

IN THE FAIR WORK COMMISSION

Matter No.: AM2014/305

Fair Work Act 2009

s.156 – 4 yearly review of modern awards

4 yearly review of modern awards – Penalty Rates

SUBMISSIONS OF THE AUSTRALIAN COUNCIL OF TRADE UNIONS

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Lodged by: Australian Council of Trade Unions

Address for service: L4, 365 Queen Street Melbourne VIC 3000

Tel: 03 9664 7333

Fax: 03 9600 0050

Contact Email: jfleming@actu.org.au

A. Background

1. The Australian Council of Trade Unions ('ACTU') files these submissions as required by the directions contained in the decision of the Fair Work Commission ('the Commission') of 23 February 2017, [2017] FWCFB 1001, ('the Decision') in the penalty rates proceedings in the 4-yearly award review (AM2014/305).¹
2. The ACTU supports the submissions of United Voice, the Shop, Distributive and Allied Employees Association, Professionals Australia and the Australian Workers' Union.

B. Transitional arrangements

3. The Commission has decided to reduce the Sunday penalty rates in four hospitality and retail awards. The ACTU is greatly concerned about the adverse impact on hospitality and retail workers of the resultant loss in their pay.
4. We submit the Decision is likely to exacerbate the gender pay gap and inequality and have a harsh impact on already low paid workers and at a time when wage growth is at a record low.
5. Hence, we submit implementing the Decision would be inconsistent with the objects of the *Fair Work Act 2009* ('FW Act') which include "*providing workplace relations laws that are fair to working Australians.*"² and with the modern awards objective which requires that the Commission ensure the minimum safety net is fair and relevant, including taking into account the "*relative living standards and the needs of the low paid*".³ Hence, we call on the Commission to make no orders to implement the proposed reductions in Sunday penalty rates.
6. In the alternative, we call on the Commission to do everything in its power to reduce the harsh effects of the Decision on the affected employees by delaying implementation and phasing in the changes over as long a timeframe as possible.
7. The ACTU notes that in the Decision the Commission acknowledged that the planned reduction in Sunday penalty rates in hospitality and retail awards will result in a

¹ In particular, paragraphs [2042], [2046], [2050] and [2062].

² s(3)(a).

³ s134(1)(a).

significant loss of pay to retail and hospitality workers who work on Sundays and that it accepts these workers are low paid.⁴ The Commission also found that:

- (a) Hospitality, retail and food services have "the largest proportion of low paid workers in Australia";⁵
- (b) These workers are more likely to be female, award-reliant, part-time, and employed on a casual basis;⁶
- (c) Many hospitality employees "*earn just enough to cover their weekly living expenses. Saving money is difficult. Unexpected expenses such as school trips, illness, or repairs, can produce considerable financial stress.*"⁷ For example, Ms Gordon's evidence in the proceedings was that she earned between \$357.90 and \$362.50 and the proposed cuts would reduce her income by between \$25 and \$40 per week, leaving "little margin for error in her spending"⁸. The Commission found that the reduction "*will have an adverse impact on the earnings of those hospitality industry employees who usually work on a Sunday... and to have a negative effect on their relative living standards and on their capacity to meet their needs*";⁹
- (d) Fast food employees are "*more likely to reside in a lower income households and are more likely to experience financial difficulties*";¹⁰
- (e) Retail employees and their households "*face greater difficulties in raising emergency funds [and] their financial resources are more limited*";¹¹ and
- (f) As a result of the Decision, most of the hospitality and retail employees who work on Sundays would receive a wages cut, some will have to work more hours to make up the lost pay, whilst others will be unable to and others will be offered less hours than they received previously.¹²

⁴ For example, see [818] and [2040].

⁵ The Decision at [1455].

⁶ The Decision at [743]; [1464].

⁷ The Decision at [819].

⁸ The Decision at [820].

⁹ The Decision at [818].

¹⁰ The Decision at [1356].

¹¹ The Decision at [1656].

¹² The Decision at [818], [822]; [1357]; [1657]; [1827]; [1659], [1828].

8. The Commission's view that the 'relative living standards and needs of the low paid' criterion is not a consideration engaged by the primary purpose of penalty rates¹³ is a separate matter to that of determining the appropriate transitional arrangements of such a reduction where, we submit, the needs of the low paid should be given utmost priority and priority over the impact on business.
9. We agree with United Voice's submission that take home pay orders are not available under the FW Act.
10. We submit that all of the above suggests that in fairness to the affected employees, should the Commission not accept our submission that the no orders should be made implementing the reductions in Sunday penalty rates, priority should be accorded to minimising the impact and financial stress on employees by at least implementing the Decision over as long a period as possible and by providing an interim period of delay for employees to re-arrange their affairs and mitigate the Decision's impact to the extent possible. The Commission has already indicated its provisional view that implementation should occur from 1 July 2017 and be phased in via instalments over at least 2 and less than 4 years. We note this was expressed as a provisional view.
11. Whilst the Commission accepts many of the detrimental affects on workers are known with some certainty, such as the size and significance of the resulting loss in pay for award-reliant employees, the factors moving the Commission to nevertheless reduce penalty rates, such as a possible extension in service levels and hours and a possible increase in employment in the hospitality and retail industries, are known with less certainty, and indeed, are largely speculative. In short, the Commission has acknowledged that if the Decision is implemented, award-reliant workers will certainly face a loss of pay but it is not known to what extent employers will roster more work or hire more people. This too would suggest caution and a transitional process that favours the needs of those known with a higher degree of certainty to be disaffected over the needs of business for a rapid implementation when any benefits are not known with such certainty.
12. The Commission's provisional view is that the employees affected by these changes have limited resources to escape the Decision's detrimental effects, for example, through retraining or alternative employment, so a delay in implementation is

¹³ The Decision [823].

unnecessary. The Commission found these employees "*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*"¹⁴ and "*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.*"¹⁵

13. We submit that 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. The longer workers are given to pay for and undertake training, the more will be able to access it. Those unable to escape the harsh effects of a reduction in pay should be given sufficient time to rearrange their affairs, expenses and financial obligations before the reductions commence.

14. Hence, we submit the Commission should delay implementation for at least 2 years and phase in the penalty rate reductions 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. This five-year implementation, including a period of delay, is consistent with the award modernisation process. In the Award Modernisation Decision, a Full Bench of the Australian Industrial Relations Commission decided on 2 December 2009 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. The Full Bench noted,

We consider it 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.¹⁶

15. The Commission has suggested the timeline should be shorter than the Award Modernisation process because the penalty rate reductions in this case are less complex. We submit this proposition places greater weight on the impact of the Decision on business and the time business requires to adjust to the changes over the needs of the low paid, which would favour a longer implementation. As we have argued, the needs of the low paid should take priority.

¹⁴ The Decision [2040].

¹⁵ Ibid.

¹⁶ Award Modernisation Decision [2009] AIRCFB 800, 2 September 2009, at [30].

C. Clubs Award, Restaurant Award, Hair and Beauty Award

16. The Commission found that employer groups had failed to "establish a merit case sufficient to warrant the granting of the claim"¹⁷ to reduce weekend penalty rates in the *Registered and Licensed Clubs Award 2010* ('Clubs Award'), however the Commission proposes to provide interested parties an opportunity to "advance a properly based merit case in support of any changes they propose in respect of weekend penalty rates".¹⁸ We submit that allowing employer parties to immediately run their case again violates the principles of natural justice. We oppose such an opportunity being provided.
17. We oppose the Commission's alternative proposal to revoke the Clubs Award and subsume it within the *Hospitality Industry (General) Award 2010*. Such a potentially dramatic change should not be made without supporting evidence. To do otherwise would violate the principles of the 4-yearly review laid down in the Statutory Framework Decision.¹⁹
18. The Commission also found that the employer groups had "not established a merit case sufficient to warrant the Sunday penalty rates" in the *Restaurant Industry Award 2010*, however it has flagged providing a further opportunity for the employer parties to address weekend penalty rates in this award and to submit additional evidence. We oppose this course of action for the same reasons as outlined above in relation to the Clubs Award.
19. Further, we oppose the Commission's proposal to allow employer parties to pursue changes to weekend rates in the *Hair and Beauty Industry Award 2010* after the employer groups abandoned their claims earlier in the review on the grounds that it violates the principles of natural justice.

ACTU

¹⁷ The Decision at [994].

¹⁸ The Decision at [999].

¹⁹ See [2014] FWCFB 1788.