

FAIR WORK COMMISSION

Matter No. AM2014/305

FOUR YEARLY REVIEW OF MODERN AWARDS – PENALTY RATES

SUBMISSIONS OF UNITED VOICE REGARDING
THE DRAFT DETERMINATION OF THE RESTAURANT INDUSTRY AWARD 2010
ISSUED BY THE FAIR WORK COMMISSION ON 24 FEBRUARY 2017

1. On 24 February 2017, the Fair Work Commission handed down its decision in the Four Yearly Review of Modern Awards – Penalty Rates (*Penalty Rates Decision*): [2017] FWCFB 1001.
2. At paragraph 2026, the Full Bench stated that it has decided to vary the late night penalties in the *Restaurant Industry Award 2010*. The Award currently provides, at clause 34.2, for an additional payment of 10 per cent of the standard hourly rate for work between 10.00pm and midnight, and 15 per cent of the standard hourly rate for work between midnight and 7.00am. The FWC determined to reduce the span of hours in which the 15 per cent loading is payable to between midnight and 6.00am.
3. A draft determination was published by the FWC on 24 February 2017, which provided for the varied clause 34.2 to come into effect from **27 March 2017**. Interested parties have seven days to comment on the draft variation determinations: at [2031].
4. In making this comment, United Voice does not address the merits of the Commission’s decision to vary the span of hours in the *Restaurants Award* in which the night loading is payable, and reserves its rights in that regard.
5. The FWC considered that the following matters were relevant to its determination that the variation should commence on 27 March 2017:
 - (a) The variation will have limited impact, *i.e.*, just to those employees who work between 6.00am and 7.00am: at [1136] and [2029]; and
 - (b) The need to ensure a simple and easy to understand modern award system: at [2029].
6. United Voice submits that the variation to clause 34.2 should commence on 1 July 2017, for the following reasons.

7. First, the FWC has acknowledged that a substantial proportion of award-reliant employees covered by the *Restaurants Award* are low paid and the variation will reduce the earnings of those employees: at [1136]. The FWC has determined that the low-paid status of workers who will be affected by cuts to Sunday penalty rates is relevant to the consideration of transitional arrangements for the variation to those awards: see [824] with respect to the *Hospitality Industry Award*.
8. The FWC stated that the variation would not be reduced “*by a significant extent*”, because it would only apply to work performed by those employees who work between 6.00am and 7.00am for that duration. However, there is no material before the Commission to enable an assessment of the scale of the impact of the variation.
9. Second, the FWC heard evidence about the low rates of compliance with award terms and conditions that are a particular feature of the restaurant industry, with the Fair Work Ombudsman reporting over a third of restaurants and cafes were noncompliant with paying correct rates of pay: see United Voice final submissions dated 21 March 2016 at [111]; and 58 per cent of restaurants and cafes being noncompliant with award conditions overall: [2017] FWCFB 1001, [1128]. The Ombudsman identified a general lack of awareness and understanding by restaurant and café owners of award conditions as an explanation for the high rates of noncompliance in the sector: see Exhibit UV-36 at 7, 9, 10, and 11
10. The introduction of a variation to the *Restaurants Award* on 27 March 2017 will not aid compliance with award conditions.
11. By contrast, businesses are accustomed to adjusting rates of pay from 1 July each year to account for any change to minimum award rates as a result of the Annual Wage Review. In 2017, restaurant businesses will also be likely adjusting public holiday penalty rates for permanent employees by 25 per cent, consistent with the decision of the Full Bench at [2032]. Presumably, the relevant employer associations including the RCA will be publicising the new minimum wage rates and reduced public holiday rates to its members in advance of 1 July 2017 to enable compliance by 1 July. In the circumstances, we consider the appropriate commencement date for the variation to the late night loading is 1 July 2017.

Date: 3 March 2017

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