

FOUR YEARLY REVIEW OF  
MODERN AWARDS: PENALTY RATES

**SUBMISSIONS OF THE SDA - FAST FOOD INDUSTRY AWARD DRAFT  
DETERMINATION ISSUED 24 FEBRUARY 2017**

1. These submissions concern the draft determination published by the Commission on 24 February 2017 in respect of the Fast Food Industry Award 2010 (the **Award**).
2. The draft determination is proposed to give effect to that part of the decision of the Commission in the *Four Yearly Review of Modern Awards – Penalty Rates (Penalty Rates Decision)* [2017] FWCFB 1001 in which the Commission determined to reduce the span of hours during which the 10% evening loading applies (from work between 9.00pm and midnight, to work between 10.00pm and midnight) and to clarify the span of hours referred to in clause 25.5(a)(ii) of the Award: see at [1332], [1335], [1391], [2016]-[2029].
3. The Commission concluded that “*the limited impact of the [above] variations and the need to ensure a “simple, easy to understand ...modern award system’ (s 134(1)(g)) have led us to conclude that it is not necessary to prescribe transitional arrangements in respect of these variations*” (at [2029]). The Commission further stated that, following a period of consultation, its intention was for these variations to commence on 27 March 2017.
4. The SDA submits that, in all the circumstances, it would be unfair and unreasonable on employees for the variation to commence operation as proposed on 27 March 2017 and that such a commencement date will be contrary to the objective of establishing a simple and easy to understand modern award system. Instead, the appropriate course is for the determination to commence on 1 July 2017. The considerations outlined below support this approach.

5. *First*, the Commission has found that a “*substantial proportion of award-reliant employees covered by the Fast Food and Restaurants Awards are low paid and the variations to the late night penalty provisions will reduce the earnings of those employees*” (at [2028]).
6. *Secondly*, the Commission has not articulated the basis for its conclusion that the above reduction in earnings would not be to “*a significant extent*”. There is no material before the Commission which would enable an assessment to be made of the extent of the reduction in earnings which fast food workers will suffer as a result of this variation. Self-evidently, the actual extent of that reduction will depend on, amongst other things, the specific hours worked by particular employees and the total number of hours worked by them in any period.
7. *Thirdly*, what is known however is that “*a substantial proportion of Fast Food industry employees are ‘low paid’; are more likely to reside in a lower income households[sic] and are more likely to experience financial difficulties*” (at [1356].) Any reduction in earnings for this group of workers, however small, is a matter which calls for reasonable and fair arrangements which allow employees sufficient opportunity to mitigate the adverse effects.
8. *Fourthly*, the effect on employees of a reduction in in late night penalties must not be seen in isolation from the reduction in earnings and the diminution in relative living standards fast food employees will suffer by reason of the reduction in Sunday penalty rates (as found by the Commission at [1357]). There is a compounding prejudice to the position of fast food employees which the Commission should take into account in setting an appropriate commencement date of the variation presently under consideration.
9. *Fifthly*, a “notice period” of approximately one month since the publication of the Penalty Rates Decision is manifestly inadequate in giving fast food employees sufficient opportunity to attempt to mitigate the effect of the reduction in the evening penalty by, for example, making other arrangements in respect of their employment, their hours of work, or by engaging with their employer about the retention of their pre-existing entitlement as an over-award condition. It cannot be reasonably assumed that fast food employees will be aware of this specific change, appearing as it does in a few

paragraphs of a decision of the Commission in excess of 500 pages in length. The proposed change in the span of hours for the late night penalty is not a matter which received particular attention in the public comment and discussion about the present proceeding; nor has this change been canvassed or highlighted in the public domain since the Penalty Rates Decision. Absent sufficient notice of the type proposed by the SDA, the likelihood is that affected employees will remain unaware of the reduction in their evening penalty rates until they see its effect on their take home pay.

10. *Sixthly*, the objective of establishing a simple and easy to understand modern award system is best served by the establishment of consistent transitional arrangements arising from the Penalty Rates Decision which would see the commencement of all the variations which flow from the decision on 1 July 2017, rather than in a piecemeal way prior to that date.

**Dated:** 3 March 2017

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