

IN THE FAIR WORK COMMISSION

Proceeding: AM2020/31

Applicant: Shop, Distributive and Allied Employees' Association (**SDA**)

Subject: *Application to vary modern award to achieve them modern awards objective – General Retail Industry Award 2010*

SUBMISSIONS OF THE NATIONAL RETAIL ASSOCIATION

Introduction

1. On 19 June 2020 the Applicant filed an application under s.157 of the *Fair Work Act 2009* (Cth) (**FW Act**), seeking to vary the General Retail Industry Award 2010 (**Award**).
2. The National Retail Association (**NRA**) opposes the proposed amendment by the SDA. In summary this is because:
 - (a) the Applicant's submission at paragraph 3 of its Application is incorrect. The *Penalty Rates Decision* [2017] FWCFB 3001 (**Transitional Decision**) did not assume that there would be a minimum wage increase every year, and did not rely upon the timing of wage increases as a factor in coming to its own decision; and
 - (b) the proposed amendment is not necessary to achieve the modern awards objective within the meaning of s.157 of the FW Act.
3. The NRA further opposes that any increase to penalty rates be made retrospective to 1 July 2020.

Legislative and historical framework

Legislative framework

4. Section 158(1) of the FW Act authorises certain parties to apply to vary modern awards. Any such application is made under s.175, which relevantly states:

"The FWC may:

- (a) *make a determination varying a modern award, otherwise than to vary modern award minimum wages or to vary a default fund term of the award;*

...

if the FWC is satisfied that making the determination or modern award is necessary to achieve the modern awards objective.” (emphasis added)

5. The focus under s.157 is therefore upon the proposed variation, and whether it is “*necessary to achieve the modern awards objective*”.¹ It is not the same focus as reviews under the former s.156 of the FW Act.
6. The “modern award objective” is contained in s.134 of the FW Act. In the interests of brevity it is not repeated here. The approach to weighing the differing relevant factors under the modern awards objective has been considered in detail in past decisions.²

Relevant history of Award amendments

7. On 23 February 2017, the Full Bench published *Penalty Rates Decision* [2017] FWCFB 1001 (**Penalty Rates Decision**), in which the Commission relevantly decided to decrease certain Sunday penalty rates. The Commission made some preliminary comments regarding transitional arrangements, but expressly reserved that issue for later determination, after it had received submissions on the subject.
8. The Full Bench published the Transitional Decision in which it relevantly determined to “phase in” decreases to the Sunday penalty rates in the Award for permanent and casual employees from 1 July 2017 by 15% per year, with the final decrease for permanent employees to take effect from 1 July 2020.
9. Several parties involved in the Transitional Decision made submissions to the effect that the Full Bench ought “set aside” the Penalty Rates Decision and not implement it. The Full Bench rejected those submissions.
10. In rejecting those submissions, the Full Bench expressly acknowledged that it was aware that employees would suffer a reduction in take-home pay, yet this factor had already been taken into account, and did not invalidate its decision.³
11. The Full Bench also considered an argument that the Penalty Decision ought be set aside because it did not contain transitional arrangements. In rejecting this submission, the Bench (in summary):
 - (a) accepted that a reduction in take-home pay would occur;

¹ See *CFMEU v Anglo American Metallurgical Coal Pty Ltd (Anglo American)* [2017] FCAFC 123; 252 FCR 337 at [28].

² See, for example, *Four yearly review of modern awards* [2014] FWCFB 1788 (**Preliminary Jurisdiction Decision**).

³ See [34], [40] and [43] of the Transitional Decision.

- (b) commented that implementing Sunday rate decreases at the same time that minimum wages “usually” increase meant that take home pay “*may not reduce to the same extent*”; but
- (c) expressly rejected the proposition that the normal timing of the Annual Wage Review “*(can) be said to ameliorate the impact of our decision*”. Rather, “*It is the phased implementation of the Sunday penalty rate cuts which provides a degree of amelioration*”.⁴

12. The summary at 11 above is drawn from [42]-[44] of the Transitional Decision which states:

“The third line of argument is that there are no transitional arrangements which could ameliorate the impact of the penalty rates reductions so as to prevent significant disadvantage to the employees affected.

We accept that while the transitional arrangements determined in this decision will ameliorate the adverse impact of our decision upon the employees affected, it will not remove that impact and the implementation of the variations we propose (albeit over an extended time period) are still likely to reduce the earnings of the employees affected. The phased reductions in Sunday penalty rates that we intend to make will be implemented at the same time as the implementation of any increases arising from the Annual Wage Review decision. This will usually mean that the affected employees will receive an increase in their base hourly rate of pay at the same time as they are affected by a reduction in Sunday penalty rates. As such, the take home pay of the employees concerned may not reduce to the same extent as it otherwise would – but it is also important to acknowledge that they will receive a reduction in the earnings they would have received but for the implementation of the Penalty Rates decision. Accordingly, any Annual Wage Review increase cannot be said to ameliorate the impact of our decision. It is the phased implementation of the Sunday penalty rate cuts which provides a degree of amelioration.

However, 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.”

13. In 2018, further amendments were made to the Award that increased employment costs under the award by making casual employees entitled to overtime loadings, and then increasing the

⁴ See [43] of the Transitional Decision.

casual rates for Evening and Sunday work.⁵ Annual Wage Cases of course occurred between 2017 and 2020 as well.

14. On 19 June 2020, Commission handed down the 2020 Annual Wage Case. In its decision, the Bench considered an argument advanced by the Applicant that, should the Bench delay implementation of the 2020 wage increase, then the decreases to Sunday penalty rates ought to be similarly delayed. In considering that submission, the Bench commented as follows:

“...we would also observe that there have also been other changes to modern awards that have increased employment costs. It is particularly relevant to note that in addition to the Sunday penalty rate reductions highlighted by the SDA, a subsequent Full Bench increased the penalty rates for casuals for Saturday work and for evening work on Monday to Friday.”

Submissions

Interpretation of the Transitional Decision

15. The Applicant’s primary submission appears to be that the Transitional Decision’s approach to Sunday penalty rates was based upon the assumption that, effective 1 July each year, all relevant employees would receive an increase to their minimum rate of pay. As stated in paragraph 3 of the Application:
- “The basis therefore upon which the Fair Work Commission was earlier satisfied that its phased reduction met the modern awards objective, namely the stated coincidence in timing between the reduction and any increase arising from the Annual Wage Review decision is now demonstrated to be falsely premised...”*
16. As can be seen from the above extracts, that was not the basis for the Transitional Decision. If anything, the Commission expressly denied that it was a basis for the decision, and instead *“It is the phased implementation...which provides a degree of amelioration”*
17. Any comments in the Penalty Decision regarding the significance of 1 July must be read in the context of that those comments being provisional, and the subsequent express justifications in fact relied upon in the later Transitional Decision.
18. Therefore while it is true that in the Transitional Decision the Full Bench found a need for *“appropriate transitional arrangements to mitigate hardship”*,⁶ the course of action relied upon

⁵ See [2018] FWCFB 5897 and [2018] FWCFB 6665.

⁶ See [57].

to achieve that goal was the four-year phasing-in of the reduction; not an assumption that wages would increase every year on 1 July.

19. The Commission's use of qualifiers such as "usually" and "may" at [43] shows that the Commission was well aware, in any event, that annual wage increases were not a certainty.⁷ Note also that there is no suggestion that either a zero percent wage increase would result in penalty rates not falling at all, or that an unusually high increase one year would result in rates falling faster the next.
20. The present Bench ought assume that at the time of the Transitional Decision "*the modern award being reviewed achieved the modern awards objective*".⁸ As the Transitional Decision was not based upon an incorrect factual assumption as alleged, its decision ought be upheld.

Is the variation otherwise "necessary" to achieve the modern award objective?

21. Paragraph 4 of the Application suggests that, even if the Commission determines that the Transitional Decision was not based upon a false assumption, the Award ought be varied regardless because "*the effect of the transitional arrangements decision, if not varied, will be to impose a reduction in take-home pay*".
22. The problem with this submission is that it has already been considered, and rejected, twice. As stated in the Transitional Decision at [36], the Penalty Decision expressly considered and dealt with evidence and submissions about the impact of its proposed changes, including evidence from the present Applicants regarding the Retail Award.
23. As the Bench stated at [44] and extracted above:

"However, 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."

⁷ Note that at [43] of the Transitional Decision the bench expressly acknowledged that it is only "*usually*" that a wage increase will occur on 1 July each year, and that this "*may*" assist offset any decrease.

⁸ See [254] of the Penalty Rates Decision.

24. This is effectively the third time that the Commission has been asked to consider the same submission. The NRA submits the Commission ought continue its established approach.

Review of comments in the Annual Wage Case

25. As the Commission recently touched upon this issue in the recent Annual Wage Case, it is appropriate to briefly refer to the Commission's prior comments, particularly those at [125], which are extracted above.
26. As the Commission there observed, since 2017 the Award has been amended to increase certain penalty rates. This undercuts the Applicant's position regarding assessment of pay rates to those existing or anticipated in 2017. As stated by the bench, the effect of these changes "*increased employment cost*". Those increased costs, of course, were implemented in the context and presumably on the assumption that the Transitional Decision would not be varied. Its changes were similarly "phased-in" over a number of years, with increases due on 1 October 2020 and 1 March 2021.
27. If the decreases to Sunday Penalty rates are frozen, then this raises the question of whether the same rationale ought apply to the scheduled October 2019 increase to casual penalty rates, resulting in that increase being postponed to February 2021, which then raises the question of whether this would have a "knock on" effect to the proposed increase for March 2021.
28. The NRA submits that the better approach is for all changes to proceed as intended.
29. In relation to the Applicant's submissions on this issue, the NRA responds that, regardless of whether or not [125] of the Annual Wage Case was made as "*the result of any forensic analysis*", the fact is that the Applicant's submissions on this subject are similarly not based on any forensic data.
30. The Applicant bears the onus of making out the factual basis for its application, yet its submission is that "*No assessment of the number of employees in each group has been made and nor has any assessment been made of any relevant overlap in relation to each group*".⁹ The NRA submits that the Applicant cannot point to its own absence of evidence as a strength for its case.
31. The evidentiary state of this case is discussed in more detail below.

⁹ At [23] of its submissions.

Paucity of evidence

32. At [23] of the *Jurisdictional Issues Decision*, the Full Bench observed:

“Variations to modern awards must be justified on their merits. The extent of the merit argument required will depend on the circumstances. Some proposed changes are obvious as a matter of industrial merit and in such circumstances it is unnecessary to advance probative evidence in support of the proposed variation. Significant changes where merit is reasonably contestable should be supported by an analysis of the relevant legislative provisions and, where feasible, probative evidence.”

33. The NRA submits that this observation takes on particular significance in the present circumstance, where the Commission is not conducting a general review. Rather, it is the Applicant that has filed an Application, and so it is the Applicant that must make out an evidentiary case that is sufficient to establish its suggested changes are “necessary”.

34. Yet the Applicant has effectively provided no evidence at all. It has not even provided an estimate of the actual financial impact that the proposed change would have upon employees, or any factual material upon which a reasonable estimate may be drawn. Further, considering the speed with which this application has been brought, neither the NRA nor any other intervening party has reasonably been able to provide data in relation to this issue.

35. The proposed change is a significant one, affecting a large (but unknown) number of employers and employees, and potentially involving a large (but similarly unknown) effect upon employment costs. Importantly, the employers subject to this change will receive at most two days’ notice of the change. The absence of evidence does not weigh in the Applicant’s favour, particularly in circumstances where other parties have been significantly prejudiced in providing their own evidence.

36. The Commission may reasonably assume that by this stage, many employers have already set wage rates, rosters and otherwise structured their business in reliance upon the annual wage case and the Transitional Decision. If a major variation is suddenly introduced, then the prospect of employers inadvertently contravening the Act due to insufficient notice is unacceptably high.

37. The NRA accordingly submits that on the facts before it, the Commission cannot be satisfied that the Applicant’s case has been made out.

Response to submissions regarding ABS data

38. The Applicant does refer to ABS data for May 2020 regarding what it submits is a “*more promising picture*” in relation to the status of the industry. While not strictly relevant, it is appropriate for the NRA to comment on this material.
39. Due to the speed of the Application (the Applicant’s submissions only being received at approximately 4.00pm on Friday afternoon), the NRA is not in a position to provide detailed data in response. However, it makes the following observations:
- (a) the data is a snapshot of one month. Particularly in the absence of other evidence, care ought be taken before it is relied upon to justify significant changes to the sector;
 - (b) huge swings in retail turnover can be attributed to:
 - (i) panic buying within the supermarket sector; and
 - (ii) the lockdown of the fashion and speciality retailers, which re-opened in May and thus prompting an initial “flush” of spending; and
 - (c) most retailers are presently having their wages bill subsidised by JobKeeper. When that scheme ends in September 2020, maintenance of pre-COVID-19 staff numbers will be in jeopardy. This is particularly so considering the increases to casual penalty rates scheduled for October 2020, which would (under the Applicant’s proposed variations) be imposed despite no reduction to Sunday penalty rates having occurred at that point.
40. The NRA submits that the data for May 2020 does not suggest a “recovered” economy. It is reflective of a “sugar rush” caused by panic buying and the re-opening of certain retailers in May. This submission is supported by the fact that overall, unemployment rates in May 2020 have continued their sharp rise.¹⁰
41. This submission is also supported by the Commission’s information note dated 26 June 2020 (**Information Note**), which shows:
- (a) The retail industry is highly casualised, with approximately 1/3 of employees being casual. This means that if this variation is implemented, the employment cost of that third will go up in October 2020, while the employment cost of the remaining permanent staff will not go down on 1 July 2020 as expected;¹¹
 - (b) the retail industry is, more than most other sectors, operating under modified conditions;¹²

¹⁰ ABS Catalogue Number 6202.0 - *Labour Force, Australia, May 2020*.

¹¹ See [9] of the Information Note.

¹² See [21] and table 6 of the Information Note.

- (c) over two-thirds of retail business have experienced a decrease in revenue compared to the same time last year;¹³ and
- (d) consumer spending has been noticeably erratic. There is no “trend” which can be reliably used to predict the health of the industry.¹⁴ As noted above, increases in consumer spending also need to be viewed in the context of panic buying and re-opening of certain business in May.

42. Particularly when JobKeeper ends in September, the retail sector is likely to be under significant pressure; maintenance of Sunday penalty rates, particularly at short notice and coupled with the proposed increases to rates in October 2020, is likely to jeopardise jobs in the industry.

Modern Awards Objective

43. As stated above, the Commission has already conducted an analysis of the modern awards objective in the Penalty Rates Decision and the Transitional Decision. No cogent reason has been put forward that should cause the Commission to engage in the process again.

44. Still, in the interests of completeness, the NRA provides the following comments in relation to the modern awards objective. Its comments are as follows:

- (a) *s.134(1)(a) – relative living standards and the needs of the low paid*

The NRA repeats and relies upon the findings of the Commission in both the Penalty Rates Decision and the Transitional Decision.

- (b) *s.134(1)(b) – the need to encourage collective bargaining*

The NRA submits this is a neutral factor

- (c) *s.134(1)(c) – the need to promote social inclusion through increased workforce participation*

The NRA submits that increasing cost to business, particularly at short notice, during uncertain times and a time of rising unemployment, suggests that the proposed variation is not necessary.

The NRA is unable to provide more detailed data or evidence on this issue due to the required timeframes.

- (d) *s.134(1)(d) – the need to promote flexible modern work practices and the efficient and productive performance of work*

As discussed in the Penalty Rates Decision and the Transitional Decision, this factor favour the decrease of Sunday penalty rates as and when determined by the Commission in 2017.

- (e) *s.134(1)(da)(i)-(iv) – the need to provide additional remuneration for overtime, etc*

¹³ See [22] and Table 7 of the Information Note.

¹⁴ See [28] and Chart 5 of the Information Note.

The NRA repeats and relies upon the findings of the Commission in both the Penalty Rates Decision and the Transitional Decision.

- (f) *s.134(1)(e) – the principle of equal remuneration for work of equal or comparable value*

The NRA submits this is a neutral factor.

- (g) *s.134(1)(f) – the likely impact of any exercise of modern award powers on business, including productivity, employment costs and the regulatory burden*

The NRA repeats and relies upon its above submissions regarding pressure upon the retail sector, particularly considering the short notice of the proposed variation.

The NRA also submits that it would be an unusual outcome for the Commission to conclude in the Annual Wage Case that the extraordinary circumstances of the economy required that no minimum wage increase be imposed on 1 July 2020, but do justify the increase of penalty rates on 1 July 2020.

- (h) *s.134(1)(g) – the need to ensure a simple, easy to understand, stable and sustainable modern award system*

If the present Application is successful, then the Commission will effectively overturn (in part) a timetable it set in place three years ago, and Sunday penalty rates will be raised with, at most, two days' notice.

A sudden and significant change of this kind undermines the objective of a simple, easy to understand and, in particular, stable modern award system. This is particularly so where the proposed change could result in knock-on effects to the planned increases for October 2020 and March 2021.

It is also significant that the proposed variation to clause 29.4(e)(iv) of the Award would lead to an inconsistency with clause 30.3(c)(iii) of the Award, which will provide for the Sunday penalty rates for shiftworkers to decrease on 1 July 2020 regardless of whether the proposed variation is made.

- (i) *s.134(1)(h) – the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy*

The NRA repeats and relies upon its submissions above regarding the state of the retail sector, and further repeats and relies upon the determinations in the Penalty Rates Decision and the Transitional Decision.

Submissions regarding request for retrospective operation

45. The Application requests, at paragraph 5, that if the Application is not determined by 1 July 2020 then it should be imposed with retrospective effect. The NRA opposes this submission for two reasons:

- (a) this is not an application under s.160 of the FW Act, and so s.165(2)(a) has not been satisfied; and
- (b) such an approach would result in employers retrospectively committing civil offences under the FW Act, in circumstances where their only folly was to rely upon then-extant Award terms and conditions.

Conclusion

46. For the above reasons, the NRA submits that the Application should be dismissed.

Prepared by Stephen Mackie of Counsel