

FAIR WORK ACT 2009

FOUR YEARLY REVIEW OF MODERN AWARDS (AM2014/305)

SUBMISSION OF THE MARITIME UNION OF AUSTRALIA IN RESPONSE TO THE STATEMENT OF THE PRESIDENT [2017] FWCFB 1933

Background

1. On 24 February 2017, the *Four Yearly Review of Modern Awards – Penalty Rates* (AM2014/305) FWCFB 1001 Decision of the Full Bench in the Fair Work Commission (“FWC”) was handed down in accordance with section 156 of the *Fair Work Act 2009* (Cth) (“FWA”) and the obligation to review modern awards every 4 years.
2. On 18 April 2017, a Statement and resulting Directions were issued by the FWC with respect to the above Decision. The Statement outlines the position of the Australian Hotels Association and the Accommodation Association of Australia, who have sought the removal of the reference to ‘penalty’ and ‘penalty rates’ in clause 32 of the *Hospitality Industry Award 2010*. They seek to replace any such reference with the words ‘additional remuneration.’ A similar variation is proposed by the Pharmacy Guild of Australia in relation to the *Pharmacy Industry Award 2010*.
3. President Justice Ross notes at paragraph [4] of the Statement issued on 18 April 2017 that if changes of the type proposed were to be made, then prima facie, they should be made to all modern awards that provide for ‘penalty rates.’ It is within this context that the Maritime Union of Australia (“the Union”) makes this submission.

Submission

4. The Union notes that as part of the FWC’s obligations under section 138 of the FWA, the Commission is to decide whether a particular modern award achieves the modern awards objective. If it does not, then it is to be varied such that it only includes terms that are ‘necessary to achieve the modern awards objective.’¹
5. At paragraph [3] of the Statement and Directions, President Justice Ross states that the proposed changes appear to be sought on the basis that section 134(1)(da)(ii) of the FWA speak to ‘the need to provide additional remuneration for...employees working on weekends.’
6. In the Union’s submission, if the proposed change in terminology from ‘penalty’ and ‘penalty rates’ to ‘additional remuneration’ were made, this would connote a change in the very nature of the work performed. We submit that there would be a negative connotation associated with the proposed change in terminology, which suggests a shift in the nature of the work such that the social or familial inconvenience has somehow changed (which is not the case). As to any suggestion that the term ‘penalty’ connotes some wrongdoing on the part of an employer, in the Union’s submission, the term reflects the ‘penalty’ suffered by an employee when working outside of ordinary hours.

¹ *Fair Work Act 2009* (Cth) s 138

7. In its Decision the FWC Full Bench notes that historically, industrial tribunals have expressed a duality in the rationale for penalty rates. There was firstly seen to be the need to compensate employees for working outside ‘normal hours’ and secondly, to deter employers from scheduling work outside ‘normal hours.’² At paragraph [39] of the Decision, the Full Bench concluded that upon their review of the more recent authority, the terms of the modern awards objective and the scheme of the FWA, that deterrence is no longer a relevant consideration in the setting of weekend and public holiday rates.³ In their reasoning, the Full bench accepted that a penalty rate may deter employers from scheduling work at specific times/on specific days, however, this was an effect of penalty rates themselves, rather than the objective of such payments.⁴ It was noted that compensating employees for the disutility of working on weekends and public holidays was the primary consideration for penalty rates.⁵
8. In the Union’s submission, ‘penalty rates’ is a collective term which takes into consideration all of the factors for which the employee is paid ‘additional remuneration’ in accordance with the modern awards objective and in particular, those matters set out in s134(1)(da)(i)-(iv). Furthermore, if the FWC were to remove the term ‘penalty rates’, in the Union’s submission, such change implies that the employee is given remuneration in addition to that which they are entitled to for performing the work.
9. The Union submits that such a change would by inference remove the compensatory element deemed by the Full Bench as being the relevant consideration in setting weekend and public holiday rates. Further, the Union submits that their removal would be inconsistent with section 138 of the FWA which requires Awards to include terms that achieve the modern awards objective.
10. The Union submits that it would be inappropriate for the words ‘penalty’ and ‘penalty rates’ to be removed from modern awards. We submit that the proposed change by the Australian Hotels Association, the Accommodation Association of Australia and the Pharmacy Guild of Australia should be rejected.
11. The Union also adopts and supports the submission of the ACTU regarding this matter.

Dated: 8 May 2017

Signed:



Aaron Neal, Senior National Legal Officer
Maritime Union of Australia

² *4 yearly review of modern awards – Penalty rates* (AM2014/305) [2017] FWCFB [38] (Ross P)

³ *4 yearly review of modern awards – Penalty rates* (AM2014/305) [2017] FWCFB [39] (Ross P)

⁴ Ibid

⁵ Ibid.