National Retail Association

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16 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 application made by the Shop, Distributive and Allied Employees' Association (**SDA**), the Australian Workers' Union (**AWU**) and Master Grocers Australia (**MGA**) (collectively, **the Applicants**) on 26 February 2021 and amended on 28 February 2021 (**the Application**); and
- in support of the alternative proposal advanced by Australian Business Industrial (**ABI**) and the New South Wales Business Chamber (**NSWBC**) filed on 15 March 2021 (**the Alternative Proposal**);

in relation to the *General Retail Industry Award* 2020 (**the Retail Award**) in accordance with the directions issued on 5 March 2021, and subsequently amended, in this matter.

To the extent that these submissions traverse the same subject matter as our previous submissions filed in this matter on 4 March 2021 (**Previous Submissions**), these submissions replace the Previous Submissions.

The NRA understands that the proponents of the Application may choose to file amended draft determinations with their submissions and evidence in this matter. In that case, it ought to be noted that the NRA makes these submissions absent the opportunity to consider any such amended draft determination.

1. Overarching principles

1.1. Legislative framework

1.1.1. As the Application is made under s.157(3)(b) of the *Fair Work Act 2009* (Cth) (**FW Act**), the Fair Work Commission (**FWC**) may only make the variation to the Retail Award sought by the Application if it is satisfied that the variation is necessary to achieve the modern awards objective.

1.1.2. Notwithstanding that it has not been formally advanced by way of a separate application, the same principles apply equally to the Alternative Proposal.

1.1.3. What is "necessary" to achieve the modern awards objective in any particular case is a value judgement having regard for the elements of the modern awards objective as set out in s.134 of the FW Act to the extent that they are relevant to the context, including the circumstances pertaining to

the particular modern award, the terms of any proposed variation, the submissions and the evidence available.[1]

1.1.4. In the case of an application made pursuant to s.157(1)(a), the task to be undertaken by the FWC is an examination of whether the posited variation is necessary in order to achieve the modern awards objective. This is distinct from the task imposed on the FWC under the now-repealed s.156, which required the FWC to examine the relevant modern award as a whole and determine whether the modern award under examination met the modern awards objective.[2]

1.1.5. Finally, the matters listed at s.134 are broad social objectives which do not, in themselves, pose any questions or set any standard against which a modern award is to be evaluated; rather, the finding required to be made by the FWC is whether the modern award does or does not meet the modern awards objective having regard for those considerations.[3]

1.2. Interaction with proposed legislation

1.2.1. It is necessary to appreciate that the Application and the Alternative Proposal are made in relation to subject matter which is presently the subject of legislative amendments due to be debated in the Senate.

1.2.2. Specifically, Part 1 of the Schedule 2 to the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021* (**the Bill**) proposes to insert provisions into the FW Act which will allow part-time employees engaged under specific modern awards, including the Retail Award, to enter into what are described as "simplified additional hours agreements."

1.2.3. Save for some differences in the specific mechanics of each process, the amendments proposed by the Bill and the variation proposed by the Application deal with the same subject matter in substantially the same manner.

1.2.4. Notwithstanding this, the NRA accepts that it is an established principle that courts and tribunals, including the FWC:

> *"… can only act upon the law as it is, and have no right to, and cannot, speculate upon alterations in the law that may be made in the future."*[4]

1.2.5. As such, although we anticipate significant overlap between the proposal advanced in the Application (if granted) and the amendments provided for in the Bill (if passed), any undermining of the modern awards objective as a result of this is properly dealt with by a further application to vary the Retail Award.

1.2.6. Although grossly inefficient, this is nevertheless the approach demanded by the legislative framework and the approach taken by courts and tribunals in response to "speculative" law.

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[1] *Re Pest Control Industry Award – Substantive Claims* [2019] FWCFB 8092 at [17]; see generally *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)* [2012] FCA 480; (2012) 205 FCR 227

[2] *Construction, Forestry, Mining and Energy Union v Anglo American Metallurgical Coal Pty Ltd* [2017] FCAFC 123 at [28]

[3] *National Retail Association v Fair Work Commission* [2014] FCAFC 118 at [109] to [110]

[4] *Ramsay Aberfoyle Manufacturing Company (Australia) Pty Ltd* (1953) 54 CLR 230 per Starke J; see also *Annual Wage Review 2013-14* [2014] FWCFB 3500 at [299] to [301]

2. The nature of the case before the FWC

2.1. Common ground

2.1.1. It appears to be common ground between both employer and employee groups that there is a need in the Retail Award for an additional degree of flexibility for part-time employees that is not otherwise permitted by its present terms.

2.1.2. Specifically, the intention of the Application is to "encourage employers … to offer additional hours of work to part-time employees willing to work them without having to engage casual employees for such a purpose."[5]

2.1.3. A similar intention is expressed in relation to the Alternative Proposal, namely that it is aimed at "… varying the part time provisions of the (Retail) Award to enable part time employees to work additional ordinary hours, without attracting overtime payments, where such hours are voluntarily worked."[6]

2.1.4. It also appears to be common ground that providing for flexible part-time employment beyond the presently existing provisions of the Retail Award will:[7]

(a) encourage employers to offer additional hours;[8]

(b) increase hours of employment amongst part-time employees, thereby promoting social inclusion through increased workforce participation;[9]

(c) have a positive impact on business and productivity;[10]

(d) have a positive impact on employees by allowing for the more efficient allocation of labour to part-time employees, rather than that labour being allocated to casual employees;[11] and

(e) support employment growth, and the performance of the economy as a whole.[12]

2.1.5. The NRA agrees with the abovementioned propositions, and notes that its own survey of its members as referred to a media release issued on 16 March 2021 supports the contention that more flexible part-time employment provisions in the Retail Award would result in beneficial employment outcomes. A copy of this media release is filed alongside these submissions as a supporting document.

2.1.6. It therefore appears to be uncontested that the outcome sought by both the Application and the Alternative Proposal, that being a more flexible form of part-time employment, is necessary to achieve the modern awards objective.

2.1.7. The expert report from the University of Wollongong filed by ABI and NSWBC (**the Expert Report**) confirms on an evidentiary level that the preference for casual labour by employers is closely linked to the flexibility that attends casual employment as compared to permanent employment, particularly part-time employment.[13]

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[5] SDA Submissions filed 2 March 2021 at [14]
[6] ABI/NSWBC Submissions filed 4 March 2021 at [32]
[7] ABI/NSWBC Submissions filed 4 March 2021 at [36] – [37]; ARA Submissions filed 4 March 2021 at [15] – [19]
[8] SDA Submissions filed 2 March 2021 at [17]; Expert Report, page 12
[9] SDA Submissions filed 2 March 2021 at [19]; ACTU Submissions filed 2 March 2021 at [33]; Expert Report, pages 12 - 13
[10] SDA Submissions filed 2 March 2021 at [20]; ACTU Submissions filed 2 March 2021 at [35], [40]
[11] SDA Submissions filed 2 March 2021 at [21]; ACTU Submissions filed 2 March 2021 at [38]
[12] SDA Submissions filed 2 March 2021 at [24]; ACTU Submissions filed 2 March 2021 at [46]
[13] Expert Report, pages 11 – 12, 13

2.2. Contended ground

2.2.1. Given the areas of a common ground traversed above, the dispute between the parties appears to be limited to the specifics of the mechanism by which the objective of more flexible part-time employment is achieved.

2.2.2. With respect to the Applicants, the NRA submits that the Application as filed does not achieve the intended outcome, and consequently does not satisfy the modern awards objective.

2.2.3. The NRA further submits that the Alternative Proposal does achieve the intended outcome, and consequently does satisfy the modern awards objective.

3. The arrangement of part-time work

3.1. Generally

3.1.1. The parties appear to agree that the existing provisions of the Retail Award are not apt to allow part-time employees to offered additional hours of work on terms which incentivise employers to do so.

3.1.2. As such, the objective of both the Application and the Alternative Proposal is to create a mechanism by which employers can offer additional hours to part-time employees without those hours being overtime.

3.1.3. This would, it is intended, remove the structural disincentive in the Retail Award which would typically see these additional hours allocated to casual employees instead.

3.1.4. As stated above, the NRA respectfully submits that the Application fails to achieve this objective, primarily as it fails to grapple with several key provisions of the Retail Award. However, the NRA is satisfied that the Alternative Proposal does address these issues.

Removing the disincentive

3.1.5. As stated above, the objective of both the Application and the Alternative Proposal is to remove the disincentive to part-time employees working additional hours, specifically the requirement to pay overtime on hours worked outside of the pattern of work agreed pursuant to clause 10.5 or 10.6.

3.1.6. The Application seeks to achieve this by allowing an employer and an employee to agree to the employee working hours greater than those agreed to under clause 10.5. Such additional hours are not subject to overtime rates provided the requirements at the proposed clause I.4 are met.

3.1.7. However, the proposed clause I.3 undermines this objective by requiring all additional hours so agreed to be paid for, even if they are not worked. Not only is this an inherently unfair impost on the employer, it also disincentivises the employer from entering into an additional hours agreement in the first place.

3.1.8. Put another way, the only value to the employer from an additional hours agreement under the Application is if the employer can guarantee that the additional hours will be available to be worked on an ongoing basis, in which case the same result can be achieved by the utilisation of clause 10.6 of the Retail Award.

3.1.9. In effect, the Application removes one disincentive and substitutes another in its place.

3.1.10. Conversely, the Alternative Proposal allows an employer the option of offering additional ordinary hours to an employee without being required to pay for those hours even they are not worked.

3.1.11. As the Alternative Proposal provides the employee with an absolute right of refusal, this is a fair and relevant means of balancing the rights of the employee with incentivising the provision of additional hours to part-time employees.

Interaction with overtime provisions

3.1.12. Under the terms of the Application, it is not clear that additional hours offered under such an arrangement would be free from overtime rates.

3.1.13. The Application takes a "default" position that overtime is payable unless the conditions of the proposed clause I.4 are satisfied. However, the proposed clause I.2 provides that an additional hours agreement entered into under the terms of the Application is subject to clause 15.

3.1.14. This necessarily included clause 15.9(h) and (g), which requires overtime to be paid where the employee's roster is changed in circumstances not constituting an emergency, and reverts back to normal the following week, overtime rates must be paid.

3.1.15. This results in an inherent tension which the terms of the Application do not deal with satisfactorily.

3.1.16. The Alternative Proposal, on the other hand, deals with this tension by specifically providing that clause 15.9(h) does not apply to additional hours agreed to under the Alternative Proposal.

3.1.17. Further, the Alternative Proposal specifically amends clause 21.2 to exclude overtime from applying to any additional hours agreed to under the terms of the Alternative Proposal. This therefore deals with the issue of overtime in a manner that is much more certain than proposed by the Application.

Protections for employees

3.1.18. Both the Application and the Alternative Proposal include a number of protections for employees, several of which are shared. These include:

(a) the requirement that an additional hours agreement cannot be a condition of employment and cannot be entered into concurrently with an offer of employment;

(b) the requirement that a copy of the agreement must be kept; and

(c) the right for an employee to request that their additional hours become part of their regular hours as agreed under clause 10.5, where the employee has regularly worked those additional hours for an extended period.

3.1.19. However, the Alternative Proposal includes a number of safeguards for employees which the Application does not, specifically:

(a) the Alternative Proposal provides the employee with an unqualified right to refuse to work additional hours when offered; and

(b) the Alternative Proposal allows the employee to terminate the additional hours agreement with effect from the next roster period; and

(c) the employee may vary their additional hours agreement at any time.

3.1.20. The NRA notes that the protections provided for employees under the Application, specifically the requirements under the proposed clause I.4, are not protections in the sense that they prohibit conduct by the employer. Rather, the absence of any one of those conditions is "absolved" by the payment of overtime.

3.1.21. Conversely, the protections afforded by the Alternative Proposal are absolute, with the right to refuse to work additional hours being a workplace right within the meaning of s.341(1) of the FW Act.

3.1.22. Significantly, the Alternative Proposal grants the employee an unfettered, unilateral right to vary or terminate the additional hours agreement, something which is disturbingly absent from the Application.

Arbitration of disputes

3.1.23. Both the Application and the Alternative Proposal provide for the arbitration of disputes arising under their terms, with the parties to such agreement providing consent to such arbitration.

3.1.24. The difference between the proposals in this respect is limited to whether such arbitral power extends to an assessment of whether an employer has reasonable business grounds to refuse an employee's regular additional hours becoming a permanent part of their agreed hours.

3.1.25. The NRA agrees with ABI and NSWBC that, in line with other elements of the minimum safety net, it is not appropriate for the FWC to substitute its own commercial judgement for that of a particular business operator. This can be seen in relation to disputes arising under s.65(5) and 76(4) of the FW Act.

3.1.26. The NRA submits that to allow for arbitration of whether the employer had reasonable business grounds to refuse such a request would elevate the provisions proposed by the Application above what is accepted as being a "fair and relevant *minimum* safety net", meaning that such a provision is not "necessary" to achieve the modern awards objective.

4. Conclusion

4.1. Recommended outcome

4.1.1. In light of the above, the NRA submits that although the Application seeks an outcome that would satisfy the modern awards objective, it fails to deliver on that intention.

4.1.2. However, the NRA is of the view that the Alternative Proposal does, in fact, deliver on that intention, with appropriate safeguards for employees and clarity for employers.

4.1.3. With this in mind, the NRA submits that the appropriate course of action is for the FWC to:

(a) not grant the Application in the terms applied for; and

(b) instead vary the Retail Award in the terms provided for in the Alternative Proposal.

Yours sincerely,

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National Retail Association

Alexander Millman
Senior Workplace Relations Advisor
National Retail Association

MEDIA RELEASE

16 March 2021

Retailers urge Senate to pass Omnibus Bill

The National Retail Association (**NRA**) urges the Senate pass the Morrison Government's industrial relations reforms without delay.

In a member impact survey undertaken between 8 and 15 March 2021, NRA members overwhelmingly supported the need for change.

The need for certainty around casual employment featured heavily, with casual employment being a common feature in almost all of NRA's members operating under the Retail Award.

80% of those retailers said that the primary reason that they engaged casual employees, rather than permanent employees, was because of the need for flexibility around work hours.

More tellingly, 52.5% of retailers said that if award conditions were more flexible, they would definitely employ more staff on a part-time basis rather than a casual basis, while 35% said that they would at least consider it. Only 12.5% said that they would stick to casual employment even if award conditions changed.

In this environment, the prospect of further delay to much-needed reforms due to the Senate cross-bench is causing consternation for employers.

"Our members are calling out for change," said NRA Deputy CEO Lindsay Carroll.

"Although the retail sector is often criticized for the scale of casual employment, we see from our members a clear desire for a workable departure from this paradigm."

An application by the retail union, the Shop, Distributive, and Allied Employee's Association (SDA) to introduce separate flexible part-time provisions directly into the Retail Award is due to be heard by the Fair Work Commission tomorrow.

"This is a rare circumstance where both employer groups and unions agree that change is needed," said Ms Carroll. "Both unions and employer groups have called for the passage of various flexibilities in the legislation."

"This should send a clear message to the cross-bench that undue delay is not in the interests of any side of the industrial divide."

The National Retail Association is Australia's most representative retail industry association, with more than 24,000 shop fronts nationwide. It has been serving businesses in the retail and fast food sectors for close to 100 years.

Please contact the NRA's media unit on 0467 792 013 or 07 3221 9222.