

IN THE FAIR WORK COMMISSION

AM 2015/305

FOUR YEARLY REVIEW OF MODERN AWARDS - PENALTY RATES

**SUBMISSIONS REGARDING TRANSITIONAL
ARRANGEMENTS**

FILED ON BEHALF OF ABI AND NSWBC

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1. INTRODUCTION

1.1 In the decision delivered in these proceedings on 23 February 2017, *4 Yearly review of modern awards - Penalty Rates* [2017] FWCFB 1001 (**Decision**), the Full Bench determined to reduce the Sunday penalty rates in the General Retail Industry Award 2010 (**Retail Award**), Hospitality Industry (General) Award 2010 (**Hospitality Industry Award**) and Fast Food Industry Award 2010 (**Fast Food Award**).

1.2 The Full Bench also expressed provisional views regarding the transitional arrangements to be applied in reducing Sunday penalty rates in these Awards and queried whether take home pay orders would be available to mitigate the impact of the Decision on existing workers.

1.3 ABI & NSWBC submit that:

- (a) It is appropriate for the reduction in Sunday penalty rates to be phased in pursuant to a transitional arrangement.
- (b) The Fair Work Commission is not empowered to make take home pay orders in order to mitigate the impact of the Decision.
- (c) Given the unavailability of take home pay orders, the appropriate transitional arrangement to be implemented in relation to the Retail Award would be for the Sunday penalty rate reductions to be phased in as follows:

1 July 2017

- (i) Reduce casual penalty rate from 200% to 175%
- (ii) Reduce permanent penalty rate from 200% to 175%

1 July 2018

- (iii) Reduce permanent penalty rate from 175% to 150%

1.4 In support of the above contentions, the submissions below address:

- (a) the Commission's power to issue take home pay orders;
- (b) the appropriateness of introducing a transitional arrangement in relation to the Decision; and
- (c) why the modern awards objective requires the transitional arrangement proposed by ABI & NSWBC to be adopted.

2. THE POWER TO ISSUE TAKE HOME PAY ORDERS

2.1 Schedule 5 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (**Transitional Act**) confers a power on the Commission to issue take home pay orders in two categories of circumstances:

- (a) firstly, where an employee suffers a "*modernisation-related reduction in take home pay*" (see Schedule 5, items 9); and
- (b) secondly, where a modern award contains a term empowering the Fair Work Commission to make an order remedying a reduction in take home pay suffered by an employee or a class of employees as a result of the making of a modern award

or the operation of any transitional arrangements in relation to the award (see Schedule 5, item 13A of the Transitional Act).

Modernisation-related reduction in take home pay

2.2 The first category of take home pay orders identified above will only be available if all three of the below requirements are met:

- (a) Firstly, an employee needs to be employed in the relevant industry before the commencement of the modern award in 2010. This requirement has already been recognised in paragraph 2012 of the Decision and is derived from Item 8(3) of Schedule 5 of the Transitional Act, which states that an employee must be employed *“in the same position as... the position he or she was employed in immediately before the modern award came into operation”* in order to suffer a *“modernisation-related reduction in take home pay”* (which is itself a pre-requisite to the making of a take home pay order).
- (b) Secondly, an employee’s take home pay for working particular hours presently must be less than the employee’s pay would have been immediately before the modern award came into operation. That is, their take home pay presently needs to be less than it was on 31 December 2009 - over 7 years ago.
- (c) Thirdly, the reduction in the take home pay must be attributable to the Part 10A award modernisation process.

2.3 Given that any reductions in take home pay will not be attributable to the Part 10A award modernisation process, but rather, will be attributable to the 4 Yearly Review of Modern Awards conducted under a different framework outlined in Part 2-3 of the Fair Work Act, it is unlikely any modernisation-related take home pay orders can be made in relation to the impact of the Decision.

2.4 Furthermore, even if the submission outlined at paragraph 2.3 above is not accepted by the Commission as correct, there would be very few employees who could qualify for a modernisation-related take home pay order, as few employees would meet the additional hurdles that they both:

- (a) were employed in the relevant industry on or before 31 December 2009; and
- (b) received less take home pay on 31 December 2009 than they would today after the relevant penalty rate reductions are imposed.

2.5 For these reasons, modernisation-related take home pay orders are not an appropriate means of addressing the impact of the Decision in a transitional way.

Take home pay orders derived from award terms

2.6 The other source of power available for the issuing of a take home pay order derives from Item 13A of Schedule 5 to the Transitional Act. This Item provides as follows:

*“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).”* (emphasis added)

- 2.7 Whilst the power contained in Item 13A permits take home pay orders to be made in a broader range of circumstances than apply to modernisation-related take home pay orders, the circumstances in which Item 13A permits take home pay orders to be made is still limited.
- 2.8 Specifically, Item 13A expressly provides that the take home pay order is only available to remedy a reduction in take home pay suffered as a result of either:
- (a) the making of a modern award; or
 - (b) the operation of any transitional arrangements in relation to the award.
- 2.9 The limited scope of the power conferred by Item 13A is reinforced by the Explanatory Statement to the Amending Regulation which introduced Item 13A into the Transitional Act.¹ The Explanatory Statement provides as follows:

*“The Regulations amend the Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009 (Principal Regulations) to modify the provisions of the Act that allow for the making of take-home pay orders. **The modifications expand the circumstances in which Fair Work Australia (FWA) may make orders to ensure that the award modernisation process does not result in the take-home pay of employees being reduced.***

The Regulations allow take-home pay orders to be made where a reduction occurs because of certain variations to modern awards made by FWA. While take-home pay orders can be made with respect to reductions arising from the award modernisation process, FWA variations to modern awards to deal with residual issues are not recognised as part of that process, as defined by the legislation. Any reductions in take-home pay that result from this limited range of FWA variations to modern awards are not able to be remedied by take-home pay orders. The Regulations address this inconsistency.

*In addition to the take-home pay order provisions in the Act, the AIRC (as part of the award modernisation process) included transitional provisions in modern awards (the modern award provisions) **enabling FWA to make orders remedying reductions in take-home pay attributable to the award modernisation process or the transitional arrangements in modern awards.** The Australian Government (the Government) is concerned to ensure that it is not open to argue that the modern award provisions 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 Government considers that the protection provided by the modern award provisions is beneficial and furthers its intention that no employee be worse off as a result of the award modernisation process. The Regulations put beyond doubt any question about the ability of modern awards to contain provisions which confer a power on FWA to make take-home pay orders.” (emphasis added)*

- 2.10 When addressing Regulation 3B.04 specifically, the Explanatory Statement further provides as follows:

¹ The Amending Regulation was the *Fair Work (Transitional Provisions and Consequential Amendments) Amendment Regulations 2010 (No.1) (SLI No 77 of 2010)*

*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)...

*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.**" (emphasis added)*

2.11 The Explanatory Statement therefore makes clear that, the purpose of Item 13A was as follows:

(a) Firstly, to ensure that award provisions made by the AIRC as part of the award modernisation process regarding protecting employee take home pay remained valid. Those award provisions typically provide as follows:

"2.4 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."²

(b) Secondly, to ensure that, if an employee suffered a reduction in take home pay as a result of the making of a modern award or the operation of transitional arrangements in the award, they could apply for a take home pay order remedying that reduction.

2.12 Neither of these circumstances are applicable to the present case. This is because any reduction in take home pay derived from the Decision has not arisen from the making of any award or any transitional arrangements. Rather, it has arisen from a variation to the award as part of the Four Yearly Review of modern awards. This review of awards is a process which is separate from the making of the awards. Indeed, the relevant awards were made in 2010.

² This text is taken from clause 2.4 of the *Clerks - Private Sector Award 2010*. However, the text is the same in all other awards.

3. THE APPROPRIATENESS OF INTRODUCING A TRANSITIONAL ARRANGEMENT

- 3.1 The Commission has determined that it is appropriate to introduce transitional arrangements to give effect to the Decision, in order to mitigate the effect of any hardship that might be caused to employees as a result of the Decision.
- 3.2 ABI and NSWBC accept that there is merit in ensuring that any reduction in wages payable on a Sunday is phased in so that those low paid and award reliant employees engaged within the retail industry can adapt their personal circumstances to accommodate any reduction in Sunday pay.
- 3.3 If a reasonable period of notice is given to employees regarding the implementation of the changes, it logically follows that the employees may be able to mitigate any adverse affects by sourcing alternate or additional hours, reassessing financial commitments, etc.
- 3.4 Introducing the effect of the Decision in a way that enables employees to mitigate adverse affects is consistent with the Commission's obligations to consider the "*needs of the low paid*" when making any modern award variations.

4. THE MERIT IN ADOPTING ABI/NSWBC'S PROPOSED TRANSITIONAL ARRANGEMENT

- 4.1 Any transitional arrangements accommodating employees must be balanced against some important business considerations.
- 4.2 Firstly, the Commission needs to consider the regulatory burden imposed by maintaining existing rates (see section 134(1)(f) of the FW Act). In relation to the retail sector in particular, it should be noted that:
- (a) profit margins for employers are lower compared to all industries (see the Decision at 1427]); and
 - (b) business survival rates are lower compared to all industries (see the Decision at [1431]).

This means that the effect of disproportionately high penalty rates is likely to have a greater impact on retail employers than industries with greater profit margins.

- 4.3 Secondly, the Decision has established that the current penalty rates are having some dis-employment effect (see Decision at [1666]-[1671]). It logically follows that the more promptly penalty rates are revised to the newly determined level, the more promptly positive employment effects are likely to be seen.
- 4.4 These considerations justify the Commission moving towards the new penalty rates determined in its decision as soon as reasonably practicable.

Achieving an appropriate balance in transition

- 4.5 The Commission therefore needs to balance:
- (a) the needs of the low paid (as identified in paragraphs 3.1 to 3.4 above); together with
 - (b) the regulatory burden and disemployment factors cited at paragraphs 4.2 and 4.3 above.
- 4.6 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.”

4.7 ABI and NSWBC answer this question by proposing the following transitional arrangement:

1 July 2017

- (i) Reduce casual penalty rate from 200% to 175%
- (ii) Reduce permanent penalty rate from 200% to 175%

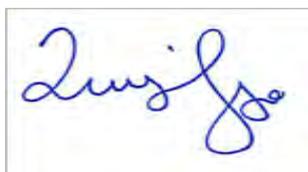
1 July 2018

Reduce permanent penalty rate from 175% to 150%

4.8 Given that the Decision was made handed down on 23 February 2017, the above proposal ensures that:

- (a) A minimum of 4 months notice is given in relation to penalty rate reductions of 25%;
- (b) any reduction in penalty rates will be partially offset by any annual wage increase determined by the Fair Work Commission;
- (c) the more substantive penalty rate reduction of 50% is phased in over a 16 month period, which in turn enables:
 - (i) two annual wage increases to provide a level of offset the full 50% reduction in penalty rates; and
 - (ii) employees to make adjustments to the new rates of pay payable over an extended period; and
- (d) changes to the minimum safety net are made at the same time as other award rate of pay changes. This ensures that employers can vary their payment processes in one efficient step, as opposed to being required to vary pay entitlements on multiple occasions.

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