IN THE FAIR WORK COMMISSION

AM2014/305

FOUR YEARLY REVIEW OF MODERN AWARDS

PENALTY RATES

SUBMISSIONS OF EMPLOYER PARTIES ON RIGHT TO REFUSE WORK ON A SUNDAY

1. In accordance with the directions issued by the Fair Work Commission on 29 April 2016, the employer parties have prepared submissions in response to the issue of Sunday work which includes President Ross' initial proposition and subsequent discussion that employees have a right to refuse to work on a Sunday on a similar basis to that articulated in section 114 of the Fair Work Act 2009 (Cth) (see Transcript at paragraphs 26991–26999 and 27564–27568).

2. The submissions of the employer parties are attached as follows:

   (a) Submissions of the Australian Retailers Association, Master Grocers Australia, Retail Council and the National Retail Association at "Attachment A";

   (b) Submissions of the Australian Business Industrial and NSW Business Chamber at "Attachment B";

   (c) Submissions of the Australian Industry Group at "Attachment C". We note that the National Retail Association relies on the Australian Industry Group submissions for the purpose of the *Fast Food Award 2010*;

   (d) Submissions of the Australian Hotels Association and Accommodation Association of Australia at "Attachment D";

   (e) Submissions of the Pharmacy Guild of Australia at "Attachment E";

   (f) Submissions of Clubs Australia Industrial at "Attachment F".

IN THE FAIR WORK COMMISSION

AM2014/305

FOUR YEARLY REVIEW OF MODERN AWARDS

PENALTY RATES

ATTACHMENT A

IN THE FAIR WORK COMMISSION

AM2014/305

FOUR YEARLY REVIEW OF MODERN AWARDS

PENALTY RATES

SUBMISSIONS OF AUSTRALIAN RETAILERS ASSOCIATION, MASTER GROCERS AUSTRALIA, RETAIL COUNCIL AND THE NATIONAL RETAIL ASSOCIATION

Note: definitions previously used are adopted herein unless otherwise stated.

A. INTRODUCTION

1. These submissions deal with the right of employees to refuse to work on Sundays on reasonable grounds.

B. REASONABLE REFUSAL TO WORK SUNDAYS

2. The primary position of the Retail Associations is that the evidence presented to the Commission strongly supports a reduction in the Sunday penalty rate from its current level of an additional 100% to an additional 50%, and that it is not necessary to introduce any additional rights for employees that would constrain the use of Sunday labour.

3. It is accepted, however, that another clear conclusion that can be drawn from the evidence before the Commission is that if the Sunday penalty rate under the GRIA is reduced to an additional 50% the retail industry will be able to access sufficient labour to meet labour resourcing needs on Sundays.

4. Given this, and on the basis that the Retail Associations' application is granted in full, the Retail Associations have attached a Draft Order which provides for a right of retail employees to refuse to work on Sundays on reasonable grounds, subject to a number of necessary limitations. Those limitations are:

   (a) the right to reasonably refuse to work on Sundays is limited to:

i. employees employed by their employer at the time of the commencement of the reduced Sunday penalty rate;
ii. permanent employees;
iii. employees who are employed at levels 1, 2 and 3 under the GRIA.

(b) employees who refuse to work on Sundays are not entitled to have those hours replaced with hours at other times in the week; and

(c) the right to reasonably refuse to work on Sundays ceases two years after the commencement of the reduced Sunday penalty rate.

Existing employees only

5. The only basis on which the Commission should consider introducing a right to reasonably refuse to work on Sundays is that employees who are currently working for a 100% penalty should have the opportunity to reconsider their position in light of the reduction in the Sunday penalty. The Retail Associations accept that those Sunday workers currently working for a 100% penalty rate have weighed up the benefits and disadvantages of Sunday work at that penalty rate, and it is appropriate that they be given the opportunity to undertake that exercise again in light of the reduced penalty.

6. New employees will not need to undertake the same exercise. Their opportunity to consider the benefits and disadvantages of Sunday work will have been undertaken at the time they accepted employment which involves Sunday work, and they will have done this in the context of a 50% Sunday penalty.

Permanent employees only

7. Casual employees, by the nature of their employment, have an unfettered right to accept or reject work, regardless of the day on which that work occurs. It follows that if the right to reasonably refuse to work on Sundays was extended to casual employees this would have a negative impact on casual employees in terms of their rights and entitlements.

Managerial level employees excluded

8. The Retail Associations submit that employees classified at level 4 and above under the GRIA should be excluded from the right to reasonably refuse to work on Sundays.

9. Employees classified at level 4 and above under the GRIA are predominantly Department, Assistant and Store Managers. It is common practice in the retail industry to pay such employees a salary, rather than an hourly rate of pay in line with the GRIA provisions. These employees have bargained for a salary which reflects their working patterns, including working on Sundays. It is not open to their employer to unilaterally reduce their salary as a result of a reduced Sunday penalty. It is also not open to their employer to unilaterally reduce their salary, which has taken Sunday work into account, where that employee refuses to work on Sundays.

10. Given these managerial employees will not experience any reduction in their employment conditions as a result of the reduced Sunday penalty rate it follows that they, like new employees as dealt with in paragraph 6 of these submissions, do not need to reconsider their decision to work on Sundays in light of the reduced penalty rate.

11. Further, given the more limited number of employees engaged at this level, and the limited pool of employees with the requisite skills to replace those who refuse to work, it is likely to have a negative impact on retail employers. Retail employers risk having insufficient skilled employees working at key operational times, and the evidence before the Commission is that this will have a negative impact on retail employers.

No right to replacement hours

12. The Retail Associations submit that employees who refuse on reasonable grounds to work on Sundays should not be entitled to have those hours replaced at other times during the week. We can consider the example of a full time retail employee who ordinarily works 6 hours on Sundays, and who then refuses to work on Sundays. In the absence of the limitation the Retail Associations have proposed, the employer of that employee would be forced to find that employee 6 hours within the roster between Monday and Saturday.

It is highly likely that this would involve requiring other employees to change their hours of work.

13. It is the Retail Associations' submission that this would unfairly disrupt the employer's business, and would not represent a fair and relevant minimum safety net taking into account section 134(1)(d) (which deals, in part, with flexible modern work practices), 134(f) (which deals, in part, with the regulatory burden) and 134(g) (which deals, in part, with a simple, easy to understand modern award system) of the *Fair Work Act 2009* (Cth) (FW Act).

Two year limitation

14. It is the Retail Associations' submission that the right to refuse on reasonable grounds to work on Sundays should cease to operate two years after it commences. As provided for in paragraphs 5 and 6 of these submissions, the purpose of the clause is to allow existing employees the opportunity to reconsider their position on Sunday work in light of the reduced penalty rate. Two years is a reasonable timeframe for these employees to have fully considered their position. It is sensible that such a clause, once it ceases to have any work to do, should be removed from the GRIA to eliminate any confusion in relation to employee and employer rights and obligations.

P J Wheelahan

2 May 2016

Draft Sunday work clause

Clause 29.5 – Reasonable refusal of Sunday work

(a) This clause only applies to:
  (i) permanent full-time and part-time employees (this clause does not apply to casual employees);
  (ii) employees classified at level 3 or below under this Award; and
  (iii) employees employed by their employer immediately prior to this clause coming into operation.

(b) An employee covered by this clause may refuse to work on a Sunday, or Sundays, if the refusal is reasonable.

(c) In determining whether a refusal to work ordinary hours on a Sunday or Sundays is reasonable, the following must be taken into account:
  (i) the nature of the employer's workplace or enterprise (including its operational requirements), and the nature of the work performed by the employee;
  (ii) the employee's personal circumstances, including family responsibilities;
  (iii) whether the employee could reasonably expect that the employer might require work on a Sunday;
  (iv) the amount of notice in advance of the Sunday given by the employer of the requirement to work;
  (v) the amount of notice in advance of the Sunday given by the employee when refusing to work;
  (vi) any other relevant matter.

(d) Where an employee refuses to work on a Sunday or Sundays in accordance with clause 29.5(c), and those Sunday hours form part of the employee's ordinary hours of work, the employer is not obliged to provide that employee with an equivalent number of hours at an alternative time in the employer's roster.

  For example, where:

  (a) a full-time employee is rostered to work 6 ordinary hours on a Sunday as part of their 38 ordinary hours; and
  (b) the employee informs their employer of their refusal to work those Sunday hours,

  the employee is not entitled to have those hours replaced within the employer's roster. In these circumstances the employee would only be entitled to be paid for 32 hours for that week.

(e) This clause will cease to operate on **[date – 2 years from commencement]**.

IN THE FAIR WORK COMMISSION

AM2014/305

FOUR YEARLY REVIEW OF MODERN AWARDS

PENALTY RATES

ATTACHMENT B

IN THE FAIR WORK COMMISSION

AM 2015/305

FOUR YEARLY REVIEW OF MODERN AWARDS - PENALTY RATES

ADDITIONAL SUBMISSION FILED ON BEHALF OF

ABI AND NSWBC

2 May 2016

Australian Business Lawyers & Advisors

Level 10, 140 Arthur Street

NORTH SYDNEY NSW 2060

AUSTRALIAN BUSINESS
Lawyers & Advisors

1. At the hearing of the final hearing of these proceedings in the week commencing 11 April 2016, the employer parties were asked by his Honour President Ross whether they would be willing to consider a variation being made to the relevant awards that are subject to the proceedings whereby:

   (a) the penalty rates applicable for Sunday work are reduced; and

   (b) employees are provided with a right to refuse Sunday work.

2. In response to this proposal, ABI and NSWBC submit that:

   (a) The variations proposed by the ABI and NSWBC, if accepted and inserted into the General Retail Industry Award 2010 (**Retail Award**), would create a fair and relevant safety net which achieves the modern awards objective and which goes no further than is necessary to achieve the modern awards objective. In support of this contention, ABI and NSWBC note that:

      (i) ABI and NSWBC have accepted, at paragraph 20.54 of their written submissions dated 3 February 2016, that, sometimes, working on Sundays may involve a *very slight* increased disability for some employees when compared to Saturday work.

      (ii) This slightly increased disability for some employees is addressed by the draft clause for the Retail Award which provides for a higher Sunday penalty rate as compared to Saturday (25% greater loading on Sundays). The proposed clause may over-compensate the level of increased disability for those who experience it, and certainly provides compensation beyond those employees for whom there is additional disability.

   (b) If the Commission forms a view (contrary to the position of ABI and the NSWBC) that the reduction of a Sunday penalty rate in the Retail Award to 150% in the manner proposed by ABI and NSWBC will not meet the modern awards objective, then the Commission is able to include an alternative clause in the Retail Award to ensure that the proposed penalty rate reduction is consistent with the modern awards objective.

   (c) Were the Commission to reduce the Sunday penalty rate to 150% as proposed, and assuming that the Commission was of the view that an additional clause is required to be included in the Retail Award in order for the Commission to be satisfied that the Retail Award, as then varied, meets the modern awards objective, the term attached overleaf could be adopted. ABI and NSWBC submit that the draft alternate clause properly addresses the matters raised by His Honor the President concerning the proposed reduction of the Sunday penalty rate to 150%. If it is necessary ABI and NSWBC propose that the alternate clause would be inserted into the Hours of Work clause of the Retail Award (clause 27).

   (d) This term is being proposed on the basis that:

      (i) ABI and NSWBC's primary position at paragraph 2(a) above is not accepted; and

      (ii) the whole reduction in the Sunday rate proposed by ABI and NSWBC is granted by the Commission.

DRAFT ALTERNATE CLAUSE FOR INSERTION INTO RETAIL AWARD

27.4 - Reasonable refusal to attend for work on a Sunday

(1) If an employee is directed to work ordinary hours on a Sunday, the employee may refuse if the refusal is reasonable.

(2) Subsection (1) does not apply to:

(a) any employee who, prior to the employee's commencement of employment (or upon the commencement of this provision), was notified by the employer that he/she would be regularly required to work on Sundays; or

(b) any employee classified at Grade 4 or above.

(3) In determining whether the refusal is reasonable, the following must be taken into account:

(a) the nature of the employer's workplace or enterprise (including its operational requirements), and the nature of the work performed by the employee;

(b) the employee's personal circumstances, including family responsibilities;

(c) whether the employee could reasonably expect that the employer might direct work to be performed on the Sunday;

(d) the type of employment of the employee (for example, whether full-time, part-time, casual or shiftwork);

(e) the amount of notice in advance of the Sunday given by the employer when making the direction to work the Sunday;

(f) in relation to the refusal of a direction to work -- the amount of notice given by the employee when refusing the direction; and

(g) any other relevant matter.

(4) Where an employee refuses to work hours on a Sunday or Sundays in accordance with clause 27.4(1), and those hours form part of the employee's ordinary hours of work, the employer is not obliged to pay the employee for the hours that have been refused, nor to provide that employee with an equivalent number of hours at an alternative time in the employer's roster.

IN THE FAIR WORK COMMISSION

AM2014/305

FOUR YEARLY REVIEW OF MODERN AWARDS

PENALTY RATES

ATTACHMENT C

FAIR WORK COMMISSION

AM 305 of 2014

FOUR YEARLY REVIEW OF MODERN AWARDS
PENALTY RATES

OUTLINE OF SUBMISSION OF AUSTRALIAN INDUSTRY GROUP ON CONDITIONING SUNDAY PENALTY RATE ON OPTION OF EMPLOYEE TO REFUSE TO WORK ON A SUNDAY

1. On 12 April 2016, the Full Bench invited the parties to consider the possibility of conditioning a reduction in the Sunday penalty rate upon the right of an employee to refuse reasonably to work on a Sunday (by reference to the approach in section 114 of the *Fair Work Act* 2009 (Cth)) (see Transcript, 12 April 2016, PN26983 to PN26999). The Full Bench noted that the SDA had submitted, in relation to the Retail Award, that any reduction in the Sunday penalty rate should be conditioned on an employee volunteering to work on a Sunday (see SDA Submissions at par 72). On 14 April 2016, the Ai Group reserved its right to address the issue in writing (see Transcript, 14 April 2016, PN28018).

2. The Ai Group opposes the conditioning of a reduction in the Sunday penalty rate *in the Fast Food Award* upon an employee volunteering to work on a Sunday:

   (a) First, there is no evidence, and there was no cross-examination by the SDA, to the effect that employees in the fast food industry do not work voluntarily on Sundays.

   (b) Secondly, there was extensive evidence that employees in a major employer in the fast food industry make themselves available voluntarily for significant hours on Sundays (between 11 and 16 hours – see Limbrey Affidavit (Exhibit AIG 3), par 164) and make themselves available for more hours on Sundays than weekdays (at least double the number of hours on a weekend than a weekday – see Limbrey Affidavit (Exhibit AIG 3), par 164) (and noting the lack of complaints by employees in the fast food industry over being rostered to work on Sundays (see Limbrey Affidavit (Exhibit AIG 3), par 192) and noting the lack of evidence from the SDA of any such complaints).

(c) Thirdly, it has never been a feature of award regulation of the fast food industry that work on Sundays be voluntary only and not the subject of an employer requirement (with a clause such as clause 19 of the SDAEA Victorian Shops Victorian Interim Award (see Transcript, 13 April 2016, PN27564) not being contained in awards of the fast food industry and with clause 19 only being included in the different retail industry in one State only).

(d) Fourthly, it has never been a feature of award regulation of the fast food industry that the rate of the Sunday penalty was to reflect that employees had previously worked on Sundays voluntary but were now being required to do so (compare the approach in the *$2 and Under Case* (2003) 135 IR 1 and the SDA Submissions at pars 67 to 70).

3. The Ai Group also opposes the conditioning of a reduction in the Sunday penalty rate *in the Fast Food Award* upon the regime contained in section 114 of the FW Act:

(a) First, section 114 confers an entitlement to an employee not to work on a public holiday and, for the reasons outlined in the previous paragraph, a reduction in the Sunday penalty rate should not, in respect of the fast food industry, confer an entitlement to an employee in the fast food industry not to work on a Sunday.

(b) Secondly, section 114 is based on a diversity of characteristics associated with public holidays (which fall on various days of the week (not the same day each week) irregularly (not the same number each month) and having varying degrees of importance (Christmas Day v Friday before AFL Grand Final) whereas working on Sundays has no such diversity (same day each week four (or occasionally five) times a month with no difference between one Sunday and the next Sunday (unless it coincides with a public holiday)).

(c) Thirdly, section 114 identifies some relevant matters in identifying whether a request by an employer to work on a public holiday, or a refusal by an employee to work on a public holiday, is reasonable but most of those matters are not relevant to work on a Sunday:

(i) the operational requirements of an employer in the fast food industry, involving operations on Sundays, will always favour a conclusion that a request to work on a Sunday is reasonable (see section 114(3)(a));

(ii) the employee circumstances of an employee in the fast food industry is such that they are unlikely to have caring responsibilities (with 93 per cent of fast food employees not having such responsibilities – see Ai Group Submissions at par 74), with the result that the matter will favour

a conclusion that a request to work on a Sunday is reasonable or a refusal (is not on that ground alone) reasonable (see section 114(3)(b));

(iii) an employer in the fast food industry, with operations every Sunday and required to pay a penalty rate under the Fast Food Award for work on that day, could always reasonably expect the employee to work on a Sunday and thus will favour a conclusion that a request to work on a Sunday is reasonable (see section 114(3)(c));

(iv) an employee will, by the terms of the Fast Food Award, be entitled to receive penalty rates for the work on the Sunday and thus will favour a conclusion that a request to work on a Sunday is reasonable (see section 114(3)(d));

(v) the type of employment is unlikely to produce different results in the fast food industry, particularly given the high proportion of part-time and casual work (approximately 85 per cent – see Ai Group Submission at par 67) and the limited number of hours worked per week (approximately 70 per cent work less than 15 hours per week, including Sundays – see Ai Group Submission at par 70) such that the matter will not lead to a conclusion that a request to work on a Sunday was unreasonable (see section 114(3)(e)); and

(vi) the amount of notice of a request to work on a Sunday is unlikely to be operative, given the ability of an employer in the fast food industry to specify at the commencement of employment a request to work every Sunday such that the matter will favour a conclusion that the request to work on a Sunday is reasonable (see section 114(3)(f)).

(d) Fourthly, the introduction of a regime contained in section 114 but applying to work on a Sunday has the potential in the fast food industry to increase disputes between employers and employees (particularly by an employer giving a reasonable request to work on a Sunday and an employee refusing such a reasonable request) in circumstances where presently there is no disputation over the requirement to work on a Sunday.

4. The Ai Group opposes the conditioning of a reduction in the Sunday penalty rate *in the Fast Food Award* upon an employee volunteering to work on a Sunday, or upon the regime contained in section 114 of the FW Act, as such a condition would provide, in respect of the fast food industry in light of the evidence in the proceedings, more than necessary to meet the modern awards objective.

5. If the Full Bench is minded, contrary to the submissions in this outline, to condition a reduction in the Sunday penalty rate upon an employee volunteering to work on a Sunday, or upon the regime contained in section 114 of the FW Act, Ai Group wishes to be heard on the form of a clause to give effect to such conditioning. The Ai Group

wishes to ensure in particular that the clause is workable and does not give rise to further disputes between employers and employees.

H J Dixon SC
A B Gotting
Counsel for Ai Group

29 April 2016

IN THE FAIR WORK COMMISSION

AM2014/305

FOUR YEARLY REVIEW OF MODERN AWARDS

PENALTY RATES

ATTACHMENT D

Australian Hotels Association (AHA) and Accommodation Association of Australia (AAA)

1 These submissions are filed in accordance with direction 1 of the directions made on 29 April 2016 in relation to the proposal and subsequent discussion that employees have a right to refuse work on a Sunday on a similar basis to that articulated in section 114 of the *Fair Work Act 2009* (Cth) (**reasonable refusal of Sunday work clause**).

2 The AHA and AAA with respect to the *Hospitality Industry General Award* (HIGA) submit that the penalty rate claims they have advanced go no further than necessary to achieve the modern awards objective.

3 The AHA and AAA claim maintains a difference in the penalty rate payable to permanent employees on a Saturday and Sunday under the HIGA. The AHA proposes payment, as a percentage of the relevant minimum hourly wage, of 125% on a Saturday and 150% on a Sunday for permanent employees and 150% on a Saturday and Sunday for casual employees.

4 Having regard to the very slight increase in disability for some employees working on Sundays when compared to Saturdays, the Commission could vary the penalty rates in HIGA in the terms sought by the AHA and AAA *without* a reasonable refusal of Sunday work clause.

5 The AHA and AAA accept that it is open to the Commission to determine that there are different ways a fair and relevant safety net can be achieved.

6 The Commission could, for example, determine that a reasonable refusal of Sunday work clause be included in the HIGA and to make Sunday penalty and Saturday penalty rates the same for permanent employees. The refusal of Sunday work clause would be in lieu of the marginally higher Sunday penalty rates proposed by the AHA and AAA for permanent employees.

7 If the Commission considers that the penalty rates sought by the AHA and AAA in the HIGA would only be fair and relevant and meet the modern award objectives with the inclusion of a reasonable refusal of Sunday work clause, then it is submitted that such a clause should be included.

8 If a reasonable refusal of Sunday work clause was to be included in the HIGA it should:

(a) be drafted simply and plainly and be uncomplicated in its application; and

(b) to the extent possible be drafted to minimise disputes, at the workplace level or in the Commission or elsewhere, about what is *reasonable* or *unreasonable*

9 If such a clause is to be included the AHA and AAA propose the clause attached.

Sharlene Wellard | Principal
Meridian Lawyers
Level 6, 20 Bond Street, Sydney NSW 2000
p: 02 9018 9939 | **f:** 02 9018 9900 | **e:** swelard@meridianlawyers.com.au

DRAFT ALTERNATE CLAUSE FOR INSERTION INTO THE HOSPITALTY INDUSTRY GENERAL AWARD

[INSERT clause number]- Reasonable refusal to attend for work on a Sunday

(1) If an employee is directed to work ordinary hours on a Sunday, the employee may refuse if the refusal is reasonable.

(2) Subsection (1) does not apply to:

(a) any employee who, prior to the employee's commencement of employment (or upon the commencement of this provision), was notified by the employer that he/she would be regularly required to work on Sundays; or

(b) any employee classified at Grade 4 or above.

(3) In determining whether the refusal is reasonable, the following must be taken into account:

(a) the nature of the employer's workplace or enterprise (including its operational requirements), and the nature of the work performed by the employee;

(b) the employee's personal circumstances, including family responsibilities;

(c) whether the employee could reasonably expect that the employer might direct work to be performed on the Sunday;

(d) the type of employment of the employee (for example, whether full-time, part-time, casual or shiftwork);

(e) the amount of notice in advance of the Sunday given by the employer when making the direction to work the Sunday;

(f) in relation to the refusal of a direction to work -- the amount of notice given by the employee when refusing the direction; and

(g) any other relevant matter.

(4) Where an employee refuses to work hours on a Sunday or Sundays in accordance with clause [**INSERT this clause number**], and those hours form part of the employee's ordinary hours of work, the employer is not obliged to pay the employee for the hours that have been refused, nor to provide that employee with an equivalent number of hours at an alternative time in the employer's roster.

IN THE FAIR WORK COMMISSION

AM2014/305

FOUR YEARLY REVIEW OF MODERN AWARDS

PENALTY RATES

ATTACHMENT E

Pharmacy Guild of Australia (PGA)

1 These submissions are filed in accordance with direction 1 of the directions made on 29 April 2016 in relation to the proposal and subsequent discussion that employees have a right to refuse work on a Sunday on a similar basis to that articulated in section 114 of the *Fair Work Act 2009* (Cth) (**reasonable refusal of Sunday work clause**).

2 The PGA with respect to the *Pharmacy Industry Award* (PIA) submits that the penalty rate claim it has advanced goes no further than necessary to achieve the modern awards objective.

3 The PGA claim maintains a difference in the penalty rate payable on a Saturday and Sunday under the PIA. The PGA claim is that work performed on a Saturday between 7am and 9pm should attract a payment of 125% of ordinary time rates and work at the same time on a Sunday 150%. Work between 9pm and midnight should attract a payment of 150% of ordinary time rates on a Saturday and 175% on a Sunday.

4 The PGA claim accounts for the very slight increased disability between Saturday and Sunday work and the Commission could vary the penalty rates the PIA in the terms sought by the PGA *without* the inclusion of a reasonable refusal of Sunday work clause.

5 The PGA is concerned that a reasonable refusal of Sunday work clause:

(a) will be interpreted at the workplace level as an absolute right to refuse to work on Sundays

(b) will lead to disputes at both the workplace level and before the Commission (and other jurisdictions) in relation to what is "reasonable"

(c) does not recognise the increasing need for Sundays to be standard operating business hours for community pharmacy

(d) infers that the disability of work on a Sunday is akin to working on a public holiday, when it is in fact the same, or only marginally greater for some employees, as the disability of working on a Saturday.

Sharlene Wellard | Principal
Meridian Lawyers
Level 6, 20 Bond Street, Sydney NSW 2000
p: 02 9018 9939 | **f:** 02 9018 9900 | **e:** swelard@meridianlawyers.com.au

IN THE FAIR WORK COMMISSION

AM2014/305

FOUR YEARLY REVIEW OF MODERN AWARDS

PENALTY RATES

ATTACHMENT F

Registered and Licensed Clubs Award

Draft Sunday Work Clause

Clubs Australia Industrial attaches the below draft clause, on the basis that Clubs Australia Industrial's application is granted in full.

Clause 29.6 – Right to refuse Sunday work

(a) This clause is designed to ensure employees who were, prior to the commencement date of this clause, entitled under clause 29.1 of this award to be paid an additional loading of 75% for work performed on Sundays have a genuine right to reconsider working on Sundays in light of the reduction in the Sunday penalty rate.

(b) This clause only applies to:

(i) permanent full-time and part-time employees (this clause does not apply to casual employees);
(ii) employees classified at level 3 or below under this Award; and
(iii) employees employed by their employer immediately prior to this clause coming into operation.

(c) This clause does not apply to employers with less than 15 employees.

(d) An employee covered by this clause may refuse to work on a Sunday, or Sundays, if the refusal is reasonable.

(e) In determining whether a refusal to work ordinary hours on a Sunday or Sundays is reasonable, the following must be taken into account:

(i) the nature of the employer's workplace or enterprise (including its operational requirements), and the nature of the work performed by the employee;
(ii) the employee's personal circumstances, including family responsibilities;
(iii) whether the employee could reasonably expect that the employer might request work on a Sunday;
(iv) the amount of notice in advance of the Sunday given by the employer when making the request;
(v) in relation to the refusal of a request—the amount of notice in advance of the Sunday given by the employee when refusing the request;
(vi) any other relevant matter.

(f) Where an employee refuses to work on a Sunday or Sundays in accordance with clause 29.6(d), and those Sunday hours form part of the employee's ordinary hours of work, the employer is not obliged to provide that employee with an equivalent number of hours at an alternative time in the employer's roster.

For example, where:

(a) a full-time employee is rostered to work 6 ordinary hours on a Sunday as part of their 38 ordinary hours; and

(b) the employee informs their employer of their refusal to work those Sunday hours,

the employee is not entitled to have those hours replaced within the employer's roster. In these circumstances the employee would only be entitled to be paid for 32 hours for that week.