



## IN THE FAIR WORK COMMISSION

Matter No: AM2014/305

Title: Four yearly review of modern awards –  
Penalty rates

## SUBMISSIONS

8/05/2017

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## Introduction

1. The Health Services Union [HSU] makes these brief submissions following the Statement and Directions [2017] FWCFB 1933, issued by the Fair Work Commission Full Bench on 18 April 2017. Parties were directed to file written submissions in regards to proposed changes in terminology in all modern awards, which would remove the reference to ‘penalty’ and ‘penalty rates’ and replace with the term ‘additional remuneration’.
2. The HSU has an interest in multiple awards in the modern awards system which would be affected by this decision, in particular the following awards in the health sector:
  - a. Aboriginal Community Controlled Health Services Award
  - b. Aged Care Award
  - c. Ambulance and Patient Transport Industry Award
  - d. Health Professionals and Support Services Award
  - e. Medical Practitioners Award
  - f. Nurses Award
  - g. Social, Community, Home Care and Disability Services Award
  - h. Supported Employment Services Award 2010
3. For the reasons set out below, the HSU is strongly opposed to the proposed change in terminology. In particular we oppose any change to the term ‘penalty rate/s’ which would deviate from its use or interpretation within the current health awards. The interpretation of the term (and the meaning attributed to the term) ‘penalty rate/s’ emanates from important industrial history in the health sector, and should not lightly be varied.

## Jurisdictional Issues

4. The HSU is of the view that there are jurisdictional limitations preventing the Fair Work Commission from making the proposed changes in terminology in all modern awards.
5. The Full Bench Decision in this matter<sup>1</sup> held that, in the context of the four yearly review of modern awards, the Commission’s initial task in reviewing an award:

*“... the Commission’s task in the Review is to make a finding as to whether a particular modern award achieves the modern award objective. If a modern award is not achieving the modern awards objective then it is to be varied such that it only includes terms that are necessary to achieve the modern awards objective’.<sup>2</sup> (emphasis added)*

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<sup>1</sup> [2017] FWCFB 1001, 23 February 2017

<sup>2</sup> [141]



6. This Decision seems to clarify that the Commission has no grounds to vary an award until it has first made a finding that the award as it currently stands does not meet the modern awards objective.
7. The ACTU, in its submissions concerning the Plain Language proceedings, puts it more definitively:
 

*“...this makes clear that a finding that a modern award does not achieve the modern awards objective is a mandatory precondition - a jurisdictional fact - that must be satisfied before the Commission can exercise the discretionary power under section 156 to make a determination to vary a modern award in the course of a Review.”<sup>3</sup>*
8. The finding that is relevant is whether the deficiency in regards to the modern awards objective is so great that it does not provide a fair and relevant safety net.
9. It is the HSU’s view that the Full Bench has not made such a finding, and therefore is barred from varying the modern awards as proposed until it does so.
10. The criterion which appears to be relevant in this matter is s 134(1)(g), ‘*the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards*’. Moreover, it must be determined that this deficiency in simplicity and stability is so significant, that the award does not provide a fair and relevant safety net. (\*) This requires more than a finding that an award would be *made more simple* or *made easier* to understand with the alternative terminology, ‘additional remuneration’.
11. In the Decision, the Full Bench makes clear that ‘*to be satisfied that a modern award is not achieving the modern awards objective it is not necessary to make a finding that the award fails to satisfy one or more of the s.134 considerations*’.<sup>4</sup> Rather, ‘*The Commission’s task is to balance the various considerations and ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions*’.<sup>5</sup>
12. The HSU is of the view that the Fair Work Commission has not made a finding that the relevant modern awards do not achieve the modern awards objective.

## Health sector awards

13. Only one of the awards that the HSU has an interest in – the Pharmacy Award – has been the subject of the penalty rates review.
14. The premise that findings in the penalty rates proceedings should now be applied to all awards would go against the requirement that each award be reviewed in its own right. While one or more may be reviewed at the same time, sweeping changes to all awards in the system requires the Commission to consider particularities of individual awards in all sectors.

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<sup>3</sup> [ACTU Submissions Plain Language](#)

<sup>4</sup> [162]

<sup>5</sup> [163]



15. All of the health awards contain penalty rates. The rates are applied and referenced for working evening and night shift work, for weekend and public holiday work, and for overtime hours.
16. Work across all hours and all days of the year is common to the health sector – and penalty rates has always been the terminology used to define the payments made to employees for the disutility of working outside the Monday – Friday 8am-6pm ‘normal’ hours framework.
17. Employers generally decide the days, nights and shifts to be worked by employees. The rosters are drafted to take account of the operational needs of the health service and to meet the needs of those requiring care.
18. Penalty rates are not described, nor thought of, as a penalty applying against employers, but rather one applying for the benefit of employees because the employees work all hours of the day and night; all days of the week and year; in short – anti-social hours for which they are paid a penalty rate.
19. We think it is erroneous to change the terminology on the basis that penalty rates implies a deterrent rather than a compensatory motivation for the payment. Penalty rates are an understood term in the context of the health sector, and in fact in the general public lexicon.

## Plain language implications

20. HSU has been a party to the initial plain language project and pilot through the Pharmacy Industry Award. At no stage during these proceedings, including the initial plain language draft<sup>6</sup> by an external plain language expert; the user testing conducted research<sup>7</sup>; or the FWC report<sup>8</sup> was the ‘penalty rate’ terminology questioned or misunderstood.
21. The concept that ‘additional remuneration’ should replace the words ‘penalty rate/s’ to prevent a possible interpretation that an employer was being penalised for the temerity of rostering an employee to work unsociable hours seems contrary to the basic premise used for undertaking the plain language project in its entirety.
22. There were approximately 6,000 individual submissions from workers to the penalty rates full bench concerning the impact of a proposed reduction in their penalty rates on their lives. None of these individuals required an explanation of the term ‘penalty rates’.
23. The HSU submits that given the underpinning premise of the plain language pilot is simple easily understood awards; with presumably a view to meeting the modern award objective [in particular] in s 134(1)(g), ‘*the need to ensure a simple, easy to understand, stable and sustainable modern award system....*’ [emphasis added], then a change in the terminology ‘penalty rates’ to ‘additional remuneration’ would result in the antithesis of plain language process simply by varying a widely and easily understood term.

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<sup>6</sup> [PIA Plain Language Exposure Draft](#)

<sup>7</sup> [Plain Language Modern Award Pilot](#)

<sup>8</sup> [Report from Plain language modern award pilot](#)



24. The word 'additional' may well be comprehended by everyone. But the word remuneration is not the term in general use by employees or employers to describe their wages or pay; regardless of whether they are referring to their pay in total or the rates payable for evening/ nights, weekends, public holidays or overtime.



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