

## Article Information

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# Independent Umpires, Merits-Based Applications and the Disutility of Sunday Work- A Guide to the Penalty Rates Decision

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*On 23 February 2017, the Fair Work Commission handed down its decision on applications by employer organisations to reduce Sunday and public holiday penalty rates in six modern awards in the hospitality and retail industries. Since then, there have been a lot of misconceptions floating around about the decision. In this article, **Emily Haar, Associate,** and **Professor Andrew Stewart, Consultant,** explain its scope and impact.*

The issue of “doing away with” penalty rates for work at anti-social times has been fertile political ground in the industrial relations arena for many years. This was certainly true at the 2007 Federal Election, in response to the Howard Government’s “Work Choices” amendments. In their original form, these enabled employers to propose workplace agreements to reduce or eliminate the penalty rates set by awards, without any compensating benefits for the workers concerned.

That particular option was removed by Labor’s *Fair Work Act 2009 (FW Act)*, which requires employees covered by enterprise agreements to be better off overall than they would be under an otherwise applicable modern award. There has been some controversy over the application of that rule to union-negotiated agreements with large retailers and fast food operators. These contain “rolled up” rates that lift pay for most employees, but may leave those who work predominantly at nights or on weekends worse off.

In any event, the Act does not prevent attempts being made to persuade the independent umpire, the Fair Work Commission (**FWC**), to reduce or restructure the penalty rates set by awards.

In that context, a number of employer associations made applications to the FWC to reduce Sunday and public-holiday penalty rates in a number of modern awards. The applications were largely successful, but to understand why requires careful analysis.

### Why did the Commission do this?

Under section 156 of the *FW Act*, the FWC is required to conduct a four-yearly review of all modern awards, following the modernisation of the award system that commenced following the Labor election victory in 2007.

In that review, the FWC is required to decide whether particular modern awards are achieving the “modern awards objective”. Among other things, this requires the FWC in setting and varying awards to take into account the “*need to provide additional remuneration*” for employees working on weekends or public holidays, encouraging collective bargaining, and the “*likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy*”.

In the course of the review, a number of employer associations, in particular, the Australian Hotels Association, Clubs Australia, the Restaurant and Catering Industry Association, the various national retail and grocers associations and the Pharmacy Guild of Australia, applied to vary penalty rates provisions in:

- *Fast Food Industry Award 2010 (Fast Food Award)*;
- *General Retail Industry Award 2010 (Retail Award)*;

- *Hospitality Industry (General) Award 2010 (Hospitality Award);*
- *Pharmacy Industry Award 2010 (Pharmacy Award);*
- *Registered and Licensed Clubs Award 2010 (Clubs Award);* and
- *Restaurant Industry Award 2010 (Restaurant Award).*

Some of the applications concerned the penalty rates in certain awards for late evenings or night work. Applications of that kind succeeded in relation to the Fast Foods and Restaurant Awards. But in this article we will concentrate on the larger question of Sunday and public holiday rates.

Over 5,900 submissions were received in response to the applications, with 143 witnesses giving evidence (128 of whom were required for cross examination). The applications were heard over 39 hearing days. The main opposition to the applications came from the Shop, Distributive and Allied Employees Association (SDA), United Voice, the Australian Council of Trade Unions and the federal Labor Opposition. Various State and Territory Governments and Oppositions made submissions, as well as a number of religious based organisations. The Turnbull Government did not, however, express a view.

### What was actually decided by the Commission?

The FWC concluded that penalty rates for certain industries should be reduced on Sundays and public holidays, because the current levels of penalty rates were not meeting the modern awards objective in the FW Act.

The FWC concluded that there was still a higher “disutility” associated with working on a Sunday or public holiday compared to Saturdays or weekdays more generally, but that the disutility was less prevalent than in the past.

The variations determined by the FWC are as follows:

#### *Sunday Penalty Rates*

<b>Award</b>	<b>Current Sunday Penalty Rate</b>	<b>New Sunday Penalty Rate</b>
<b>Hospitality Award</b>		
Full-time and part-time employees (no change for casuals)	175%	150%
<b>Fast Food Award</b>		
Level 1 Full-time and Part-time employees	150%	125%
Level 1 Casual employees	175%	150%
<b>Retail Award</b>		
Full-time and part-time employees	200%	150%
Casual employees	200%	175%
<b>Pharmacy Award</b>		
(7.00 am-9.00 pm only) Full time and part-time employees	200%	150%
(7.00 am to 9.00 pm only) Casual employees	200%	175%

#### *Public Holiday Penalty Rates*

<b>Award</b>	<b>Current Public Holiday Penalty Rate</b>	<b>New Public Holiday Penalty Rate</b>
<b>Hospitality Award</b>		
Full-time and part-time employees	250%	225%
Casual employees	275%	250%
<b>Fast Food Award</b>		
Full-time and Part-time employees	250%	225%
Casual employees	275%	250%
<b>Restaurant Award</b>		
Full-time and Part-time employees	250%	225%
<b>Retail Award</b>		
Full-time and part-time employees	250%	225%
Casual employees	250/275%	250%

<b>Pharmacy Award</b>		
Full time and part-time employees	250%	225%
Casual employees	275%	250%

It is interesting to note that no changes to Sunday penalty rates were made for the Clubs Award or the Restaurant Award. Why this is the case will be explored later in this article.

In coming to the view that penalty rates had to be reduced to meet the modern awards objective, the FWC took into consideration both the need to compensate employees for working outside “normal hours” (the compensatory element) and to deter employers from scheduling work outside “normal hours” (the deterrence element). The FWC concluded that while the compensatory element is still relevant, the deterrence element should no longer be seen as a relevant consideration in setting weekend and public holiday penalty rates. The objective of penalty rates, in other words, is not to stop employers from opening their businesses on weekends, but to compensate employees who are required to work at that time. The evidence before the FWC was that there was already pressure to open on weekends and public holidays in these industries.

The SDA and United Voice argued that before a decision could be made to reduce penalty rates, the FWC had to be first satisfied that since the making of the modern award in question, there had been a “material change” in circumstances such that the modern awards objective was not being met. The FWC rejected this submission as adding a constraint on the FWC’s discretion that was not warranted by the FW Act.

Similarly the SDA and United Voice attempted to persuade the FWC that any cuts to Sunday penalty rates would affect women more than men, but provided no evidence to support their contention, which meant that the FWC had no scope to consider the argument.

A great deal of other evidence was, however, put to the FWC. The employer association evidence focussed on the current impacts of Sunday and public holiday penalty rates on businesses, and the positive effects if those rates were reduced.

The union evidence focussed on the disutility of working on Sundays and public holidays. The employer associations did not dispute that there was some disutility in having to work on those days, but challenged the extent of the disadvantage. In this respect, evidence of a reduction in religious worship attendance was also relied upon (at least in respect of Sundays).

In determining whether the current levels of penalty rates were meeting the modern awards objective, the FWC considered:

- the impact of working on Sundays or public holidays (that is, the extent of the disutility);
- whether the terms of the modern awards already compensate employees for working at such times or on such days; and
- the extent to which working on Sundays and public holidays are a feature of the industries under review.

The FWC concluded from the expert evidence, including the 2015 Productivity Commission report on the workplace relations framework ([here](#)), that:

- data shows that employees in the hospitality and retail sectors are more likely to work on weekend;
- employers in the hospitality and retail sectors are more likely to be small businesses;
- businesses in the hospitality and retail sectors are more likely to be open on six or seven days each week; and
- employees in the hospitality and retail sectors are more likely to be reliant on a modern award for their pay and conditions.

### **Why did the applications succeed?**

#### *Hospitality Award*

The Australian Hotels Association called 41 witnesses, including hotel owners and managers based all around Australia, including in rural, regional and metropolitan areas.

They gave specific evidence about the limitation of services offered to customers on Sundays and public holidays, and gave specific predictions about what would change if penalty rates were reduced for those days, including increased opening hours, numbers of staff working and increased and different services and duties to be undertaken.

The evidence was sufficient for the FWC to conclude that if rates were reduced, it could result in an increase in

employment levels for the businesses covered by the Hospitality Award. (This award, it should be noted, does *not* cover most restaurants and cafes, who are subject instead to the Restaurant Award.)

#### *Retail Award*

Similarly to the Hospitality Award evidence, nine witnesses were called by the relevant employer associations. They gave evidence of limited operations on Sundays, on the basis that the labour was too expensive in comparison to the profit generated. The evidence was that generally only “selling” tasks are performed on Sundays by a small number of employees, rather than administrative work, or stock replenishment or cleaning.

Evidence was also submitted that retailers would on Sundays only roster staff for shifts of such a short length that the employees would not be entitled to a break. Hence they would not have to pay for another employee for a minimum engagement period purely so that the store would be staffed during the first employee’s break period. The evidence presented was that if penalty rates were reduced, other tasks could be performed, and more staff could be rostered on for additional hours or shifts.

#### *Fast Food Award*

13 witnesses gave evidence, being either managers or franchisors of McDonald’s or Hungry Jacks stores. They gave evidence about the current levels of staffing on Sundays and public holidays, and what types of employees tend to work those shifts. Generally, the evidence was that employees at Level 1 were more likely to work those shifts, and were more likely to be shorter-term employees.

The FWC concluded that a reduction should only apply to Level 1 employees, because employees at Levels 2 and above are considered to be “career” employees, and are more negatively affected by working on Sundays or public holidays.

#### *Pharmacy Award*

24 pharmacists gave evidence. Similarly to the Hospitality and Retail Awards evidence, the pharmacists’ evidence was to the effect that because of the expenses of labour on Sundays and public holidays, fewer services are offered to the public, and fewer tasks are undertaken on those days.

#### *Clubs Award*

Only five witnesses were called by the relevant employer association. Of the witnesses who gave evidence, a number of them represented organisations that had their own enterprise agreements, which provided for high Sunday and public holiday penalty rates. Contradictory positions were put by these witnesses about whether any benefits could arise from the proposed reduction in penalty rates.

The FWC could not conclude that the Clubs Award should be varied, because the applicant employer associations were unable to make a merits-based argument for why the Clubs Award should be varied.

The FWC concluded that there were two options open to it under the terms of the Modern Awards Review. First, it could order that the Clubs Award be revoked, with the relevant employers and employees being absorbed into the coverage of the Hospitality Award. Second, if a proper merits-based application were made, it could give further consideration to the proposed reductions.

The reason the application to vary the Clubs Award failed was the limited evidence. For example, when asked by the FWC why the application only sought a reduction of Sunday penalty rates to a level still in excess of Saturday rates, the answer given by the relevant employer association was that that application was more likely to succeed.

In other words, they ran their application on the basis of Saturday and Sunday work having no difference, but only seeking a partial reduction because that was more likely to be accepted. That was, however, not the test the FWC could apply. The question for the FWC was whether the proposed variation would better meet the modern awards objective. The evidence led by the applicants did not address that test.

#### *Restaurant Award*

Unlike the other industries seeking a reduction, the Restaurant Award had already been varied in 2014, with Sunday penalty rates for Level 1 and 2 casual employees being reduced to the same as the Saturday penalty rates.

The evidence led by Restaurant and Catering did not address the 2014 changes in any meaningful way. It did not, for example, point to any evidence of those changes resulting in increased employment on Sundays or increased service-provision. In fact, some of the witnesses expressed a view that they considered all penalty rates should be removed

altogether. There was no evidence of the financial impact (or benefits) of any penalty rate reduction, which meant the FWC could not conclude that the proposed reductions would further the modern awards objective in any meaningful way.

### **The public holiday penalty rates decision**

The FWC concluded that in deciding to reduce the public holiday penalty rates in a number of Awards, it was important to take into account that under section 114 of the FW Act, employees have a statutory right to refuse to work on a public holiday if the request is unreasonable. That right was telling in determining that the disutility of working on a public holiday has been ameliorated to an extent. The FWC also took into consideration changing society expectations about the availability of hospitality and retail services on public holidays.

### **What will happen next?**

The FWC determined that the reduction in public holiday penalty rates in the applicable awards should take effect on 1 July 2017. But it deferred a decision on the implementation of the changes to Sunday rates.

In its decision it expressed the *tentative* view that the best way to manage the reductions to Sunday penalty rates would be to set transitional provisions to phase in the change from 1 July 2017, rather than immediately reducing rates. The FWC expressed a preference for this over two other options: deferring the introduction of the new rates for twelve months (as the Productivity Commission had proposed); and having the new rates only apply to newly hired employees, not existing employees.

It is still possible, however, that the FWC will change its mind. It has specifically asked for submissions on the transitional arrangements. It has also sought advice on whether it has the power to provide for the availability of “take-home pay orders” to ensure existing employees do not see their total pay reduced.

In short then, as far as Sunday and public holiday rates, nothing has changed just yet, or will change until July at the earliest. (Late night/early morning penalty rates in the fast food and restaurant industries will commence from 1 July 2017).

In fact, if an organisation has an enterprise agreement, this decision has no impact on the terms and conditions bargained for in that agreement, though it will eventually change the base line entitlements against which future agreements will be tested.

Non-government bills to restrict the application of the ruling have been introduced, but are not likely to progress.

With respect to the applications to vary the Clubs and Restaurant Awards, the FWC has given the relevant parties the opportunity to seek to put on further merits evidence in support of their claims, following the FWC’s conclusions that the evidence that was put was insufficient to allow it to consider the reductions.

### **What will this mean for other awards?**

The FWC noted that there had originally been an application, since dropped, to reduce Sunday penalty rates in the Hair and Beauty Industry Award 2010. The FWC has indicated that it will nonetheless proceed to review the Sunday and casual rates in that award.

Beyond that, some unions or commentators have been suggesting that this ruling by the FWC has put penalty rates in many other awards under threat. But the decision itself does not suggest that. The FWC went out of its way to quote (twice, in separate parts of its judgment) the Productivity Commission’s explanation as to why the issue of penalty rates in the retail and hospitality industries raise different issues to those in other sectors.

This is not to rule out the possibility of further changes. The FWC is keen, for example, to consider whether more modern awards should provide for the payment of “loaded” or “rolled-up” rates.

But with so many other issues still to be determined as part of the four-yearly review, it would be surprising if the FWC used this decision as a springboard to open up the penalty rates set for workers in industries with very different characteristics to those considered in this case.

*Should you have any questions concerning how the decision may affect your business, please contact a member of Piper Alderman’s Employment Relations team.*

### **The decisions by the numbers**

**Over 5,900 submissions**

143 witnesses
39 days of hearings
6 Awards under review
5 Commission Members