

4 Yearly Review of Modern Award – Penalty Rates (AM2014/305)

TRANSITIONAL ARRANGEMENTS: SUNDAY PENALTY RATE REDUCTIONS AND OTHER MATTERS

SUBMISSIONS OF THE AUSTRALIAN HOTELS ASSOCIATION AND THE ACCOMMODATION ASSOCIATION OF AUSTRALIA

1. The Australian Hotels Association (AHA) and the Accommodation Association of Australia (AAA) make these submissions following the decision *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001.

Transitional Arrangements

2. The AHA / AAA acknowledge that the actual impact of the change to the Sunday penalty rate will differ depending on the circumstances applying to the individual business¹ and to the individual employee, and that appropriate transitional arrangements will mitigate the impact on employees.
3. The review of the penalty rates in the *Hospitality Industry (General) Award 2010* (HIGA) commenced in 2014, it has attracted significant public attention since it commenced and it was publicly known that following the review the Sunday penalty rate in the HIGA could change.
4. The AHA / AAA accept even if an employee knew that a penalty rate change was possible, they may not consider the full impact on them personally until the quantum and the date from which the change will apply is known.
5. The hospitality employers lay evidence supported the proposition that the current level of penalty rates has lead employers to impose operational limitations such as, restricting trading hours, lowering staff levels and restrictions on the types of services they provide² and that a reduction in penalty rates was likely to lead to:
 - a. increased trading hours on Sundays and public holidays;
 - b. a reduction in the hours worked by some owner operators;
 - c. an increase in the level and range of services offered on Sundays and public holidays; and
 - d. an increase in the overall hours worked.³

¹ 4 yearly review of modern awards – Penalty Rates [2017] FWCFB 1001 [1621]

² Ibid [853]

³ Ibid [854]

6. Having regard to the above, the AHA / AAA are of the view that the change to the Sunday penalty rate for fulltime and part-time employees should be introduced effective from 1 July 2017. However, respecting the decision of the Commission we submit the change in Sunday penalty rates should be introduced in two instalments, each taking effect at the same time as adjustments to minimum hourly rates as a consequence of annual wage reviews.
7. The AHA / AAA respectfully submit that, for fulltime and part-time employees to whom the HIGA applies, the Sunday penalty should be set at:
 - a. 160% of the minimum hourly rate, taking effect on the first full pay period on or after 1 July 2017.
 - b. 150% of the minimum hourly rate, taking effect on the first full pay period on or after 1 July 2018.
8. The AHA / AAA submit that if the change in the penalty rate was to occur in more than two instalments or its introduction delayed for 12 months⁴ it would unnecessarily delay the benefits set out in paragraph 4 above. For the change to be relevant it needs to remain contemporary and foster an increase in the level of services offered with a consequent increase in employment (in terms of hours worked by existing employees or the engagement of new employees).⁵
9. The AHA / AAA agree with the Full Bench's provisional views against 'grand fathering' or 'red circling' all existing employees.⁶ Such a proposal would create a two tiered payroll system, creating a burden on business administration and an unnecessary and unfair differential between employees performing the same work.
10. When the Commission may include a term in a modern award providing for take home pay orders is prescribed in the Act⁷ and regulations.⁸ Take home pay orders are limited to orders to remedy 'modernisation related' reductions and reductions resulting from the making of the modern award or the operation of transitional arrangements in relation to the award.
11. The AHA / AAA submit that, having regard to the prescriptive nature of the legislation in relation to take home pay orders, the Commission cannot include a term in modern awards that provides take home pay orders resulting from the change to Sunday penalty rates.

⁴ 4 yearly review of modern awards – Penalty Rates [2017] FWCFB 1001 At [86]

⁵ Ibid [783]

⁶ Ibid [2021 (ii)]

⁷ *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*

⁸ *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009*

12. If, contrary to the AHA / AAA submission, take home pay orders are available, any term in the HIGA providing for such an order should:
 - a. be limited to employees whose take home pay has been reduced as a consequence of the change in the Sunday penalty rate only (and not due to any other reason);
 - b. be confined to employees who were employed on a fulltime or part-time basis and regularly worked a Sunday over the 12 months from 1 July 2016 to 30 June 2017;
 - c. define regularly worked Sundays as 34 Sundays⁹ in the 12 months from 1 July 2016 to 30 June 2017; and
 - d. take into account the needs of the employee and the requirements of the business.

Specified Award Matters – Registered and Licensed Clubs Award 2010

13. The Commission has proposed that the *Registered and Licensed Clubs Award 2010* (Clubs Award) be revoked and the coverage of the HIGA varied so that it covers the class of employees presently covered by the Clubs Award and has invited interested parties to express a view.
14. The AHA / AAA submit that the HIGA's coverage should not be varied so as to include employers and employees in the registered clubs industry. The hotel and accommodation industry is different to that of clubs. Clubs are membership based organisations that provide services to their members (who are eligible persons in accordance with the clubs rules), who have typically paid a joining (and renewing) membership fee, and their guests. Clubs are often subsidised by corporate and other sponsorship and a larger proportion of the revenue (when compared to the hotel sector) comes from gaming. The business drivers in registered clubs is significantly different to that of the hotel and accommodation sector.
15. While the AHA / AAA accept that much of the work done by award covered employees in the registered clubs sector and the hotel and accommodation sector is very similar, the differences between the registered clubs employer and the hotel and accommodation employer are stark. The AHA / AAA submit that it is appropriate that fair and relevant minimum award standard be maintained separately for each of the club sector and the hotels and accommodation sector.

⁹ See *Re Shift Re Shift Workers Case* [1972] AR 633

Proposed Change in Terminology

16. The AHA / AAA note that a separate statement and directions will be issued in relation to the change of the term 'penalty rates' to ' additional remuneration' as sought by the AHA / AAA and the Pharmacy Guild of Australia.
17. The AHA / AAA maintain that the term 'additional remuneration' is more appropriate than 'penalty' and will make further submissions on that point in accordance with the directions.

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