IN THE FAIR WORK COMMISSION

Fair Work Act 2009

Section 156 – Four-Yearly Review of Modern Awards

AM2015/2 – FAIMILY FRIENDLY WORK ARRANGEMENTS

SUBMISSIONS OF THE NATIONAL RETAIL ASSOCIATION

DATE:	30 October 2017
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PREAMBLE

[1] The National Retail Association (**NRA**) is a transitionally recognised association under the *Fair Work (Registered Organisations) Act 2009* (Cth).

[2] The NRA has over 700 members across Australia in the retail, fast food, hairdressing and beauty, and hardware industries, representing 19,000 shop fronts and their attendant employees.

[3] The members of NRA are covered by a variety of modern awards, pre-reform transitional instruments, and post-reform enterprise agreements.

[4] The claim made by the Australian Council of Trade Unions (**ACTU**) in this matter seeks to vary modern awards which cover a significant number of the NRA's members, in particular:

[a] *Clerks – Private Sector Award 2010*

[b] *Fast Food Industry Award 2010*

[c] *General Retail Industry Award 2010*

[d] *Hospitality Industry (General) Award 2010*

[e] *Manufacturing and Associated Industries Award 2010*

[f] *Restaurant Industry Award 2010*

[g] *Storage Services and Wholesale Award 2010*

CASE BACKGROUND

[5] This matter comes before the Commission pursuant to s 156 of the *Fair Work Act 2009* (Cth) (**the Act**) following submissions by the ACTU to agitate a variation to all modern awards.

[6] The NRA notes that this matter has, until the latter half of 2017, been substantially dealt with concurrently with AM2015/1 – Family and Domestic Violence Leave.

[7] Following the decision of the Full Bench in AM2015/1 – Family and Domestic Violence Leave on 3 July 2017, the two matters have diverged and are now the subject of separate consideration by the Commission.

[8] The NRA also notes that substantial evidence, both expert and lay, has been led by the ACTU, filed with the Commission on 10 May 2017 and 6 September 2017.

[9] The NRA has had regard for the most recent draft determination submitted by the ACTU on 18 May 2017 for the consideration of the Commission in this matter, and makes these submissions in response to that draft determination.

THE POSITION OF THE NATIONAL RETAIL ASSOCIATION

[10] The NRA accepts, in principle, that further guidance for employers and employees in the administration of various rights and entitlements around parenting and carers' responsibilities would be beneficial for both employers and employees.

[11] However, these rights and entitlements arise out of various State, Territory and Federal legislation, and apply to all employees rather than just those covered by modern awards.

[12] As such, the NRA is of the view that the modern awards are not the appropriate avenue for such guidance to be provided; rather, this matter may need to be addressed by collective bipartisan legislative or regulatory activity across the above-mentioned jurisdictions.

[13] Additionally, the NRA has concerns with the draft determination as filed and cannot support the application by the ACTU. The NRA's concerns with the draft determination are ventilated in these submissions.

[14] In particular, the NRA is of the view that the draft determination as filed does not meet the modern awards objective in that it:

[a] fails to balance between the rights and obligations of employer and employees, and as such is not fair; and

[b] provides an avenue for potentially reduced workforce participation; and

[c] may have a significant adverse impact on the productivity, employment costs and regulatory burden of employers; and

[d] given the proposal to include the term in all modern awards, is sufficiently uncertain in its terms to render the modern award system as a whole less simple and harder to understand.

NATURE OF THE MODERN AWARDS OBJECTIVE AND QUALIFICATION ON THE COMMISSION'S POWERS

[15] Section 134 of the Act defines the modern award objective as follows:

(1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

(a) relative living standards and the needs of the low paid; and

(b) the need to encourage collective bargaining; and

(c) the need to promote social inclusion through increased workforce participation; and

(d) the need to promote flexible modern work practices and the efficient and productive performance of work; and

(da) the need to provide additional remuneration for:

(i) employees working overtime; or

(ii) employees working unsocial, irregular or unpredictable hours; or

(iii) employees working on weekends or public holidays; or

(iv) employees working shifts; and

(e) the principle of equal remuneration for work of equal or comparable value; and

(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and

(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

This is the ***modern awards objective***.

[16] The duty to be discharged by the Commission in this regard is to ensure that the minimum safety net provided by the modern awards under review is fair and relevant.

[17] In discharging this duty, the Commission is to have regard for the matters listed at s 134(1)(a) – (h), however the Commission may consider other pertinent matters when determining what is a fair and relevant minimum safety net[1].

[18] Section 138 provides a significant qualification on the Commission's powers in varying a modern award in that a modern award may include terms, including compulsory terms, only to the extent necessary to achieve the modern awards objective.

[19] Tracey J commented, in *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)*[2]:

> "*In reaching my conclusion on this ground I have not overlooked the SDA's subsidiary contention that a distinction must be drawn between that which is necessary and that which is desirable. That which is necessary must be done. That which is desirable does not carry the same imperative for action. Whilst this distinction may be accepted it must also be acknowledged that reasonable minds may differ as to whether particular action is necessary or merely desirable.*"[3]

[20] The Full Bench of the Fair Work Commission subsequently adopted these comments, noting:

> "*… the observations of Tracey J in SDAEA v NRA (No.2), as to the distinction between that which is "necessary" and that which is merely desirable, albeit in a different context, are apposite to any consideration of s.138.*"[4]

[21] The Commission has subsequently expanded on this distinction, holding that the mere fact that a proposed variation may be more appropriate than an existing provision is insufficient to warrant the exercise of the Commission's powers to vary a modern award[5].

[22] Recently, the Full Court of the Federal Court of Australia clarified the qualification that s 138 placed on the powers of the Commission, holding that in exercising its powers under s 156:

> "*… it is not necessary for the Commission to conclude that the award, or a term of it as it currently stands, does not meet the modern awards objective.*"[6]

[23] This qualification on the Commission's power to vary a modern award are of particular relevance when the proposed variation involves the insertion of a new provision into the award. In this context the Full Bench recently reiterated the threshold test of necessity, holding:

> "*The question the Commission must consider is whether inserting such a provision is necessary to provide a fair and relevant minimum safety net for each of the awards*."[7]

[24] It naturally follows that if the answer to this inquiry is in the negative, then the Commission may not vary the modern award or awards in question.

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[1] *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [48]; see also *National Retail Association v Fair Work Commission* [2014] FCAFC 118 at [109]
[2] [2012] FCA 480
[3] Ibid at [46]
[4] *Modern Awards Review 2012* [2012] FWAFB 5600 at [33]
[5] *Australian Federation of Employers and Industries re Amusement, Events and Recreation Award 2010* [2011] FWA 1330 at [43] – [44]
[6] *Construction, Forestry, Mining and Energy Union v Anglo American Metallurgical Coal Pty Ltd* [2017] FCAFC 123 at [29]
[7] *4-yearly review of modern awards – Family and Domestic Violence Leave Clause* [2017] FWCFB 1133 at [139]

CONSIDERATION OF THE MATTERS IN s 134(1)(a) – (h)

Relative living standards and the needs of the low paid

[25] Historically, the Commission has considered the assessment of the 'needs of the low paid' as requiring:

> *"… an examination of the extent to which low-paid workers are able to purchase the essentials for a "decent standard of living" and to engage in community life, assessed in the context of contemporary norms."*[8]

[26] Typically, the needs of the low paid are assessed by considering whether the income provided to award-reliant employees under the safety net of the modern award system is capable of allowing those employees to purchase the necessities for a decent standard of living. Where this is found to be lacking, the Commission's response is generally to either:

[a] increase the minimum wage payable under the modern awards[9]; or

[b] increase the ability of award-reliant employees to access paid leave to support themselves during periods of absence from work, where that absence is not at the employee's election (for example, where work is seasonal)[10].

[27] The ACTU submits that its proposed variation is aimed at providing additional job security to carers and parents[11], which in turn would lead to improved economic outcomes for parents and carers.

[28] The ACTU also submits that without the proposed variation, parents and carers lack job security because s 65 of the Act – referring to requests for flexible working arrangements – is unenforceable[12].

[29] The NRA respectfully disagrees with the assertion that s 65 of the Act is unenforceable. Section 65 falls within Part 2-2 of the Act, which comprises the National Employment Standards.

[30] Further, the NRA disagrees with the assertion that an additional avenue of enforcement addresses the needs of the low paid.

[31] As mentioned at [25] above, the 'needs of the low paid' are viewed through the lens of the ability of low-paid workers to purchase the essentials of a decent standard of living.

[32] Avenues of enforcement, in the context of low-paid workers, operate as a deterrent against the actions of employers that are contrary to legal obligations. Low-paid workers are unlikely to have the resources to pursue a formal, litigious avenue of enforcement, but nevertheless may access other forms of redress.

[33] All modern awards contain a default dispute resolution clause which allows an employee to bring a dispute in relation to the National Employment Standards before a Member of the Fair Work Commission if attempts to resolve the dispute in the workplace have failed[13].

[34] Whilst the Commission cannot arbitrate disputes brought before it under s 738 of the Act save by consent, it may mediate, conciliate or issue an opinion or recommendation under s 595.

[35] It must also be considered that adverse action taken against an employee – such as decisions by an employer adversely affecting their job security because of their parental or carers'

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[8] *Annual Wage Review 2012-13* [2013] FWCFB 4000 at [361]
[9] *Annual Wage Review 2015-16* [2016] FWCFB 3500 at [56]
[10] *Four yearly review of modern awards – Annual Leave* [2016] FWCFB 3177
[11] Submissions of the ACTU filed 9 May 2017 at [220]
[12] Ibid at [218]
[13] For example, clause 9 of the *General Retail Industry Award 2010*

responsibilities – may be subject to enforcement action under s 351 of the Act or under State anti-discrimination laws.

[36] Additionally, if an employee cannot perform their job because of an unreasonable failure by an employer to allow for flexible working arrangements, the employee may be able to claim an unfair dismissal by way of express or constructive dismissal[14], in which case the Commission may make an order for reinstatement on the flexible terms requested.

[37] As such, the NRA submits that the legislative regime in both the State and Federal jurisdictions provide sufficient avenues of redress, which in turn act as necessary deterrents to adequately ensure the job security of award-reliant employees and in particular carers and parents.

[38] Further, the NRA notes that the evidence of Dr Jill Murray indicates that where requests for flexible working arrangements were made under s 65, the overwhelming majority of such requests were granted, with only between 2% - 11% being refused outright[15].

[39] This low level of refusal, in NRA's submission, indicates that employers are in fact cognisant of their obligations under s 65 and its place in the National Employment Standards.

[40] The NRA therefore questions the necessity of any additional avenue of enforcement to protect award-reliant workers where the need for such an avenue would appear, on the face of the ACTU's expert evidence, to be limited.

[41] In the absence of any aspect of the proposed variation providing for additional leave with pay, the NRA fails to see how the provision assists low-paid workers to meet their needs in providing for a decent standard of living.

The need to encourage collective bargaining

[42] The consideration under s 134(1)(b) is one which must be viewed as a positive proposition rather than a non-negative proposition.

[43] It is therefore insufficient for the Commission to be satisfied that a proposed variation does not discourage collective bargaining, or alters the content of what may be bargained for[16]; the Commission must be satisfied that, if the proposed variation were made, the award system as a whole would encourage collective bargaining.

[44] The NRA accepts the ACTU's submission that such a clause would "encourage collective bargaining over family friendly working hours and family friendly work arrangements more generally"[17], however submits that this is not the relevant test.

[45] The ACTU's submission is to the effect that were the proposed variation to be included in the modern awards, any collective bargaining would, by necessity, be required to address this issue.

[46] The ACTU's submission does not, however, indicate that the inclusion of the proposed variation would encourage employers and employees to enter into the process of collective bargaining; rather, it would simply alter the content of what is bargained for[18].

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[14] See, for example, *Hanina Rind v AIST* [2013] FWC 3144 and *Reale v Helloworld Ltd t/a Qantas Holidays and Viva Holidays Ltd* [2015] FWC 7122

[15] Statement of Dr Jill Murray dated 6 May 2017, Annexure JM-3 at paragraphs [46] – [47]

[16] See, for example, *4-Yearly Review of Modern Awards – Timber Industry Award 2010* [2015] FWCFB 2856 at [122]

[17] Submissions of the ACTU dated 9 May 2017 at [223]

[18] Supra, note 16

[47] Since a proposed variation does not 'encourage' collective bargaining if it merely alters the content of bargaining discussions, the proposed variation does not satisfy this element of the modern awards objective.

Promoting social inclusion through increased workforce participation

[48] The notion of promoting social inclusion through increased workforce participation has historically been interpreted to mean increased employment[19].

[49] Conceptually, this has been taken to mean affecting the incentives for people to seek and retain employment, and influencing the desire of businesses to employ them[20].

[50] The NRA has grave concerns that the variation proposed by the ACTU not only fails to provide incentives for businesses to employ persons with parental and caring responsibilities; it may in fact provide a disincentive for businesses to employ persons who have or may in the future have parental or caring responsibilities.

[51] This criticism arises out of the complete absence for the employer to refuse a request made under the proposed provision, and the ability for the employee to veto any variations proposed by the employer.

[52] Under clause X.3.1, an employee may make a request for a specific pattern of working hours. If an employer wishes to make a variation to the request, the employee must agree to it before it can be implemented per clause X.3.2.

[53] If the employee does not agree to the variation, then clause X.3.2 requires the employer to implement the arrangement as requested by the employee, no matter how detrimental to the business – the proposed provision contains no ability for the employer to refuse on reasonable business grounds.

[54] As such, the employer must implement the arrangement requested by the employee, regardless of how impractical, expensive, or operationally burdensome it may be.

[55] The only exception to this is where the employee's intended date of returning to their former working hours falls outside the periods specified in clauses X.2.1 or X.2.2.

[56] Where an employee has parental responsibilities for a child who is below school age, the interaction of these clauses requires an employer to grant a request on potentially ruinously detrimental terms for the business, unless the employee is agreeable to a variation, for a period of five to six years depending on the definition of 'school age' in the relevant jurisdiction.

[57] The interaction of clauses X.2 and X.3.2 is uncertain in this regard, in that:

[a] an employee has an absolute right to return to their former hours within a specified timeframe under clause X.2 'or at a later time by agreement'; however

[b] if the employee specifies in their request under clause X.3.1 a date outside this period the employee must agree to any earlier date as a variation of the arrangement before this earlier date can become an operative part of the arrangement; otherwise

[c] per clause X.3.2 the employer must grant the request, notwithstanding that the proposed date of return to former working hours is outside the period specified in clause X.2.

[19] *Annual Wage Review 2015-2016* [2016] FWCFB 3500 at [465]
[20] Ibid at [468]

[58] As such, clause X.2 provides little protection for employers as clause X.3.2 effectively provides that the employee has the right to return to their former working hours at a date of their choosing.

[59] Since an employee can request an arrangement under this provision if they have responsibility for a school-aged child or younger, it is theoretically possible under the proposed provision for an employee to request family friendly working arrangements for a period of up to 17 or 18 years, depending on the definition of 'school age' in the relevant State of Territory.

[60] Whilst the NRA can accept the notion that not all employees will be willing to hold their employer hostage under the proposed provision, the risk of an employee using these provisions to adversely affect the operations of a business may result in businesses being unwilling to take the risk.

[61] The consequence of this may well be that parents, and persons who are in a demographic who are likely to become parents, may find that they are unemployable due to the regulatory risk that they pose.

[62] Further, by extending an unabrogated right to employees to vary their working patterns for extended periods of time, the proposed provision may have the effect of creating an underclass of workers who are employed solely on a temporary basis to 'make up' for any shortfalls in labour by virtue of such arrangements.

[63] These workers would suffer from the very lack of secure connection to their workplace that the proposed provision purports to avoid, especially if they are engaged to cover flexible working arrangements spanning extended periods.

[64] The clause as it stands potentially allows an employee to dictate a flexible working arrangement for more than a decade – in the course of which their replacement will only be 'temporary', with no security in their position, despite their potentially extensive period of service.

[65] As such NRA submits that the proposed provision fails to satisfy this element of the modern awards objective as it creates a disincentive for employers to employ workers, and potentially creates an underclass 'permanent temporary' workers.

The need to promote flexible work practices and the efficient and productive performance of work

[66] The NRA accepts that the intention behind the ACTU's claim is to promote flexible work practices with a particular view towards those with parenting and caring responsibilities.

[67] However, this element of the modern awards objective is a composite expression, requiring the satisfaction of both elements. The promotion of flexible working practices in and of itself is not enough.

[68] The Full Bench recently considered that an unabrogated right for an employee to vary their working patterns could adversely affect efficiency and productivity[21].

[69] The right to flexible working arrangements within the proposed provision is an unabrogated right which does not contemplate any consideration needing to be given to the operational needs of the business to allow for the efficient and productive performance of work.

[70] In this regard, the NRA submits that, in line with the Full Bench's conclusion in the *Family and Domestic Violence Case*:

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[21] *Four-Yearly Review of Modern Awards – Family and Domestic Violence Clause* [2017] FWCFB 1133 at [125]

> *"Consideration and flexibility is likely to enhance efficiency and productivity rather than an unsympathetic approach."*[22]

[71] As mentioned above, the expert evidence relied on by the ACTU indicates that where employees make requests under existing provisions, consideration and flexibility result in the majority of requests being approved.[23]

[72] The proposed provision allows for no consideration of efficiency or productivity, and indeed imposes no requirement on the employee to consider the operational needs of the employer.

[73] As such the proposed variation, while allowing flexibility for the employee, does not allow the employer any flexibility in granting the request or indeed discussing the request, and requires the employer to implement the request no matter the ramifications for efficiency and productivity across the employer's business.

[74] In this regard the proposed provision fails to satisfy this element of the modern awards objective.

The need for additional remuneration in prescribed circumstances

[75] The NRA agrees with the submission of the ACTU that this is a neutral consideration in this matter[24].

The principal of equal remuneration for work of equal or comparable value

[76] The principal of equal remuneration for work of equal or comparable value is defined in s 302(2) of the Act as follows:

> ***Equal remuneration for work of equal or comparable value*** *means equal remuneration for men and women workers for work of equal or comparable value.*

[77] The NRA accepts the submission by the ACTU that women are more likely than men to be expected to take time off work, or to transition to part-time hours, because of parenting or caring responsibilities.

[78] However, this has nothing to do with remuneration. The principal of equal remuneration is to ensure that men and women, when they perform work, are paid the same for the same or similar work.

[79] The proposed variation may in its operation alter access to work in a manner more likely to be beneficial to women than to men, however it does not in any way alter the remuneration paid for that work.

[80] The Full Bench was recently prepared to consider (subject to evidence) that this may extend to paid leave[25], however as the current proposal relates to neither pay nor leave, the NRA contends that this principal does not have relevance to the application.

Productivity, employment costs and regulatory burden

[81] The NRA's concerns with respect to the regulatory burden that the proposed provision will impose upon businesses are substantially the same as those ventilated at paragraphs [48] to [61] above.

[82] If approved, the proposed provision will remove from employers a significant degree of discretion in the manner in which they conduct their business, placing that discretion instead in

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[22] Ibid
[23] Supra, note 15
[24] Submissions of the ACTU dated 9 May 2017 at [230]
[25] Supra, note 21 at [127]

the hands of employees who are unlikely to have oversight of the full operational requirements of the business.

[83] A key criticism of the proposed provision in this regard may be echoed from the Full Bench's consideration of the same element of the modern awards objective in the *Family and Domestic Violence Leave Case*[26], in that the provision as it stands does not require that the changes sought by the employee are necessary for their parenting or caring responsibilities.

[84] The proposed variation in its current form is perhaps more egregious than that proposed in the *Family and Domestic Violence Case* – in that case, the employee was required to show that the absence was for a particular purpose, but not that it was necessary to achieve that purpose.

[85] The employee is also only required to give 'reasonable notice', but given the span of time which may be covered by a flexible working arrangement under the proposed provision what is reasonable may vary significantly, and the parties are unlikely to agree on what is 'reasonable notice'.

[86] Under the proposed variation in this present matter there is no requirement for the employee to show that the working arrangements requested are to assist them in meeting their parenting or caring responsibilities, let alone that the requested arrangements are necessary for this purpose.

[87] The parenting or caring responsibilities of an employee under the proposed provision are relevant only for determining whether the employee may access the entitlement.

[88] There is no requirement whatsoever in the terms of the proposed provision for the working arrangements requested by the employee to be necessary, convenient or even remotely connected to the employee's parenting or caring responsibilities.

[89] Whilst the employee can be required, under clause X.6.1, to show evidence of their parenting or caring responsibilities, this extends only so far as showing that the employee 'has' those responsibilities. The provision imposes no requirement that the employee provide evidence of the extent or nature of those responsibilities.

[90] Whilst it is open to an employer, under the terms of the provision, to suggest a variation to the request which more closely meets an employee's actual needs, the employee is empowered under clause X.3.2 to veto any such variation.

[91] As such NRA submits that the regulatory burden which would be imposed on employers by the provision is a significant factor against granting the ACTU's application.

Performance of the national economy

[92] The NRA does not consider that the overall reach of the proposed provision, if permitted, is sufficient to generate a significant positive difference to the performance of the national economy to outweigh the other elements of the modern awards objective.

[93] The expert evidence submitted by the ACTU indicates that of persons with parental or caring responsibilities in the workforce, less than one-third are employed under a modern award[27].

[94] The NRA also considers that the disincentives to employment that the proposed provision may create could have a detrimental effect on the economy.

[95] Given the scope of the application, being across all 122 modern awards, the NRA considers that there is too great a degree of uncertainty for the Commission to be satisfied that the proposed provision would be beneficial to the national economy.

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[26] Supra, note 21 at [129]

[27] Statement of Dr Ian Watson dated 4 May 2017, Annexure IW-3 at paragraph [157]

[96] The NRA also notes that whilst flexible working arrangements may be associated with benefits to the economy, much of this benefit may be attributable to the flexibility afforded to both the employer and the employee in making these arrangements.

[97] The proposed provision as it stands provides for no flexibility to the employer whatsoever, and instead grants employees the power to impose draconian conditions on their employer if they so desire.

[98] The NRA therefore does not believe that the ACTU's assertions as to the economic benefit of flexible working arrangements takes into account the regulatory burdens and disincentives to employment that the proposed provision may impose.

A simple, easy to understand, and sustainable modern award system

[99] The NRA concedes that a common provision across all modern awards provides for uniformity.

[100] However, the NRA submits that the provision as proposed is not easy to understand in that:

- [a] various terms, such as 'school age child', are not defined and would vary across jurisdictions, thereby increasing the risk of confusion and creating a non-uniform right; and
- [b] the lack of any requirement that the working arrangements be relevant to and necessary for the employee's parenting or caring responsibilities is nonsensical; and
- [c] the lack of any requirement or ability for the needs of the business to be taken into account, across all award-covered industries, is unsustainable.

Conclusion

[101] In summary of the above matters raised:

- [a] the variation is not necessary, as:
  - [i] s 65 of the Act is enforceable to an extent through the dispute resolution processes of the Fair Work Commission by way of the default dispute resolution clause contained in all modern awards; and
  - [ii] various State and Federal anti-discrimination legislation protects employees from adverse treatment on the grounds of parenting or caring responsibilities, thereby providing the detriment which the ACTU claims is lacking; and
  - [iii] by the ACTU's own expert evidence, the overwhelming majority of requests for flexible working arrangements made under s 65 are granted; and
- [b] the proposed variation does not assist low-paid workers in meeting the cost of a decent standard of living; and
- [c] the proposed variation does not operate to encourage collective bargaining, merely to alter the content thereof; and
- [d] the proposed provision, in removing utterly any discretion from the employer, operates as a disincentive for businesses to employ persons who have, or may in the future have, parenting or caring responsibilities; and
- [e] the proposed variation makes no provision for flexibility vis a vis the employer, and allows no regard for efficiency or productivity; and
- [f] the proposed provision allows for a great regulatory burden to be placed on the employer without any need for that burden to be necessary; and

[g] the effect that the proposed provision would have on the national economy is uncertain; and

[h] the proposed provision undermines the objective of a simple, easy to understand and sustainable modern award system.

[102] As such the NRA submits that for the reasons set out above, the Commission should **not** grant the variation sought by the ACTU.

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