National Retail Association

PO Box 48
Spring Hill QLD 4000

ABN | 44 009 664 073
P | 1800 RETAIL
F | (07) 3240 0130
www.nra.net.au

11 November 2020

The Hon Justice Ross
President
Fair Work Commission
11 Exhibition Street
Melbourne VIC 3000

By email: amod@fwc.gov.au

Dear President Ross,

AM2017/60 – Four yearly review of modern awards – *General Retail Industry Award 2020* – substantive issues

The National Retail Association Limited, Union of Employers (**NRA**) makes these submissions in the above matter in accordance with the directions issued by the Full Bench of the Fair Work Commission (**Full Bench**) in at paragraphs [98] – [99] in [2020] FWCFB 5371 (**the Statement**).

1. Questions to the parties

1.1. The Full Bench has posed several questions to the parties, which we address below. Please note that the NRA does not make comment on any question directed to a specific party.

Legislative framework

1.2. Subject to the below, the NRA agrees with the summary of the legislative framework outlined at paragraphs [7] to [22] (inclusive) of the Statement as it applies to section 134 of the *Fair Work Act 2009* (Cth) (**FW Act**).

1.3. However, the NRA also agrees with the submission of ABI that section 135 of the FW Act is also relevant, as the SDA's claim would, if granted, vary modern award minimum wages by the exercise of a modern award power under Part 2-3 of the FW Act rather than the exercise of a power under Part 2-6.

1.4. We note that the FW Act appears to expressly recognise special rates for junior employees as being a "minimum wage" condition at section 153(3), which provides that special minimum wages for junior employees (*inter alia*) are not discriminatory for the purposes of that provision.

1.5. It therefore follows that any alteration to these "minimum wages" must be subject to section 135 and, by operation of that provision, section 157(2). This provision requires that variations to modern award minimum wages outside the annual wage review may only occur if the Full Bench is satisfied that the variation is "justified by work value reasons."

1.6. Section 157(2A) of the FW Act specifies that "work value reasons" are limited to any of:

(a) the nature of the work;

(b) the level of skill or involved in doing the work; and

(c) the conditions under which the work is done.

1.7. With respect to the "work value" aspect, the NRA notes the statement of the Full Bench in the *Equal Remuneration Case* [2011] FWAFB 2700 in which, at paragraph [261], the Full Bench observed:

> *In order to succeed in their submission it would be necessary for the applicants to deal with work value and relativity issues relating to the classification structure in the modern award and potentially to structures and rates in other modern awards.*

1.8. The Full Bench in the *Penalty Rates Case* [2017] FWCFB 1001 observed, with respect to section 156(3) (as it then was), that:

> *This may be contrasted with the discretion in s.156(2)(b)(i) (as it then was) to make determinations varying modern awards in a Review which is expressed in general, unqualified terms.*

1.9. That is to say, the discretion to make determinations varying a modern award under section 157(2) is much more limited than the discretion granted under section 157(1). More importantly, the Full Bench may only make a determination varying modern award minimum wages if the requirements of ***both*** sections 157(1) (the variation is necessary to achieve the modern awards objective) and 157(2) (the variation is justified by work value reasons) are satisfied.

1.10. In assessing whether the work value reasons "relate to" any of the matters set out in section 157(2A), the words are themselves reasonably broad but nevertheless require "the existence of a connection or association".[1]

1.11. It would therefore be insufficient for the Full Bench to reach the requisite level of satisfaction on the basis of vague logic unsupported by probative evidence.

Expert report and evidence of Dr Martin O'Brien

1.12. On 6 June 2019 the Shop, Distributive and Allied Employees' Association (**SDA**) filed submissions in relation to the substantive issues in this matter.

1.13. Annexed to these submissions was an expert report compiled by Dr Martin O'Brien, Associate Professor of Economics of the University of Wollongong (**Expert Report**). Dr O'Brien gave verbal evidence in relation to the Expert Report at a hearing before the Full Bench on 8 October 2019.

1.14. Paragraphs [26] to [33] (inclusive) of the Statement provide a summary of the Expert Report and Dr O'Brien's evidence.

1.15. The NRA agrees in particular with the points outlined by the Full Bench at paragraph [33] of the Statement in relation to the concessions made by Dr O'Brien in cross-examination.

1.16. In addition to the concessions made by Dr O'Brien as summarised at paragraph [33] of the Statement, we note that:

(a) when asked if there was any way of knowing whether some employees who identified themselves as 'store persons' (Retail Employee Level 1) operated forklifts (Retail Employee Level 2), Dr O'Brien's evidence was that:

(i) this was impossible to determine "without asking the individuals filling out the form"; and

[1] *Project Blue Sky v ABA* [1998] HCA 28; (1998) 194 CLR 355 at paragraph [87]

(ii) "(he) couldn't get into the thought process of the person filling out the census form to be able to say that a forklift driver would not have filled out that they were a store person".[2]

Interaction between junior minimum rates and apprentice minimum rates

1.17. With respect to the Full Bench, the table provided in the question to all parties immediately prior to paragraph [69] of the Statement does not align with the scenario posited, as the table in the Statement commences at the age of 15 rather than 16 as posited.

1.18. For the purposes of comparing a junior employee against a junior apprentice who has not completed year 12 and who is 16 years old when they start their apprenticeship, the below table is a more accurate representation:

Age	Junior Rate (%)	Year of apprenticeship	% of standard weekly rate (Apprentice)
16	50	1st	50
17	60	2nd	60
18	70	3rd	80
19	80	4th	90
20	100[3]		

1.19. As can be seen from the above re-framing of the proposition, a person who is aged 16 at the commencement of an apprenticeship may experience a slight reduction in pay (from 90% to 80%) if they complete their apprenticeship before their 20th birthday.

1.20. However, unless such a person commenced their apprenticeship exactly on their 16th birthday, the more likely scenario is that the person would complete the fourth year of their apprenticeship after their 20th birthday, entitling them to the adult rate of pay under the award (having completed six months' service).

1.21. Whilst there may be circumstances in which an apprentice may complete their course at an accelerated rate and completing their apprenticeship before their 20th birthday, these would be the exception rather than the norm.

1.22. In response to the question posited by the Full Bench – what is person aged 19 paid at the completion of their apprenticeship – the answer is 80% of the relevant classification.

1.23. We note that notwithstanding the completion of an apprenticeship, the relevant classification may not be Retail Employee Level 4 – an employer may choose, for various reasons, to continue a person's engagement beyond the conclusion of the training contract in a non-tradesperson role.

Minimum rate for a tradesperson

1.24. The Full Bench has asked the parties to advise the minimum rate for a tradesperson aged 20 under the Retail Award.

1.25. As a tradesperson, the applicable classification is Retail Employee Level 4, which carries an adult weekly rate of $862.50 (equivalent to the C10 rate in the *Manufacturing and Associated Industries and Occupations Award 2020*).

[2] Transcript, 8 October 2019 at PN163 – PN164

[3] This assumes that the employee served at least six months of their apprenticeship with the same employer.

1.26. A tradesperson aged 20, assuming they had been newly hired by the employer, would be subject to a junior rate at 90% of the adult rate, for a weekly rate of $776.25.[4] The employee would become entitled to the adult rate of pay after six months' service even if they had not yet turned 21.[5]

1.27. However, if this person had undertaken their apprenticeship with that employer, they would most likely have completed the six months' service necessary to entitle them to the adult rate of pay from the time they turn 20.[6]

2. Final submissions

2.1. Noting the legislative framework summarised by the Full Bench at paragraphs [7] to [22] (inclusive) of the Statement, and the additional points raised at paragraphs 1.3 to 1.11 above, the NRA submits that the Shop, Distributive and Allied Employees' Association (**SDA**) has not advanced a sufficiently cogent argument on the merits to support its application for variation.

2.2. The evidence advanced by the SDA in the form of the expert report of Dr O'Brien is subject to several areas of critical uncertainty, specifically those outlined at paragraph [33] of the Statement and the additional matters referred to at paragraph 1.16 above.

2.3. The NRA notes that in first review of modern awards in 2012 under Schedule 6, Item 5 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) the SDA advanced a claim for the extension of adult rates of pay to all employees aged 20.[7]

2.4. This application was granted only in part, with the adult rate extended to employee aged 20 only after the completion of six months' service with the employer. Importantly, the Full Bench only reached this decision after considering extensive evidence, including a total of 27 witnesses, 20 of whom were led by the SDA.

2.5. In contrast, the current application is supported by only a single expert report which does little more than identify the possible cohort of employees who would stand to benefit from the application if granted.

2.6. The evidence led by the SDA to date does not address any of the matters required to be considered by the Full Bench in the exercise of its discretion under section 157 of the FW Act. In particular, there has been no evidence led of any "work value" considerations allowing the Full Bench to achieve the requisite level of satisfaction required under section 157(2).

2.7. It therefore follows that the only outcome reasonably open to the Full Bench is to dismiss the application for lack of a cogent case on the merits.

Yours sincerely,

Lindsay Carroll
Deputy Chief Executive Officer
National Retail Association

Alexander Millman
Senior Workplace Relations Advisor
National Retail Association

[4] *General Retail Industry Award 2020* cl. 17.2, Table 5
[5] Ibid
[6] Ibid
[7] *Application by Shop, Distributive and Allied Employees' Association* [2014] FWCFB 1846