



**THE UNION FOR WORKERS IN
RETAIL FAST FOOD.WAREHOUSING.**

Shop Distributive and Allied Employees' Association

Matter No: 2014/305

FOUR YEARLY REVIEW OF MODERN AWARDS : PENALTY RATES

SUBMISSION OF THE SDA -

Transitional And Related Matters

Date 24 March, 2017

SDA Primary Position

1. The Shop Distributive and Allied Employees' Association makes the following submission in respect of the Commission's decision *Four Yearly Review of Modern Awards – Penalty Rates*¹ (the **decision**).
2. In the decision, the Commission determined to reduce Sunday penalty rates prescribed by the Awards as follows:

GRIA

Full-time and part-time employees: 200 per cent → 150 per cent

Casual employees: 200 per cent → 175 per cent

FFIA

(Level 1 employees only)

Full-time and part-time employees: 150 per cent → 125 per cent

Casual employees: 175 per cent → 150 per cent

PIA

(7.00 am – 9.00 pm only)

Full-time and part-time employees: 200 per cent → 150 per cent

Casual employees: 225 per cent → 175 per cent

3. The Commission adopted this course even though, in respect of the mandated consideration in s 134(1)(a) (“the relative living standards and the needs of the low paid”), it found that the proposed reduction in penalty rates is:²

...likely to reduce the earnings of those employees, who are already low paid, and to have a negative effect on their relative living standards and on their capacity to meet their needs.

¹ [2017] FWCFB 1001

² [1657], [1827], [1357].

4. The Commission then stated that:³

... The needs of the low paid are best addressed by the setting and adjustment of modern award minimum rates of pay (independent of penalty rates).

We are conscious of the adverse impact of a reduction in Sunday penalty rates on the earnings of retail workers who work on Sundays and this will be particularly relevant to our consideration of the transitional arrangements associated with any such reduction.

5. The SDA is of the view that in adopting this approach the Commission failed to properly direct itself to the requirements of s 134(1)(a) and misconceived its approach to the modern awards objective. It reserves its rights in that regard.

6. In deciding upon these reductions in Sunday penalty rates, the Commission concluded that “*appropriate transitional arrangements are necessary to mitigate the hardship caused to employees who work on Sundays*”.⁴ The Commission specifically identified the nature of this “*hardship*” as being that the reductions in penalty rates “*are likely to reduce the earnings of those employees and have a negative effect on their relative living standards and on their capacity to meet their needs.*”⁵

7. Moreover, as recognised by the Commission, a substantial proportion of these employees are already low paid.⁶ “*Many of these employees earn just enough to cover weekly living expenses, saving money is difficult and unexpected expenses produce considerable financial distress.*”⁷

8. The legislative framework establishing the award safety net is not one which permits a cut to take home pay for low paid workers. No transition period can protect the take home pay of the low paid workforce covered by the Awards. As such, the decision should be set aside.

³ [1660]-[1661], [1830]-[1831], [1360]-[1361].

⁴ [2021].

⁵ [1998].

⁶ [1998].

⁷ [1999].

Alternative Position

9. If the FWC does not adopt the SDA's primary position to set aside the decision, then the transitional arrangements set out below should be established.

Transitional Arrangements – Sunday Penalty Rates

10. The Commission should establish the transitional arrangements detailed below for the following reasons:

- (a) As noted above, the Commission has found that consideration of the needs of the low paid is "*particularly relevant*" in determining appropriate transitional arrangements for the reductions in Sunday penalty rates. This reflects the large quantum of the reductions, particularly in the case of employees under the GRIA and the PIA, and the acknowledged adverse effects of those reductions on employees employed under the Awards. A period of 5 years is necessary to give employees some opportunity to make whatever arrangements they can to mitigate the adverse effects of the reductions in penalty rates.
- (b) Given that the quantum of the penalty rates cuts under the Awards, it is also appropriate that the commencement of the phased reduction in respect of the Awards be deferred until 1 July 2019. This will also allow adequate opportunity for the SDA and any other interested parties to prepare an application for increases in modern award minimum rates of pay, given that the Commission has identified that that is the best means of addressing the needs of the low paid and which it has found will be adversely affected by the decision. In light of the Commission's findings about the adverse effects of the penalty rate cuts on the needs of the low paid, it would be unfair and unjust if those reductions were to commence before the SDA and other interested parties have had an opportunity to seek increases in modern award minimum wages.
- (c) With the making of modern awards in 2010, the Commission established a 5 year transitional period for employers to phase in increases in award minima, which relevantly included penalty rates for employers in a number of States. In the case of the GRIA, this had the consequence that, for example, NSW retailers had a 5 year transition period to transition from Sunday penalty rates of 150% to 200%.

Fairness and equal treatment of employees and employers demands that the same transitional period be afforded to employees will who suffer an equivalent reduction in penalty rates. In that regard, it is to be noted that the reductions in penalty rates affect *all* award covered retail employees, whereas only some employers (being those in NSW, SA and sections in Qld) were subjected to increases in penalty rates and yet had the benefit of a 5 year transition period plus were also given an additional 18 months notice of the impending increase.

- (d) It appears to the SDA that, for the reason outlined in the submissions of United Voice, “take home pay orders” are not available to ameliorate the impact of the proposed cuts in penalty rates. Further, the need for such orders to be made on an individual-by-individual basis means that, because the decision will affect hundreds of thousands of workers, even if there was capacity to make such orders, they would not be a practical way to ameliorate the harsh effect of the reductions in penalty rates. The unavailability and practical limitations of take home pay orders means is a further reason why the Commission should establish the transitional arrangements set out above.
11. Although both existing and future employees employed under the Awards will be adversely affected by the reductions in Sunday penalty rates, the nature of those adverse effects is qualitatively different.
 12. In particular, in the face of the reductions in Sunday penalty rates, existing employees will suffer the *additional detriment* of having an established entitlement in respect of Sunday work unilaterally cut. These employees will have entered into or continued in employment on the basis that Sunday work would be compensated at the existing penalty rates and, to the extent that they work on Sundays, they must be taken to have agreed to do so on those existing penalty rates. Having entered into those employment arrangements and/or hours of work, employees will inevitably have made corresponding decisions in respect of their financial arrangements relating to matters such as their anticipated income and expenditure, financial commitments, savings and other significant personal and family commitments such as housing, educations and childcare. Future employees are, by definition, not subjected to these specific forms of disruption and detriment occasioned by the reductions in Sunday penalty rates.

13. Suitable and adapted transitional arrangements in respect of the reductions in Sunday penalty rates must recognise the above additional detriments to which existing employees will be subject over and beyond future employees. The SDA submits that this is appropriately achieved by the establishment of different transitional arrangements for these two classes of employees as outlined below.

Existing Employees

14. The determinations issued by the Commission should include terms which make the following provision:
 - (a) Following proper and full determination in proceedings of the annual wage review employers must continue to pay employees the rate of pay prescribed by the relevant Award as at that time for Sunday work (“the **preserved rate**”) until such time that the rate of pay for Sunday work under the Award equals or exceeds the preserved rate.
 - (b) Employers will not dismiss, injure in their employment or alter to their prejudice the position of any employee entitled to be paid the preserved rate (including by a reduction in shifts or changes in rosters) by reason of, or for reasons which include, that entitlement.
15. The Commission has indicated its provisional view that it does not favour any general “red circling” preserving the current Sunday penalty rates for all existing employees because such a term would have the consequence that different employees of the one employer may be employed on different terms and conditions, thereby adding to the regulatory burden on business (being a relevant consideration under s 134(1)(f)).⁸
16. This concern may be acknowledged. However, the Commission’s task is to balance the various consideration in s 134(1) and ensure that modern awards together with the NES

⁸ [2040](ii)

provide a fair and minimum safety net of terms and conditions of employment.⁹ No particular weight should be attached to one consideration over another.¹⁰

17. Here, although the Commission stated that “*the ‘needs of the low paid’ [s 134(1)(a)] is a consideration which weighs against a reduction in Sunday penalty rates,*”¹¹ it concluded that the needs of the low paid was:

- (a) best addressed by the setting and adjustment of modern award minimum rates of pay; and
- (b) “*particularly relevant*” to the consideration of transitional arrangements associated with any such reductions.¹²

18. Having so found, the SDA submits that it is incumbent on the Commission to give substantial weight to s 134(1)(a) when considering appropriate transitional arrangements. This can be achieved by establishing the above transitional arrangements for existing employees.

Future employees

19. The Commission has expressed the provisional view that the reductions in Sunday penalty rates be phased in over a period of between 2 and less than 5 annual instalments.¹³

20. The SDA submits that the reductions in penalty rates:

- (a) in the GRIA and PIA be phased in over 6 annual instalments (being a period of 5 years) commencing on 1 July 2019; and
- (b) in the FFIA be phased in over 3 annual instalments commencing on 1 July 2019.

The proposed transitional arrangements in respect of each of the Awards are set out below.

⁹ *Four Yearly Review of Modern Awards – Annual Leave* [2015] FWCF 3406 at [20].

¹⁰ *Ibid* [19].

¹¹ [1358], [1660], [1829].

¹² [1359], [1661], [1830].

¹³ [2040](iv).

The GRIA and the PIA

Date	Sunday loading Permanent	Sunday Loading Casual
- 1 July 2019	- 92%	- 100%
- 1 July 2020	- 84%	- 95%
- 1 July 2021	- 76%	- 90%
- 1 July 2022	- 68%	- 85%
- 1 July 2023	- 59%	- 80%
- 1 July 2024	- 50%	- 75%

The FFIA

- Date	Sunday loading Permanent	Sunday Loading Casual
- 1 July 2019	- 42%	- 67%
- 1 July 2020	- 34%	- 59%
- 1 July 2021	- 25%	- 50%

Transitional Arrangements – Public Holiday Rates

21. By the decision, the Commission has foreshadowed reducing public holiday penalty rates in each of the Awards from 250% to 225% for permanent employees and from 275% to 250% for casual employees.
22. The Commission stated that these reductions are intended to commence on 1 July 2017 and that no transitional arrangement is necessary for these reductions in the public holiday rate.¹⁴
23. The SDA disagrees with this finding and reserves its rights in that regard. The reductions in public holiday rates of pay will have a similar adverse effect as the reductions in Sunday penalty rates and should be phased over an identical period (and subject to the same preservation arrangements). Public holiday loadings provide additional income to

¹⁴ [2025].

low paid workers, for example, at times of the year when they are under some financial stress such as the Christmas/New Year period and may rely on this additional income in their financial planning.

24. For the above reasons, the SDA proposes the transitional and preservation arrangements set out below.

Existing employees

25. The determinations issued by the Commission should include terms which make the following provision:

- (a) Following proper and full determination in proceedings of the annual wage review employers must continue to pay employees the rate of pay prescribed by the relevant Award as at that time for Public Holiday work (“the **preserved rate**”) until such time that the rate of pay for Public Holiday work under the Award equals or exceeds the preserved rate.
- (b) Employers will not dismiss, injure in their employment or alter to their prejudice the position of any employee entitled to be paid the preserved rate (including by a reduction in shifts or changes in rosters) by reason of, or for reasons which include, that entitlement.

Future employees

26. In respect of the GRIA and the PIA:

- Date	Public Holiday Loading Permanent	Public Holiday Loading Casual
- 1 July 2019	- 142%	- 167%
- 1 July 2020	- 134%	- 159%
- 1 July 2021	- 125%	- 150%

27. In respect of the FFIA:

- Date	Public Holiday Loading Permanent	Public Holiday Loading Casual
- 1 July 2019	- 142%	- 167%
- 1 July 2020	- 134%	- 159%
- 1 July 2021	- 125%	- 150%

FFIA Variations

28. In the decision, the Commission set out (at [2034]-[2038]) its provisional views about two proposed amendments to the FFIA and invited submissions on those matters.
29. The SDA does not oppose the terms of the proposed amendment to cl 25.5(a) concerning Saturday work set out at [2036] of the decision.
30. The SDA does oppose the proposed amendment to clause 26 dealing with overtime, set out at [2037] of the decision.
 - (a) The proposed change was not the subject of any submissions or evidence.¹⁵
 - (b) The proposed amendment is not an inconsequential change and requires proper consideration in the context of the other provisions of the FFIA. The appropriate place for that to occur is in the Commission proceedings dealing with the exposure draft of the FFIA. The exposure draft has rewritten and reformulated various clauses. In that process, the parties can review the Public Holiday clause and the Overtime clause and consider the making of any necessary adjustments.
 - (c) In general terms, the SDA is concerned that the change sought by the NRA could have several detrimental consequences including a casual only receiving a 50% loading for work on a Public Holiday, where the employer deems the work to be “overtime”. This is a real problem that the SDA has needed to address in the past and controversies about the misapplication of the provision should not be re-enlivened.

24 March 2017