Summary of Decision

23 February 2017

4 yearly review of modern awards — Penalty Rates

AM2014/305

[2017] FWCFB 1001

Background

1. Section 156 of the *Fair Work Act 2009* (Cth) (FW Act) provides that the Commission must conduct a 4 yearly review of modern awards (the Review). The Commission's task in the Review is to decide whether a particular modern award achieves the modern awards objective. If it does not then it is to be varied such that it only includes terms that are 'necessary to achieve the modern awards objective' (s.138).

2. As part of the Review, various employer bodies made applications to vary the penalty rates provisions in a number of modern awards in the Hospitality and Retail sectors. These applications have been heard together.

3. This decision deals with the review of the weekend and public holiday penalty rates and some related matters, in Hospitality and Retail awards. The modern awards which are dealt with in this decision are:

- *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*)

4. The conduct of these proceedings has been a substantial undertaking.

5. The Full Bench heard evidence and submissions over 39 days of hearing in 2015 and 2016. Evidence was given by 143 lay and expert witnesses, of whom 128 were required for cross-examination. Over 5,900 submissions have been received from the principal parties, State and Territory Governments, Church based organisations, political entities and individual employees and employers. Evidence from the final witness was heard on 28 September 2016 and the final written submission was received on 4 February 2017.

6. The proceedings have been conducted in an open and transparent manner, in accordance with s.577 of the FW Act. The Commission's website has been used extensively to provide information to any interested person in order to facilitate broad participation.

Interested persons were encouraged to subscribe to the dedicated penalty rates subscription notification service to keep them informed about the penalty rates matter.

The modern awards objective and penalty rates

7. Historically, industrial tribunals have expressed the rationale for penalty rates in terms of 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). Having regard to more recent authority, the terms of the modern awards objective, and the scheme of the FW Act, the Full Bench concluded that deterrence is no longer a relevant consideration in the setting of weekend and public holiday penalty rates. The Full Bench accepted that the imposition of a penalty rate may have the *effect* of deterring employers from scheduling work at specified times or on certain days, but that is a consequence of the imposition of an additional payment for working at such times or on such days, it is not the *objective* of those additional payments. Compensating employees for the disutility associated with working on weekends and public holidays is a primary consideration in the setting of weekend and public holiday penalty rates.

8. A central contention advanced by the Shop, Distributive and Allied Employees Association (SDA) and United Voice in the proceedings was that before the Commission can vary a modern award in the Review, it must first be satisfied that since the making of the modern award there has been a material change in circumstances pertaining to the operation or effect of the award such that the modern award is no longer meeting the modern awards objective (the 'material change in circumstances test'). If adopted the proposed test would require the proponent of a variation to establish that there has been a material change in circumstances since the modern award was made. The Full Bench noted that the proposed 'material change in circumstances test' seeks to place a constraint on the discretion conferred by s.156 which is not warranted by the terms of this section or the relevant statutory context and purpose.

9. The Full Bench rejected the proposition advanced by the Unions on the basis that the adoption of the proposed test would obfuscate the Commission's primary task in the Review, determining whether the modern award achieves the modern awards objective. To adopt such a test would add words into s.156 in circumstances where it is not necessary to do so in order to achieve the legislative purpose.

10. The Full Bench recorded its agreement with the point advanced by Ai Group that the variation of a modern award may be warranted if it was established that there was a 'material change in circumstances' since the modern award was made, but the establishment of such a change is not a condition precedent to the variation of a modern award in the Review.

11. Section 134(1)(da) speaks of the 'need to provide additional remuneration' for employees performing work in the circumstances mentioned in (i) to (iv). The Full Bench decided that the expression ('the need to provide additional remuneration') must be construed in context and that the context tells against the proposition that s.134(1)(da) *requires* that each modern award must provide additional remuneration for working in the identified circumstances.

12. Relevantly, s.134(1)(da)(iii) requires that the Commission take into account the 'need to provide additional remuneration' for 'employees working on weekends or public holidays'.

13. The Full Bench decided that an assessment of 'the need to provide additional remuneration' to employees working in the circumstances identified in s.134(1)(da) requires a consideration of a range of matters, including:

> (i) the impact of working at such times or on such days on the employees concerned (i.e. the extent of the disutility);
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> (ii) the terms of the relevant modern award, in particular whether it already compensates employees for working at such times or on such days (e.g. through 'loaded' minimum rates or the payment of an industry allowance which is intended to compensate employees for the requirement to work at such times or on such days); and
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> (iii) the extent to which working at such times or on such days is a feature of the industry regulated by the particular modern award.

14. The Full Bench observed that assessing the extent of the disutility of working at such times or on such days (issue (i) above) includes an assessment of the impact of such work on employee health and work/life balance, taking into account the preferences of the employees for working at those times.

15. The various employer parties sought reductions in Sunday and public holiday penalty rates. These claims are summarised in Tables 1 and 74 in the Decision. There were also some claims to vary the penalty payments for early/late night work in some awards. Generally speaking, no changes were sought in relation to Saturday penalty rates.[1]

Weekend penalty rates

16. Variations to modern awards must be justified on their merits. The extent of the merit argument required will depend on the circumstances. Significant changes where merit is reasonably contestable should be supported by an analysis of the relevant legislative provisions and, where feasible, probative evidence.

17. The Full Bench reviewed the Saturday penalty rates in the *Fast Food, Hospitality, Restaurant* and *Retail Awards* and (subject to the observations about the *Retail Award* at [65] and [66]), was satisfied that the existing Saturday penalty rates achieve the modern awards objective – they provide a fair and relevant minimum safety net. The review of Saturday penalty rates in the *Clubs* and *Pharmacy Awards* is to be the subject of further proceedings (see [994]–[1009] and [1872]–[1892]).

18. The Full Bench decided that the existing Sunday penalty rates in the *Hospitality*, *Fast Food, Retail* and *Pharmacy Awards* do *not* achieve the modern awards objective, as they do not provide a fair and relevant minimum safety net.

19. The effect of the decision in respect of Sunday penalty rates is set out below:

Table 1
Proposed changes to Sunday penalty rates in the *Hospitality* and *Retail Awards*

Award	**Sunday Penalty Rate**
Hospitality Award	
Full-time and part-time employees: (no change for casuals)	175 per cent → 150 per cent
Fast Food Award	
(Level 1 employees only) Full-time and part-time employees: Casual employees:	 150 per cent → 125 per cent 175 per cent → 150 per cent
Retail Award	
Full-time and part-time employees: Casual employees:	200 per cent → 150 per cent 200 per cent → 175 per cent
Pharmacy Award	
(7.00 am – 9.00 pm only) Full-time and part-time employees: Casual employees:	 200 per cent → 150 per cent 225 per cent → 175 per cent

20. Except in the *Fast Food Award*, the Full Bench did not reduce the Sunday penalty rates to the same level as the Saturday penalty rates, noting that for many workers Sunday work has a higher level of disutility than Saturday work, though the extent of the disutility is much less than in times past. The Full Bench also noted that it is implicit in the claims advanced by most of the employer interests that they accepted the proposition that the disutility associated with Sunday work is *higher* than the disutility associated with Saturday work. If this was not the case then they would have proposed that the penalty rates for Sunday and Saturday work be the same, but they did not.

21. In relation to the *Fast Food Award*, for reasons associated with the preferences of the relevant employees and the limited impact of Sunday work upon those employees (see Chapter 7.5), the Full Bench decided to reduce the Sunday penalty rate, for level 1 employees from 150 per cent to 125 per cent (for full-time and part-time employees) and from 175 per cent to 150 per cent (for casual employees). The Full Bench did not propose to change the Sunday penalty rate for Level 2 and 3 employees. Level 2 and 3 employees are, generally speaking, regarded as 'career' employees with the major chains whereas casual and part-time crew members (level 1 employees) are usually regarded as 'non-career' employees.

22. In addition to the changes to Sunday penalty rates the Full Bench decided to vary some of the penalty provisions in relation to early/late night work in the *Restaurant* and *Fast Food Awards* (see [1126]–[1137], [1154], [1324]–[1334] and [1391]).

23. As to the *Pharmacy Award*, at this stage, the Full Bench was not persuaded to make the changes proposed to the loadings for work before 7.00 am and between 9.00 pm and

midnight, on weekends and Monday to Friday. The next steps in the review of this award are set out in Chapter 12. Nor was the Full Bench satisfied 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. In short, the employer organisations concerned did not establish a merit case sufficient to warrant the granting of their claims. The deficiencies in the cases put and the next steps in relation to the review of these 2 awards are set out in Chapter 11 of the Decision at [2044]–[2050].

Public Holiday penalty rates

24. The Full Bench also decided to reduce the public holiday penalty rates in the Hospitality and Retail awards (except for the *Clubs Award,* for the reasons set out at [1915]).

25. The effect of the decision in respect of public holiday penalty rates is shown (in marked up format) in Table 2 below.

Table 2
Proposed public holiday penalty rates in the Hospitality and Retail awards

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

26. The Full Bench also concluded that the two-tiered approach to public holiday penalty rates advanced by the Hospitality Employers lacks merit. The distinction sought to be drawn between those public holidays expressly mentioned in s.115(1)(a) and the other days declared or prescribed by or under a law of a State or Territory as a public holiday (s.115(1)(b)), was considered to be illusory. In that regard the Full Bench concurred with the views expressed in the *1994 Public Holidays Test Case decisions* and the *Modern Awards Review 2012 – Public Holidays decision*, that, in essence, the number and standardisation of public holidays across Australia is primarily an issue for the Commonwealth, State and Territory legislatures.

27. The decision to reduce Sunday and public holiday penalty rates in these awards is based on the Full Bench's conclusions with respect to the common evidence (see Chapter 6) and its assessment of the evidence in relation to each of these particular awards (see Chapters 7.2, 7.5, 8.2 and 8.3).

28. In Chapter 6 the Full Bench considered the 'common evidence' adduced in these proceedings and deals with the incidence and effects of weekend work and the employment effects of reducing penalty rates. The Full Bench concluded that the following propositions emerged from the common evidence before it:

'1. There is a disutility associated with weekend work, above that applicable to work performed from Monday to Friday. Generally speaking, for many workers Sunday work has a higher level of disutility than Saturday work, though the extent of the disutility is much less than in times past.

2. We agree with the assessment in the PC Final Report that there are likely to be some positive employment effects from a reduction in penalty rates, though it is difficult to quantify the precise effect. Any potential positive employment effects from a reduction in penalty rates are likely to be reduced due to substitution and other effects.'[2]

29. As to proposition 1 above, the Full Bench's conclusion is different to that in the *Productivity Commission Inquiry Report: Workplace Relations Framework* (PC Final Report). However, the Full Bench had the opportunity to consider evidence not available to the Productivity Commission, such as the Pezzullo Weekend Work Report, the Rose Report and the Sands Report in addition to a substantial amount of lay employer and employee evidence. None of the above reports concluded that the activities conducted on, and attitudes towards, Saturdays and Sundays were identical.

30. As to proposition 2, the Hospitality and Retail Employers' lay evidence supported the proposition that the current level of penalty rates has led employers to reduce labour costs associated with Sunday and public holiday trading by imposing a number of operational limitations, such as:

(i) restricting trading hours;

(ii) lowering staff levels; and

(iii) restrictions on the type and range of services provided.

31. The Hospitality and Retail Employers' lay evidence also supported the proposition that a reduction in penalty rates is likely to lead to:

(i) increased trading hours on Sundays and public holidays;

(ii) a reduction in the hours worked by some owner operations;

(iii) an increase in the level and range of services offered on Sundays and public holidays; and

(iv) an increase in overall hours worked.

32. The Full Bench did not suggest that these changes will apply uniformly across all hospitality and retail businesses. The actual impact of a reduction in Sunday and public holiday penalty rates will depend on the circumstances applying to individual businesses.

33. As to public holiday penalty rates, the Full Bench noted that the disutility of working on public holidays is greater than the disutility of working on Sundays (which in turn is greater than Saturday work). The notion of relative disutility supported a proportionate approach to the fixation of weekend and public holiday penalty rates. In determining the appropriate penalty rate for public holiday work the Full Bench had regard to the level of Sunday penalty rates in the *Hospitality and Retail Awards* (after applying the decisions we have made to reduce those rates).

34. The Full Bench also noted that the disutility in relation to public holidays has been ameliorated somewhat by the introduction of the statutory right to refuse to work on such days, on reasonable grounds. Contrary to ABI's submission, the Full Bench did not characterise s.114(3) of the FW Act as making public holiday work 'voluntary' (it is a limited right to refuse to work, on reasonable grounds), but that it was still a significant contextual matter which was not taken into account when the existing 250 per cent penalty was set.

35. In addition, public holiday work is more common in the Hospitality and Retail Awards sectors and, on the evidence before the Full Bench, reducing the public holiday penalty rate will increase employment and have a number of positive effects on business.

Reasons

36. The changes the Full Bench proposes to make to Sunday and public holiday penalty rates will result in greater consistency in penalty rate settings in the *Hospitality* and *Retail Awards.*

37. In each of the Sunday and public holiday penalty rates determined by the Full Bench it adopted what the PC Final Report describes as the 'default approach' to setting the appropriate rate for casual employees (see [333]–[338]). Under this approach the rate of pay for casual employees is always 25 percentage points above the rate of pay for non-casual employees. Hence if the Sunday penalty rate for full-time and part-time employees is 150 per cent, the Sunday rate for casuals will be 150 + 25 = 175 per cent.

38. The approach adopted by the Full Bench in respect of Sunday and public holiday rates for casuals may have implications for the rate paid to casuals for Saturday work under the *Retail Award.* This issue is referred to at [1716]–[1720]. It may also result in a shift from casual to part-time employment in respect of those employed in the modern awards which are to be varied.

39. The Full Bench observed that it is important to appreciate that the conclusions it has reached in relation to the weekend and public holiday penalty rates in the *Hospitality* and *Retail Awards* are largely based on the particular circumstances relating to these awards. The Hospitality and Retail sectors have a number of characteristics which distinguish them from other industries.

40. The distinguishing characteristics of the Hospitality and Retail sectors are alluded to in the PC Final Report, where it explains the rationale for focussing on the 'HERRC' (hospitality, entertainment, retail, restaurants and cafes) industries.

> '… the appropriate *level* for regulated penalty rates for weekend work — particularly on Sundays in a number of discretionary consumer service industries — has become a highly contested and controversial issue. The industries of greatest concern are hospitality, entertainment, retail, restaurants and cafes (HERRC). These are industries where consumer expectations of access to services has expanded over time so that the costs of penalty rates affect consumer amenity in ways they did not when penalty rates were first introduced. Such industries are also important sources of entry-level jobs for, among others, relatively unskilled casual employees and young people (particularly students) needing flexible working arrangements. The provision of discretionary, and therefore demand responsive, services on weekends is less frequent in most other industries, which is a key (but not only) rationale for a focus of concerns on the HERRC industries. It is notable that the FWC is currently also

considering appropriate penalty rates in awards, and that their focus almost exactly matches the group of industries that the Productivity Commission has identified as the most relevant.' [3] (footnotes omitted)

41. The data on weekend work showed that workers in the Retail and Hospitality sectors are more likely to work on weekends than workers in other industries. As shown in Table 3 below (see [397]).

Table 3:

Proportion of employees who work on weekends, by industry

Industry	2002–2008	2009–2016
Accommodation and food services	58.6	60.8
Retail trade	44.4	47.6
All employees	**25.9**	**27.5**

42. The sections that provide an overview of the Retail and Hospitality sectors (see Chapters 7.1 and 8.1) also highlight the differences between these two sectors and other industries.

43. Given the distinguishing characteristics of the Hospitality and Retail sectors, the decisions the Full Bench has made in respect of the Hospitality and Retail awards provide no warrant for the variation of penalty rates in other modern awards. Each case must be determined on its merits. The Full Bench notes the views expressed in the PC Final Report in this regard:

'There is no case for common penalty rates across all industries The Commission is not recommending a reduction in the Sunday penalty rates beyond HERRC. Regulated penalty rates as currently constructed for essential services and many other industries are justifiable. The original justifications have not altered materially: they align with working arrangements that often involve rotating shifts across the whole week, are not likely to reduce service availability meaningfully, are commensurate with the skills of the employees, and are unlikely to lead to job losses.'[4]

44. The Full Bench deals with the implementation of the decision in Chapter 11: Transitional Arrangements.

45. In the numerous submissions before the Full Bench little attention was given to the implementation of any variations to Sunday penalty rates arising from the proceedings. One exception was in the PC Final Report which recommends that 12 months' notice of any change be given, rather than an extended transition process involving staggered small changes to Sunday penalty rates. The Full Bench noted that some other submissions also alluded to the need to protect the take home pay of workers affected by any changes to penalty rates.

46. A substantial proportion of award-reliant employees covered by these modern awards are low paid and the reductions in Sunday penalty rates we have determined are likely to reduce the earnings of those employees who currently work on Sundays. As observed in the PC Final Report, in general, most existing employees would probably face reduced earnings

as it is improbable that, as a group, existing workers' hours on Sundays would rise sufficiently to offset the income effects of penalty rate reductions.

47. The evidence of the SDA and United Voice lay witnesses puts a human face on the data and provides an eloquent individual perspective on the impact of the award variations. Many of these employees earn just enough to cover weekly living expenses, saving money is difficult and unexpected expenses produce considerable financial distress. The immediate implementation of the variations to Sunday penalty rates would inevitably cause some hardship to the employees affected, particularly those who work on Sundays. The Full Bench concluded that appropriate transitional arrangements are necessary to mitigate the hardship caused to employees who work on Sundays.

48. The Full Bench has not reached a concluded view as to the form of the transitional arrangements and proposes to seek submissions from interested parties as to that issue. For the assistance of those parties who wish to make submissions as to the form of the transitional arrangements the Full Bench expressed the following *provisional* views:

(i) Contrary to the views expressed by the Productivity Commission we do not think it appropriate to delay making any changes to Sunday penalty rates for 12 months, as it would impose an unnecessary delay on the introduction of any reduction in Sunday penalty rates and would give rise to a sharp fall in earnings for some affected employees at the end of the 12 month period.

(ii) If 'take home pay orders' are an available option then they may mitigate the effects of a reduction in Sunday penalty rates. But the Full Bench did not favour any general 'red circling' term which would preserve the current Sunday penalty rates for all existing employees.

(iii) The reductions in Sunday penalty rates should take place in a series of annual adjustments on 1 July each year (commencing 1 July 2017) to coincide with any increases in modern award minimum wages arising from Annual Wage Review decisions.

(iv) As to the number of annual instalments, the 5 annual instalment process which accompanied the making of the modern awards is too long for present purposes. It is likely that at least 2 instalments will be required (but less than 5 instalments). The period of adjustment required will depend on the extent of the reduction in Sunday penalty rates, the availability of 'take home pay orders' and the circumstances applying to each modern award.

49. The changes to public holiday penalty rates will take effect on 1 July 2017 and the variation of the early/late night work loadings in the *Restaurant* and *Fast Food Awards* will take effect in late March 2017.

50. The Full Bench deals with the next steps in these proceedings in Chapter 12. The matters addressed include:

(i) transitional arrangements having regard to the impact of the Sunday penalty reductions for some employees;

(ii) the potential further review of the *Clubs Award*, the *Restaurants Award* and other retail modern awards;

(iii) the terminology of penalty rates; and

(iv) the potential for loaded rates in retail modern awards.

51. 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).

52. The Full Bench was of the view that, subject to appropriate safeguards, schedules of 'loaded rates' may make awards simpler and easier to understand, consistent with the considerations in s.134(1)(g). Schedules of 'loaded rates' would also allow small businesses to access additional flexibility without the need to enter into an enterprise agreement.

53. The Full Bench also noted that the Fair Work Ombudsman (FWO) has reported significant levels of non-compliance in the Hospitality and Retail awards which are before us. It appears from the various FWO reports mentioned in Chapter 12 that some businesses in the Hospitality and Retail sectors already provide 'flat' (or loaded) rates of pay, in order to simplify their payroll process, but they underestimate the additional premium (or loading) required in order to compensate employees for the loss of penalty rates, resulting in non-compliance. The insertion of 'loaded rates' schedules in these modern awards may have a positive effect on award compliance.

54. In raising this matter, the Full Bench said that is was alive to the potential complexity involved in the task of developing schedules appropriately for loaded rates, and that:

> 'It has to be borne in mind that any loaded rate will remain part of the safety net and will have to be fair and relevant. Determining an appropriate loaded rate would not be straightforward. For example, an employee who worked the vast majority of their hours on a weekend or late at night, when a penalty rate would apply, would require a higher loaded rate than, say, an employee who worked the vast majority of their hours during the ordinary spread of hours, Monday to Friday.'

55. Any loaded rate and the associated roster configuration, would, of course, need to be relevant to the needs of industry and employees. Accordingly, there would be benefit in further engagement with interested parties as to the dominant roster patterns in the relevant industries so that appropriate rates can be developed.

56. The Full Bench envisages that the development of loaded rates will be an iterative process undertaken in consultation with interested parties. That process will commence after we have determined the transitional arrangements in respect of the reductions in Sunday penalty rates.

57. The 'Next Steps' in respect of these proceedings are summarised in Attachment 1 to this Summary.

- ***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.***

- ENDS -

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4 yearly review of modern awards – Penalty Rates (AM2014/305)

Next Steps

1. Variation determinations

Draft variation determinations in respect of the late night penalty provisions in the *Fast Food* and *Restaurant Awards* will be published shortly. Interested parties will have 7 days to comment on the draft variation determinations before they are finalised.

As mentioned in Chapter 9, the Full Bench decided to reduce the public holiday penalty rate for full-time and part-time employees (from 250 per cent to 225 per cent) in a number of modern awards before us. These variations will commence on 1 July 2017. Draft variation determinations will be published shortly. Interested parties will have 7 days to comment on the draft variation determinations before they are finalised.

2. Transitional arrangements: Sunday penalty rate reductions

The Full Bench expressed the following *provisional* views about the form of the transitional arrangements with respect to the Sunday penalty rate reductions (at [2040]).

> '(i) Contrary to the views expressed by the Productivity Commission we do not think it appropriate to delay making any changes to Sunday penalty rates for 12 months, at which time the reductions apply in full. The Productivity Commission's proposal imposes an unnecessary delay on the introduction of any reduction in Sunday penalty rates and would give rise to a sharp fall in earnings for some affected employees.
>
> The Productivity Commission suggests that a 12 month delay would allow the affected employees to 'review their circumstances' so that they 'can seek other jobs, increase their training and make other labour market adjustments'.
>
> As we have mentioned, the employees affected by these changes are low paid and have limited financial resources. It is unlikely that they will be able to afford the costs associated with increasing their training.
>
> Further, workers in the Accommodation and Food Services and Retail sectors have lower levels of educational attainment than the total workforce, which is likely to limit their capacity to obtain other employment. As noted in the Peetz and Watson Report:
>
> > '… while a majority of tertiary students who are employed work in either retail or hospitality (i.e. accommodation and food services) industries, this does not mean that most people who work in those industries are tertiary students. Nor does it indicate that they are not in need …
> >
> > Pay rates in retail therefore affect not only tertiary students but also a significant number of other people who are likely to be dependent on earnings from this industry as their principal or sole source of income.'
>
> (ii) If 'take home pay orders' are an available option then they may mitigate the effects of a reduction in Sunday penalty rates. But we do not favour any general 'red circling' term which would preserve the current Sunday penalty rates for all existing employees. A consequence of such a term would be that different employees of the one employer may be employed on different terms and conditions. Such an outcome would add to the regulatory burden on business (a relevant consideration under s.134(1)(f)).

(iii) The reductions in Sunday penalty rates should take place in a series of annual adjustments on 1 July each year (commencing 1 July 2017) to coincide with any increases in modern award minimum wages arising from Annual Wage Review decisions.

(iv) As to the number of annual instalments, the 5 annual instalment process which accompanied the making of the modern awards is too long for present purposes. It will be recalled that the Award Modernisation Full Bench was dealing with an array of award provisions that were the subject of transitional arrangements including minimum wages, whereas we are only dealing with one provision, Sunday penalty rates. It is likely that at least 2 instalments will be required (but less than 5 instalments). The period of adjustment required will depend on the extent of the reduction in Sunday penalty rates, the availability of 'take home pay orders' and the circumstances applying to each modern award. The most significant reduction is for full-time and part-time employees covered by the *Retail Award* (from 200 per cent to 150 per cent), it follows that a longer period of adjustment may be required in this award, than for the other awards before us.' (footnotes omitted)

The Full Bench seeks submissions from interested parties in respect of the above provisional views. Further, as mentioned at [2019] it is unclear whether 'take home pay orders' are an available option to mitigate the impact of the reductions in Sunday penalty rates we propose. The Full Bench would be assisted by submissions from interested parties in respect of this issue and, in particular, the Commonwealth (given that the issue raises a question as to the proper construction of the statutory framework).

Interested parties are to file written submissions in relation to the transitional arrangements to apply to the reduction in Sunday penalty rates by **4.00 pm Friday, 24 March 2017**, with reply submissions to be filed by **4.00 pm on Friday, 7 April 2017**. The matter will be listed for hearing in early May 2017.

3. Specified Award matters

(a) Clubs Award

In Chapter 7.3.6 the Full Bench concluded that Clubs Australia Industrial (CAI) has not established a merit case sufficient to warrant the variation of the *Clubs Award* and also expressed the view that there are 2 options in respect of the future conduct of the penalty rates review of the *Clubs Award:*

> Option 1: determinations could be made revoking the *Clubs Award* and varying the coverage of the *Hospitality Award* so that it covers the class of employers and employees presently covered by the *Clubs Award.* Such a course would obviously avoid the need for any further Review proceedings in respect of the *Clubs Award.*
>
> Option 2: CAI and any other interested party could be provided with a further opportunity to advance a properly based merit case in support of any changes they propose in respect of weekend penalty rates.

At [1000] the Full Bench expressed the *provisional* view that Option 1 has merit and warrants further consideration. The Full Bench proposes to provide an opportunity for interested parties to express a view as to the future conduct of this aspect to these proceedings and, in particular, we invite submissions on the two options set out above.

Short submissions setting out the position of the interested party are to be filed at amod@fwc.gov.au by **4.00 pm Friday, 24 March 2017**. The matter will be listed for mention on **Tuesday, 28 March 2017**.

(b) Fast Food Award

Interested parties are to file written submissions in relation to the provisional views set out at [1406]–[1408] by **4.00 pm Friday, 24 March 2017**. If there are no objections to the provisional views, final determinations will be published.

(c) Restaurant Award

In Chapter 7.4.6 the Full Bench concluded that Restaurant & Catering Industrial (RCI) has not established a merit case sufficient to warrant varying the Sunday penalty rates in this award.

The Full Bench will provide RCI (and any other interested party) a further opportunity to seek to establish that the weekend penalty rates in the *Restaurant Award* do not provide a 'fair and relevant minimum safety net'.

The RCI is to provide an indication as to whether it wishes to press its claim in light of the comments above at [2047]–[2049] by filing correspondence at amod@fwc.gov.au by **4.00 pm Friday, 24 March 2017**. The matter will be listed for mention on **Tuesday, 28 March 2017**.

4. Proposed change in terminology

The Hospitality Employers seek the removal of the reference to 'penalty' and 'penalty rates' in clause 32 of the *Hospitality Award* and the insertion of references to 'additional remuneration'. A similar variation is proposed by the The Pharmacy Guild of Australia (PGA) in respect of the *Pharmacy Industry Award 2010.*

The Full Bench invite further submissions in respect of this issue. As the issue potentially affects a large number of modern awards it will be the subject of a separate statement and directions.

5. The Review of Other Awards

The *Hair and Beauty Industry Award 2010* was the subject of a claim to reduce Sunday penalty rates, by ABI, which was originally part of these proceedings. In correspondence dated 14 September 2016 ABI stated that its claim in respect of this award was no longer pressed.

The existing rates appear to raise issues about the level of the Sunday penalty rate and the penalty rates applicable to casual employees.

It is appropriate that these rates be reviewed.

There would be significant practical impediments to the Commission acting on its own motion to obtain relevant lay evidence. A proponent for change (and a contradictor) would be

a useful means of measuring that all of the relevant considerations were appropriately canvassed.

The Full Bench seeks expressions of interest from employer organisations prepared to take on the proponent role. Any such expressions of interest should be filed to amod@fwc.gov.au by **4.00 pm Friday, 24 March 2017**. The Full Bench assumes that the SDA will appear as contradictor in any subsequent proceedings. The matter will be listed for mention on **Tuesday, 28 March 2017**.

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[1] CAI sought to vary the Saturday penalty rates in the *Clubs Award* and the PGA seeks to vary the early morning and late night penalties on Saturdays in the *Pharmacy Award*.
[2] See [689] of the Decision.
[3] PC Final Report at p. 406.
[4] PC Final Report, at p. 493.

Note: This Summary replaces the document published on 23 February 2017. The change made is in Table 1 in paragraph 19 where the current Sunday penalty rate for a casual employee under the *Pharmacy Award* has been corrected to show **225** per cent (instead of 200 per cent).