



# Summary of Decision

5 June 2017

## 4 yearly review of modern awards — Penalty Rates – Transitional Arrangements

AM2014/305

[\[2017\] FWCFB 3001](#)

### 1. Background

[1] On 23 February 2017 a Full Bench issued a decision dealing with the weekend and public holiday penalty rates, and some related matters, in a number of awards in the Hospitality and Retail sectors (the *Penalty Rates decision*).<sup>1</sup>

[2] The *Penalty Rates decision* determined that the existing Sunday penalty rates in the *Hospitality, Fast Food, Retail and Pharmacy Awards* did not achieve the modern awards objective, as they do not provide a fair and relevant minimum safety net. The effect of the *Penalty Rates decision* was to reduce Sunday penalty rates to 150 per cent for full-time and part-time employees in the *Hospitality, Retail and Pharmacy Awards* and to 175 per cent for casual employees in the *Retail and Pharmacy Awards*. The Sunday penalty rate for casual employees in the *Hospitality Award* remained unchanged at 175 per cent. The decision reduced the Sunday penalty rates in the *Fast Food Award* (for Level 1 employees only) to 125 per cent for full-time and part-time employees and 150 per cent for casual employees. The *Penalty Rates decision* also reduced the public holiday penalty rates in the above awards as well as the *Restaurant Award*.

[3] The *Penalty Rates – Transitional Arrangements decision* deals with the implementation of the *Penalty Rates decision*.

### 2. The *Penalty Rates – Transitional Arrangements decision*

#### 2.1 General Issues

[4] The *Penalty Rates – Transitional Arrangements decision* first dealt with a number of general issues canvassed in the submissions.

##### 2.1.1 *The reconsideration of the Penalty Rates decision*

[5] A number of parties (including United Voice, the ACTU and the Federal Opposition) submitted that the *Penalty Rates decision* should be ‘set aside’ or ‘not implemented’. A number of grounds were advanced in support of those submissions including that the decision did not give appropriate weight to the impact on workers of cutting penalty rates and that

modern award variations which result in the reduction of take home pay are inconsistent with the legislative purposes of s.134(1)(da).

[6] As to the first argument referred to above the Full Bench said:

“The first proposition is that the *Penalty Rates decision* gave either no weight or insufficient weight to the impact on the affected employees of cutting penalty rates. In essence, it is said that the Full Bench failed to take into account the ‘relative living standards and the needs of the low paid’, as it was required to do by s.134(1)(a). In our view, there is no substance to this proposition.

Chapter 3.2 of the *Penalty Rates decision* deals with the statutory framework and, relevantly, the Full Bench observes that:

- the modern awards objective applies to the Review (at [113]); and
- s.134(1)(a) requires that the Commission take into account ‘relative living standards and the needs of the low paid’ (at [165]).

Further, the impact of the proposed reductions in penalty rates upon affected employees was expressly considered in the context of each of the relevant modern awards:

- the *Hospitality Award*
  - United Voice’s lay witness evidence: [784]–[815];
  - s.134(1)(a): [817]–[824] and [886].
- the *Fast Food Award*
  - the SDA called no lay witness evidence in respect of the impact upon employees of the proposed reduction in penalty rates;
  - s.134(1)(a): [1356]–[1359].
- the *Pharmacy Award*
  - SDA and APESMA lay witness evidence: [1815]–[1821];
  - s.134(1)(a): [1826]–[1830].
- the *Retail Award*
  - SDA lay witness evidence: [1623]–[1654];
  - s.134(1)(a): [1656]–[1661].

In addition to the fact that s.134(1)(a) was expressly considered and taken into account, it needs to be borne in mind that the Act accords no particular primacy to any one of the s.134 considerations and, further, while the Commission must take into account the matters set out at s.134(1)(a)–(h), the relevant question is whether the modern award, together with the NES, provides a fair and relevant minimum safety net of terms and conditions. In respect of the *Hospitality, Fast Food, Retail and Pharmacy Awards*, the *Penalty Rates decision* determined that the existing Sunday penalty rates did not achieve the modern awards objective, as they did not provide a fair and relevant minimum safety net.”<sup>2</sup> [Footnotes omitted]

[7] The Full Bench also rejected the proposition that modern award variations which result in reductions in take home pay are inconsistent with the legislative purpose of s.134(1)(da):

“Contrary to the submission put, we are not persuaded that the terms of s.134(1)(da), construed in context, support the proposition that there is no power to vary a modern award if such a variation results in a reduction in take home pay.

Further, the modern awards objective is that the Commission ensure that modern awards, together with the NES, ‘provide a fair and relevant minimum safety net of terms and conditions’. As observed in the *Penalty Rates decision*, fairness in this context is to be assessed from the perspective of the employees *and employers* covered by the modern award in question and the word ‘relevant’ is intended to convey that a modern award should be suited to contemporary circumstances. The notion that the terms and conditions in modern awards can never be reduced, if such a variation results in a reduction in take home pay, seems inconsistent with the key concepts inherent in the modern awards objective. For the reasons given we are not persuaded that there is any substance in the proposition advanced.”<sup>3</sup>  
[Footnotes omitted]

[8] The Full Bench rejected the proposition that the *Penalty Rates decision* should be ‘set aside’ or ‘not implemented’ and concluded as follows:

“... while we accept that the reductions we have determined will adversely impact employees, that is a matter that we have already considered and balanced in the *Penalty Rates decision* and it is not a basis upon which we would propose to ‘set aside’ or ‘not implement’ the *Penalty Rates decision*. Nor are we persuaded that the range of other considerations advanced in support of the general proposition provide a sufficiently cogent basis for adopting the course proposed. Each of these matters was considered in the *Penalty Rates decision*.

For the reasons given, we reject the proposition that we should set aside or not implement the *Penalty Rates decision*.”<sup>4</sup>

#### 2.1.2 *The onus issue*

[9] The Full Bench rejected an ACCI submission that parties seeking to depart from the *provisional* views expressed in the *Penalty Rates decision* carried the ‘burden of proof’<sup>5</sup>.

#### 2.1.3 *The power to make transitional arrangements and discretionary considerations*

[10] The Full Bench confirmed the views expressed in the *Penalty Rates decision* that there is a need for appropriate transitional arrangements to mitigate hardship and was satisfied that it had the power to make appropriate transitional arrangements. The Full Bench also observed that ‘the determination of appropriate transitional arrangements is a matter that calls for the exercise of broad judgement, rather than a formulaic or mechanistic approach involving the qualification of the weight accorded to each particular consideration’<sup>6</sup>.

[11] The Full Bench summarised the matters which were relevant to its determination of the transitional arrangements under three broad categories:

- (i) The statutory framework: any transitional arrangements must meet the modern awards objective and must only be included in a modern award to the extent necessary to meet that objective. The Full Bench also noted that it must perform its functions and exercise its powers in a manner which is ‘fair and just’ (as required by s.577(a)) and must take into account the objects of the Act and ‘equity, good conscience and the merits of the matter’ (s.578).

- (ii) The *Penalty Rates decision*: the evidence and our findings and conclusions in the *Penalty Rates decision* are relevant.
- (iii) Fairness: is a relevant consideration, given that the modern awards objective speaks of a ‘*fair and relevant minimum safety net*’. Fairness in this context is to be assessed from the perspective of both the employees *and* employers covered by the modern award in question.<sup>7</sup> The Full Bench said “while the impact of the reductions in penalty rates on the employees affected is a plainly relevant and important consideration in our determination of appropriate transitional arrangements, it is not appropriate to ‘totally subjugate’ the interests of the employers to those of the employees.”<sup>8</sup>

[12] A number of the submission advanced by employer organisations in the proceedings had contended that a shorter transition period would result in positive employment effects materialising earlier. The Full Bench addresses these submissions at [81]–[82] of the decision as follows:

‘While this is so, the ... findings from the *Penalty Rates decision* need to be borne in mind. In particular, the views expressed about the potential for positive employment effects consequent upon a reduction in Sunday penalty rates were somewhat muted and cautious. As such, the force of the various employer submissions which rely on positive employment effects to support a shorter transition period are somewhat diminished.

However, it is relevant to note that the findings in the *Penalty Rates decision* in respect of the positive effect of a reduction in Sunday penalty rates were not limited to the employment effects. In particular, we concluded that the evidence supported the proposition that a reduction in penalty rates is likely to lead to:

- increased trading hours on Sundays and public holidays;
- a reduction in the hours worked by some owner operators;
- an increase in the level and range of services offered on Sundays and public holidays; and
- an increase in overall hours worked.’

[13] The Full Bench also noted that in assessing the fairness of transitional arrangements it is relevant to consider the extent of the reduction in penalty rates and the number of employees affected. The reductions in Sunday penalty rates are more significant in the *Retail* and *Pharmacy Awards* than in the *Hospitality* and *Fast Food Awards*. This was a factor that favoured a longer transition period in respect of the *Retail* and *Pharmacy Awards*.

#### 2.1.4 *Take home pay orders*

[14] The purpose of ‘take-home pay orders’ is to compensate an employee for any reduction in their pay as a result of the making of a modern award or the transitional arrangements in a modern award.

[15] As to ‘take-home pay orders’ the Full Bench concluded:

“In summary then, the position is that ‘take-home pay orders’ are *not* an available option to mitigate the impact of the reductions in penalty rates determined in the *Penalty Rates decision* and the Australian Government has no present intention to amend the Act to provide the requisite power to make such orders...

First, the fact that take-home pay orders are *not* an available option is significant and has implications for our consideration of the duration of any transitional period. As we observed in the *Penalty Rates decision*:

‘If ‘take home pay orders’ were available ... then the period over which the reductions are to be phased in may be shorter than it would otherwise be’.”<sup>9</sup>

[Footnotes omitted]

#### 2.1.5 *The red circling proposal*

[16] ‘Red circling’ refers to the practice of preserving the status quo for existing employees and only imposing a particular change on employees engaged after a specified date. In the present context it would mean an award term which would preserve the current Sunday and public holiday penalty rates for all existing employees, but the reduced penalty rates would apply to all new employees.

[17] The SDA submitted that the Commission should establish different transitional arrangements for future employees and existing employees in the *Retail, Fast Food* and *Pharmacy Awards*.

[18] The Full Bench was not persuaded of the merit of inserting a ‘red circling’ term of the type proposed by the SDA:

“Contrary to the submissions advanced by the SDA we are of the view that the introduction of such a term would:

- create significant potential for disharmony and conflict between employees performing the same work at the same time but receiving different Sunday penalty rates (contrary to s.577(d)); and
- make the transition to ‘fair and relevant’ Sunday penalty rates more complex (adding to the ‘regulatory burden’ on business (s.134(1)(f)) and making the modern award system less simple and easy to understand (s.134(1)(g)).”<sup>10</sup>

#### 2.1.6 *Delayed implementation*

[19] The SDA, United Voice and the ACTU all proposed that the implementation of the reductions for Sunday penalty rates in *Hospitality, Fast Food, Retail* and *Pharmacy Awards* be delayed by a period of two years. APESMA submitted that the implementation of the reductions in Sunday penalty rates in the *Pharmacy Award* should be delayed for four years.

[20] The various employer organisations opposed the imposition of a delay in the implementation of the *Penalty Rates decision*.

[21] The Full Bench was not persuaded that it was appropriate to impose any further delay in the implementation of the *Penalty Rates decision*. However, the Full Bench also said:

“... we are not persuaded that it is appropriate to impose any further delay in the implementation of the *Penalty Rates decision*. However, we recognise that commencing the implementation of the transition to the new Sunday rates on 1 July 2017 will mean that the affected employees will have had only about 4 months’ notice of the changes.”<sup>11</sup>

[22] The decision next dealt with the transitional arrangements for phasing in the reductions in Sunday penalty rates in the *Hospitality, Fast Food, Retail and Pharmacy Awards*.

## 2.2 Sunday Penalty Rates

[23] The phased reductions will be implemented on 1 July each year, at the same time as the implementation of any increases arising from the Annual Wage Review decision.

[24] In relation to the *Fast Food Award*, the Full Bench decided the transitional arrangements set out below were necessary to ensure that the award achieves the modern awards objective:

### Full-time and part-time employees – Level 1 only

1 July 2017	150 per cent → <b>145</b> per cent
1 July 2018	145 per cent → <b>135</b> per cent
1 July 2019	135 per cent → <b>125</b> per cent

### Casual employees (inclusive of casual loading) – Level 1 only

1 July 2017	175 per cent → <b>170</b> per cent
1 July 2018	170 per cent → <b>160</b> per cent
1 July 2019	160 per cent → <b>150</b> per cent

[25] In relation to the *Hospitality Award*, the Full Bench decided the transitional arrangements set out below were necessary to ensure that the award achieves the modern awards objective:

### Full-time and part-time employees

1 July 2017	175 per cent → <b>170</b> per cent
1 July 2018	170 per cent → <b>160</b> per cent
1 July 2019	160 per cent → <b>150</b> per cent

[26] In relation to the *Retail Award*, the Full Bench decided the transitional arrangements set out below were necessary to ensure that the award achieves the modern awards objective:

**Full-time and part-time employees**

1 July 2017	200 per cent → <b>195</b> per cent
1 July 2018	195 per cent → <b>180</b> per cent
1 July 2019	180 per cent → <b>165</b> per cent
1 July 2020	165 per cent → <b>150</b> per cent

**Casual employees (inclusive of casual loading)**

1 July 2017	200 per cent → <b>195</b> per cent
1 July 2018	195 per cent → <b>185</b> per cent
1 July 2019	185 per cent → <b>175</b> per cent

[27] In relation to the *Pharmacy Award*, the Full Bench decided the transitional arrangements set out below were necessary to ensure that the award achieves the modern awards objective:

**Full-time and part-time employees**

1 July 2017	200 per cent → <b>195</b> per cent
1 July 2018	195 per cent → <b>180</b> per cent
1 July 2019	180 per cent → <b>165</b> per cent
1 July 2020	165 per cent → <b>150</b> per cent

**Casual employees (inclusive of casual loading)**

1 July 2017	225 per cent → <b>220</b> per cent
1 July 2018	220 per cent → <b>205</b> per cent
1 July 2019	205 per cent → <b>190</b> per cent
1 July 2020	190 per cent → <b>175</b> per cent

[28] Draft variation determinations in respect of the Sunday penalty rate provisions in the *Fast Food, Hospitality, Retail and Pharmacy Awards* will be published shortly. Interested parties will have 7 days to comment on the draft variation determinations before they are finalised.

## 2.3 Public Holiday Penalty Rates

[29] In the *Penalty Rates decision* the Full Bench decided to reduce the public holiday penalty rates in the *Hospitality, Restaurant, Fast Food, Retail* and *Pharmacy Awards* as shown in Table 1 below (in marked up format):

**Table 1**

### Proposed public holiday penalty rates in the *Hospitality and Retail Awards*

Award title	Public holiday penalty rates (%)	
	Full-time & part-time	Casual
<i>Hospitality Award</i> (cl. 32)	<del>250</del> 225	<del>275</del> 250
<i>Restaurant Award</i> (cl. 34)	<del>250</del> 225	250
<i>Retail Award</i> (cl. 29)	<del>250</del> 225	<del>275/250</del> 250
<i>Fast Food Award</i> (cl. 30)	<del>250</del> 225	<del>275</del> 250
<i>Pharmacy Award</i> (cl. 31)	<del>250</del> 225	<del>275</del> 250

[30] The Full Bench concluded that the reductions in these rates should take effect on 1 July 2017, without any transitional arrangements:

“We have had regard to the submissions made in respect of this issue and to the considerations identified in Chapter 4. Further, we also note that:

- the number and timing of State and Territory declared public holiday vary depending on the particular State or Territory; most public holidays occur in the first 6 months of the year;<sup>12</sup>
- the impact of the reductions in public holiday penalty rates will, in aggregate, be less than the reduction in Sunday penalty rates.

In all the circumstances we are of the view that the reductions in public holiday penalty rates should take effect on 1 July 2017, without any transitional arrangements. It is necessary to vary the *Fast Food, Hospitality, Restaurant, Retail* and *Pharmacy Awards* in the manner proposed to ensure that those awards achieve the modern awards objective.”<sup>13</sup>

[31] Draft variation determinations in respect of the public holiday penalty rate provisions in the *Fast Food, Hospitality, Restaurant, Retail* and *Pharmacy Awards* will be published shortly. Interested parties will have 7 days to comment on the draft variation determinations before they are finalised.



## 2.4 Other Matters

[32] The decision also deals with a range of other matters.

[33] At [243]–[256] the decision deals with whether the references to ‘penalty’ and ‘penalty rates’ in modern awards should be changed to ‘additional remuneration’.

[34] The Hospitality Employers had initially sought to remove the reference to ‘penalty’ and ‘penalty rates’ in clause 32 of the *Hospitality Award* and insert references to ‘additional remuneration’. A similar variation was proposed by the Pharmacy Guild in respect of the *Pharmacy Award*.

[35] The submissions filed in response overwhelmingly opposed the proposal. On 5 May 2017, correspondence was received from the Hospitality Employers and the Pharmacy Guild stating that they no longer pressed their claims for the change in terminology from ‘penalty rate’ to ‘additional remuneration’ in the *Hospitality Award* and the *Pharmacy Award*.

[36] The Full Bench decided not to proceed with the proposed change in terminology.

“...we are not persuaded that such a change would make the modern award system ‘simple’ or ‘easy to understand’ (a relevant consideration under s.134(1)(g)). Indeed such a change may be apt to confuse and may increase the regulatory burden on business (a relevant consideration under s.134(1)(f)).”<sup>14</sup>

[37] The decision also deals with the future conduct of a range of other matters that are yet to be finalised, in particular:

- (i) the future conduct of any further proceedings in respect of the *Clubs Award* and the *Restaurant Award*;
- (ii) the future conduct of the review of penalty rates in the *Pharmacy Award*;
- (iii) the review of the penalty rate provisions in the *Hair and Beauty Award*; and
- (iv) the decision also deals with ‘loaded rates’ in the *Hospitality and Retail Awards*

[38] As to the last matter, a ‘loaded rate’ in this context refers to a rate which is higher than the applicable minimum hourly rate specified in the modern award and is paid for all hours worked instead of certain penalty rates (such as the penalty rates for Saturday and Sunday work).

[39] The *Penalty Rates decision* agreed with the view expressed by the Transitional Review Full Bench that there is merit in considering the insertion of appropriate loaded rates into the *Hospitality* and *Retail* awards.

[40] In the course of its submissions in the Transitional Arrangements proceedings ACOSS proposed that:

“...the Commission must ensure that the decision does not result in existing or future low-paid employees being worse off in terms of the income they receive for the hours that they work. One option for achieving this outcome is to ensure that any existing or future

employees subject to reductions in penalty rates in the affected Awards are paid ‘loaded hourly rates’ to compensate for potential losses of pay.”<sup>15</sup>

[41] In relation to this proposal, the Full Bench decided as follows:

“On the limited material before us we do not propose to give any further consideration to ACOSS’s proposal. In the event any interested party wishes to advance the proposal (or a variant of it), it may do so by making an application to vary one or more of the modern awards affected by our decision. Any such application will be considered in the award stage of the Review.”<sup>16</sup>

[42] The Full Bench also rejected an ACCI submission that any further consideration of loaded rates only be instigated on application (by unions or employers) and not on the Commission’s own motion.

[43] The Full Bench also said that the process of developing loaded rates in the *Hospitality* and *Retail Awards* would commence after the completion of the foreshadowed judicial review proceedings.

- ***This statement is not a substitute for the reasons of the Fair Work Commission nor is it to be used in any later consideration of the Commission’s reasons.***

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<sup>1</sup> [\[2017\] FWCFB 1001](#)

<sup>2</sup> [\[2017\] FWCFB 3001](#) at [34]–[37]

<sup>3</sup> *Ibid* at [40]–[41]

<sup>4</sup> *Ibid* at [44]–[451]

<sup>5</sup> *Ibid* at [46]–[53]

<sup>6</sup> *Ibid* at [142]

<sup>7</sup> *Ibid* at [117]–[119]

<sup>8</sup> *Ibid* at [148]

<sup>9</sup> *Ibid* at [109] and [157]

<sup>10</sup> *Ibid* at [119]

<sup>11</sup> *Ibid* at [159]

<sup>12</sup> [\[2017\] FWCFB 1001](#) at [1898]

<sup>13</sup> [\[2017\] FWCFB 3001](#) at [229]–[230]

<sup>14</sup> *Ibid* at [251]

<sup>15</sup> [ACOSS submission](#) 24 March 2017, p. 1

<sup>16</sup> [\[2017\] FWCFB 3001](#) at [269]