

4 Yearly Review of Modern Award – Penalty Rates

(AM2014/305)

TRANSITIONAL ARRANGEMENTS: SUNDAY PENALTY RATE REDUCTIONS AND OTHER MATTERS

SUBMISSIONS IN REPLY OF THE AUSTRALIAN HOTELS ASSOCIATION AND THE ACCOMODATION ASSOCIATION OF AUSTRALIA

- 1 The Australian Hotels Association (AHA) and the Accommodation Association of Australia (AAA) make these general submissions in reply to the submissions filed by United Voice (UV) and other interested parties in relation to the transitional arrangements for penalty rate changes in the Hospitality Industry (General) Industry Award (HIGA) and respond to the Questions on Notice set out in Statement issued on 5 April 2017 ([2017] FWCFB 1934).
- 2 The AHA/ AAA reject all submissions that the penalty rates changes should not be introduced at all. Submissions of that kind, following a substantial hearing involving lay and expert witness evidence, thousands of submissions and the handing down of a decision, are disrespectful and need not be considered by the Commission.
- 3 The UV alternative proposal, that the Sunday penalty rate change for fulltime and part-time employees be delayed until 2018 and then be introduced in three instalments the last on July 2021, would maintain a penalty rate that is not fair or relevant for such an extreme period that it cannot be taken seriously and is not useful.

Questions on Notice

[6] It appears to be common ground that the Commission should take steps to mitigate the impact of the Decision on the affected employees. Does any interested party take a different view? 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.

- 4 The AHA / AAA maintain their position as set out at paragraph 6 of the submissions filed on 24 March 2017, that the penalty rate change should be introduced on 1 July 2017. If the Commission is of the view that a phase in is necessary to mitigate the impact of the decision on the employees, the AHA / AAA submit it should be in no more than two stages, as set out in paragraph 7 of the abovementioned submissions.
- 5 There is no data available that identifies the number of fulltime and part-time employees who work on a Sunday, nor how many hours they work on a Sunday, nor how regularly they work on Sunday.

- 6 Although the number of employees affected is difficult to estimate and the AHA / AAA can make general comment in relation to the hotel sector (and not caravans, caterers and others to whom the award applies).
- 7 The penalty rate change only affects fulltime and part-time employees who work on a Sunday. Not all fulltime and part-time employees work on a Sunday. Casual employees are not affected at all. Managerial employees and those on an annualised salary arrangement are unlikely to be affected by the Sunday penalty rate change.
- 8 The HIGA does not apply to many large employers who have enterprise agreements in place. Fulltime and part-time employees who work on Sundays covered by enterprise agreements are not affected by the Decision.
- 9 The evidence in the case was that for many employers currently Sunday is a day on which they currently reduce services and run on skeleton staff.
- 10 There is a propensity for the industry to engage most employees as casuals and there is a high turnover in the industry.
- 11 Based on the above the number of fulltime and part-time employees who work on a Sunday and are affected by the Decision is likely to be a low percentage of those covered by the HIGA.

[9] All parties are asked to comment on the ACOSS proposal. – Loaded Rates

- 12 The employers covered by the HIGA are diverse, from very small to very large businesses across remote, regional and metropolitan locations, some are affected by seasons, some rely heavily on local trade. All operate enterprise specific rosters to meet the needs of the particular business.
- 13 The AHA / AAA appreciate the attraction of loaded rates, but having regard to the diversity of the industry and variety of rosters that may be worked, it does not consider it appropriate for loaded rates to be included in the HIGA. Annualised salary arrangements and individual flexibility arrangements can achieve the same result as a loaded rate for the particular enterprise and individual employee.

[16] It seems to be common ground that the take home pay order provisions of the TPCA Act are not an available option to mitigate the impact of the reductions in penalty rates set out in the Decision. Does any interested party take a different view?

- 14 The AHA / AAA do not take a different view.

[18] It appears to be common ground that the Commission has power to make transitional arrangements relating to the staggered introduction of the reduction to existing Sunday penalty rates. Does any interested party take a different view?

- 15 The AHA / AAA agree that the Commission has power to stagger the reduction to the Sunday penalty rates. However, the Commission has determined that the current Sunday penalty rates are not fair and relevant. Any staggered introduction prolongs a Sunday penalty rate that is not fair and relevant.

[19] At paragraph [43] of its submission, Ai Group submits that in determining the transitional arrangements for the Sunday penalty rate, the Full Bench must act consistently with:

- a) its statutory charter, including the exercise its powers under the FW Act in a manner that is fair and just (see section 577(a) of the FW Act);*
 - (b) its principle that fairness is assessed from the perspective of both employer and employee (and not simply from the perspective of the employee) (see Penalty Rates Decision at [37], [117], [118], [151], [885], [1701], [1877], [1948]);*
 - (c) the objects of the relevant Part (see section 578(a) of the FW Act);*
 - (d) the merits of the matter (see section 578(b) of the FW Act);*
[2017] FWCFB 1934
 - (e) its findings and conclusions in the Penalty Rates Decision;*
 - (f) the evidence in the proceedings;*
 - (g) the extent of the reductions in the existing Sunday penalty rates; and*
 - (h) the approach adopted by other Full Benches to the staggered introduction of reductions in penalty rates.*
- Does any interested party hold a contrary view?*

- 16 The AHA / AAA agrees with the proposition advanced by AIGroup and do not hold a contrary view.

*[20] In its submission ABI and NSWBC contend that an appropriate transitional arrangement needs to balance the needs of the low paid and the regulatory burden and disemployment factors referred to at paragraphs 4.2 and 4.3 of their submission. ABI and NSWBC submit that an appropriate way in which to achieve this balance is for the Commission to ask the following question:
'Which transitional proposal will provide a substantive opportunity to employees to mitigate any adverse effects of the Decision whilst not significantly prejudicing the employment and regulatory benefits associated with the Decision?'*⁵
All parties are invited to comment on the question posed by ABI and NSWBC and whether it is the appropriate question for the Commission to direct itself to in these proceedings.

- 17 The Commission need not direct itself to this question in these proceedings. Terms like “substantive opportunity” or “not significantly prejudicing” are subjective, unhelpful and are not statutory considerations.
- 18 The Commission must consider whether a transitional arrangement is necessary, and if so that it goes no further than necessary, to ensure the HIGA together with the National Employment Standards provides a fair and relevant minimum safety net of term and conditions.

- 19 The Commission does not need to consider whether a transitional arrangement would “balance” the needs of the low paid against other matters. The requirement on the Commission is to take into account a number of matters listed in section 134(1).

[25] What is the source of the Commission’s power to preserve the current Sunday penalty rates for existing employees as advanced by the SDA?

If the Commission is vested with such a power, what do the other parties say about the merits of the proposal advanced by the SDA?

Other than the SDA’s proposal in relation to the Retail, Fast Food and Pharmacy Awards, are there any other ‘red circling’ proposals being advanced by any other party?

- 20 Any grandfathering of penalty rates would create a two tiered payroll system, creating a burden on business administration and an unnecessary and unfair differential between employees performing the same work. Grandfathering does not address the fundamental issue that the current Sunday rate for fulltime and part-time employees is currently not fair and relevant.

- 21 The AHA / AAA does not advance a red-circling proposal.

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