



Australian Federation of Employers and Industries (AFEI)

Submission to the Fair Work Commission concerning
4 yearly review of modern awards: Penalty Rates
AM2014/305

March 2017

AFEI

Australian Federation of
Employers & Industries

BEFORE THE FAIR WORK COMMISSION

Title of Matter: 4 yearly review of modern awards – Penalty Rates

Matter Number: AM2014/305

Section: s.156

Document: Submissions of the *Australian Federation of Employers and Industries* ('AFEI') re transitional arrangements to apply to the reduction in the Sunday penalty rate in the:

Hospitality Industry (General) Award 2010

Fast Food Industry Award 2010

General Retail Industry Award 2010.

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1. The Fair Work Commission (**Commission**) has sought submissions from interested parties in response to the Commission's provisional views regarding the form of transitional arrangements to apply to the reduction in the Sunday penalty rates. As a party with an interest in each of the above awards, AFEI makes the following submissions in response to the provisional views.

Time frame for change to the Sunday penalty rates (response to provisional view at [2040(i)]

2. The Commission has expressed the provisional view that it is not appropriate to delay making changes to Sunday penalty rates for 12 months at which time the reductions apply in full. For the reasons which follow, AFEI's position is that:
 - a. any delay (whether 12 months or other) in making the changes in full would not be appropriate; and
 - b. 1 July 2017 is a fair and reasonable date for implementing the changes in full.

3. In the decision of 23 February 2017, the Commission concluded that, with respect to the central issue of the modern awards objective, the existing Sunday penalty rate in each award is neither fair nor relevant, and that reduction is justified in order to meet that objective.¹
4. Most notably, the Commission accepted propositions that the current Sunday penalty rates in hospitality and retail industries have led to operational limitations such as restricted trading hours, lower staff levels and restrictions in the type and range of services.²
5. It follows that until the existing rate is reduced in full, the Sunday penalty rate in each award will remain in a state that is neither fair nor relevant. In the absence of it being fair and relevant, the Sunday penalty rate should be rectified as soon as possible.
6. Any delay would not be appropriate given that the Commission ‘must ensure’ that the awards meet the modern awards objective.³
7. Delay in rectifying the awards will consequentially delay the achievement of the objective of a guaranteed safety net of ‘fair, relevant and enforceable minimum terms and conditions’.⁴
8. Implementing the change in full on 1 July 2017 will represent four months since the Commission’s finding that change is necessary. It is submitted that four months is a fair and a reasonable period to those affected by the change. When compared with the required periods of notice in order to change a roster, it is a substantially longer.⁵
9. Further, with respect to the retail industry in New South Wales, the implementation of the reduced Sunday rate on 1 July 2017 will effectively return the industry to the 50% Sunday penalty rate position which applied in NSW before the modern award.

1 Decision at [885]-[886], [1701]-[1702],[1877].

2 Decision at [70]

3 FWA, s.134(1).

4 FWA, s.3(b)

5 Hospitality Award at cl.30.2 requires 7 days notice; Retail Award at cl.28.14(d) requires 7 days or 14 days if not agreed by employee.

10. Implementation on 1 July 2017 will promote the realisation of the benefits which are the likely consequence of the reduced Sunday penalty rate in the hospitality and retail industries such as positive employment effects,⁶ increased trading hours and the level and range of services provided on Sunday.⁷

Take home pay orders (response to provisional view at [2040(ii)])

11. In relation to take home pay orders, it is AFEI's submission that the changes to penalty rates are not matters that fall within the ambit of take home pay orders as the changes are neither related to the making of a modern award or transitional provisions in modern awards.
12. If they are available, take home pay orders would not be suitable for the reasons which follow.
13. First, as noted by the Commission, take home pay orders have the capacity to add to the regulatory burden on business. That is an outcome that might diminish or neutralise the beneficial stimulating effect of the reduced Sunday penalty on industry.
14. Second, taking into account the case that has demonstrated that the current Sunday penalty is neither fair nor relevant and has led to the imposition of 'a number of operational limitations'⁸, it is submitted that take home pay orders have the potential to simply transfer the source of the problem i.e. transfer from the award and to regulatory infrastructure which is only superficially different from the award.

Reductions by instalment (response to provisional view at [2040(iii)-(iv)])

15. Instalments will delay the implementation with the consequence that there will be delay in the realisation of the benefits of the reduced rate. AFEI relies upon its submissions at paragraphs [3] – [11], in support of the position that the reduced Sunday penalty should be implemented on 1 July 2017.

6 Decision at [68]

7 Decision at [71]

8 Decision at [70]