

IN THE FAIR WORK COMMISSION

AM 2015/305

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**FOUR YEARLY REVIEW OF MODERN AWARDS - PENALTY RATES**

**SUBMISSIONS REGARDING**  
**TERMINOLOGY USED TO DESCRIBE “PENALTY RATES”**

8 May 2017

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## 1. INTRODUCTION

- 1.1 On 23 February 2017, the Fair Work Commission (**Commission**) handed down its decision (**the Decision**) in these proceedings following a review of penalty rates in a number of modern awards.
- 1.2 On 18 April 2017, the Full Bench issued a Statement in the proceedings regarding a claim by the AHA, AAA and Pharmacy Guild seeking to remove the phrases “*penalty*” and “*penalty rates*” from the *Hospitality Industry (General) Award 2010* and the *Pharmacy Industry Award 2010* respectively and replace these phrases with the term “*additional remuneration*”. This claim was not determined in the Decision.
- 1.3 The Statement relevantly noted as follows:
- “The changes proposed appear to be sought on the basis that s.134(1)(da)(iii) of the FW Act speaks of ‘the need to provide additional remuneration for ... employees working on weekends’. The changes proposed may also be said to be consistent with the contemporary purpose of ‘penalty rates’. As we mentioned in Chapter 3 of the Decision, the purpose of such rates is not to penalise employers for rostering employees to work at such times, it is to compensate employees for the disutility of working on weekends.”*
- 1.4 Directions were issued together with the Statement, requiring parties who support the proposed change in terminology to:
- (a) file any submissions and evidence in support of the changes by 8 May 2017; and
  - (b) identify the modern awards that should be the subject of any terminology variation by 8 May 2017.
- 1.5 On 5 May 2017, the AHA, AAA and Pharmacy Guild wrote to the Fair Work Commission to inform the Commission and relevant parties that they no longer pressed their claims to change the penalty rates terminology in any awards.
- 1.6 In light of the AHA, AAA and Pharmacy Guild correspondence, it is unclear whether the Commission will continue its review of the terminology used to describe penalty rates in modern awards. Given that the 4 Yearly Review of modern awards is conducted on the Commission’s own motion and is to be distinguished from inter-parties proceedings<sup>1</sup>, it is possible that the Commission may continue its review of penalty rates terminology, notwithstanding the AHA, AAA and Pharmacy Guild correspondence.

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<sup>1</sup> See the Decision at [110]

1.7 In this context, ABI and NSWBC provide the submissions below in order to assist the Commission with its consideration of the terminology used to describe penalty rates in modern awards.

## 2. **BENEFITS ASSOCIATED WITH A CHANGE IN TERMINOLOGY**

### **History of penalty rates**

2.1 Chapter 3 of the Decision provides a detailed summary of the development of jurisprudence regarding the purpose of including penalty rates in awards.

2.2 Paragraphs [143] to [150] of the Decision identify that:

- (a) the initial purpose of penalty rates was to both compensate employees for working outside ‘normal hours’ and to deter employers from scheduling work outside ‘normal hours’;
- (b) more recently, industrial tribunals have eschewed any reliance on the deterrence element of penalty rates when setting appropriate loadings for work during these hours. More recent decisions have instead included penalty rates in awards to compensate employees for the disability associated with working at particular times; and
- (c) the deterrence element of penalty rates are no longer a relevant consideration in setting the rate of pay for working ordinary hours on a weekend.

2.3 The Decision ultimately concludes that the notion of deterring or penalising employers for rostering work at particular times does not conform with the objects of the *Fair Work Act 2009 (FW Act)* nor the modern awards objective:

*“[149] The object of the FW Act is ‘to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians’, by the means specified in s.3(a) to (g). Detering the working of ordinary hours on a weekend is not one of the specified means of achieving the object of the FW Act*

*[150] Nor does the notion of deterrence sit conformably with the modern awards objective and the considerations the Commission is required to take into account in giving effect to that objective.”*

### **Merit behind making a change to terminology**

- 2.4 Having regard to the above principles, describing weekend loadings as penalty rates is inconsistent with their underlying purpose. The extra payments provided to employees for working on weekends are in fact additional remuneration (or additional compensation) provided to compensate for the social disabilities associated with working on a weekend.
- 2.5 In such circumstances, it logically follows that penalty rates would be better referred to as “*additional remuneration*” or “*additional compensation*” or “*weekend loadings*”.
- 2.6 Given that the modern awards objective expressly calls out the need to provide “*additional remuneration*” for employees working weekends or public holidays, the phrase initially proposed by the AAA, AHA and Pharmacy Guild (namely, “*additional remuneration*”) appears most appropriate. ABI and the NSWBC would not be opposed to a slightly different formulation of words being adopted, subject to such words aligning with the purposes behind what are currently called penalty rates and subject to ABI/NSWBC having the opportunity to comment on any alternate formulation.
- 2.7 By changing the terminology used to better align with the purpose of additional weekend payments, there is a *prima facie* case that the Commission would be furthering the creation of a “*simple, easy to understand, stable and sustainable modern award system*”<sup>2</sup> as required by the modern awards objective.

### **The awards that should be varied**

- 2.8 If the case for changing the phrase “*penalty rates*” succeeds in relation to any modern award, it would appear that the same arguments would warrant changing the phrase “*penalty rates*” in all modern awards, unless there was an award-specific reason as to why changing the phrase would cause difficulties in a particular modern award.
- 2.9 Given the iterative process that has ordinarily been adopted by the Commission when varying awards during the 4 Yearly Review, it is anticipated that any award specific issues could be identified if and when any draft determinations were prepared varying the relevant awards.

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<sup>2</sup> Section 134(1)(g) of the FW Act

### **3. DISADVANTAGES ASSOCIATED WITH MAKING A CHANGE TO THE TERMINOLOGY**

3.1 Whilst the matters identified in section 2 above suggest that there is merit in changing the terminology used to refer to penalty rates, there are a number of other consequences that might arise from any changed terminology that the Commission would need to consider before implementing any terminology changes.

3.2 If the Commission considers that any of the consequences identified below would have the effect of confusing or altering employees' statutory or contractual entitlements, then the proposed change to penalty rates terminology may in fact be inconsistent with the creation of a "*simple, easy to understand, stable and sustainable modern award system*"<sup>3</sup>.

#### **Determination of base and full rates of pay**

3.3 Various award and statutory entitlements are determined by reference to an employee's "*base rate of pay*" or "*full rate of pay*". By way of example, statutory annual leave, personal leave, compassionate leave and redundancy payments are all calculated by reference to an employee's base rate of pay. On the other hand, payments in lieu of notice of termination are calculated on an employee's full rate of pay.

3.4 The terms "*base rate of pay*" and "*full rate of pay*" are both defined by the FW Act.

3.5 Section 16 of the FW Act defines "*base rate of pay*" as follows:

*"(1) The base rate of pay of a national system employee is the rate of pay payable to the employee for his or her ordinary hours of work, but not including any of the following:*

*(a) incentive-based payments and bonuses;*

*(b) loadings;*

*(c) monetary allowances;*

*(d) overtime or penalty rates;*

*(e) any other separately identifiable amounts."*

3.6 "*Full rate of pay*" is defined by section 18 of the FW Act as follows:

*"(1) The full rate of pay of a national system employee is the rate of pay payable to the employee, including all the following:*

*(a) incentive-based payments and bonuses;*

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<sup>3</sup> Section 134(1)(g) of the FW Act

- (b) loadings;
- (c) monetary allowances;
- (d) overtime or penalty rates;
- (e) any other separately identifiable amounts.”

- 3.7 There is presently no doubt regarding whether penalty rates fall within base and fall rates of pay given that they are expressly addressed by the statutory definitions.
- 3.8 If the terminology associated with penalty rates changed, it is possible there might be some confusion caused by how “*additional remuneration*” is to be treated. Whilst this is a possible consequence, ABI and NSWBC submit that:
- (a) despite the fact that the label applied to weekend additional remuneration might have changed, the character of the payment has not changed. In such circumstances, any additional remuneration would still constitute a “*penalty rate*” for the purposes of subsection 16(1)(d) and 18(1)(d) of the FW Act; and
  - (b) it is relatively self-evident that additional remuneration paid on weekends would fall within the concept of “*separately identifiable amounts*”, thereby ensuring that the treatment of any new terminology would remain the same as has been the case in the past.
- 3.9 It should also be noted that there are record keeping obligations derived from the *Fair Work Regulations 2009* which specifically apply in relation to penalty rates. These are expressed in the same terms as the definitions above and the above comments would apply equally to such record keeping obligations.

### **Section 139 of the FW Act**

- 3.10 Section 139 of the FW Act outlines those matters that may be included in modern awards.
- 3.11 Penalty rates are expressly identified as a term that may be included in modern awards.
- 3.12 If the terminology associated with penalty rates was to change, the Commission would need to be satisfied that “*additional remuneration*” is a permitted award term.
- 3.13 Again, ABI and NSWBC do not consider that this would give rise to substantive concerns. It should be self-evident that the “*additional remuneration*” which is provided on account of employees working weekends and public holidays is a type of term contemplated by the phrase “*penalty rates*” as it appears in section 139(1)(e) of the FW Act. This is particularly

the case given that section 139(1)(e) identifies penalty rates as being included in awards on account of employees working on weekends or public holidays:

“139 Terms that may be included in modern awards—general

(1) A modern award may include terms about any of the following matters:...

(e) penalty rates, including for any of the following:

(i) employees working unsocial, irregular or unpredictable hours;

(ii) employees working on weekends or public holidays;

(iii) shift workers;”

**Award provisions**

3.14 Provisions in modern awards contain numerous references to “*penalty rates*” in a range of clauses other than the specific clause which confers the entitlement to the weekend penalty rate. By way of example only:

- (a) clauses pertaining to annual leave loading often refer to employees receiving the higher of 17.5% annual leave loading or other applicable amounts such as penalty rates<sup>4</sup>;
- (b) all the award flexibility clauses in the modern awards refer to employers and employees being able to change terms concerning “*penalty rates*”; and
- (c) award definitions of “*ordinary pay*” often expressly refer to “*penalty rates*”.<sup>5</sup>

3.15 As part of any change in terminology, all of these ancillary award clauses referring to penalty rates would need to be varied so as to ensure that employers and employees understand precisely what payments these award clauses are referring to.

3.16 The iterative process adopted by the Commission regarding the review process (including plain language re-drafting) means that the need to make ancillary changes to other award clauses may not be fatal to introducing a change of terminology with respect to penalty rates.

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<sup>4</sup> By way of example, see clause 29.3(b) of the *Clerks – Private Sector Award 2010*

<sup>5</sup> By way of example, see clause 29.3 of the *Cleaning Services Award 2010*

### **Contractual entitlements**

- 3.17 It is uncontroversial that, regardless of the statutory and award safety nets applicable to employees, every employment relationship is also governed by a contract of employment (whether express or implied).
- 3.18 Where contractual employment arrangements have been recorded in writing, it is entirely possible and in many cases likely that the contract will contain terms regarding penalty rates. For instance, there might be contractual clauses:
- (a) purporting to satisfy penalty rate obligations arising from awards;
  - (b) reiterating or supplementing penalty rate obligations arising from awards; or
  - (c) seeking to offset the payment of penalty rate obligations against other over-award payments.
- 3.19 Where contractual payments are intended to 'offset' award entitlements, in many cases it can be expected that the set off clause is clearly directed to additional payments of the kind described in the contract but it is possible that any change to the terminology associated with penalty rates could have an impact on some contractual set-off clauses.
- 3.20 This is a matter that needs to be balanced against the benefits associated with the proposed change in terminology.

## **4. CONCLUSION**

- 4.1 In providing the above submissions, ABI and NSWBC have sought to provide assistance to the Commission in assessing the merit associated with changing the terminology relating to penalty rates.
- 4.2 ABI and NSWBC remain supportive of any change in terminology, provided that the Commission is satisfied that it assists with better meeting the objective of a *"simple, easy to understand, stable and sustainable modern award system"*<sup>6</sup>.

**Filed on behalf of ABI/NSWBC by  
Australian Business Lawyers & Advisors**

**8 May 2017**

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<sup>6</sup> Section 134(1)(g) of the FW Act