



Australian Government

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Response to Questions on Notice
from the Fair Work Commission
concerning
the 4 yearly review of modern awards –
Penalty Rates
(AM2014/305)

21 April 2017

1. Impact of the Penalty Rates decision

1.1 Questions for all parties:

[6] It appears to be common ground that the Commission should take steps to mitigate the impact of the Decision on the affected employees.

Each party is asked to provide an estimate of the number of employees affected by the penalty rate reductions determined in the Decision ([2017] FWCFB 1001), by award, and the basis of that assessment.

Consistent with previous written submissions, there are just over 12 million workers in total in Australia.¹

There are approximately 1.8 million non-managerial workers in the industries covered by the Fair Work Commission's decision – that is, in the Retail Trade, and the Accommodation and Food Services industries. It must be noted that not all of these workers are affected by the Fair Work Commission's Decision (as set out below).

Of those 1.8 million workers, around 1.1 million are covered by awards (either paid the exact rate or above it).² The remainder of these workers have their terms and conditions of employment set by an enterprise agreement.

Of those workers in the affected industries who are covered by awards, the number who actually work on Sundays and will therefore be affected by the Fair Work Commission's Decision is approximately 300,000 to 450,000 employees.

This is equivalent to 3-4 per cent of Australia's total workforce.³

This range is likely to over-estimate the number of employees affected by the Fair Work Commission's Decision who are paid under one of the awards affected by the Decision. This is because the estimate has not excluded:

- casual workers employed on the Hospitality Award, who are not affected by the Decision.
- workers in the hospitality and retail industries employed under other awards, such as the Restaurant Industry Award, the Registered and Licensed Clubs Award and the Amusement, Events and Recreation Award, which are not affected by the Decision.
- employees above level 1 on the Fast Food Industry Award, who are not affected by the Decision.

¹ ABS Labour Force, Australia, February 2017 (seasonally adjusted)

² ABS Employee Hours and Earnings, Australia, 2016

³ See paragraph 1.17 and specifically Attachment A (the chart) of the Australian Government Submission to the Fair Work Commission concerning the 4 yearly review of modern awards – penalty rates (AM2014/305), 24 March 2017

[7] A number of parties submit that the Commission should reconsider the Decision to reduce penalty rates in the Hospitality and Retail Awards and set aside that Decision. Further, United Voice submit (at [61]) that the Commission should not invite or permit RCI or CAI ‘to re-litigate their failed claims for variation of weekend penalty rates’.

Other interested parties are invited to reply to these submissions.

The Fair Work Commission is unable to set aside a decision of this kind by reason of paragraph 603(3)(a) of the *Fair Work Act 2009* (the Fair Work Act), which relevantly provides as follows:

FAIR WORK ACT 2009 – SECTION 603

Varying and revoking the FWC's decisions

(3) The FWC must not vary or revoke any of the following decisions of the FWC under this section:

(a) a decision under Part 2-3 (which deals with modern awards)

The Fair Work Commission’s Decision is a “decision under Part 2-3”.

2. Take home pay orders

[11] Take home pay orders are dealt with in several sections of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (the TPCA Act), as modified by the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009* (the TP Regulations).

[12] Item 9 of Schedule 5 to the TPCA Act provides that if the Commission 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 Commission may make a take home pay order concerning the payment of an amount(s) to the employee(s) which the Commission considers appropriate to remedy the situation. Item 9 limits the power to make a take home pay order to orders remedying 'modernisation related' reductions in take home pay. Item 8(3) sets out the circumstances where an employee suffers a 'modernisation related' reduction in take home pay. Item 8(3) requires, relevantly, that the employee be employed in the same position (or comparable position) that they were employed in immediately before the modern award came into operation. Hence persons employed after the commencement of the modern award are not eligible for an Item 9 take home pay order.

[13] Part 3A of Schedule 5 was inserted by amendments to the TP Regulations made by the *Fair Work (Transitional Provisions and Consequential Amendments) Amendment Regulations 2010 (No. 1)* (the TP Amendment Regulations).

[14] Regulation 3B.04 of the TP Regulations modifies Schedule 5 of the TPCA Act by inserting Part 3A, after Part 3. Item 13A(1) of Part 3A of Schedule 5 to the TPCA Act 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).'

[15] Item 13A(1) restricts the type of reduction that it applies to as one that occurs 'as a result of the making of a modern award or the operation of any transitional arrangements in relation to the award'. Accordingly, it may be that it was not intended that awards would include terms that allow for making of take home pay orders in all circumstances. The purpose of the amendments made by the TP Amendment Regulations is discussed in the Explanatory Statement accompanying the TP Amendment Regulations.

2.2 Question for the Australian Government:

Is there any present intention to amend the Fair Work Act 2009 (Cth) (the FW Act) to provide the Commission with a discretion to make take home pay orders that may mitigate the impact upon effected employees of a variation to a modern award.

It is a well-established principle that a court or tribunal must only interpret the law as it stands when the matter is before them.

As the High Court has previously commented:

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“Courts of law, however, can only act upon the law as it is, and have no right to, and cannot, speculate upon alterations in the law that may be made in the future.”⁴

That principle has been echoed by the Full Bench of the Fair Work Commission in 2014 which noted in similar terms:

“It has been the longstanding practice of the Commission and its predecessors to determine the matters before it on basis of the existing legislative framework and not otherwise.”⁵

It would be irregular for the Fair Work Commission to consider any intention to amend the Fair Work Act as part of this or any other proceeding.

⁴ *Ramsay v Aberfoyle Manufacturing Co. (Australia) Pty Ltd* [1935] 54 CLR 230 per Starke J at p.253

⁵ 2013-14 Annual Wage Review Decision [2014] FWCFB 3500 at [299]-[301]

3. 'Phasing in'

3.2 Question for the Australian Government:

[21] The Government notes that the reductions in certain Sunday penalty rates that occurred during the award modernisation process were phased in in equal instalments over a 5 year period – from 2010 to 2015 – and that the Restaurant Industry Award 2010 Appeal decision reduced penalty rates and no phasing in occurred.

Does the Government have a view on the merits of phasing in the penalty rate reductions we have determined and, if so, what phasing method is appropriate in each award?

Phasing in arrangements are a matter for the independent Fair Work Commission to determine.

Consistent with its previous written submissions, in the view of the Australian Government the Fair Work Commission should approach this task considering the following principles:

- In its Decision, the Fair Work Commission found that a reduction in penalty rates on Sundays in the affected industries would likely generate positive employment effects, and an increase in the level and range of services offered.⁶
- The Fair Work Commission reached that conclusion following a very thorough examination of all of the evidence presented to it over a two year period.⁷ Its findings cannot be ignored and should be upheld.
- Any transitional arrangements adopted should ensure those positive employment benefits identified in the Decision 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.⁸
- Any transitional arrangements should be as simple as possible so they can be implemented in a way that is easy to understand and execute for both business and employees.⁹

⁶ [2017] FWCFB 1001 at [67] to [72]

⁷ Over 5,900 submissions were provided by interested parties including employer groups, unions, state governments, opposition parties and individuals. Additional expert evidence was also provided. 143 witnesses gave evidence during the 39 days of hearings held by the Commission. The Commission's final decision was over 500 pages long.

⁸ See paragraph 4.8 of the Australian Government Submission, 24 March 2017

⁹ See paragraph 4.9 of the Australian Government Submission, 24 March 2017

4. 'Red circling'

4.2 Question for the Australian Government:

[26] The Government submits that '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'.

The Government is asked to elaborate on the 'costs and benefits and potential impact' of the red circling approach including that proposed by the SDA in respect of the General Retail Industry Award 2010.

Consistent with its previous written submissions, the Australian Government identified a range of complexities that would need to be resolved if the Fair Work Commission was inclined to adopt a red-circling approach.

These include:¹⁰

- 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.

The same complexities as outlined above would need to be considered in determining if the approach put forward by the SDA is an appropriate transitional provision.

¹⁰ See paragraph 3.7 of the Australian Government Submission, 24 March 2017