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4 March 2020

The Hon. Justice Iain Ross
President
Fair Work Commission
Level 4, 11 Exhibition Street
Melbourne VIC 3000

By email: chambers.ross.j@fwc.gov.au
CC: amod@fwc.gov.au

Dear President Ross,

AM2021/7 – Award flexibility – *General Retail Industry Award 2020*
Application by SDA, AWU and Master Grocers Australia

The National Retail Association Limited, Union of Employers (NRA) makes the below submissions in **opposition** to the joint application to vary the *General Retail Industry Award* 2020 (**the Award**) filed by the Shop, Distributive and Allied Employees' Association (**SDA**), the Australian Workers Union (**AWU**), and Master Grocers Australia (**MGA**) (**the Applicants**) on 26 February 2021 and amended on 28 February 2021 (**the Application**).

1. "Urgent" consideration and procedural fairness

1.1. The NRA objects to the Application being dealt with as a matter of urgency.

1.2. Although the Applicants, by email from the SDA dated 28 February 2021, requested that the Application be dealt with urgently, the Application does not disclose any basis on which such expedited determination is required.

1.3. The NRA accepts that there is a need for flexible part-time employment in the Award, with the inflexibility of part-time employment in the Award being, in NRA's view, one of the most substantial factors resulting in the level of casualisation seen in the retail industry. The Fair Work Commission (**FWC**) has also previously acknowledged the need to flexibility in the engagement of part-time employees in other modern awards.[1]

1.4. While the NRA is gratified that the Applicants appear to acknowledge this need, the NRA submits that such need is not so pressing as to require the FWC to depart from the usual process of requiring submissions and evidence in support of contested applications.

1.5. It is well-established that the FWC is required to act judicially in the exercise of its powers, in the sense that it is obliged to respect and apply traditional notions or procedural fairness and impartiality.[2]

[1] [2019] FWCFB 272 at [151]
[2] *Coal & Allied Mining Services Pty Ltd v Lawler* [2011] FCAFC 54; (2011) 192 FCR 78 per Buchanan J

1.6. While this is caveated to a degree by the statutory requirement that the FWC must exercise its functions in a manner that is quick, informal, and avoids unnecessary technicalities, [3] this does not absolve the FWC of its obligation to act judicially.

1.7. The Full Bench noted this obligation in *Re Hospitality Industry (General) Award 2020*[4], and further noted that the application and content of the doctrine of procedural fairness is determined by context.[5]

1.8. The Full Bench in that case considered that the key contextual considerations were:

(a) the statutory framework;

(b) the consent of the key interested parties;

(c) the parties' joint request for expedition; and

(d) the need to respond quickly to a rapidly changing industrial environment;

and noted that the consent of the key industrial parties was the central consideration.[6]

1.9. The Full Bench then went on to note that:

> "*In the event that this application had been contested then, plainly, different considerations would have been enlivened, necessitating a more protracted hearing process than the one we have adopted in this matter.*"[7]

1.10. The NRA notes that the present Application is **not** a case in which the consent of the key industrial parties has been obtained.

1.11. Although the relevant unions, these being the SDA and the AWU, are co-Applicants, with the Australian Council of Trade Unions (**ACTU**) expressing its support, the only employer applicant is the MGA.

1.12. The NRA reiterates that it does **not** consent to the Application, and understands that the Australian Retailers Association (**ARA**), Australian Industry Group (**Al Group**), Australian Business Industrial (**ABI**) and the New South Wales Business Chamber (**NSWBC**) also oppose the Application.

1.13. In circumstances where the key industrial organisations representing the relevant industry do not consent to the Application, the process adopted by the FWC to date, specifically:

(a) requiring non-applicant parties to file submissions in support or opposition less than 48 hours after the Applicants were due to file their submissions, and

(b) bringing the Application on for hearing seven days after it was filed;

is perplexing.

1.14. We also note that the Application is said to arise from the conference held on 5 February 2021. The NRA considers this to be a peculiar assertion as none of the Applicants put forward any proposals for consideration at or prior to that conference. However, other parties including the NRA did put the

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[3] *Fair Work Act 2009* (Cth) s.577(b)
[4] [2020] FWCFB 1574
[5] Ibid at [9]
[6] Ibid at [12] to [13]
[7] Ibid at [14]

FWC, and the Applicants, on notice that they were working on various proposals including proposals dealing with part-time employment.

1.15. The NRA has been consulted in relation to a proposal that will be advanced by ABI and NSWBC in relation to part-time employment, and is supportive of that proposal in principal subject to the opportunity to make further detailed submissions in relation to that proposal.

1.16. That the NRA was not consulted as to the status of its proposal prior to the listing of this matter for submissions and hearing is most perplexing.

1.17. In these circumstances, were the FWC to determine the Application at hearing on 5 March 2021, as it would appear to intend on the face of the present directions, this would be a significant departure from the FWC's obligation to act judicially and lead the FWC into error.

2. Technical concerns

2.1. The NRA has a number of serious concerns with how the proposed Schedule I is intended to operate.

2.2. Of particular concern to the NRA is exactly how the additional hours agreed to in accordance with the proposed clause I.2 interacts with the pattern of work agreed to between the part-time employee and the employer pursuant to clause 10.5 of the Award.

2.3. Firstly, the NRA notes that clause I.2 refers to the expression "number of hours" in what appears to be a weekly context. However, the number of hours agreed to in accordance with clause 10.5 is a daily number of hours. The NRA foresees this as a source of confusion, in particular for small business operators.

2.4. Secondly, the terms of the proposed Schedule I are silent on whether the other requirements of clause 10.5, such as the need to specify the days on which the employee will work and the starting and finish times each day, apply to an agreement entered into under clause I.2. Although we note that clause I.3 absolves the employer of the requirement to pay overtime on the additional hours so agreed to, there is nothing in the text of Schedule I to indicate that the technical requirements of clause 10.5(a) to (d) are also waived.

2.5. Thirdly, since Schedule I in its current terms does not appear to absolve the employer of the obligation to comply with the technical requirements of clause 10.5 of the Award, and clause I.3 requires the employer to pay the employee for those additional hours even if they are not worked, there appears to be no practical distinction between additional hours agreed to under clause I.2 and a variation to a part-time employee's pattern of work under clause 10.6.

2.6. Fourthly, we note that the terms of clause I.5 allow one party to force the other to continue the additional hours agreement indefinitely. Although that clause refers to the provision of 24 hours' notice, the provision of that notice is qualified by the requirement for mutual agreement.

2.7. Fifthly, clause I.8 provides that an employer may only refuse an employee's request for their additional hours to be made permanent on "reasonable business grounds", with the subsequent note providing the example that "reasonable business grounds" may include that the reason the employee regularly worked those additional hours is temporary.

2.8. As Schedule I is itself temporary this results in something of a paradox, as by definition all additional hours agreements under Schedule I would be temporary, merely to varying degrees.

2.9. Finally, we note that clause I.11 proposes to make all aspects of the operation of Schedule I, including the reasonableness of any business ground relied on by the employer to refuse a request for additional hours to be made permanent, liable to arbitration.

2.10. This would be a significant departure from the FWC's dispute resolution capabilities under modern awards and the NES generally, and by extension from the established minimum safety net. Indeed, it would be the only circumstance outside of an enterprise agreement in which the FWC would be empowered to substitute the commercial decision making of an employer with its own.

3. Application redundant to existing provisions and other prospective provisions

3.1. In order for the FWC to exercise its powers under s.157 of the FW Act, it must first be satisfied that the variation made in the exercise of those powers is "necessary" to achieve the modern awards objective.

3.2. In that sense, it is trite to say that if provisions already exist which allow the same outcome to be achieved, a variation will not be "necessary" in order to achieve the modern awards objective.

3.3. Whilst the submissions of the Applicants have emphasised what the provisions of the proposed Schedule I purport to do, they do not grapple with the question of how these differ from existing provisions under the Award.

3.4. It should be noted that an employer and an employee may, at any time, agree to the employee performing additional ordinary hours through the facility of clause 10.6 of the Award. Such an agreement replaces, either on a temporary or ongoing basis depending on its terms, the ordinary hours agreed to pursuant to clause 10.5, and the employer is consequently:

(a) not required to pay overtime rates for the additional hours so agreed; but

(b) is obligated to pay the employee their ordinary rate for those hours, regardless of whether or not the employer requires the employee to work them.

3.5. The proposed clauses I.2 and I.3 do not, on the current drafting of the Application, differ from this in any meaningful respect.

3.6. The NRA therefore submits that the FWC cannot be satisfied that the Application, or at least to the extent that it pertains to clauses I.2 and I.3, is necessary to achieve the modern awards objective.

3.7. We also note that the provisions proposed by the Application are, in effect, variations on the theme of the new Part 2-3, Division 5A as proposed by the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* (**the Bill**). Specifically, s.168S(1), as proposed to be inserted into the FW Act by the Bill, has the effect of making the proposed Part 2-3, Division 5A,Subdivision A a term of the Award.

3.8. Given how similar the effect of this subdivision is, in its key aspect of allowing additional hours agreements, to the terms proposed by the Application, we further submit that unless and until the Bill is defeated in Parliament the FWC is not able to be satisfied that the variation proposed by the Application is necessary to achieve the modern awards objective.

4. Recommendation

4.1. The NRA respectfully submits that the only means by which the FWC may proceed judicially in this matter is:

(a) for the hearing listed on Friday 5 March 2021 to be adjourned;

(b) for the Applicants to be required to file and serve evidence and more fulsome submissions in support of the Application; and

(c) for other parties to be provided with a more fulsome and fair opportunity to reply to that evidence and those submissions.

Yours sincerely,

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National Retail Association

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