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

16 June 2021

Fair Work Commission
Annual Wage Review 2019-20
GPO Box 1994
Melbourne VIC 3001

By email: amod@fwc.gov.au

Dear Members of the Full Bench,

AM2021/54 – Casual terms award review 2021
Submissions in reply of the National Retail Association Limited, Union of Employers

In accordance with the directions issued by the Full Bench in the above matter in [2021] FWCFB 2222 timetable of the Annual Wage Review 2020–21 the National Retail Association Limited, Union of Employers (**NRA**) makes the **below** submissions in reply.

For the purposes of these submissions, the NRA confines its reply to the submissions of the Shop, Distributive, and Allied Employees' Association (**SDA**) as filed on 24 May 2021.

1. DEFINITIONS OF CASUAL EMPLOYEE / CASUAL EMPLOYMENT

1.1. Has Attachment 1 to (the) Discussion Paper wrongly categorised the casual definition in any award?

1.1.1. The SDA submits that clause 11.2 of the *General Retail Industry Award 2020* (**Retail Award**) does not define casual employment and is therefore not a relevant term for the purposes of the review.

1.1.2. The NRA disagrees with this position.

1.1.3. Whilst clause 11.2 could, on some readings, be taken as a directive to an employer rather than a definition of casual employment in and of itself, the practical effect of clause 11.2 is to denote as a casual employee any individual who does not fit within the definitions of full-time or part-time employment.

1.2. For the purposes of Act Schedule 1 cl.48(2):

- **is the "engaged as a casual" type casual definition (as in the Retail Award, Hospitality Award and Manufacturing Award) consistent with the Act as amended, and**
- **does this type of definition give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended?**

1.2.1. The SDA submits the "engaged as a casual" definition does not, in and of itself, create inconsistency with s.15A of the Act as amended.

1.2.2. The NRA reiterates that the "engaged as such" definition must necessarily derive its content from the Act itself, which subsequent to its amendment now includes an effective definition of casual employment.

1.2.3. Whilst this may not necessarily be inconsistent with the Act as amended, it does not provide any particular assistance to the lay reader of the Retail Award. As such, whilst legal minds may not perceive uncertainty, the NRA reiterates its position that such uncertainty that may arise is a matter of practical application rather than legal interpretation.

1.3. For the purposes of Act Schedule 1 cl.48(2):

- **are 'paid by the hour' and 'employment day-to-day' type casual definitions (as in the Pastoral Award and Teachers Award) consistent with the Act as amended,**
- **are 'residual category' type casual definition (as in the Retail Award and Pastoral Award) consistent with the Act as amended, and**
- **do such definitions give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended?**

1.3.1. The NRA notes that the SDA declined to make submissions on the "residual category" point other than to note that an employee's status as full-time or part-time is outside the terms of reference of this review.

1.3.2. The NRA agrees with the proposition that the definition of full-time and part-time employment is outside the scope of this review, however notes that clause 11.2 of the Retail Award does not seek to define full-time or part-time employment, but rather seeks to define casual employment as "anything other than full-time or part-time."

1.3.3. The NRA reiterates its submission that with the amendment of the Act to include s.15A, it is at least theoretically possible for an employee to be neither a full-time nor part-time within the meaning of the Retail Award, or casual within the meaning of the Act as amended.

1.3.4. To this extent, the "residual category" of casual employment may give rise to an uncertainty or inconsistency, as the Act as amended now defines casual employment by reference to specific indicia, as distinct from the Retail Award defining casual employment by what it is not.

1.4. For the purposes of Act Schedule 1 cl.48(3), would replacing the casual definitions in the Retail Award, Hospitality Award, Manufacturing Award, Teachers Award and Pastoral Award with the definition in s.15A of the Act or with a reference to that definition, make the awards consistent or operate effectively with the Act as amended?

1.4.1. The SDA submits that s.15A should be replicated in the Award.

1.4.2. The NRA disagrees with this approach, noting that where a matter is comprehensively dealt with in the Act it is common practice for the Retail Award to refer to the Act (see, for example, clauses 28.1, 29.1, 30, 31, 32, and 33.1).

1.4.3. The NRA reiterates that the only effective means to ensure that the Retail Award and the Act remain in accordance with each other is for the Retail Award to refer to the Act.

1.5. For the purposes of Act Schedule 1 cl.48(2):

- **are award definitions that do not distinguish full-time and part-time employment from casual employment on the basis that full-time and part-time employment is ongoing employment (as in the Retail Award, Hospitality Award, Manufacturing Award, Teachers Award and Pastoral Award) consistent with the Act as amended, and**

- **do these definitions give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended?**

1.5.1. The SDA submits that the definitions of full-time and part-time employment in the Retail Award are not relevant terms for the purposes of the review and do not give rise to any uncertainty.

1.5.2. The NRA reiterates its submission that it is possible for an employee to satisfy both the definition of a casual employee in s.15A of the Act as amended and the definition of a part-time employee within the Retail Award.

1.5.3. Even if the definitions of full-time and part-time employment are not relevant terms for the purposes of the review, it would nevertheless be appropriate for the Full Bench to exercise its general powers under s.160 of the Act to remedy this deficiency having regard for the new legislative paradigm.

1.6. Are any of the clauses in the Retail Award, Hospitality Award, Manufacturing Award, Teachers Award and Pastoral Award that provide general terms and conditions of employment of casual employees (not including the clauses considered in sections 5.1 – 5.5 and 6 of the Discussion Paper) 'relevant terms' within the meaning of Act Schedule 1 cl.48(1)(c)?

1.6.1. The NRA reiterates its previous submission on this point, and notes that a modern award provision does not need to specifically direct itself to casual employment in order to "provide for the manner in which casual employees are to be employed."

1.6.2. Rather, any modern award provision which is expressed as applying to "employees", without limitation, may provide for the manner in which casual employees are to be employed, particularly where that provision may give rise to inconsistency or uncertainty.

1.7. Whether or not these clauses are 'relevant terms':

- **are any of these clauses not consistent with the Act as amended, and**
- **do any of these clauses give rise to uncertainty or difficulty relating to the interaction between the award and the Act as amended?**

1.7.1. The NRA disagrees with the proposition advanced by the SDA that the Retail Award should be presumed to not be "uncertain or difficult" on two bases.

1.7.2. First, any review undertaken of the Retail Award historically occurred in the context of the Act prior to amendment. Where the Act has been amended, sometimes substantially, it cannot be presumed that any modern award is necessarily consistent with the Act as amended.

1.7.3. The submission of the SDA in this respect appears to harken back to the decision of the Full Bench in the initial stages of the four-yearly review of modern awards in 2014, wherein the Full Bench adopted a position that *prima facie* the modern awards met the modern awards objective at the time that they were made.[1]

1.7.4. With respect, whilst this observation may have been apt as a starting point for the review commencing in 2014 under s.156 of the Act (since repealed), it is erroneous to suggest that a review brought about by Schedule 1 item 48 of the Act, resulting from a significant legislative amendment, is able to proceed on a similar footing.

1.7.5. Second, the statement that the Retail Award is "not uncertain or difficult" by virtue of recent review activity is simply not borne out by recent proceedings.

[1] [2014] FWCFB 1788 at [24]

1.7.6. A separately constituted Full Bench has recently held that clause 10 of the Retail Award is "uncertain",[2] whilst clause 16.6 of the Retail Award has been noted as "ambiguous" with little in the way of resolution of that ambiguity.[3]

1.7.7. Whilst acknowledging that casting a wide net as part of the current review may have an adverse impact on the expedience with which the current review may be completed, the question posed by the Discussion Paper was to identify provisions of the modern award/s which may give rise to uncertainty as between the award and the Act as amended.

1.7.8. Whether it is expedient to address these issues as part of the current review, or for these issues to be dealt with through a separate process, is for the Full Bench in the present review to determine. However, the NRA submits that where uncertainty or difficulty is identified as arising from the interaction of the award and the Act as amended, such uncertainty ought to be dealt with sooner rather than later.

2. CASUAL CONVERSION CLAUSES

2.1. Is it the case that the model award casual conversion clause (as in the Retail Award and Pastoral Award) is detrimental to casual employees in some respects in comparison to the residual right to request conversion under the NES, and does not confer any additional benefits on employees in comparison to the NES?

For the purposes Act Schedule 1 cl.48(2):

- **is the model award casual conversion clause consistent with the Act as amended, and**
- **does the clause give rise to uncertainty or difficulty relating to the interaction between these awards and the Act as amended?**

2.1.1. For the purposes of these submissions in reply, it is convenient to address both of these questions together.

2.1.2. The NRA notes the submission from ACCI that as the modern award casual conversion clauses appear to be neither supplementary nor incidental to the NES entitlement in the Act as amended, they are not permitted terms for inclusion in the modern awards.

2.1.3. Rather, the model casual conversion clause as it appears in the Retail Award is almost identical to the entitlement in s.66F of the Act as amended, save that the assessment of the employee's pattern of work must be undertaken over a period of 12 months rather than six months.

2.1.4. To this extent, the model casual conversion clause in the Retail Award would appear to be more detrimental than the NES entitlement, requiring an assessment over a longer period of time.

2.1.5. The NRA also notes that the protections afforded for employees in clause 11.7(n) of the Retail Award also arise under s.66L(1) of the Act as amended.

2.1.6. As such, the NRA supports the view advanced by ACCI that the model casual conversion clauses may well not be permitted terms pursuant to s.55(4) of the Act.

2.1.7. With respect to the SDA submission on this point, the NRA notes that the SDA has advanced a submission that the model clauses are not detrimental to employees. The SDA points to clause 11.7(n) of the Retail Award, ignoring the effect of s.66L(1) as noted above, and to this extent the SDA's submission is in error.

---

[2] [2021] FWCFB 1608 at [120]
[3] [2018] FWCFB 6075 at [40] to [45]

2.1.8. Separately, the NRA rejects the SDA's submission that a 12-month assessment period under the model clause is more beneficial to employees as it mitigates the effect of seasonality.

2.1.9. The NRA submits that a longer assessment period is more likely to capture more seasonal variation, rather than less, whereas a six-month assessment period allows a casual employee to time their rquest in such a way as to minimise the effect of major seasonal events (for example, Black Friday and Christmas trading periods).

2.1.10. The NRA reiterates its submission that concurrent operation of both the NES and modern award casual conversion provisions would service little more than to create confusion and uncertainty for both employees and employers.

2.2. For the purposes of Act Schedule 1 cl.48(3), would removing the model clause from the awards, or replacing the model clause with a reference to the casual conversion NES, make the awards consistent or operate effectively with the Act as amended?

2.2.1. The NRA notes that the SDA agrees with the proposition that replacing the model casual conversion clause with a reference to the NES would make the awards consistent and operate effectively with the Act as amended.

2.2.2. Indeed, the SDA is firm in this position, the exact phrase used being "the answer to the question as posed is undoubtedly yes."

2.2.3. The SDA's submission on this point merely reiterates its previous (in NRA's view, erroneous) position that doing so would derpive employees of particular entitlements.

2.3. If the model clause was removed from the awards, should other changes be made to the awards so that they operate effectively with the Act as amended (for example, adding a note on resolution of disputes about casual conversion)?

2.3.1. The NRA notes that there has long been a practice of not reproducing the terms of the NES in the modern awards.[4] The NRA submits that this practice ought to be continued, noting that doing so saves the costly and time-consuming requirement for the modern awards to be separately varied in response to legislative amendment.

Yours sincerely,

Lindsay Carroll
Deputy Chief Executive Officer
M| 0411 318 643
E| l.carroll@nra.net.au
National Retail Association

[4] [2008] AIRCFB 1000 at [34]; see also [2019] FWCFB 5144 at [7]