



DECISION

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards—Penalty rates—Late night penalties (AM2014/305)

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

MELBOURNE, 17 MARCH 2017

4 yearly review of modern awards – penalty rates – hospitality and retail sectors – late night penalties – public holiday penalty rates

[1] On 23 February 2017 we issued a decision¹ (the *Penalty Rates decision*) in relation to the penalty rate provisions in a number of awards in the hospitality and retail sectors.

[2] Among other matters, the *Penalty Rates decision* dealt with claims to vary the *Restaurant Industry Award 2010* (the *Restaurants Award*) and the *Fast Food Industry Award 2010* (the *Fast Food Award*) in respect of the hours to which late night penalties apply. The *Restaurants* and *Fast Food* awards provided an additional payment of 15 per cent of the standard hourly rate between midnight and 7.00 am.

[3] We decided to vary the span of hours which attract the 15 per cent loading in the *Restaurants* and *Fast Food* awards such that the loading applies to work performed between midnight and 6.00 am (not 7.00 am). 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.

[4] In the *Penalty Rates Decision* we concluded that it was not necessary to prescribe transitional arrangements in respect of these changes, because of the limited impact of the variations and the need to ensure a ‘simple, easy to understand ... modern award system’ (s.134(1)(g)). We also expressed our intention that, subject to a consultation process with interested parties, these variations would commence on 27 March 2017.²

[5] Draft determinations giving effect to our decision in relation to late night penalties were published³ and interested persons were given 7 days to comment.

[6] Submissions were received from 4 parties:

Restaurant Award

United Voice [3 March 2017](#)

Fast Food Award

Restaurant and Catering Industrial (RCI) [3 March 2017](#)

Australian Industry Group (Ai Group) [3 March 2017](#)

Shop, Distributive and Allied Employees Association (SDA) [3 March 2017](#)

[7] No employer submissions were received in relation to the draft determination varying the *Restaurant Award*.

[8] In its submission in relation to the *Fast Food Award*, RCI supported the draft determination as published, including the proposed 27 March 2017 commencement date. Ai Group had ‘no objection’ to the form of the draft determination.⁴

[9] United Voice and the SDA (the Unions) did not make any comment on the form of the determinations, however both unions opposed the proposed commencement date. The Unions submit that the commencement date for the changes to late night penalties should be 1 July 2017.

[10] In support of their proposal for a deferred commencement date the Unions submit that one month is not long enough for employees to adjust to these changes⁵ and that an operative date of 1 July 2017 would coincide with any Annual Wage Review adjustment, as well as the commencement of the proposed changes to public holiday penalty rates in these awards.⁶ In this regard, United Voice advanced the following submission, at paragraph 11:

‘... businesses are accustomed to adjusting rates of pay from 1 July each year to account for any change to minimum award rates as a result of the Annual Wage Review. In 2017, restaurant businesses will also be likely adjusting public holiday penalty rates for permanent employees by 25 per cent, consistent with the decision of the Full Bench at [2032]. Presumably, the relevant employer associations including the RCA will be publicising the new minimum wage rates and reduced public holiday rates to its members in advance of 1 July 2017 to enable compliance by 1 July. In the circumstances, we consider the appropriate commencement date for the variation to the late night loading is 1 July 2017.’⁷

[11] Taking into account the submissions made in the consultation process we have been persuaded that the changes to the late night penalties should commence on 1 July 2017. In particular, we accept the SDA’s submission 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*. Having already decided that the reduction in public holiday penalty rates will commence on 1 July 2017⁸, commencing the changes to late night penalties on the same date will provide for greater consistency.

[12] Final determinations will be issued accordingly.

Public holidays

[13] In the *Penalty Rates decision* we decided to reduce the public holiday penalty rates in five of the awards under review, as follows:

Proposed public holiday penalty rates in the Hospitality and Retail awards⁹

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

[14] Draft determinations varying these awards will be published shortly. The provisions in the *General Retail Industry Award 2010*, *Fast Food Industry Award 2010* and the *Pharmacy Industry Award 2010* have been modified to reflect plain language drafting principles and to remove any ambiguity about the application of the casual loading. Parties will be given 7 days to comment on the draft variation determinations before they are finalised.

PRESIDENT

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¹ [\[2017\] FWCFB 1001](#)

² Ibid at [2029]

³ See [Draft determination - Restaurant Industry Award 2010](#), [Draft determination - Fast Food Industry Award 2010](#)

⁴ Ai Group submission 3 March 2017 at [2]

⁵ SDA submission 3 March 2017 at para 9

⁶ United Voice submission at paras 9–11; SDA, submission at para 10

⁷ United Voice submission 3 March 2017 at para 11

⁸ [\[2017\] FWCFB 1001](#) at [2025]

⁹ Table 2 of *Penalty Rates decision* at [63]