Australian Retailers Association

MODERN AWARDS REVIEW 2014

AM2014/190

SUBMISSIONS ON COMMON ISSUE – TRANSITIONAL PROVISIONS (DISTRICT ALLOWANCES)

1. The Australian Retailers Association (**ARA**) is the peak industry body for Australia's retail sector, and is an incorporated employer body under the *Fair Work (Registered Organisations) Act 2009*. The ARA represents the interests of over 5,000 independent and national retailers throughout Australia.

2. These submissions address the application (**SDA Application**) by the Shop, Distributive and Allied Employees Association (**SDA**) for the insertion of a new clause 20.13 in the *General Retail Industry Award 2010* (**GRIA**).

3. The ARA relies on its submissions filed on 24 April 2015 in relation to the SDA Application. These submissions are intended to deal with the significant failings of the SDA's latest version of their application.

Changing nature of the SDA Application

4. When initially filed, the SDA application, was seeking allowances at 4% and 8% of the Standard Rate per week, based on the geodesic distance from a capital city. Based on current rates, this represented a weekly allowance of approximately $30.60 and $61.19 respectively. It is inarguable that these are significant amounts.

5. What the SDA now seeks is uncertain. They have proposed that there be either an as yet unspecified allowance based on geodesic distance or an as yet unspecified allowance that will apply to listed locations. The SDA essentially seeks a finding that district allowances are necessary, and to then deal with the issue of quantum. It is the ARA's submission that this is not permitted given the legislative regime and the scope of the Review.

SDA has failed to provide evidence and submissions addressing the legislative regime

6. In order to properly consider the SDA Application the FWC is required to take into account the matters contained within section 134 of the *Fair Work Act 2009* (Cth) (**FW Act**), collectively the Modern Awards Objective (**MAO**). In disposing of its obligations the FWC needs to conduct a balancing exercise, taking into account the matters which support the granting of the application and those which do not. The SDA has elected to approach the issue of location based allowances in a way that simply does not enable the FWC to undertake that task. It has also done so in a way that does not allow employer parties to properly consider the impact of the allowances on employers within the particular industry.

7. The SDA has failed to quantify its claim. As a result, the FWC, and other parties to the matter, cannot properly consider the proposed location allowances in the context of the MAO in order to reach a conclusion.

8. As a starting point the FWC cannot determine whether the proposed variation ensures a fair and relevant minimum safety net because it does not know what change the variation will make to the minimum safety net. It is unreasonable for the SDA to expect the FWC to approach their application on the basis that it first needs to determine whether any location based allowance is necessary, and then to adopt some other, as yet unspecified approach, to determine the quantum of that allowance.

9. The FW Act requires the FWC to, among other things, perform and exercise its powers in a manner that is fair and just[1] and is quick, informal and avoids unnecessary technicalities[2]. The proposed approach of the SDA is fundamentally inconsistent with this requirement. The SDA appears to be asking the FWC to decide twice on the same issue – first whether a location allowance is a necessary element of a fair and relevant minimum safety net, and then whether any proposed quantum of a location allowance is a necessary element of a fair and relevant minimum safety net. The FWC should not contemplate adopting this approach in light of the requirements placed on the FWC by s577 of the FW Act.

10. Further, considering the matters the FWC is required to take into account in determining whether a fair and relevant minimum safety net exists:

    a. the FWC cannot consider the impact of the variation on the needs of the low paid (s134(1)(a)) because it does not know the amount by which the SDA proposes to increase the pay of those who are purported to be low paid;

    b. the FWC cannot consider the need to promote social inclusion through increased workforce participation (s134(1)(c)) because, without knowing the quantum of the SDA's proposed variation it cannot assess the impact of the variation on workforce participation;

    c. the FWC cannot consider the impact of the proposed variation on business (s134(1)(f)) because it is impossible to quantify the cost to business of the proposed variation;

    d. the FWC cannot consider the impact on inflation and employment growth (s134(1)(h)) because it is impossible to quantify the cost to business, and therefore its response to the cost, of the proposed variations.

11. The only matters on which the FWC can reach any conclusion, based on the SDA Application are:

    a. s134(1)(b) does not support the granting of the application. The only evidence relied on by the SDA indicates that location allowances are a matter that can and are being addressed in collective bargaining (see witness statement of Hughes-Gage); and

    b. s134(1)(g) counts strongly against the application being granted, at least as it relates to the proposal that the allowance be based on geodesic distance. A modern award which requires employees and employers to calculate their geodesic distance from a capital city in order to identify their obligations and entitlements cannot be said to be one which is simple and easy to understand.

12. Further, while the SDA's failure to quantify the proposed location allowance means it is not possible to measure the impact of the allowance, what is clear is that any significant elevation in the minimum safety net will have a negative impact on employment in the retail industry. As part of the Penalty Rates case the FWC issued research papers in relation to a number of industries, including the retail industry – *Industry Profile - Retail Trade* (link provided below). Part 7.1.3 of that paper extracted information from the Fair Work Commission, *Australian Workplace Relations Study 2014*, and found that in response to questions about changes in labour costs, the most common short term response to a substantial increase in labour costs for retail

[1] *Fair Work Act 2009 (Cth)* s577(a)
[2] ibid at s577(b)

employers would be to "implement strategies to manage or reduce wage bill", and the most common long-term response was "reduce workforce/hours".

13. Despite the fact the SDA has not quantified its claim, if it is intended that the location allowance be similar to that contained within the SDA's original application, as set out in paragraph 4 of these submissions, it cannot be contested that these allowances, if introduced, would amount to a substantial increase in labour costs. On the current Retail Employee Level 1 rate of pay, the allowances initially proposed by the SDA would amount to a 4.24% and an 8.48% increase in labour costs, depending on geodesic distance. Given the findings of the Australian Workplace Relations Study 2014 it follows that such a substantial increase in labour costs will result in retail businesses reducing workforce/hours, and implementing strategies to manage or reduce wage bills.

SDA evidentiary case does not support any change

14. The SDA has filed "evidence" from six witnesses. Four of these witnesses are retail employees – two from the North of Western Australia, one from the Northern Territory and one from Broken Hill. The employee from Broken Hill cannot, in the ARA's submission, be relevant to the SDA Application as there already exists a location allowance for employees in Broken Hill. This leaves three employee witnesses on which the SDA seeks to base its significant change to the GRIA. None of those employees work under the terms of the GRIA. Two work for Woolworths and one for Bunnings, both of which operate under enterprise agreements.

15. The remaining two witnesses called by the SDA in support of their application are union officials. One witness, Mr Gunsberger, appears to confine his evidence to purported higher costs of living in "Far North Queensland" and "Cape York", allegedly caused by higher grocery process and the cost of air conditioning (presumably confined to the "summer months" identified by Mr Gunsberger, and not the highly desirable 26 degrees daytime and 17 degrees night time temperatures identified in "winter months"). Mr Gunsberger makes assertions about the cost of living in Far North Queensland and Cape York being higher than in Brisbane. He also attempts to support this by providing photos of what he says are grocery prices at two stores.

16. There are a number of difficulties with Mr Gunsberger's assertions. The first is that he is not an expert, and cannot make reliable assertions about matters of opinion without having the requisite expert knowledge. The second is that he relies on grocery prices (and in example) a fuel price to support his assertion. He does not consider the vast number of other factors that impact on cost of living, including accommodation costs. The third is that he has made the assertion about Far North Queensland and Cape York, a vast geographical area, and then provided examples of grocery prices in a tiny part of that vast geographical area. Mr Gunsberger could have taken photographs of grocery prices at Innisfail, or Mareeba, or Port Douglas, given he travels *"extensively throughout Cape York and Far North Queensland liaising and consulting with members and employers",* and employees in all of these towns would receive the allowance if the SDA was successful . The fourth issue is that Mr Gunsberger purports to compare the cost of living in Far North Queensland with the cost of living in Brisbane, when the comparison should be between areas where the allowance would apply and areas where it would not.

17. The second union official to file a statement is Mr O'Keefe of the SDA. Mr O'Keefe's evidence is of little utility in this matter. The only paragraph of that statement that is directed at any matters in dispute is paragraph 14. Paragraph 14 is not evidence, it is a submission, and should be treated as such. The SDA is entitled to tender all of the annexures to Mr O'Keefe's statement, and is entitled to make submissions on what use it says the FWC should make of those documents. It is not entitled to do this through a witness who does not hold the requisite expert knowledge to comment on the conclusion or conclusions to be drawn from those documents.

18. Given the failure of the SDA to frame their application in such a way as to allow the FWC or the employer parties to consider the likely impact of the proposed location allowance on employers and employees, the FWC should dismiss the application. Even if this is not accepted, given the paucity of evidence presented by the SDA in support of its application it should be rejected.

AUSTRALIAN RETAILERS ASSOCIATION

13 May 2015