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Working for business.  
Working for Australia

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Associate to President Iain Ross  
Fair Work Commission  
Level 4, 1 Exhibition Street  
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Via email: [chambers.ross.j@fwc.gov.au](mailto:chambers.ross.j@fwc.gov.au)

Dear Associate

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

The Full Bench's 23 February 2017 decision in the above matter ([2017] FWCFB 1001), at paragraph [2042], invites interested parties to file written submissions in relation to transitional arrangements for the application of reduction(s) in Sunday penalty rates.

Please find attached the brief submission of the Australian Chamber of Commerce and Industry (Australian Chamber) which is to be read in conjunction with, and in support of, those of our member organisations in relation to particular modern awards before the Commission in this matter.

Yours Sincerely

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## IN THE FAIR WORK COMMISSION

AM 2014/305

### FOUR YEARLY REVIEW OF MODERN AWARDS: PENALTY RATES

#### SUNDAY PENALTY RATES – TRANSITIONAL ARRANGEMENTS

1. This submission responds to Part 12 of the Full Bench’s 23 February 2017 Penalty Rates Decision<sup>1</sup> (‘the Decision’), headed “next steps”, and specifically to paragraphs [2039] to [2043] entitled “Transitional arrangements: Sunday penalty rate reductions”.
2. A number of Australian Chamber member organisations were applicants in this matter and were extensively represented throughout proceedings in relation to each of the awards for which there are to be reductions in Sunday penalty rates, being the:
  - a. Hospitality Industry (General) Award 2010 [MA000009]
  - b. General Retail Industry Award 2010 [MA000004]
  - c. Pharmacy Industry Award 2010 [MA000012]
  - d. Fast Food Industry Award 2010 [MA000003]
3. This submission addresses a number of cross award / general considerations. It should be read in conjunction with those of the applicant employer organisations in relation to specific awards and their transition to the reduced Sunday penalty rates. Applicant employer organisations will advance proposals for the phasing in of reductions in Sunday penalty rates in specific modern awards, and the Australian Chamber supports such submissions in relation to each of the awards.

#### Approach to Transition - Do not delay commencement

4. The Full Bench has already determined on a preliminary basis that it is disinclined to delay the commencement of adjusted Sunday penalty rates.
5. This is the correct approach. The Commission should:
  - a. Confirm and apply what it has characterised as its “provisional views” on the commencement of Sunday penalty rate changes as final/concluded views.
  - b. Eschew any course of action that would delay the commencement of reductions in Sunday penalty rates in the awards for which reductions are to be made, and that would have the effect of unduly delaying the full implementation of the reductions in penalty rates that have been awarded.

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<sup>1</sup> [\[2017\] FWCFB 1001](#)

6. In relation to the Productivity Commission's (PC) recommended approach of delaying any penalty rate reduction for 12 months, the Full Bench indicated that:

[2040](i) *The Productivity Commission's proposal imposes an unnecessary delay on the introduction of any reduction in Sunday penalty rates...*

7. We see no basis to depart from this preliminary conclusion in implementing the 23 February 2017 Decision. To delay the commencement / full implementation of the reductions in Sunday penalty rates that have been awarded would:
- a. Prolong a situation in which minimum rates of pay for Sunday work are based on a consideration found to no longer be relevant, being the deterrence of Sunday work.<sup>2</sup>
  - b. Prolong a situation in which existing Sunday penalty rates in Hospitality, Fast Food, Retail and Pharmacy Awards are not achieving the modern awards objective (s.134 of the *Fair Work Act 2009* (Cth)).<sup>3</sup>
  - c. Prolong a situation in which existing Sunday penalty rates in Hospitality, Fast Food, Retail and Pharmacy Awards are not providing a fair and relevant minimum safety net.<sup>4</sup>
  - d. Prolong a situation in which minimum rates of pay for Sunday work are based on levels of disutility for employees that:
    - i. No longer exist / are no longer relevant.
    - ii. Exceed those this Full Bench found exist in contemporary Australia.<sup>5</sup>

### **Delaying the reductions will delay the benefits**

8. The Full Bench found important benefits will flow from the reductions in penalty rates it awarded, being:
- a. Increased trading hours<sup>6</sup>, which will increase services available to local communities on Sundays<sup>7</sup>.
  - b. A reduction in the hours worked by some owner operations<sup>8</sup> and their families.
  - c. Increased overall hours worked<sup>9</sup>. This is directly relevant to providing additional work opportunities for the:

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<sup>2</sup> [\[2017\] FWC FB 1001](#), Summary of Decision, 23 February 2017, ¶[7], p.2/15

<sup>3</sup> [\[2017\] FWC FB 1001](#), Summary of Decision, 23 February 2017, ¶[18], p.3/15

<sup>4</sup> [\[2017\] FWC FB 1001](#), Summary of Decision, 23 February 2017, ¶[18], p.3/15

<sup>5</sup> [\[2017\] FWC FB 1001](#), Summary of Decision, 23 February 2017, ¶[20], p.4/15

<sup>6</sup> [\[2017\] FWC FB 1001](#), Summary of Decision, 23 February 2017, ¶[31 (i)], p.6/15

<sup>7</sup> [\[2017\] FWC FB 1001](#), Summary of Decision, 23 February 2017, ¶[31 (iii)], p.6/15

<sup>8</sup> [\[2017\] FWC FB 1001](#), Summary of Decision, 23 February 2017, ¶[31 (ii)], p.6/15

<sup>9</sup> [\[2017\] FWC FB 1001](#), Summary of Decision, 23 February 2017, ¶[31 (iv)], p.6/15

- i. 738,900 Australians who are unemployed<sup>10</sup>.
  - ii. 274,500 young Australians (aged 15-24) who are unemployed, with youth unemployment more than double that for adults (13.0% for youth, 5.8% for all persons).<sup>11</sup>
  - iii. The 212,000 underemployed Australians working in the Retail industry who want access to additional hours of work.<sup>12</sup>
  - iv. The 173,900 underemployed Australians working in the 'Accommodation and Food Services' industry who want access to additional hours of work.<sup>13</sup>
9. Delaying the implementation of the reductions in penalty rates will delay these benefits, which the Commission:
- a. Has already found are likely to flow from reducing penalty rates.<sup>14</sup>
  - b. Has already found to, along with other considerations, merit the reductions in penalty rates it awarded.
10. The Commission has found that existing penalty rates are not meeting the modern awards objective. To unduly delay the changes to penalty rates the Commission has awarded would not be consistent with requirements for modern awards under the Fair Work Act 2009 (Cth). To pursue such a course would prevent awards, together with the National Employment Standards, from providing a fair and relevant minimum safety net of terms and conditions, as required under s.134 of the *Fair Work Act 2009* (Cth).
11. The Commission has also already determined that the reductions in Sunday penalty rates it awarded "are likely to reduce the earnings of those employees who currently work on Sundays" and that "in general, most existing employees would probably face reduced earnings".<sup>15</sup>
- a. Such concerns have already been taken into account in the Commission's rejection of the full quantum of changes sought by the applicant employers, and in its decision to award smaller reductions in Sunday penalty rates.
  - b. Such concerns have also already been taken into account in the Commission's strong inclination towards phased implementation rather than full commencement in a single tranche.

<sup>10</sup> [6202.0](#) - Labour Force, Australia, Feb 2017, Trend

<sup>11</sup> [6202.0](#) - Labour Force, Australia, Feb 2017, Table 13, Trend

<sup>12</sup> ABS Cat. No.6291.0.55.003 - Labour Force, Australia, Detailed, Quarterly, Nov 2016, [Table 19](#)

<sup>13</sup> ABS Cat. No.6291.0.55.003 - Labour Force, Australia, Detailed, Quarterly, Nov 2016, [Table 19](#)

<sup>14</sup> [\[2017\] FWCFB 1001](#), Summary of Decision, 23 February 2017, ¶[31], p.6/15

<sup>15</sup> [\[2017\] FWCFB 1001](#), Summary of Decision, 23 February 2017, ¶[46], p.8/15

- c. This is very clear from [47] of the Decision Summary:

*The immediate implementation of the variations to Sunday penalty rates would inevitably cause some hardship to the employees affected, particularly those who work on Sundays. The Full Bench concluded that appropriate transitional arrangements are necessary to mitigate the hardship caused to employees who work on Sundays.*<sup>16</sup>

## How to proceed

12. The Commission has determined (at least preliminarily) that the new Sunday penalty rates it has awarded should be implemented by way of a phased approach. Australian Chamber member organisations will address the specific phasing of reductions in Sunday for each of the four awards listed at [2], above.
13. However, as general/cross-award input to the Commission's consideration of the implementation of the Decision, the points outlined in the preceding paragraphs should see the Commission pursue an approach to implementation which:
- a. Does not unduly draw out transition or delay implementation, which would prolong the unacceptable circumstances outlined at [7], above.
  - b. Does not delay the benefits the Commission found, outlined at [8], above.
  - c. Achieves full implementation in as few steps as possible, and - subject to any Australian Chamber member submissions to the contrary and noting that award circumstances do differ - in not more than two (2) tranches/stages.
14. An effective transition to the full application of the Decision should see:
- a. The first tranche / stage of any phased introduction commence on 1 July 2017, concurrent with:
    - i. The changes to public holiday penalty rates.<sup>17</sup>
    - ii. The revised date for changes to late night/early morning penalty rates in the fast food and restaurant awards.<sup>18</sup>
  - b. The Commission reject any application for delayed commencement of the reductions in penalty rates beyond 1 July 2017.
  - c. The Commission reject any proposals for a zero increase in the first year or for "back ended" implementation in which:

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<sup>16</sup> [\[2017\] FWCFB 1001](#), Summary of Decision, 23 February 2017, ¶[47], p.9/15

<sup>17</sup> [\[2017\] FWCFB 1001](#), Summary of Decision, 23 February 2017, ¶[49], p.9/15

<sup>18</sup> [\[2017\] FWCFB 1551](#), 17 March 2017

- i. There is a minimal or cursory reduction in the first tranche/year(s).
- ii. The bulk of the penalty rate reductions are implemented only in the second or subsequent tranche(s)/year(s).

### **Take Home Pay Orders (THPO)**

15. At [2043] the Full Bench directs those making submissions on the implementation of its decision on penalty rates for Sunday work to “address the provisional views expressed above (at [2040]) and the issue of whether take home pay orders are an available option to mitigate the impact of the reductions in Sunday penalty rates”.
16. There is potential for some confusion in this area as a single term ‘take home pay orders’ has been used for two (2) different statutory purposes in recent years:

### Transition to modern awards (now complete)

17. Take Home Pay Orders (note capitalisation) were a specific mechanism inserted into the Schedule 5, Part 3, s.8 of the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 [Cth], for a very specific and time limited purpose, being the transition from premodern to modern awards.
18. Such orders were made available to support the transition from a pre-modern award (a modernisable instrument under the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 - Schedule 5) to a modern award.
19. The transition to modern awards was completed in 2010. The implementation of the 23 February 2017 Penalty Rates Decision is separate to, and entirely distinguishable from, the modern award transition that Take Home Pay Orders were created to address/support.
20. Any reductions in take home pay arising from the implementation of the 23 March 2017 Decision are not “modernisation-related reduction(s) in take home pay”. Once that very specific transition was complete, as it now is, such orders became unavailable to the Commission / applicants.

### Part 6-3A Transfer of business from a state public sector employer

21. Take home pay orders are defined in s.12 of the Fair Work Act 2009 [Cth] as follows:  
  

***"take-home pay order"***: see subsection 768BS(1).
22. Section 768BS is part of Part 6-3A of the Fair Work Act 2009 that is designed to address very specific transfers of business from state public sector employment.
23. This is not in any way relevant to the implementation of the Penalty Rates Decision.

## Complexity and Administration

24. The Commission has expressed a provisional reticence to attempt any grandfathering of current rates of pay for existing employees, as follows:

*...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)).<sup>19</sup>*

25. The Australian Chamber is not aware of any basis to depart from this approach. It is axiomatic that any attempt to grandfather would:
- a. See different employees of the same employer, doing the same work at the same time, entitled to different rates of pay.
  - b. Impose an additional regulatory burden on businesses, contrary to s.134(1)(f) of the *Fair Work Act 2009* (Cth).
  - c. Impose additional employment on-costs arising from the administration of such added payroll complexity.
26. The PC also eschewed any attempt at grandfathering in its consideration of how any future reduction in penalty rates could be implemented.

Dated: 24 March 2017

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<sup>19</sup> [\[2017\] FWCFB 1001](#), Summary of Decision, 23 February 2017, p.12/15