

10 April 2015

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

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

Dear Justice Ross

SDA Submission of 2 March 2015

We act for the Australian Retailers' Association (ARA), National Retail Association (NRA), Australian National Retailers' Association (ANRA) and Master Grocers' Association (MGA), and write in relation to the submission filed by the Shop, Distributive and Allied Employees' Association (SDA) on 2 March 2015. In that submission, the SDA advised of the variations it seeks the *General Retail Industry Award 2010 (GRIA)* including, at paragraph 16, payment of an overtime penalty rate for casual employees and, at paragraphs 17 and 18, a variation to penalty rates for work performed in the evenings and on Saturdays by casual employees.

The SDA is pursuing these matters purportedly as part of the Award Stage of the 2014 Review. It is clear, however, that the changes being sought are changes to applicable penalty rates under the GRIA.

The SDA seeks, in our view disingenuously, to characterise these variations as something other than penalty rate claims. In relation to their proposed variations to casual penalty rates they attempt to characterise these as changes to the casual loading. This is patently incorrect. Clause 13.2 of the GRIA comprehensively deals with the casual loading under the GRIA, providing:

13.2 A casual employee will be paid both the hourly rate payable to a full-time employee and an additional 25% of the ordinary hourly rate for a full-time employee.

In relation to penalty rates for evening work Monday to Friday, clause 29.4(a) of the GRIA provides:

(a) Evening work Monday to Friday

A penalty payment of an additional 25% will apply for ordinary hours worked after 6.00 pm. This does not apply to casuals.

In relation to Saturday work, clause 29.4(b) provides:

(b) Saturday work

A penalty payment of an additional 25% will apply for ordinary hours worked on a Saturday for full-time and part-time employees. A casual employee must be paid an additional 10% for work performed on a Saturday between 7.00 am and 6.00 pm.

The SDA cannot legitimately suggest, as it has in its submission, that “currently, their casual loading during evening work Monday to Friday and on a Sunday is fully absorbed by the 25% penalty rate. On a Saturday, their casual loading is reduced by 15%.”

It cannot be any clearer that what the SDA is seeking is a variation to the evening and Saturday penalty rates under the GRIA. It is unclear exactly what the SDA is suggesting in relation to Sundays.

Further, a change the way overtime penalty rates apply to casual employees is also clearly a penalty rates matter.

The SDA has known since as early as 30 October 2014, when the Fair Work Commission (FWC) issued a Statement¹, that the issue of changes to penalty rates was to be dealt with as a common issue, or would at least be dealt with during a process separate to the Award Stage. Since that time, the following events have occurred:

1. on 18 November 2014 a conference was held at which the penalties common issue was discussed;
2. on 28 November 2015 a further Statement was issued by the FWC.² In that Statement the FWC identified that it had been indicated by parties that variations to penalty rates in the GRIA would be pursued;
3. on 12 December 2014 a conference took place at which parties with an interest in the GRIA articulated their intention to pursue penalty rate changes, and a proposed process for dealing with these claims was discussed; and
4. on 17 December 2014 a further Statement was issued by the FWC in which it was clearly articulated that a specially constituted Full Bench of the FWC would deal with proposals to alter penalty rates in the GRIA.³

Throughout the process outlined above, and during subsequent proceedings that have dealt with the Penalty Rates matter, the SDA has given no indication that it was pursuing changes to penalty rates under the GRIA.

The ARA submits that the submissions of the SDA referred to above are to be properly classified as a penalty claim and as such should have been revealed during proceedings dealing with penalty rates, and must be dealt with as part of the penalty rate proceedings. If the SDA intends to continue to pursue these matters they must be required to comply with the Directions set by the FWC on 3 March 2015 for the conduct of the Penalty Rates

¹ [2014] FWC 7742

² [2014] FWC 8575

³ [2014] FWC 9175

matter (**Directions**). It is noted the first requirement in the Directions is that employer parties are required to file a list of experts to be called (including qualifications and the nature and substance of their evidence) and an outline of submissions and the findings they submit the FWC should make based on the expert evidence to be filed at or before 4.00pm on Monday, 20 April 2015.

It is reasonable to assume the SDA will be relying on expert and other evidence in support of the significant variations to the penalty rate provisions of the GRIA they are asking the FWC to make. We therefore respectfully request that the FWC amend the Directions as follows:


1. On or before 4.00 pm on Monday, 20 April 2015 each party seeking a variation is to file in the Commission the list of expert witnesses to be called (including their qualifications and the nature and substance of their evidence) and an outline of submissions and the findings they submit the Commission should make based on the expert evidence to be filed.
2. On or before 4.00 pm on Monday, 15 June 2015 each party opposing a variation is to file in the Commission the list of expert witnesses to be called (including their qualifications and the nature and substance of their evidence) and an outline of submissions and the findings they submit the Commission should make based on the expert evidence to be filed.
4. On or before 4.00 pm on Monday, 29 June 2015 each party seeking a variation is to file expert evidence and common material relevant to the variation they seek.
8. On or before 4.00 pm on Monday, 10 August 2015 each party seeking a variation is to file retail evidence and an outline of submissions and the findings they submit the Commission should make based on the retail evidence to be filed.
9. On or before 4.00 pm on Monday, 24 August 2015 each party opposing a variation is to file expert evidence and common material relevant to the variation they oppose.
10. On or before 4.00 pm on Tuesday, 1 September 2015 each party seeking a variation is to file reply evidence from their experts.
12. On or before 4.00 pm on Monday, 5 October 2015 each party opposing a variation is to file retail evidence and an outline of submissions and the findings they submit the Commission should make based on the retail evidence to be filed.

We have communicated our concerns to the SDA and have provided them with a copy of the proposed amended Directions as set out above, asking that they give their consent to comply with those Directions. Unfortunately the SDA has refused to provide such consent, and surprisingly insists that the variations that it has sought, which we have outlined above, do not fall within the scope of the Penalty Rates matter.

To allow the SDA to run its penalty claims in a separate set of Hearings, likely in front of a separate Commission member, to the penalties Hearings already scheduled for the GRIA would be highly inefficient and potentially prejudicial to the interests of retail employers.

We therefore respectfully request that the Commission vary the Directions in accordance with the proposal we have outlined above.

Please do not hesitate to contact me should you require any further information.
Kind regards,

A handwritten signature in black ink, appearing to read 'Nick Tindley', with a stylized, cursive script.

Nick Tindley
Executive Manager HR Consulting and Advisory Services