

IN THE FAIR WORK COMMISSION

MATTER NO. AM2014/305

FOUR YEARLY REVIEW OF MODERN AWARDS – PENALTY RATES

SUBMISSIONS REGARDING TRANSITIONAL ARRANGEMENTS
FOUR YEARLY REVIEW OF MODERN AWARDS – PENALTY RATES
[2017] FWCFB 1001 23 FEBRUARY 2017



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24 March 2017

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1. Part 1: Overview

1. On 24 February 2017, the Full Bench of the Fair Work Commission (Full Bench) released its decision (of 23 February 2017) on penalty rates, which included a proposal to reduce Sunday penalty rates within the *General Retail Industry Award 2010* (Retail Award), *Fast Food Industry Award 2010* (Fast Food Award), *Hospitality Industry (General) Award 2010* (Hospitality Award) and the *Pharmacy Industry Award 2010* (Pharmacy Award). The National Retail Association Ltd (NRA) has been involved from the outset of these proceedings and welcomes the decision to cut Sunday penalty rates.
2. This submission details the NRA's position in response to the Full Bench's decision, pursuant to paragraph 2042, with respect to transitional arrangements to reduce Sunday penalty rates, as it impacts on the Retail Award and Fast Food Industry Award only – being the relevant awards in respect of NRA's members.
3. Since the release of the decision, the NRA has extensively communicated with its members to collect their thoughts on how the proposed reduction in Sunday penalty rates should be implemented.
4. The NRA has determined an appropriate transitional arrangement which balances the interests of employers and employees impacted by the decision. It is our view, that the proposed reduction in Sunday penalty rates should be implemented in two instalments (of equal value) for both the Retail and Fast Food Awards. This would result in amendments as follows:

Table 1 – Retail Award Sunday Penalty Rates

	Full-time/part-time employees	Casual employees
Current Rate	200%	200%
Effective 1 July 2017	175%	187.5%
Effective 1 July 2018	150%	175%

Table 2 – Fast Food Award Sunday Penalty Rates

	Full-time/part-time (Level 1)	Casual (Level 1)
Current Rate	150%	175%
Effective 1 July 2017	137.5%	162.5%
Effective 1 July 2018	125%	150%

5. These submissions are made in the above context and relate to the following areas which the NRA relies upon in support of its position:
 - a. the modern awards objective;
 - b. industry progression and attitudes;
 - c. businesses operating under enterprise agreements; and
 - d. take-home pay orders.

6. The NRA also notes that reviewing penalty rates has been an agenda item since the exposure drafts of the modern awards were issued in September 2008.¹ This supports NRA's proposition that a decision of the Full Bench, as to the implementation of the proposed reduction in Sunday penalty rates, take effect without any further delay.

¹ [2017] FWCFB 1001 [1170], [1727].

2. Part 2: The Modern Awards Objective

7. The purpose of the four yearly review of modern awards is to decide whether a particular modern award achieves the modern awards objective, contained in s.134 of the *Fair Work Act 2009* (Cth) (FW Act). Any variation must also be consistent with this provision:

The modern awards objective

What is the modern awards objective?

- (1) *The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:*
- a) *relative living standards and the needs of the low paid; and*
 - b) *the need to encourage collective bargaining; and*
 - c) *the need to promote social inclusion through increased workforce participation; and*
 - d) *the need to promote flexible modern work practices and the efficient and productive performance of work; and*
 - da) *the need to provide additional remuneration for:*
 - (i) *employees working overtime; or*
 - (ii) *employees working unsocial, irregular or unpredictable hours; or*
 - (iii) *employees working on weekends or public holidays; or*
 - (iv) *employees working shifts; and*
 - e) *the principle of equal remuneration for work of equal or comparable value; and*
 - f) *the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and*
 - g) *the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and*
 - h) *the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.*

This is the modern awards objective.

When does the modern awards objective apply?

- (2) *The modern awards objective applies to the performance or exercise of the FWC's*

modern award powers, which are:

- a) *the FWC's functions or powers under this Part; and*
- b) *the FWC's functions or powers under Part 2-6, so far as they relate to modern award minimum wages.*

Note: The FWC must also take into account the objects of this Act and any other applicable provisions. For example, if the FWC is setting, varying or revoking modern award minimum wages, the minimum wages objective also applies (see section 284).

8. Relevant to this submission is section 134(b), (d), (f), (g) and (h) of the FW Act.
9. Subsection (b) is discussed in more depth in Part 4 of this submission.
10. Subsection (d) requires the Fair Work Commission (FWC) to take into consideration the need to promote flexible modern work practices. It is the NRA's view that a transitional arrangement involving two instalment dates will promote more flexible modern work practices as opposed to a longer phasing-in period. Additionally, subsection (f) requires the FWC to take into consideration the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden. As stated by the Full Bench:

*"It is self-evident that if the Sunday penalty rate was reduced then employment costs would reduce. It was not contended that a reduction in the Sunday penalty rate would impact on productivity or regulatory burden. This consideration supports a reduction in the Sunday penalty rate ... In addition to the impact on employment costs, it is also apparent that a reduction in the Sunday penalty rate would have other positive effects on business."*²
11. The NRA submits that the proposed reduction in Sunday penalty rates be implemented in two stages to allow employers to reap the benefits of reduced labour costs as soon as possible. These benefits include:
 - a. longer trading hours;
 - b. extension of services;
 - c. increased job opportunities (through increased Sunday employment); and
 - d. particularly in regards to small business owners, allowing business owners to take time off on a Sunday who, through necessity, otherwise regularly work in their respective businesses on a Sunday in an effort to reduce the high wage costs

² [2017] FWCFB 1001 [852].

associated with rostering staff to work on a Sunday under the existing Sunday penalty rates entitlements.

A longer phasing in arrangement would restrict employers from these benefits and prevent the Australian economy from growth. In turn, this promotes flexible modern work practices and provides more leeway to business' over their operational capacity.

12. The NRA is mindful that the Full Bench also sought submissions as to whether a longer period of adjustment is required for the Retail Award in particular.³ The NRA is of the view that having inconsistent or non-uniform transitional arrangements for different modern awards would directly contradict subsection (g). Under this provision, the FWC must consider the need to ensure a simple and easy to understand modern award system that avoids unnecessary overlap of modern awards. A uniform transitional arrangement would make both the Retail and Fast Food Awards simpler and easier to understand and would prevent unnecessary confusion in respect of the reduction in penalty rates. In addition to this, the NRA has found no evidence to suggest that employees under the Retail Award should be distinguished from those employed under in the Fast Food Award. The introduction of different transitional arrangements is likely to cause confusion within the retail sector and should, in NRA's view, be avoided by the FWC. It is for this reason that the NRA also suggests that the reduction in penalty rates take effect on 1 July. This would coincide with the annual wage review, which businesses are accustomed to, and the start of the financial year.
13. Subsection (h) requires the FWC to consider, *"the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy."* Feedback from NRA's members is that a reduction in Sunday penalty rates is likely to extend trading hours and in turn promote employment growth.
14. On this basis, the NRA maintains that a two-stage transitional arrangement will provide a fair and relevant minimum safety net of terms and conditions, from both the employee and employer's perspectives. A longer transition to give effect to the proposed reduction in Sunday penalty rates will not meet the modern awards objective contained in s.134 of the FW Act and create unnecessary hardship to the retail and fast food sectors.

³ [2017] FWCFB 1001 [2021].

3. Part 3: Industry Progression and Attitudes

15. The Full Bench stated:

*“Historically industrial tribunals have expressed the rationale for weekend penalty payments in terms of both the need to compensate employees for working outside ‘normal hours’ (the compensatory element) and to deter employers from scheduling work outside ‘normal’ hours (the deterrence element).”*⁴

16. The Full Bench went on to consider recent authorities (such as *Re Shop, Distributive and Allied Employees’ Association and \$2 and Under and Ors*⁵) and concluded that deterrence is no longer a relevant consideration in the setting of weekend penalty rates.⁶ The Full Bench accepted that:

*“the imposition of penalty rate may have the effect of deterring employers from scheduling work at specified times or on certain dates, but that is a consequence of the imposition of an additional payment for working at such times or on such days, it is not the objective of those additional payments. Compensating employees for the disutility associated with working on weekends and public holidays is a primary consideration in the setting of weekend penalty rates.”*⁷

17. This view would be consistent with the introduction of two annual adjustments to the proposed reduced Sunday penalty rates. The NRA submits that employers should not be deterred from rostering work to be performed on a Sunday for any longer than is necessary. Employees will remain adequately compensated for the so described “disutility” associated with working on a Sunday and, in the NRA’s view, such an arrangement will achieve an appropriate balance of interests.

18. Further to that, industrial courts and tribunals have historically considered the current social context when determining the level of inconvenience and disutility involved with working on weekends.⁸ The NRA submits that as we move towards a more modern retail trading environment that is increasingly globalised and less restrictive than it has been historically, including in terms of extended trading hours, the extent of disutility associated with Sunday work has noticeably decreased. This has been recognised by various benches of the FWC and supports a shorter implementation period for the

⁴ [2017] FWCFB 1001 [143].

⁵ [2017] FWCFB 1001 [146] in reference to PR941526, 3 December 2003 at [91]

⁶ [2017] FWCFB 1001 [148] and [158]

⁷ [2017] FWCFB 1001 [158]

⁸ *Retail Industry (South Australia) Award – Variation* [2004] SAIRComm 54 at 201.

proposed reduction in Sunday penalty rates.

19. For example, in the *Restaurants Case*,⁹ the majority noted:

“The evidence tends to demonstrate that for that proportion of the workforce, weekends will frequently be the time that they are available to and want to work. Their position is distinguishable from “core” or “career” restaurant employees such as, for example, trade-qualified chefs or senior front-of-house staff intending to stay in the industry on a long term basis, who are much more commonly engaged on a full-time or permanent part-time basis, have to accept the loss of Saturdays and Sundays as a permanent feature of their working lives, and depend upon penalty rates as a core component of their take-home pay.”

20. The Full Bench acknowledged that *“the extent of the disutility is much less than in times past.”*¹⁰ The NRA maintains that this is true for the fast food and retail industries, whereby Sunday work has become accepted as a common condition to employment. This does not detract from the requirement of the FWC to ensure that modern awards provide additional remuneration for employees working on weekends or public holidays.¹¹

21. In the NRA’s view, the information contained in the FWC Statistical Reports and the PC Report (Supporting Material), read together with the evidence advanced by employer parties, provide strong support for the position that substantial socio-economic changes have taken place since the early 1900’s. Throughout the retail sector, attitudes around weekend work have changed and demonstrate a willingness to accept these hours as ordinary.

22. In effect, the NRA submits that a longer transitional period would stifle the industry’s progression and conflict with current attitudes. A two-stage transitional arrangement is advised to maximise efficiency and allow employees to adequately prepare for the full effect of the proposed reduced Sunday penalty rates.

23. The NRA is also mindful of the proposition that a reduction in penalty rates is likely to lead to increased trading hours, a reduction in hours worked by business owners (particularly in small business), an increase in the level and range of services offered and an increase in overall hours worked. This was supported by the Hospitality and Retail

⁹ [2014] FWCFB 1996 [132].

¹⁰ ¹⁰ [2014] FWCFB 1996 [54], [68] and [689].

¹¹ *Fair Work Act 2009* (Cth) s 134(1)(da)(iii).

Employers' lay evidence which was accepted by the Full Bench at [71].

"These are industries where consumer expectations of access to services has expanded over time so that the costs of penalty rates affect consumer amenity in ways they did not when penalty rates were first introduced."

4. Part 4: Enterprise Agreements

24. Section 134(1)(b) of the FW Act requires the FWC to take into consideration the need to encourage collective bargaining. Whilst the variations to the Fast Food and Retail Awards do not impact existing enterprise agreements (EA's), the NRA submits that a long phasing in arrangement, in excess of NRA's proposed two-stage transitional arrangement, is likely to create significant difficulties in relation to enterprise bargaining. In other words, since the proposed amendments to the modern awards would underpin future agreements, a long transitional arrangement would unnecessarily complicate the ability for employers to bargain effectively and, potentially, create an imbalance in employer/employee bargaining power.

25. EA's are an effective tool used by many of NRA's members to create a tailored set of employment conditions for their staff. Whilst it is only one incentive to bargain, the ability to "freeze" penalty rates is a major draw card for employers. Complexities arising from transitional phasing in of reduced Sunday penalty rates, particularly lengthy phasing in provisions, would, in NRA's view, hamper the negotiation process.

26. On this basis, the NRA takes the view that an overly lengthy transitional period (in terms of reducing Sunday penalty rates) not only gives rise to an imbalance of bargaining power, but also may render EA's futile, until the transition period has lapsed. In contrast, implementing a two-stage annual adjustment in reducing Sunday penalty rates would provide employers and employees with more certainty around enterprise bargaining and facilitate the making of EA's to meet the specific requirements of a workforce. This position was acknowledged by the Full Bench at [825]:

"A reduction in penalty rates is likely to increase the incentive for employees to bargain, but may also create a disincentive for employers to bargain."

5. Part 5: Take-Home Pay Orders

27. The Full Bench stated:

*“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. The relevant statutory provisions are not without a degree of complexity.”*¹²

28. The issue that arises is whether in fact take-home pay orders are available to employees under the Fast Food and Retail Awards. Both Awards include the following clause:

*“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 situation.”*¹³

29. This is consistent with Item 13A(1) of Part 3A of Schedule 5 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (“TPCA Act”), which states 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).”

30. However, NRA notes that the Explanatory Statement to Regulation 3B.04 of the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009* (Cth) provides that reference to “transitional arrangements in relation to the award” in the context of Item 13A(1) of Part 3A of Schedule 5 of the TPCA Act, is “a reference to the phasing in of differences between the pay rates in pre-modernised awards and modern awards”. The Explanatory Statement therefore suggests that take-home pay orders are

¹² [2017] FWCFB 1001 [2010].

¹³ *Fast Food Industry Award 2010* cl 2.4; *General Retail Industry Award 2010* cl 2.4.

limited only to the transition period between pre-modernised awards and modern awards, and are not available in the current context.

31. In any case, the NRA submits that a take-home pay order is contrary to the objects of the review and therefore not appropriate to mitigate the impact of the reduction in Sunday penalty rates. The NRA takes the view that such orders are unnecessary and contrary to the purpose of the four yearly review and the modern awards objective.

6. Part 7: Conclusion

32. For the reasons set out above, the NRA considers that to achieve the modern awards objective, pursuant to s.134 of the FW Act, it is necessary to implement the proposed reduction in Sunday penalty rates in two annual instalments (of equal value) for both the Retail and Fast Food Awards. The first half of the proposed reductions is to commence on 1 July 2017 and the second half of the proposed reductions is to commence on 1 July 2018.

33. This will ensure that the Fast Food and Retail Awards provide a fair and relevant minimum safety net of terms and conditions in accordance relevant requirements of the modern awards objective.