

THE FAIR WORK COMMISSION

AM 31 of 2020

RE GENERAL RETAIL INDUSTRY AWARD 2010

APPLICATION BY SHOP DISTRIBUTIVE AND ALLIED EMPLOYEES ASSOCIATION

OUTLINE OF SUBMISSIONS OF AI GROUP

1. The Australian Industry Group (“**Ai Group**”) is representing employers in the retail industry covered by the *General Retail Industry Award 2010* (the “**Award**”).
2. Ai Group opposes the application by the Shop Distributive and Allied Employees Association (“**SDA**”) to vary clause 29.4(e)(iv) of the Award (see Form F46 dated 19 June 2020).
3. Ai Group submits that the Commission should not be satisfied that the variation is necessary to achieve the modern awards objective (compare section 157(1) of the *Fair Work Act 2009* (Cth) (the “**FW Act**”).
4. Ai Group submits that, in any event, the Commission should decline, in the exercise of its discretion, to grant the application (see section 157(1) of the FW Act).
5. Ai Group emphasises that, for the purposes of the modern awards objective, fairness is to be assessed from the perspective of both employers and employees (and not simply from the perspective of employees) (see, for example, *Penalty Rates Decision* [2017] FWCFB 1001 at [37], [117], [118], [151], [885], [1701], [1877], [1948]; *Penalty Rates Transitional Decision* [2017] FWCFB 3001 at [41], [69], [148]; *Annual Wage Review 2019-2020* [2020] FWCFB 3500 at [104], [189], [208]).
6. Ai Group submits that the Commission should refuse the application:
 - 6.1 The Commission should recognise the original finding of a separately constituted Full Bench in the *Penalty Rates Decision* and the *Penalty Rates Transitional Decision* that the level of Sunday penalty rates (as it existed in 2017) for employees covered by the Award was not fair or relevant and was effectively a form of overcompensation for the disutility or relative disutility for working on Sundays (see *Penalty Rates Decision* [2017] FWCFB 1001 at [53], [1701] (see also at [1660]) and *Penalty Rates Transitional Decision* [2017] FWCFB 3001 at [2], [37], [91], [92], [146]).
 - 6.2 The Commission should recognise the original consideration and determination by the separately constituted Full Bench in the *Penalty Rates Decision* and the *Penalty Rates Transitional Decision* that a reduction in Sunday penalty rates was to have an adverse impact on the earnings and living standards of retail employees who usually

worked on Sundays (see *Penalty Rates Decision* [2017] FWCFB 1001 at [1657], [1661], [1998] and *Penalty Rates Transitional Decision* [2017] FWCFB 3001 at [43], [44], [155]) and that transitional arrangements were to mitigate or ameliorate the hardship associated with the reduction (see *Penalty Rates Decision* [2017] FWCFB 1001 at [2000], [2021] and *Penalty Rates Transitional Decision* [2017] FWCFB 3001 at [10], [43], [54], [57]).

- 6.3 The Commission should recognise that the separately constituted Full Bench in the *Penalty Rates Transitional Decision* did not anticipate that in all circumstances the reduction in Sunday penalty rates would occur at the same time as the implementation of increases arising from annual wage decisions (and that the separately constituted Full Bench only stated that the reduction would “usually” occur at the same time) (see *Penalty Rates Transitional Decision* [2017] FWCFB 3001 at [43]).
- 6.4 The Commission should recognise that the separately constituted Full Bench in the *Penalty Rates Transitional Decision* saw the transitional arrangements themselves (rather than the coincidence with the implementation of increases arising from the annual wage decisions) as providing the mitigation or amelioration (or the degree of mitigation or amelioration) from the reduction in Sunday penalty rates (see *Penalty Rates Transitional Decision* [2017] FWCFB 3001 at [43]).
- 6.5 The Commission should recognise that the separately constituted Full Bench in the *Penalty Rates Transitional Decision* exercised a broad judgment of an evaluative kind in determining the transitional arrangements and did not apply some formulaic or mechanistic approach (see *Penalty Rates Transitional Decision* [2017] FWCFB 3001 at [142]; see also SDA submissions dated 26 June 2020, pars 8, 9, 10).
- 6.6 The Commission should recognise that the application of the SDA is essentially an endeavour to re-open the *Penalty Rates Transitional Decision* (see also *Penalty Rates Transitional Decision* [2017] FWCFB 3001 at [24] (but note at [32])).
- 6.7 The Commission should not lightly vary the decision of a separately constituted Full Bench in the *Penalty Rates Decision* and the *Penalty Rates Transitional Decision*.
- 6.8 The Commission should give significant weight to the higher employment costs associated with the application of the SDA (were it to be granted) in that the Sunday penalty rates for full time and part time employees would remain 15 per cent higher (at a 65 per cent loading) for an extra seven months (from 1 July 2020 to 1 February 2021) (see section 134(1)(f) of the FW Act; see also SDA submissions dated 26 June 2020, par 37).
- 6.9 The Commission should give significant weight to the increase in shift penalties provided to casual employees performing evening work Monday to Friday under clause 29.4(b) of the Award (such increases being introduced into the Award on 1 November 2018 (that is, subsequent to (and not contemplated at the time of) the *Penalty Rates Decision* and the *Penalty Rates Transitional Decision*) and taking effect on 1 March 2020 and 1 October 2020 (see also *Annual Wage Review 2019-2020*

[2020] FWCFB 3500 at [125]).

- 6.10 The Commission should give significant weight to the economic impact of the COVID-19 coronavirus pandemic (see, for example, *Annual Wage Review 2019-2020* [2020] FWCFB 3500 at [2], [12], [22], [24], [37], [55], [71]-[77]).
 - 6.11 The Commission should give significant weight to the (obvious) planning made by employers to implement the reduction in weekend penalty rates on 1 July 2020 and to the practical difficulties (including relating to payroll systems) with delaying the implementation of the next reduction (see, for example, the payroll system issues discussed in *Re MRVL Investments Pty Limited* [2019] FWCA 293 at [3] per Sams DP and *McDonald's Australia Enterprise Agreement* [2019] FWCA 8563 at [5], [61], [77] per Colman DP).
 - 6.12 The Commission should give significant weight to the (obvious) increased regulatory burden associated with the application of the SDA (were it to be granted) and, in particular, the need for employers to alter (again) their payroll systems to address the late change to (or deferral of) the reduction in the Sunday penalty rate (in circumstances where employers may be exposed to a civil penalty for contravening section 45 of the FW Act due to non-compliance with the Award if they do not change or defer the reduction).
 - 6.13 The Commission should recognise that, for employees covered by the Award on 5 June 2017 (the date of publication of the *Penalty Rates Transitional Decision*), they were given over three years notice that the final reduction in the Sunday penalty rates was to commence on 1 July 2020 (and so they have had a considerable period to adjust their affairs to meet the reduction) (compare *Penalty Rates Transitional Decision* [2017] FWCFB 3001 at [159]).
7. In the alternative, Ai Group submits that the Commission should refuse the application for the variation to take effect from 1 July 2020:
 - 7.1 The Commission should recognise that employers will have little notice of the variation (were it to be granted) and will have little time (if any) to implement the variation (compare *Penalty Rates Transitional Decision* [2017] FWCFB 3001 at [159]).
 - 7.2 The Commission should recognise that (if the determination of the Commission is made in July 2020) it is likely that employers will have paid some employees their weekly pay (and the employers should not have to revisit or revise those pays or be exposed to a civil penalty for contravening section 45 of the FW Act).
 8. Ai Group submits that the Commission should attach little weight to the AlphaBeta data relied upon by the SDA (see SDA submissions dated 26 June 2020, pars 17, 18):
 - 8.1 The data relates back to consumer spending on 19 January 2020 but it is not known whether the date is typical or representative.

- 8.2 The data is based on approximately 250,000 anonymised consumers but it is not known whether the consumers are typical or representative of the Australian community.
- 8.3 The data is based on the extrapolation of the 250,000 anonymised consumers to the Australian community but it is not known whether the extrapolation is valid or fair.
- 8.4 The data has been weighted to the Australian Census but it is not known whether the weighting is valid or representative.
- 8.5 The data relates to consumer spending generally and is not limited to consumer spending in the retail industry.
- 8.6 The data does not relate to segments in the retail industry (in circumstances where the impact of the pandemic is diverse amongst the segments) (see *Annual Wage Review 2019-2020* [2020] FWCFB 3500 at [74], [184], [306], [308]; see also Fair Work Commission, *Information Note: Retail Trade and COVID-19*, 26 June 2020, par 2).
- 8.7 The consumer spending recorded in the data seems to reflect a spike on 3 May 2020 in circumstances where:
- 8.7.1 the Coronavirus supplement first became available in that timeframe (see Department of Treasury, *Fact Sheet: Income Support for Individuals*, Commonwealth Government, 14 April 2020¹; see also *Annual Wage Review 2019-2020* [2020] FWCFB 3500 at [346], [601]);
- 8.7.2 the JobKeeper payments (which according to the Treasury and ATO totalled \$8.7 billion in the first three weeks of May 2020 (see Joint Media Release of Department of Treasury and ATO dated 22 May 2020²)) first became available in that timeframe (see Department of Treasury, *Fact Sheet: JobKeeper Payment - Frequently Asked Questions*, Commonwealth Government, 11 April 2020³; see also *Annual Wage Review 2019-2020* [2020] FWCFB 3500 at [348], [603]); and
- 8.7.3 members of the Australian community were permitted to access superannuation monies for the first time in that timeframe (see Department of Treasury, *Fact Sheet: Early Access to Superannuation*, Commonwealth Government, 4 May 2020⁴; see also *Annual Wage Review 2019-2020* [2020] FWCFB 3500 at [601]).

¹ https://treasury.gov.au/sites/default/files/2020-04/Fact_sheet-Income_Support_for_Individuals.pdf (Accessed 28 June 2020).

² <https://treasury.gov.au/media-release/jobkeeper-update> (Accessed 28 June 2020).

³ https://treasury.gov.au/sites/default/files/2020-04/JobKeeper_frequently_asked_questions_2.pdf (Accessed 28 June 2020).

⁴ https://treasury.gov.au/sites/default/files/2020-05/Fact_sheet-Early_Access_to_Super.pdf (Accessed 28 June 2020).

- 8.8 The consumer spending recorded in the data since 3 May 2020 is unlikely to be sustained where the Coronavirus supplement and the JobKeeper payments are only scheduled to apply for six months (see Department of Treasury, *Fact Sheet: Income Support for Individuals*, Commonwealth Government, 14 April 2020; Department of Treasury, *Fact Sheet: JobKeeper Payment - Frequently Asked Questions*, Commonwealth Government, 11 April 2020; see also *Annual Wage Review 2019-2020* [2020] FWCFB 3500 at [346], [348], [601], [603]) and where only two withdrawals from superannuation monies are permitted prior to 24 September 2020 (see Department of Treasury, *Fact Sheet: Early Access to Superannuation*, Commonwealth Government, 4 May 2020; see also *Annual Wage Review 2019-2020* [2020] FWCFB 3500 at [601]).
- 8.9 The consumer spending recorded in the data since 3 May 2020 is unlikely to be sustained if there is a second wave of infections (see also *Annual Wage Review 2019-2020* [2020] FWCFB 3500 at [35], [101], [596]) and restrictions on gatherings, movements and activities are re-imposed or tightened (see also *Annual Wage Review 2019-2020* [2020] FWCFB 3500 at [584], [589]).
- 8.10 The consumer spending recorded in the data does not reflect profit or costs.
9. Ai Group also submits that, whilst the SDA emphasises that retail trade increased by 16.3 per cent in May 2020 (the largest ever in the 38 years of the ABS data series) (see SDA submissions dated 26 June 2020, par 16), the Commission should note that the increase followed the largest ever fall of 17.7 per cent in April 2020 (see *Annual Wage Review 2019-2020* [2020] FWCFB 3500 at [185]; Fair Work Commission, *Information Note: Retail Trade and COVID-19*, 26 June 2020, par 23).
10. Ai Group further submits that, despite being overlooked by the SDA (see SDA submissions dated 26 June 2020, par 23), the significance of the increase in shift penalties provided to casual employees performing evening work Monday to Friday under clause 29.4(b) of the Award (see paragraph 6.9 of this outline) is the increase in employment costs of retailer employers.

A B Gotting
Counsel for Ai Group

29 June 2020

LIST OF AUTHORITIES OF AI GROUP

1. [Penalty Rates Decision \[2017\] FWCFB 1001](#) at [37], [53], [117], [118], [151], [885], [1657], [1661], [1998], [1701], [1877], [1948], [2000], [2021].
2. [Penalty Rates Transitional Decision \[2017\] FWCFB 3001](#) at [2], [10], [24], [37], [41], [43], [44], [54], [57], [69], [91], [92], [142], [146], [148], [155], [159].
3. [Annual Wage Review 2019-2020 \[2020\] FECFB 3500](#) at [2], [12], [22], [24], [37], [55], [71]-[77], [100], [101], [125], [139], [184], [189], [208], [274], [306], [308], [346], [584], [589], [601], [603].
4. [Re MRVL Investments Pty Limited \[2019\] FWCA 293](#) at [3].
5. [McDonald's Australia Enterprise Agreement \[2019\] FWCA 8563](#) at [5], [61], [77].
6. *Fair Work Act 2009* (Cth), sections 134, 157, 557, 578.

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