May 2017 at para 3

<sup>213</sup> [Ai Group submission](#), 8 May 2017

<sup>214</sup> [ABI submission](#), 8 May 2017 at [4.2]

<sup>215</sup> [AHA, AAA and the PGA submission](#), 5 May 2017

<sup>216</sup> [\[2017\] FWCFB 1001](#) at [143]–[150]

<sup>217</sup> [\[2017\] FWCFB 1001](#) at [2059]–[2062]

<sup>218</sup> [\[2017\] FWCFB 1001](#) at [2080]–[2081]

<sup>219</sup> ACOSS submission 24 March 2017, p. 1

<sup>220</sup> Draft determinations in relation to the public holiday rate provisions have already been issued for comment. Consolidated draft variation determinations arising from this decision will be issued shortly. In relation to the *Hospitality Award* and the *Restaurant Award* revised draft determination will be issued reflecting certain consequential changes to the time off in lieu provisions of the relevant public holiday clauses as considered during the conference conducted by Hampton C on 21 April 2017.

<sup>221</sup> [\[2017\] FWCFB 1001](#) at [58] and [\[2017\] FWCFB 1551](#) at [2]–[11]

<sup>222</sup> [MA000009](#)

<sup>223</sup> [MA000012](#)

**Attachment A—List of submissions received since *Penalty Rates decision***

<b>Organisation</b>	<b>Date</b>
<a href="#">United Voice</a>	3 March 2017
<a href="#">Australian Industry Group</a>	3 March 2017
<a href="#">Shop, Distributive and Allied Employees Association</a>	3 March 2017
<a href="#">Restaurant &amp; Catering Industrial</a>	3 March 2017
<a href="#">D Wedgwood</a>	14 March 2017
<a href="#">Hair and Beauty Australia Industry Association</a>	22 March 2017
<a href="#">Victorian Government</a>	23 March 2017
<a href="#">Government of South Australia</a>	23 March 2017
<a href="#">Luke Foley - Leader of the Opposition in New South Wales</a>	23 March 2017
<a href="#">Rebecca White MP - Tasmanian Labor Leader</a>	23 March 2017
<a href="#">Government of Queensland</a>	23 March 2017
<a href="#">Australian Small Business and Family Enterprise Ombudsman</a>	23 March 2017
<a href="#">Government of Western Australia</a>	23 March 2017
<a href="#">Chamber of Commerce and Industry of Western Australia</a>	24 March 2017
<a href="#">Federal Opposition of Australia</a>	24 March 2017
<a href="#">RSL Victoria</a>	24 March 2017
<a href="#">Shop, Distributive and Allied Employees' Association</a>	24 March 2017
<a href="#">Pharmacy Guild of Australia</a>	24 March 2017
<a href="#">Australian Government</a>	24 March 2017
<a href="#">Fair Work Ombudsman</a>	24 March 2017
<a href="#">Australian Industry Group</a>	24 March 2017
<a href="#">Australian Retailers Association and others</a>	24 March 2017
<a href="#">United Voice - Liquor and Hospitality Division</a>	24 March 2017
<a href="#">National Retail Association</a>	24 March 2017
<a href="#">Australian Council of Trade Unions</a>	24 March 2017
<a href="#">ACT Government</a>	24 March 2017
<a href="#">Restaurant &amp; Catering Industrial</a>	24 March 2017
<a href="#">Australian Workers' Union</a>	24 March 2017
<a href="#">Australian Business Industrial and the NSW Business Chamber</a>	24 March 2017
<a href="#">Retail and Fast Food Workers Union</a>	24 March 2017

<a href="#">Australian Council of Social Service</a>	24 March 2017
<a href="#">Australian Chamber of Commerce and Industry</a>	24 March 2017
<a href="#">United Voice</a>	24 March 2017
<a href="#">Business SA</a>	24 March 2017
<a href="#">Australian Hotels Association and the Accommodation Association of Australia</a>	24 March 2017
<a href="#">Clubs Australia Industrial</a>	24 March 2017
<a href="#">Chamber of Commerce and Industry Queensland</a>	24 March 2017
<a href="#">Club Managers Association Australia</a>	24 March 2017
<a href="#">Association of Professional Engineers, Scientists and Managers Australia</a>	24 March 2017
<a href="#">Shop, Distributive and Allied Employees' Association</a>	27 March 2017
<a href="#">National Retail Association</a>	27 March 2017
<a href="#">Australian Industry Group</a>	27 March 2017
<a href="#">Australian Retailers Association and another</a>	27 March 2017
<a href="#">Australian Hotels Association</a>	27 March 2017
<a href="#">Pharmacy Guild of Australia</a>	27 March 2017
<a href="#">Northern Territory Government</a>	27 March 2017
<a href="#">Australian Federation of Employers and Industries</a>	27 March 2017
<a href="#">Climate Action Network Australia</a>	31 March 2017
<a href="#">Australian Industry Group</a>	3 April 2017
<a href="#">Australian Hotels Association and Accommodation Association of Australia</a>	20 April 2017
<a href="#">Australian Business Industrial and the NSW Business Chamber</a>	20 April 2017
<i>Submissions in reply</i>	
<a href="#">United Voice</a>	31 March 2017
<a href="#">Equity Economics</a>	7 April 2017
<a href="#">Australian Federation of Employers and Industries</a>	7 April 2017
<a href="#">Australian Industry Group</a>	12 April 2017
<a href="#">United Voice</a>	20 April 2017
<a href="#">Australian Business Industrial and the NSW Business Chamber</a>	20 April 2017
<a href="#">Australian Retailers Association and others</a>	21 April 2017
<a href="#">Shop, Distributive and Allied Employees' Association</a>	21 April 2017

<a href="#">Australian Industry Group</a>	21 April 2017
<a href="#">Retail and Fast Food Workers Union</a>	21 April 2017
<a href="#">Australian Government</a>	21 April 2017
<a href="#">Australian Hotels Association and Accommodation Association of Australia</a>	21 April 2017
<a href="#">Australian Business Industrial and the NSW Business Chamber</a>	21 April 2017
<a href="#">Pharmacy Guild of Australia</a>	21 April 2017
<a href="#">Australian Council of Trade Unions</a>	21 April 2017
<a href="#">Restaurant &amp; Catering Industrial</a>	21 April 2017
<a href="#">Chamber of Commerce and Industry Western Australia</a>	21 April 2017
<a href="#">Australian Chamber of Commerce and Industry</a>	21 April 2017
<a href="#">Restaurant &amp; Catering Industrial</a>	28 April 2017
<a href="#">Australian Business Industrial and NSW Business Chamber</a>	28 April 2017
<a href="#">Victorian Government</a>	1 May 2017
<a href="#">Australian Hotels Association and Accommodation Association of Australia</a>	2 May 2017
<a href="#">Clubs Australia Industrial</a>	2 May 2017
<a href="#">United Voice</a>	3 May 2017
<a href="#">Shop, Distributive and Allied Employees' Association</a>	4 May 2017
<i>Submissions – terminology</i>	
<a href="#">Australian Nursing and Midwifery Federation</a>	5 May 2017
<a href="#">Australian Hotels Association and others</a>	5 May 2017
<a href="#">RSL &amp; Services Clubs Association Queensland Inc</a>	7 May 2017
<a href="#">Australian Council of Trade Unions</a>	8 May 2017
<a href="#">Shop, Distributive and Allied Employees' Association</a>	8 May 2017
<a href="#">Australian Industry Group</a>	8 May 2017
<a href="#">APESMA</a>	8 May 2017
<a href="#">Maritime Union of Australia</a>	8 May 2017
<a href="#">Australian Business Industrial and NSW Business Chamber</a>	8 May 2017
<a href="#">Health Services Union</a>	8 May 2017
<a href="#">CFMEU - Forestry, Furnishing, Building Products and Manufacturing Division</a>	11 May 2017

## **Attachment B—Questions on notice**

(Extract from Statement of 5 April 2017 [\[2017\] FWCFB 1934](#); references omitted)

*Note: These questions do not limit the issues that may be raised with the parties by the Full Bench or the submissions that parties may wish to make during any hearing in connection with this matter.*

### **1. Impact of the Penalty Rates decision**

#### **1.1 Questions for all parties:**

[6] It appears to be common ground that the Commission should take steps to mitigate the impact of the Decision on the affected employees.

*Does any interested party take a different view?*

*Each party is asked to provide an estimate of the number of employees affected by the penalty rate reductions determined in the Decision ([2017] FWCFB 1001), by award, and the basis of that assessment.*

[7] A number of parties submit that the Commission should reconsider the Decision to reduce penalty rates in the Hospitality and Retail Awards and set aside that Decision. Further, United Voice submit (at [61]) that the Commission should not invite or permit RCI or CAI ‘to re-litigate their failed claims for variation of weekend penalty rates’.

*Other interested parties are invited to reply to these submissions.*

#### **1.2 Question for the Retail Associations:**

[8] The Retail Associations submit that for existing employees the employment benefits of reduced penalty rates ‘have the potential to directly minimise the hardship which is to be mitigated’.

*How does this submission sit with the observation in the Penalty Rates Decision at [1657]–[1659]?*

‘As stated in the PC Final Report, a reduction in Sunday penalty rates will have an adverse impact on the earnings of those hospitality industry employees who usually work on a Sunday. It is likely to reduce the earnings of those employees, who are already low paid, and to have a negative effect on their relative living standards and on their capacity to meet their needs.

The evidence of the SDA lay witnesses provides an individual perspective on the impact of the proposed changes. For example, witness SDA Retail 1 said that if Sunday penalty rates were reduced to 150 per cent he would be \$74.06 worse off each week – a reduction of 7.88 per cent in his current weekly earnings.



The extent to which lower wages induce a greater demand for labour on Sundays (and hence more hours for low-paid employees) will somewhat ameliorate the reduction in income, albeit by working more hours. We note the Productivity Commission's conclusion that, in general, most existing employees would probably face reduced earnings as it is improbable that, as a group, existing workers' hours on Sundays would rise sufficiently to offset the income effects of the penalty rate reduction.'

### **1.3 Question for ACOSS:**

[9] ACOSS propose an option for mitigating the impact of the Decision on affected employees: 'to ensure that any existing or future employees subject to reductions in penalty rates in the affected Awards are paid "loaded hourly rates" to compensate for potential losses of pay'.

*How would such a proposal work in practice?*

### **1.4 Question for all parties:**

*All parties are asked to comment on the ACOSS proposal.*

### **1.5 Questions for CCIWA**

[10] CCIWA submits that 'we believe that the proportion of employees who are reliant upon existing Sunday penalty rates to meet household expenses is low'.

*What is the factual basis for this submission?* (Note: expand on the material referred to at [13]–[20] of CCIWA's [submission](#))

## **2. Take-home pay orders**

[11] Take-home pay orders are dealt with in several sections of the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth) (the TPCA Act), as modified by the Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009 (the TP Regulations).

[12] Item 9 of Schedule 5 to the TPCA Act provides that if the Commission is satisfied that an employee, or a class of employees, to whom a modern award applies has suffered a modernisation related reduction in take-home pay the Commission may make a take-home pay order concerning the payment of an amount(s) to the employee(s) which the Commission considers appropriate to remedy the situation. Item 9 limits the power to make a take-home pay order to orders remedying 'modernisation related' reductions in take-home pay. Item 8(3) sets out the circumstances where an employee suffers a 'modernisation related' reduction in take-home pay. Item 8(3) requires, relevantly, that the employee be employed in the same position (or comparable position) that they were employed in immediately before the modern award came into operation. Hence persons employed after the commencement of the modern award are not eligible for an Item 9 take-home pay order.

[13] Part 3A of Schedule 5 was inserted by amendments to the TP Regulations made by the *Fair Work (Transitional Provisions and Consequential Amendments) Amendment Regulations 2010 (No. 1)* (the TP Amendment Regulations).

[14] Regulation 3B.04 of the TP Regulations modifies Schedule 5 of the TPCA Act by inserting Part 3A, after Part 3. Item 13A(1) of Part 3A of Schedule 5 to the TPCA Act provides that:

‘A modern award may include terms that give FWA power to make an order (a *take-home pay order*) remedying a reduction in take-home pay suffered by an employee or outworker, or a class of employees or outworkers, as a result of the making of a modern award or the operation of any transitional arrangements in relation to the award (whether or not the reduction in take-home pay is a modernisation-related reduction in take-home pay).’

[15] Item 13A(1) restricts the type of reduction that it applies to as one that occurs ‘as a result of the making of a modern award or the operation of any transitional arrangements in relation to the award’. Accordingly, it may be that it was not intended that awards would include terms that allow for making of take home pay orders in all circumstances. The purpose of the amendments made by the TP Amendment Regulations is discussed in the Explanatory Statement accompanying the TP Amendment Regulations.

## **2.1 Question for all parties:**

[16] It seems to be common ground that the take home pay order provisions of the TPCA Act are not an available option to mitigate the impact of the reductions in penalty rates set out in the Decision.

*Does any interested party take a different view?*

## **2.2 Question for the Australian Government:**

*Is there any present intention to amend the Fair Work Act 2009 (Cth) (the FW Act) to provide the Commission with a discretion to make take home pay orders that may mitigate the impact upon effected employees of a variation to a modern award?*

## **2.3 Question for the Small Business and Family Enterprise Ombudsman:**

[17] The Ombudsman recommends that ‘at the end of the transition period, the Fair Work Commission should consider granting take home pay orders for individuals to mitigate the effects of any gap that remains between the amounts of their earnings with and without application of the Sunday penalty rate’.

*What is the source of the Commission’s power to make the take home pay orders proposed?*

### 3. ‘Phasing in’

#### 3.1 Questions for all parties

[18] It appears to be common ground that the Commission has power to make transitional arrangements relating to the staggered introduction of the reduction to existing Sunday penalty rates.

*Does any interested party take a different view?*

[19] At paragraph [43] of its submission, Ai Group submits that in determining the transitional arrangements for the Sunday penalty rate, the Full Bench must act consistently with:

- ‘(a) its statutory charter, including the exercise its powers under the FW Act in a manner that is fair and just (see section 577(a) of the FW Act);
- (b) its principle that fairness is assessed from the perspective of both employer and employee (and not simply from the perspective of the employee) (see Penalty Rates Decision at [37], [117], [118], [151], [885], [1701], [1877], [1948]);
- (c) the objects of the relevant Part (see section 578(a) of the FW Act);
- (d) the merits of the matter (see section 578(b) of the FW Act);
- (e) its findings and conclusions in the Penalty Rates Decision;
- (f) the evidence in the proceedings;
- (g) the extent of the reductions in the existing Sunday penalty rates; and
- (h) the approach adopted by other Full Benches to the staggered introduction of reductions in penalty rates.’

*Does any interested party hold a contrary view?*

*Is it also relevant that the terms of a particular modern award may limit the incidence of Sunday work (as proposed by the Retail Associations at paragraph [14] of its [submission](#))?*

[20] In its submission ABI and NSWBC contend that an appropriate transitional arrangement needs to balance the needs of the low paid and the regulatory burden and disemployment factors referred to at paragraphs 4.2 and 4.3 of their submission. ABI and NSWBC submit that an appropriate way in which to achieve this balance is for the Commission to ask the following question:

‘Which transitional proposal will provide a substantive opportunity to employees to mitigate any adverse effects of the Decision whilst not significantly prejudicing the employment and regulatory benefits associated with the Decision?’

*All parties are invited to comment on the question posed by ABI and NSWBC and whether it is the appropriate question for the Commission to direct itself to in these proceedings.*

### **3.2 Question for the Australian Government:**

[21] The Government notes that the reductions in certain Sunday penalty rates that occurred during the award modernisation process were phased in in equal instalments over a 5 year period – from 2010 to 2015 – and that the *Restaurant Industry Award 2010* Appeal decision reduced penalty rates and no phasing in occurred.

*Does the Government have a view on the merits of phasing in the penalty rate reductions we have determined and, if so, what phasing method is appropriate in each award?*

### **3.3 Questions for the NRA:**

[22] The NRA submits that lengthy phasing in provisions would impede collective bargaining.

*If the transitional arrangements are determined why would the length of phasing in have any adverse impact on collective bargaining?*

*The award modernisation penalty rate reductions were phased in over 5 years, what impact, if any, did that have on collective bargaining?*

### **3.4 Questions for United Voice**

[23] At paragraph [15] of its submission, United Voice supports the Productivity Commission's proposed 12 month delay in implementing the reduction to Sunday penalty rates and at paragraph [19] proposes a two-year delay to the implementation of the reduction in Sunday penalty rates for permanent employees under the *Hospitality Award* and the public holiday rate for employees under the *Hospitality Award* and for permanent employees under the *Restaurant Award*.

*Does United Voice agree the submission advanced differs significantly from the Productivity Commission proposal?*

*If not, in what way does United Voice's proposal reflect the Productivity Commission's?*

### **3.5 Question for the ACTU and the SDA**

[24] The ACTU and the SDA also propose a 2 year delay to the implementation of the penalty rate reductions.

*What justification is advanced in support of the 2 year delay?*

#### 4. 'Red Circling'

[25] At paragraph [14] of its submission, the SDA submits that the Commission should preserve the current Sunday penalty rates for all existing employees by issuing the following variation determinations:

‘(a) Following proper and full determination in proceedings of the annual wage review employers must continue to pay employees the rate of pay prescribed by the relevant Award as at that time for Sunday work (“the preserved rate”) until such time that the rate of pay for Sunday work under the Award equals or exceeds the preserved rate.

(b) Employers will not dismiss, injure in their employment or alter to their prejudice the position of any employee entitled to be paid the preserved rate (including by a reduction in shifts or changes in rosters) by reason of, or for reasons which include, that entitlement.’

##### 4.1 Questions for all parties:

*What is the source of the Commission’s power to preserve the current Sunday penalty rates for existing employees as advanced by the SDA?*

*If the Commission is vested with such a power, what do the other parties say about the merits of the proposal advanced by the SDA?*

*Other than the SDA’s proposal in relation to the Retail, Fast Food and Pharmacy Awards, are there any other ‘red circling’ proposals being advanced by any other party?*

##### 4.2 Question for the Australian Government:

[26] The Government submits that ‘Given the implementation issues that would arise from red circling, the FWC will need to carefully weigh up the costs and benefits and potential impact of such an approach’.

*The Government is asked to elaborate on the ‘costs and benefits and potential impact’ of the red circling approach including that proposed by the SDA in respect of the General Retail Industry Award 2010.*

##### 4.3 Question for the SDA

[27] The SDA submits (at [12]) that ‘[f]uture employees are, by definition, not subjected to [these] specific forms of disruption and detriment occasioned by the reductions in Sunday penalty rates’.

*If the SDA’s red circling proposal is adopted, why is it necessary to phase in the reduction at all?*

**5.      *General Retail Industry Award 2010***

[28]    The Retail Associations submit that the decision to reduce the Sunday penalty rate applies equally to shiftworkers (see [53]–[55] of the Retail Associations [submission](#)).

**5.1    Question for the SDA:**

*Does the SDA oppose the submission advanced by the Retail Associations? If so, on what basis?*