



**Australian Federation of Employers and Industries (AFEI)**

**4 Yearly Review of Modern Awards—Penalty Rates  
Submissions in Reply : AM2014/305**

**7 April 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:** Reply 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. These reply submissions are made pursuant to the Statement [2017] FWCFB 1934 at [3] – [4].

**Reply to submission at [7], Attachment B – Questions on notice**

2. There is no case for reconsidering the Decision or for setting aside that Decision. The persuasive case for change in the Sunday penalty rate has been shown.
3. In particular, that case revealed that, in each award, the existing Sunday penalty rate:
  - a. overcompensates the disutility of Sunday work; and
  - b. is neither fair nor relevant; and
  - c. the new rate is justified.
4. With those findings made, the Full Bench is now concerned only with the implementation of the rate which is fair and relevant. For the reasons stated in its earlier submissions, AFEI proposes 1 July 2017 for the full implementation of the new rate.

5. Further, the tenor of some submissions might suggest that some have conflated the purpose of penalty rates with minimum wage rates, or have understated the merit of the new rate as a consideration directly relevant to the question of the period of time over which the new rate replaces the existing rate. In view of this, it is instructive to reflect upon the essential character and purpose of the new Sunday rate so that it is considered in proper context.
6. First, the new rate has a compensatory purpose. It is compensation for the disability of Sunday work and satisfies the attributes described by the Full Bench in *Modern Awards Review 2012 – Penalty Rates* [2013] FWFCB 1635 at [206]:

*Although described in the modern awards as penalty rates, they are in reality a loading which compensates for disabilities. In the modern award context these loadings must recognise the disabilities of working at unsociable times; be sufficient to induce people with appropriate skills to voluntarily work the relevant hours, and be set having regard to whether employers in the particular industry concerned normally trade at such times. These factors and the elements of the modern awards objective need to be balanced and weighed accordingly.*
7. Second, the new rate will correct the overcompensation of Sunday work which is a consequence of the existing rate. In this regard it is relevant to note the approach taken by the Commission to address a comparable situation. In *Re Restaurant and Catering Association of Victoria* [2014] FWCFB 1996 (14 May 2014) the Sunday penalty was varied by reduction to address its tendency to overcompensate a category of employees.<sup>1</sup> The variation took effect on 1 July 2014<sup>2</sup> – just under 7 weeks from the date of decision.
8. Third, the new rate will not change the ‘base rate of pay’ – that being the rate defined at s. 16(1) as ‘the rate of pay payable to the employee for his or her ordinary hours of work’ but not including the items described at (a)-(e). Thus, by virtue of s. 16(1)(d), penalty rates do not comprise part of the ‘base rate of pay’.

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<sup>1</sup> *Re Restaurant and Catering Association of Victoria* [2014] FWCFB 1996 at [138]-[139].

<sup>2</sup> *Re Restaurant and Catering Association of Victoria* [2014] FWCFB 1996 at [144]

9. Fourth, the new rate will not change the rates of minimum wages in these awards for the reason that the meaning of 'modern award minimum wages' at s. 284(3) does not include penalty rates.

**Reply to submission at [20], Attachment B – Questions on notice**

10. As submitted above, the Full Bench is now concerned only with the implementation of the rate which is fair and relevant. Thus, at this stage of the proceedings, the appropriate question for the Commission to consider is this:

*Over what period is the Commission prepared to tolerate the continuation of a Sunday rate which is neither fair nor relevant?*

11. As submitted earlier, the Decision reveals the strong case in support of the new rate and the negative consequences of the existing rate. The operational restrictions imposed by businesses in response to the existing rate demonstrate, amongst other things, the need for the variation.
12. In view of these considerations, the Commission should not be tolerant of the continuation of a rate which lacks the attributes of being fair and relevant. In *Re Restaurant and Catering Association of Victoria* [2014] FWCFB 1996, the new rate was implemented in whole less than 7 weeks from the date of decision. If the new rate is implemented on 1 July 2017, just over 4 months will have elapsed since the Decision. In the circumstances, this is a reasonable period between Decision and implementation.

**Australian Federation of Employers and Industries**

7 April 2017