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31 May 2021

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*

The National Retail Association Limited, Union of Employers (**NRA**) makes the below submissions in relation to the provisional views of the Full Bench as expressed in [2021] FWCFB 2820 (**the Statement**) and the draft determination varying the *General Retail Industry Award* 2020 (**the Award**) issued alongside the Statement (**the Draft Determination**).

1. Response to provisional views of the Full Bench

1.1. The NRA agrees with the provisional views of the Full Bench as expressed at paragraphs [17], [27] and [39] of the Statement.

1.2. With respect to the provisional view of the Full Bench as expressed at paragraph [19] of the Statement, the NRA appreciates the reasoning by which the Full Bench has reached this conclusion, but notes that by denying retrospective agreement the proposed variation is of more limited utility.

1.3. In order for an ad hoc shift to be recorded in writing, both employer and employee will need to take time out of their working day in order to document the agreement. In circumstances where a part-time employee, having already commenced worked, is asked to work longer hours in a particular shift, such opportunity is likely to be lacking.

1.4. The example used in the proposed clause 10.6 fails to account for the fact that many retail employees do not have access to their phones whilst they are on duty. As such, many part-time employees would not have the opportunity to engage in an exchange of the kind contemplated in the example until after their shift has already ended.

1.5. It may therefore be the case that it is not reasonably practicable for agreement pursuant to the proposed clause 10.6(a) to be recorded in writing before the end of the affected shift.

1.6. The NRA submits that a more reasonable form of this clause would be:

> (a) In the agreement is to vary the employee's regular pattern of work for a single rostered shift – on the same day that the varied shift was worked; and ...

1.7. This would allow and employer and an employee to record the change after the shift has ended, but by requiring that it be recorded before the employee leaves work for the day, minimises the risk of this clause being used to retrospectively absolve the employer of overtime properly owing.

1.8. In relation to the provisional view expressed by the Full Bench at paragraph [49], the NRA agrees that it is appropriate for employers the definition of "guaranteed hours" in clause 10.5 to reflect the number of hours worked on each day of the week, rather than also including the specific times at which work is performed, in order to give utility to clause 10.10.

1.9. However, the NRA notes that by limiting "guaranteed hours" to hours worked on each day rather than more broadly across the week, the Draft Determination represents a missed opportunity to introduce more flexibility for part-time employees into the Award.

1.10. Finally, the NRA notes that the proposed clause 10.11 appears to reflect similar provisions in such modern awards as the *Restaurant Industry Award 2020* (clause 10.8) and the *Hospitality Industry (General) Award 2020* (clause 10.8).

1.11. In those modern awards, such a clause is appropriate as they only apply where the employee has worked *ordinary hours* in excess of their guaranteed hours, not in respect of overtime hours.

1.12. This is not the case in the current situation under consideration. The Draft Determination requires that hours worked in excess of the guaranteed hours are additional hours compensated by the payment of overtime rates and, moreover, subject to the provisions of s.62(2) and (3) of the Act and clause 21.1 of the Award.

1.13. In the 24 March decision, the Full Bench noted that both the Joint Application filed on 28 February 2021 and the alternative proposal put by ABI in its submission dated 4 March 2021 included provision for part-time employees who had regularly worked additional hours to reach a new ongoing arrangement with their employer.[1]

1.14. This observation appears to be the genesis of the proposed clause 10.11, however fails to account for the fact that in both the Joint Application[2] and the ABI proposal,[3] these clauses operated on the basis that the additional hours worked were ordinary hours, rather than overtime.

1.15. If clause 10.11 was adopted, this would make the Award unique in the modern award system as the only modern award in which an employee can effectively compel an employer to make regular overtime part of their ordinary hours of work.

1.16. The NRA submits that this would tend against a conclusion that the variation supports a "simple … and sustainable modern award system for Australia" as contemplated by s.134 of the Act.

2. Response to the Draft Determination

2.1. The NRA notes that clause 10.8 of the Draft Determination expresses a part-time employee's entitlement to overtime by reference to the employee's "guaranteed hours", utilising the term introduced by the revised clause 10.5.

2.2. The NRA submits that the Draft Determination ought properly vary other provisions of the Award which refer to this entitlement. Specifically, the NRA proposes that the Draft Determination be amended to vary clause 21.2(b) as follows:

[1] [2021] FWCFB 1608 at [150]
[2] Joint Application, Draft Determination, clause I.6 with reference to clauses I.2 and I.3
[3] Submissions of ABI dated 4 March 2021, Draft Determination, clause 10.13

3. By deleting clause 21.2(b) and inserting the following:

> *An employer must pay a part-time employee for hours worked in excess of their guaranteed hours in clause 10.5 or as varied under clause 10.6 at the overtime rate specified in column 2 of Table 10 – Overtime rates.*

2.3. This would ensure consistency of how the entitlement to overtime is expressed between clause 10 and clause 21 and minimise any confusion which may arise due to the different manner in which clause 21.2(b) is currently expressed.

2.4. Finally, the NRA notes that clause 10.3 remains ambiguous in the sense of what is required in order for a provision of the Award to be "otherwise expressly provided."

2.5. For example, if the award applies to a part-time employee as it does to a full-time employee, then all clauses which are expressed as applying to full-time employees – including those which would be nonsensical to apply to a part-time employee, such as clause 15.6 – must also be applied to a part-time employee.

2.6. It will likely assist the lay user for a note to be included to the effect that where the Award specifies that a particular provision applies to full-time employees, it applies only to full-time employees to the exclusion of part-time employees.

Yours sincerely,

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