

# Alert

## EMPLOYMENT LAW



# Fair Work Commission Calls Time on Generous Penalty Rates

By Ben Duggan

In a long awaited decision the Fair Work Commission (FWC) determined yesterday that Sunday and Weekend penalty rates are no longer justified for all modern award employees in the Hospitality and Retail sectors.

A five-member full bench of the FWC, headed by President Ross, came to the decision in response to an application by various employer groups, as part of the 4 yearly review of modern awards, seeking to vary the penalty rates provisions in the following modern awards:

- *Fast Food Industry Award 2010 (the Fast Food Award)*
- *General Retail Industry Award 2010 (the Retail Award)*
- *Hospitality Industry (General) Award 2010 (the Hospitality Award)*
- *Pharmacy Industry Award 2010 (the Pharmacy Award)*
- *Registered and Licensed Clubs Award 2010 (the Clubs Award)*

- *Restaurant Industry Award 2010 (the Restaurant Award)*

The employer groups argued that the FWC should vary penalty rates for Early/Late Night Work, Saturday work, Sunday work and work performed on public holidays because they no longer achieved the modern award objective of providing a 'fair and relevant minimum safety net.'<sup>1</sup>

In one of the most significant cases in recent years the full bench of the FWC heard evidence and received submissions from interested parties including employer groups, unions, church groups and Government over a total of some 39 days during 2015 and 2016.

A summary of the key aspects of the decision of the full bench of the FWC follows:

### Saturday Penalty Rates

Employer groups did not have it all their own way in the decision to vary penalty rates.

<sup>1</sup> As per section 138 of the Fair Work Act (Cth) 2009.

The FWC in its decision rejected the application so far as it related to the proposed variation of Saturday penalty rates in the Fast Food Award, the Hospitality Award, the Restaurant Award and Retail Award.

A review of Saturday penalty rates in the Clubs Award and the Pharmacy Award is to be the subject of further hearing before the FWC.

### Sunday Penalty Rates

In contrast to Saturday penalty rates the FWC accepted arguments from employer groups that the existing Sunday penalty rates in the Hospitality Award, the Fast Food Award, the Retail Award and the Pharmacy Award no longer achieve the modern awards objective such that they should be varied to align with the modern award objective.

Sunday penalty rates are to be varied down by between 25% and 50% in a significant win for employers with the largest reduction of 50% to be felt by permanent employees covered by the Retail Award.

continued overleaf...

The effect of the FWC's decision in respect of Sunday penalty rates is set out below:<sup>2</sup>

<b>Proposed changes to Sunday penalty rates in the Hospitality and Retail Awards Award</b>	<b>Sunday Penalty Rate</b>
<i>Hospitality Award</i>	
Full-time and part-time employees: (no change for casuals)	175 per cent → 150 per cent
<i>Fast Food Award</i>	
(Level 1 employees only)	
Full-time and part-time employees:	150 per cent → 125 per cent
Casual employees:	175 per cent → 150 per cent
<i>Retail Award</i>	
Full-time and part-time employees:	200 per cent → 150 per cent
Casual employees:	200 per cent → 175 per cent
<i>Pharmacy Award</i>	
(7:00 am - 9:00 am only)	
Full-time and part-time employees:	200 per cent → 150 per cent
Casual employees:	200 per cent → 175 per cent

## Public Holiday Penalty Rates

The FWC also decided to reduce the public holiday penalty rates in the Hospitality Award and the Retail Award.<sup>3</sup>

The effect of the FWC's decision in respect of public holiday penalty rates is set out below:<sup>4</sup>

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

<sup>2</sup> The table has been extracted from the decision of the full bench of the FWC entitled – 4 yearly review of modern awards – Penalty Rates [2017] FWCFB 1001.

<sup>3</sup> Except for the Clubs award.

<sup>4</sup> The table has been extracted from the decision of the full bench of the FWC entitled – 4 yearly review of modern awards – Penalty Rates [2017] FWCFB 1001.

## Early / Late Night Work

A decision was made by the FWC to vary some of the penalty provisions in relation to early / late night work in the Fast Food Award and the Restaurant Award.

## Further Review

Employer groups were not able to convince the FWC that the variations proposed to weekend penalty rates in the Clubs Award and the Restaurant Award were necessary to ensure that these awards 'achieve the modern awards objective.'<sup>5</sup>

Perhaps recognising the need for a consistent approach towards weekend penalty rates the FWC identified the deficiencies in the proposed variation to these awards and proposed a further review of the Clubs Award and the Restaurant Award.

The decision of the FWC would indicate that if the employer groups are able to address the deficiencies identified that the proposed variation to weekend penalty rates in these awards may be achieved in the future.

## The Basis for the Full Bench of the FWC's Decision

The key battleground in the decision was penalty rates for Sunday work.

Historically the original basis for penalty rates for Sunday work (and public holidays) was the 'disunity' that it caused for employees who were required to work instead of spending time with family and friends.

A strong campaign had been run by employer groups, including Restaurant and Catering Australia, calling for lower penalty rates for Sunday work as reported in our earlier article back in [September 2015](#).

The Productivity Commission's Workplace Relations Framework inquiry report<sup>6</sup> had provided support for the campaign concluding that important benefits could be derived from the harmonisation of Sunday penalty rates with Saturday penalty rates.

In the decision the FWC explained that whilst it understands that working Sunday's might not have

<sup>5</sup> 4 yearly review of modern awards – Penalty Rates [2017] FWCFB 1001; see Chapter 11 at [2044] – [2050].

<sup>6</sup> Initially provided to the Government on 30 November 2015.

continued overleaf...

the 'disunity' that it once did for employees that Sunday work still did have an impact and that this formed part of the its decision not to harmonise penalty rates for Sunday work with those applying on Saturday.<sup>7</sup>

The same rationale is equally applicable to penalty rates for public holidays.

President Ross and the other members of the FWC made clear that their decision did not have broader application to other modern awards stating that:

"The conclusions (the FWC) has reached are largely based on the particular circumstances related to these awards."

Significantly the FWC's decision is confined to the 'particular characteristics' of the Hospitality and Retail sectors and does not therefore set a precedent for wholesale change to penalty rates for other industry sectors across Australia.

### The Implementation of the Full Fench of the FWC's Decision

The FWC's decision will not mean that penalty rates are reduced immediately.

An early change for employers will be the variation of the early / late night work loadings in the Restaurant Award and the Fast Food Award that will take effect in late March 2017.

<sup>7</sup> Except in the fast food industry.

The changes to public holiday penalty rates will take effect on 1 July 2017.

A final decision was not made as to the implementation of Sunday penalty rates.

The FWC made it clear that appropriate transitional arrangements were necessary because of the impact that the most significant aspect of its decision would have on employees in the Hospitality and Retail sectors.

A phase in period with respect to the Sunday penalty rates of at least two years with annual adjustments being made at the same time as the implementation of adjustments brought about by the Annual Wage Review was raised as a possible option by the FWC.

The Australian Council of Trade Unions in response to the decision has commenced a political campaign calling on the Federal Government to legislate to protect employees 'take home pay' in order to avoid the impact of these changes on those employees in the Hospitality and Retail sectors.

A long held goal of employer groups to reduce penalty rates has been achieved through this significant decision of the FWC which shall hopefully assist in combating a growing problem of underemployment through the provision of more shifts and longer trading hours in these important sectors of the economy.



MORE INFO

**Ben Duggan** Director

p: +61 8 8124 1881

[ben.duggan@dwfoxtucker.com.au](mailto:ben.duggan@dwfoxtucker.com.au)

**DW Fox Tucker Lawyers**

L14, 100 King William Street, Adelaide, SA 5000

p: +61 8 8124 1811 e: [info@dwfoxtucker.com.au](mailto:info@dwfoxtucker.com.au) [dwfoxtucker.com.au](http://dwfoxtucker.com.au)

COMMERCIAL | CORPORATE | DISPUTES | INSOLVENCY | TAX | HOSPITALITY | IP | PROPERTY | ENERGY | RESOURCES  
EMPLOYMENT | WORKERS COMPENSATION | SELF INSURANCE

**Disclaimer:** The information contained in this communication does not constitute advice and should not be relied upon as such. Professional advice should be sought prior to any action being taken in reliance on any of the information.

