



Australian Government

Australian Government Submission

to the

Fair Work Commission concerning

the

4 yearly review of modern awards

— penalty rates AM2014/305

24 March 2017

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1. Introduction

- 1.1. At the invitation of the Fair Work Commission (FWC), this submission from the Australian Government provides information to the FWC to assist it in determining appropriate transitional arrangements arising from its decision to reduce Sunday penalty rates in the retail and hospitality sectors (the decision).¹
- 1.2. The FWC reviewed penalty rates as part of the four yearly review of modern awards. This was the first four yearly review – that is, four years after 122 modern awards were created on 1 January 2010.² This review was required under section 156 of the *Fair Work Act 2009* (the Fair Work Act) introduced by the then Rudd Labor Government. The review commenced in January 2014.
- 1.3. Under the Fair Work Act, the four yearly review must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions. This is the modern awards objective.
- 1.4. The objective set out in subsection 134(1) of the Fair Work Act includes a range of matters (from paragraph 134(1)(a) – (h)) that the FWC must take into account in making and varying modern awards. These include specifically:
 - the need to provide additional remuneration for employees working overtime, at unsocial times, and on weekends or public holidays (paragraph 134(1)(da));
 - the likely impact on business, including productivity and employment costs (paragraph 134(1)(f)); and
 - the likely impact of any exercise of modern award powers on employment growth, inflation and sustainability, performance and competitiveness of the national economy (paragraph 134(1)(h)).
- 1.5. Paragraph 134(1)(da) was not a part of the modern awards objective as enacted and instead was specifically introduced in 2013 as an amendment to the Fair Work Act by the previous Labor government. In its decision, the FWC found that paragraph 134(1)(da) did not *require* that each modern award must provide additional remuneration for working in the identified circumstances³ with the effect that section 134(1)(da) allowed for a reduction in the additional remuneration that is paid for such work.
- 1.6. As part of the review, applications were made to vary penalty rate provisions in the Hospitality, Retail, Pharmacy and Fast Food Awards.⁴

¹ AM2014/305

² Note however that there was previously an interim review of the modern awards by Fair Work Australia in 2012, two years after their introduction. In that review, the FWC reduced some Sunday penalty rates in the *Restaurant Industry Award 2010*. Further discussion on this reduction is at paragraph 3.21 of this submission.

³ [48] AM2014/305

⁴ The *Hospitality Industry (General Award) 2010* (MA000009), the *Retail Industry Award 2010* (000004), the *Pharmacy Industry Award 2010* (MA000012) and the *Fast Food Industry Award 2010* (MA000003).

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- 1.7. The matter was heard by a Full Bench of the FWC⁵ over a two year period, with all interested parties provided ample opportunity to present their case.
- 1.8. Thirty nine days of substantive hearings were conducted over several months.
- 1.9. Over 5,900 submissions were provided by interested parties including employer groups, unions, state and territory governments and opposition parties, and individuals. Additional expert evidence, research and witness statements were also provided and updated throughout the proceedings.
- 1.10. In general, parties representing employees sought no change to the existing penalty rates, while employers and employer groups sought for Sunday penalty rates to be aligned with Saturday penalty rates.
- 1.11. A Full Bench of the FWC released its final decision on these Awards on 23 February 2017.
- 1.12. The over 500 page decision of the FWC, amongst other things, determined to reduce Sunday penalty rates in the four Awards but decided not to reduce the rates to the same level as Saturday penalty rates - Sunday penalty rates remain higher than Saturday penalty rates⁶.
- 1.13. The FWC made its decision based on the extensive evidence it received. As stated at paragraph 16 of the summary of its decision:

Variations to modern awards must be justified on their merits. The extent of the merit argument required will depend on the circumstances. Significant changes where merit is reasonably contestable should be supported by an analysis of the relevant legislative provisions and, where feasible, probative evidence.

⁵ The Full Bench was comprised of the President, Justice Ross, Vice President Catanzariti, Deputy President Asbury, Commissioner Hampton and Commissioner Lee.

⁶ Except for Level 1 employees under the *Fast Food Award 2010*.

1.14. The effect of the decision is set out in the table below which is from paragraph 55 of the FWC decision:

Award	Sunday Penalty Rate	
<i>Hospitality Award</i> Full-time and part-time employees: (no change for casuals)	175 per cent →	150 per cent
<i>Fast Food Award</i> (Level 1 employees only) Full-time and part-time employees: Casual employees:	150 per cent → 175 per cent →	125 per cent 150 per cent
<i>Retail Award</i> Full-time and part-time employees: Casual employees:	200 per cent → 200 per cent →	150 per cent 175 per cent
<i>Pharmacy Award</i> (7.00 am – 9.00 pm only) Full-time and part-time employees: Casual employees:	200 per cent → 225 per cent →	150 per cent 175 per cent

1.15. While noting it is difficult to quantify the precise effect, the FWC concluded that the decision was expected to deliver a range of substantive benefits including:

- an increase in the level and range of services offered by some hospitality enterprises, with a consequent increase in employment (in terms of hours worked by existing employees or the engagement of new employees);⁷
- increased service levels with a consequent increase in employment for the retail sector including:
 - more stores being open on Sunday
 - increased Sunday trading hours
 - a reduction in hours by some owner operators
 - an increase in overall hours worked in retail stores,⁸ and
- an increase in the level and range of services offered, with a consequent increase in employment, in terms of additional persons employed and additional hours worked, under the Pharmacy Award.⁹

1.16. The FWC also concluded that appropriate transitional arrangements were necessary to mitigate hardship caused to employees who work on Sundays and who are affected by the decision.¹⁰

⁷ [829] of AM2014/305

⁸ [1620] of AM2014/305

⁹ [1835] of AM2014/305

¹⁰ [2000] of AM2014/305

- 1.17. In terms of those affected by the decision, the Government notes that the Department of Employment estimates that the change to Sunday penalty rates will affect about three to four per cent of Australia's workforce. This translates to a range for those working on Sunday of between 300,000 and 450,000 employees (see Attachment A for details).
- 1.18. While expressing preliminary views, the FWC did not reach a concluded position on the most appropriate form of transitional arrangements. In particular the FWC commented that it was unclear whether Take Home Pay Orders are available to mitigate the impact of the proposed reduction in Sunday penalty rates.¹¹
- 1.19. The FWC in Chapter 11 of its decision advised that it would be assisted by submissions from interested parties in respect of this issue and, in particular, the Commonwealth (given that the issue raises a question as to the proper construction of the statutory framework). The FWC also invited submissions in response to the provisional views expressed¹².
- 1.20. This submission responds to the preliminary views expressed by the FWC by providing:
- information on the construction of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the Transitional Act) as it relates to the Take Home Pay Orders (which is, relevantly, in the same form as it was introduced by the Labor Government at the time); and
 - further information on the potential transitional arrangements outlined by the FWC available under the Commission's general power to vary modern awards.

2. Take Home Pay Orders

- 2.1. The FWC outlined in its decision¹³ some of the history and context for Take Home Pay Orders and noted that, 'in short, the purpose of a Take Home Pay Order is to compensate an employee for any reduction in their pay as a result of the making of a modern award or the transitional arrangements in a modern award.'¹⁴
- 2.2. The FWC correctly identified¹⁵ that the power to make Take Home Pay Orders is only exercisable in the following cases, each of which is discussed in turn below:
- under the Transitional Act; or
 - under the standard clause that is included in the relevant awards that allows the FWC to make an order remedying any reduction in take home pay as a result of the making of the award or the operation of transitional arrangements.

¹¹ [2019] of AM2014/305

¹² [2019] of AM2014/305

¹³ [2010] – [2018] of AM2014/305

¹⁴ [2010] of AM2014/305

¹⁵ [2011] – [2016] of AM2014/305

Take Home Pay Orders under the Transitional Act

2.3. The Transitional Act relevantly provides:

*If the FWC is satisfied that an employee, or a class of employees, to whom a modern award applies has suffered a modernisation-related reduction in take-home pay, the FWC may make any order (a **take-home pay order**) requiring, or relating to, the payment of an amount or amounts to the employee or employees that the FWC considers appropriate to remedy the situation.*¹⁶

2.4. The Transitional Act further provides that Take Home Pay Orders will only be available in two specific circumstances:

- where the reduction in take home pay was attributable to the award modernisation process;¹⁷ or
- where the reduction in take home pay was attributable to an order varying modern awards made before 1 July 2010.¹⁸

2.5. Given the circumstances of this decision - that is, it was made as part of the four yearly review - any reduction in take home pay as a result of the FWC's decision to reduce Sunday penalty rates does not fall within the circumstances prescribed above.

2.6. The FWC itself noted¹⁹ that Take Home Pay Orders cannot be made in respect of an employee who was employed after a modern award came into operation in any event because such orders only apply to employees employed before the modern award came into operation.

2.7. On this basis, the Government confirms that Take Home Pay Orders are not available under the Transitional Act in this case.

Previous reductions in penalty rates under the Transitional Act

2.8. The Government notes that the award modernisation process conducted by the Australian Industrial Relations Commission (2008-09) resulted in reductions in penalty rates from 1 July 2010, including:

- the reduction from 200 per cent for Sundays in the Hotel Employees (State) Award in New South Wales²⁰ to 175 per cent under the *Hospitality Industry (General) Award 2010*²¹; and
- the reduction from 200 per cent for Sunday work under the Cafes and Restaurants (South Australia) Award²² to the 150 per cent under the *Restaurant Industry Award 2010*²³.

Attachment B has more information.

¹⁶ Item 9 of Schedule 5 of the Transitional Act.

¹⁷ See item 8(3)(d) of Schedule 5. Item 2(1) of Schedule 5 defines this process to mean the process provided for by Part 10A of the *Workplace Relations Act 1996* (WR Act).

¹⁸ See items 8A(2) and 8A(4)(e) of Schedule 5 as modified by Regulation 3B.05 of the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009*.

¹⁹ [2012] of AM2014/305

²⁰ AN120249

²¹ Attachment C of AM2014/305

²² AN150025

²³ [285] of AM2014/305

- 2.9. In spite of these reductions by the original award modernisation process, evidence demonstrates that Take Home Pay Orders were not a preferred or effective means of addressing any disadvantage.
- 2.10. In its decision, the FWC identified that approximately 140 applications for Take Home Pay Orders were received, of which five were granted, 12 refused and the remainder either withdrawn, settled or adjourned indefinitely.²⁴

Take Home Pay Orders under a clause in a modern award

- 2.11. The FWC also sought submissions in its decision about whether Take Home Pay Orders may be available under the following standard clause included in the relevant awards:

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 situation²⁵.

- 2.12. The standard clause is authorised by item 13A(1) of Schedule 5 to the Transitional Act, which provides that:

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).²⁶

- 2.13. The availability of Take Home Pay Orders under a modern award turns on the correct construction of item 13A(1).
- 2.14. The item provides that a Take Home Pay Order can only be made for the purpose of remedying a reduction in take home pay suffered by an employee, or class of employees, as a result of:
- the making of a modern award; or
 - the operation of any transitional arrangement in relation to the award.
- 2.15. In this case, the reduction in Sunday penalty rates arising from the FWC's decision does not fall within the first of these categories as it is not the result of the *making* of a modern award; rather, it is brought about by the *varying* of those awards by the FWC.

²⁴ [2018] of AM2014/305

²⁵ [2016] of AM2014/305

²⁶ Item 13A(1) of Schedule 5 as modified by Regulation 3B.04 of the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009*.

- 2.16. It is clear that the Fair Work Act and the Transitional Act draw a distinction between the making of a modern award and the varying of a modern award.²⁷
- 2.17. Accordingly, outside of the making of a modern award, the FWC could only consider an application for a Take Home Pay Order under the second category; that is, if the employee had suffered a reduction in take home pay due to the operation of any transitional arrangement in relation to the award.
- 2.18. A reduction in take home pay from the FWC's decision is not the result of transitional arrangements but the result of an underlying variation of the modern award.
- 2.19. Item 13A cannot support an application for a Take Home Pay Order because such an application is not in accordance with the Transitional Act. The Transitional Act moved employees and employers from the previous Federal industrial relations system and various State systems, to the Fair Work Act system.
- 2.20. The Government considers that Take Home Pay Orders are not available under the standard clause in modern awards in this case.

3. Other transitional options as identified by the Fair Work Commission

- 3.1. Given Take Home Pay Orders are not available, the other options as identified by the FWC for transitioning to the new Sunday penalty rates are discussed below.

Delayed introduction of Sunday penalty rate reductions

- 3.2. The FWC referred to the Productivity Commission suggestion of a 12 month delay to the penalty rate changes.²⁸
- 3.3. The Productivity Commission Inquiry argued that this would allow employees to 'seek other jobs, increase their training and make other labour market adjustments'.²⁹
- 3.4. The FWC made it clear it did not support the Productivity Commission's approach.³⁰

'Red-circling' current employees from Sunday penalty rate reductions

- 3.5. Another option identified by the FWC involves 'quarantining' current employees from the effect of the proposed Sunday penalty rate reductions such that only future employees employed on or after 1 July 2017 are affected.
- 3.6. The FWC's provisional view was that it did 'not favour any general 'red-circling' term which would preserve the current Sunday penalty rates for all existing employees'.³¹

²⁷ See items 8 and 8A of Schedule 5 as modified by Regulation 3B.05 of the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009*.

²⁸ [2021(i)] of AM2014/305

²⁹ Productivity Commission 2015, *Workplace Relations Framework*, Final Report, Canberra, Page 495.

³⁰ [2021(i)] of AM2014/305

- 3.7. In considering whether this is the appropriate transitional provision the following issues will need to be considered by the FWC:
- whether the red-circling continues in circumstances where a current employee changes employer, changes job/position with the same employer, or changes shift patterns with the same employer.
 - formulating rules for each of these circumstances has the potential to increase the complexity of the transition to the new Sunday penalty rates decided by the FWC.
 - the potential for red-circling to encourage employers to replace ‘red circled’ employees with those on the new and lower loading. For example, red-circling could result in employers not rostering current employees on Sundays and using new employees to whom the red-circling does not apply. This could be an issue for casual employees in particular.
 - the complexity and costs of running a dual pay arrangement by employers, particularly for small businesses.
- 3.8. Given the implementation issues that would arise from red-circling, the FWC will need to carefully weigh up the costs and benefits and potential impact of such an approach.

Phasing in Sunday penalty rate reductions

- 3.9. Another option identified by the FWC was to phase in the reductions to Sunday penalty rates over a period of time.
- 3.10. The Government notes the FWC’s provisional view that:
- The reductions in Sunday penalty rates should take place in a series of annual adjustments on 1 July each year (commencing 1 July 2017) to coincide with any increases in modern award minimum wages arising from Annual Wage Review decisions.*³²
- 3.11. The FWC went on to note that the appropriate number of annual instalments is likely to be at least two but less than five.³³
- 3.12. The Government confirms that the FWC is empowered by section 156 of the Fair Work Act to vary relevant modern awards in this way.³⁴
- 3.13. Phased variations to penalty rates can be regarded as consistent with both the modern awards objective³⁵ and the general objects of the Fair Work Act.³⁶

³¹ [2021(ii)] of AM2014/305

³² [2021 (iii)] of AM2014/305

³³ [2021 (iv)] of AM2014/305

³⁴ Section 156 of the Fair Work Act.

³⁵ Section 134 of the Fair Work Act.

³⁶ Section 3 of the Fair Work Act.

Previous penalty rate reductions where ‘phasing in’ did occur

- 3.14. The Government notes that the award modernisation process in 2008-09 undertaken by a predecessor to the FWC, the Australian Industrial Relations Commission (AIRC), was initiated by the then Labor Government and resulted in reductions to certain Sunday penalty rates (amongst other penalty rate types) as employees moved from state based and some federal awards to the modern awards system.
- 3.15. Those reductions to Sunday penalty rates were phased in by the AIRC in equal adjustments over a five year period – from 2010 to 2015 – as permitted by section 576T of the former *Workplace Relations Act 1996*.³⁷
- 3.16. For example, as at 31 December 2009, the Sunday penalty rate for employees covered by the New South Wales *Hotel Employees (State) Award (AN120249)* was 200 per cent.
- 3.17. By contrast, under the national *Hospitality Industry (General) Award 2010* which commenced on 1 January 2010, the relevant Sunday penalty rate (prior to the FWC’s recent decision) was set as 175 per cent.
- 3.18. This resulted in a reduction in Sunday penalty rates for those employees who were previously covered by the NSW Award.
- 3.19. Transitional arrangements provided that Sunday penalty rate reductions were phased in from the first full pay periods from 1 July 2010, 2011, 2012, 2013 and 2014.³⁸
- 3.20. In this example, the reduction in the applicable Sunday penalty rate for New South Wales hospitality workers was staggered over five years with changes taking effect from the first pay period on or after 1 July of each year.
- 3.21. There are a range of other examples of where reductions in Sunday penalty rates have been phased in – see [Attachment B](#).

Previous penalty rate reductions as a result of the review of modern awards where ‘phasing in’ did not occur

- 3.22. The FWC has previously reduced penalty rates in the *Restaurant Industry Award 2010*, and no phasing in occurred. This occurred as a result of the initial two year review of modern awards which commenced in 2012.
- 3.23. Following an original decision by Deputy President Gooley on 10 October 2013 not to change the Sunday penalty rates in this Award an appeal was lodged by the Restaurant and Catering Association of Victoria.

³⁷ Paragraphs 28 and 30 of *Award Modernisation [2009]* AIRCFB 800.

³⁸ Clause 2 and Item A.5 of Schedule A to the *Hospitality Award 2010*.

- 3.24. A Full Bench decision about this appeal was made on 14 May 2014.³⁹
- 3.25. The decision was to reduce the Sunday penalty rate for casual employees at the introductory level and Levels 1 and 2 of the Award from 175 per cent (time and three-quarters) to 150 per cent (time and a half).
- 3.26. The reduction came into effect from 1 July 2014. There were no Bills introduced into Parliament by any party trying to prevent this decision from being implemented.

4. Concluding remarks

- 4.1. The FWC is an independent body established to, among other things, set pay and conditions for employees.
- 4.2. The Government notes that there is a long history of the FWC setting pay and conditions for award workers, including the adjustment of penalty rates.
- 4.3. This is core business for the FWC. The FWC does not change pay and conditions without a sound evidence base and, as the FWC stated in its decision, variations must be justified on their merits.
- 4.4. In this case, the FWC has made a decision to reduce Sunday penalty rates in certain awards based on a range of factors and the extensive evidence that was presented to it during the award review process.
- 4.5. The over 500 page decision in this case shows a lengthy and comprehensive process was put in place to hear and then balance competing views from interested parties.
- 4.6. Whilst acknowledging the positive employment benefits of its decision, the FWC also notes that appropriate transitional arrangements need to be put in place.
- 4.7. As an independent body that has made this decision, it is now for the FWC to determine the appropriate transitional provisions.
- 4.8. It is important that in making its determination, the FWC implement transitional arrangements which ensure the positive employment benefits⁴⁰ flow to businesses and the Australian economy in a timely fashion, while at the same time taking into consideration the potential economic impact and effects on employees.
- 4.9. The Government supports the view expressed by the FWC that transitional arrangements should be as simple as possible so they can be implemented in a way that is easy to understand and executed for both business and employees.

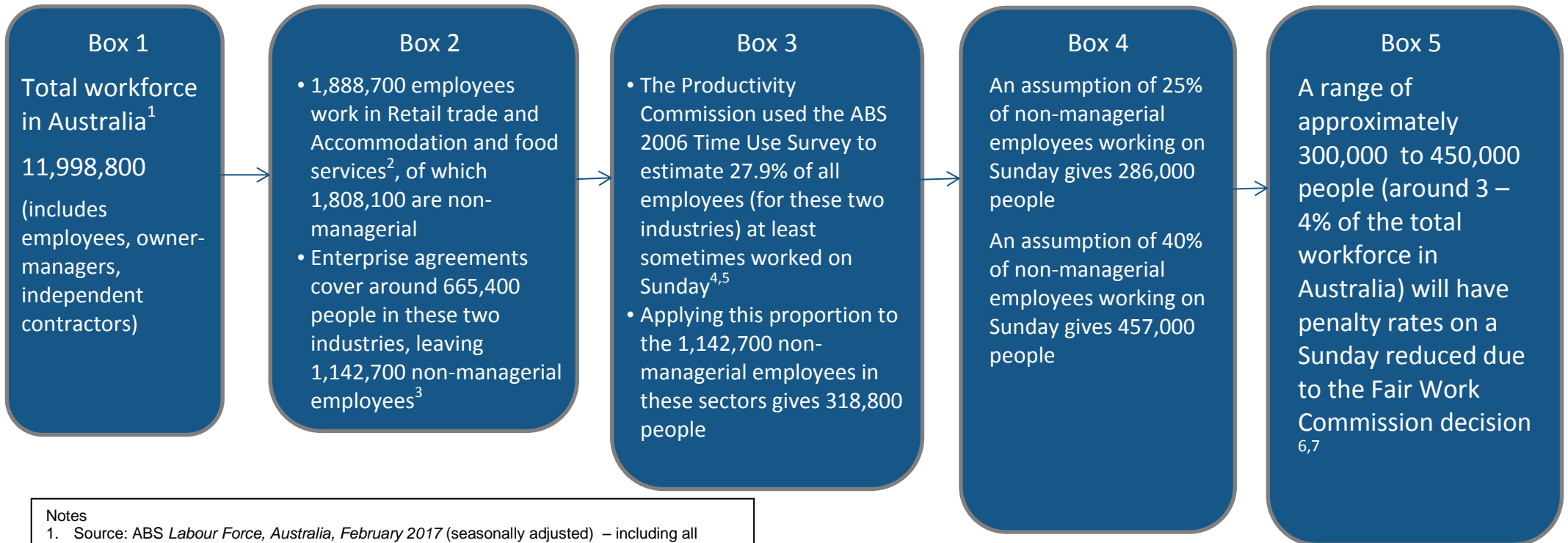
³⁹ The Full Bench for the Restaurant Industry Award final decision was comprised of Vice President Hatcher, Vice President Watson, Justice Boulton, Commissioner Roberts and Commissioner McKenna.

⁴⁰ [68] of AM2014/305. The Government notes the FWC's comments (at [71]) which quote from the Hospitality and Retail Employers lay evidence that this decision is expected to lead to increased trading hours on a Sunday, a reduction in hours worked by some owner operators, an increase in the level and range of services offered on a Sunday and an increase in overall hours worked.

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- 4.10. The appropriate form of the transitional arrangements for introducing the new Sunday penalty rates is a matter for the independent FWC after consideration of all the evidence before it.

Attachment A – Estimate of how many people will be affected by the Fair Work Commission’s Sunday penalty rate decision



Notes

1. Source: ABS *Labour Force, Australia, February 2017* (seasonally adjusted) – including all employees (managerial, non-managerial and owner managers of incorporated enterprises) and independent contractors.
2. Please note the Retail and Pharmacy Awards predominately operate in the Retail Trade sector, and the Hospitality and Fast Food Awards predominately operate in the Accommodation and Food Services sector.
3. Source: ABS *Employee Earnings and Hours 2016*.
4. Source: Unpublished ABS data - figure calculated by Productivity Commission.
5. Due to the age of the Time Use Survey, the proportion of people who work on a Sunday may be higher or lower. The working patterns are for all employees in these industries, but the working patterns of those on awards or individual arrangements may differ from the overall estimate.
6. This range estimate includes workers whose Sunday penalty rates have not been changed because they are either 1) covered by the Restaurant Award or 2) are casual hospitality workers or 3) are at levels above level 1 workers under the Fast Food Award or 4) are on other Awards in these sectors. This range estimate excludes some workers whose Sunday rates may be affected but they work in industries other than Retail Trade and Accommodation and Food Services.
7. The range estimate is derived from three different ABS surveys. In addition we have considered ABS Labour Force data from 2016 regarding days of the week worked. The range estimate has a margin of error that cannot be calculated. It could be a higher or lower range.

Attachment B – Examples of phasing in of Sunday penalty rate reductions under the Award Modernisation Process

This table shows Sunday penalty rates that reduced during award modernisation, and that were phased in over five years. Please note, there were over 3,000 pre-modern awards that turned into 122 modern awards from 1 January 2010. This table provides some examples and is not exhaustive. Most changes to pay were phased in over five instalments following the award modernisation process. The Sunday penalty rate changes were phased in over five years for existing employees and for some new employees⁴¹.

Pre-modern award (31 December 2009)	Modern award (1 January 2010)
<i>Hotel Employees (State) Award (AN120249)</i> All employees: Sunday penalty rate 200%	<i>Hospitality Industry (General) Award (MA000009)</i> All employees: Sunday penalty rate 175%
<i>Cafes and Restaurants (SA) Award (AN150025)</i> Full time/ part time Sunday penalty: 200% Casual Sunday penalty: 220%	<i>Restaurant Industry Award 2010 (MA000119)</i> ⁴² Full time/ part time Sunday penalty: 150% Casual Sunday penalty: 175%
<i>Delicatessens, Canteens, Unlicensed Cafes and Restaurants Etc. Award (AN150170)</i> Full time/ part time Sunday penalty: 200% Casual Sunday penalty: 220%	<i>Fast Food Industry Award (MA000003)</i> ⁴³ Full time/ part time Sunday penalty: 150% Casual Sunday penalty: 175%
<i>Delicatessens, Canteens, Unlicensed Cafes and Restaurants Etc. Award (AN150170)</i> Full time/ part time Sunday penalty: 200% Casual Sunday penalty: 220%	<i>Restaurant Industry Award (MA000119)</i> Full time/ part time Sunday penalty: 150% Casual Sunday penalty: 175%
<i>National Fast Food Retail Award 2000 (AP806313)</i> All employees: Sunday penalty 175% (150% for all NSW employees)	<i>Fast Food Industry Award (MA000003)</i> Full time/part time Sunday penalty: 150% Casual Sunday penalty: 175%

How to read this table: Before 1 January 2010, all employees got double time (200%) for working on a Sunday. After 1 January 2010, their new Award gave them time and three quarters (175%) for working on a Sunday. This change was in most cases phased in over five years.

⁴¹ Attachment C of AM2014/305 has more detail.

⁴² Sunday rates for Level 1 and 2 employees in the *Restaurant Industry Award (MA000119)* were reduced in the 2012 modern award review. This table contains the rates as they applied on the commencement of modern award at 1 January 2010.

⁴³ *Fast Food Industry Award 2010 (MA000003)* originally contained a loading of 175% for all employees working on Sunday. This was varied to 150% for full and part time employees on 29 January 2010 but was not back dated.