

Application by Shop Distributive and Allied Employees' Association to vary the General Retail Industry Award

SUBMISSIONS OF THE AUSTRALIAN RETAILERS ASSOCIATION (ARA)

Introduction

1. The SDA has applied to vary the *General Retail Industry Award 2010 (GRIA)* with the effect of deferring the final reduction in the Sunday penalty rate for permanent employees from an additional 65% loading to an additional 50% loading (clause 29.4(e)(iv)) from a commencement date of 1 July 2020 to a commencement date of 1 February 2021.
2. The ARA opposes the proposed variation.
3. The SDA application is founded on a contention that the Fair Work Commission (**Commission**), in determining that its decision to reduce the Sunday penalty rates in the GRIA¹ (**the Penalty Rates Decision**) was to be implemented on a transitional basis² (**the Transitional Decision**), concluded that it was necessary, in order for the GRIA to meet the Modern Awards Objective (**MAO**), that the incremental reductions in the Sunday penalty rates be irrevocably linked with increases in minimum wage rates as determined by the Minimum Wage Panel. As a result, the SDA seeks to vary clause 29.4(e)(iv) such that the reduction to a 50% additional loading for permanent employees be implemented from 1 February 2021 and not 1 July 2020 as was determined in the Transitional Decision.
4. The ARA agrees that there was an intention, expressed in the Transitional Decision, that there would be alignment between the usual minimum wage increase implementation date and the incremental reduction in Sunday penalty rates. This does not, however, mean that the deferral of the minimum wage determination for

¹ [2017] FWCFB 1001

² [2017] FWCFB 3001

the GRIA renders it necessary to defer the final Sunday penalty rate reduction in the same way. This is because:

- (a) the *Fair Work Act 2009* (Cth) (**the Act**) does not require an annual wage review determination to come into effect on 1 July in a particular year (but rather allows for decisions to be deferred in certain circumstances)³ and does not require that award minimum wages increase at all⁴;
 - (b) the Full Bench in the Transitional Decision made that decision in the knowledge that there was no certainty that minimum wage increases would occur on 1 July in each year of the transitional penalty rate reductions;⁵
 - (c) it was the fact of the transitional arrangements, and not any alignment with minimum wage determinations, that was the primary consideration in ameliorating the impacts of the Sunday penalty rate reductions⁶. As a result, the transitional provisions, and not their alignment with minimum wage determinations, were what was necessary to meet the MAO; and
 - (d) the variation proposed is not necessary to meet the MAO.
5. The SDA contends that the decision of the Commission to defer the minimum wage determinations in accordance with section 286(2) of the Act was “unforeseen at the time the Commission made orders in respect of the Penalty Rates Decision”⁷. This should be rejected. While the circumstances which caused the Commission to defer the minimum wage determinations could not have been foreseen at the time of the Penalty Rates Decision, the Commission was clearly aware, as noted in paragraph 4(b) above, that there was no guarantee of minimum wage increases on 1 July in any year of the transitional provisions. The Commission was aware of the possibility of no minimum wage increase and that a minimum wage increase may be deferred. If it had intended that the transitional provisions be inexorably linked to minimum wage determinations then it would have aligned the penalty reductions directly with those determinations. It did not do so, and instead provided for specific dates for the reductions.

³ *Fair Work Act 2009* (Cth) at section 286(2)

⁴ *Ibid* at section 285(2)(b) which provides the Commission “may” make determinations varying modern awards

⁵ [2017] FWCFB 3001 at [43] where the Full Bench noted employees will “usually” receive an increase in minimum wages at the same time as Sunday penalty reductions are implemented

⁶ *ibid*

⁷ SDA Submission of 26 June 2020 at paragraph 3

6. The SDA also contends that “part of the rationale for that commencement date in the *Penalty Rates Review Decision* was that employees would most likely be obtaining an increase in wages because of the Annual Wage Review, relevantly, from 1 July 2020.”⁸ This mischaracterises what the Commission said. The Commission gave no opinion as to the likelihood of employees impacted by the transitional provisions receiving an increase in wages from 1 July 2020 (nor could it have, given it was aware that there may not be any increase at all). What the Commission said was that employees affected by Sunday penalty rate reductions would usually receive an increase in their base hourly rate at the same time as the reduction in Sunday penalty rates.⁹ The Commission said this knowing that the base hourly rate may not increase at all or may increase at a later date in any year.
7. The SDA’s contention that “the implementation of the decision was staged in that way to ameliorate the effects of the reduction” should similarly be rejected. The Commission specifically noted the irrelevance of the minimum wage determinations in relation to ameliorating the impact of the Sunday penalty rate reductions. Instead, the Commission made it clear that it was the deferral of the reductions, implementing them over an extended period of time, that was the means by which the impact on employees would be ameliorate, not the impact of any wage increases.

The Wage Review Decision

8. The SDA’s submission makes reference to the economic circumstances of the retail industry as noted by the Minimum Wage Panel in its 2020 Decision. The relevance of this to the application before the Commission is unclear. The Penalty Rates Decision was not reached having regard to the economic circumstances of the retail industry or to those of any retail industry employer. Equally, the economic circumstances of the retail industry are not relevant to the SDA’s attempt to vary the outcome of the Penalty Rates Decision, including the transitional provisions arising from the Transitional Decision. The ARA therefore does not consider it necessary or appropriate to address the SDA’s submissions on the retail industry’s economic performance.
9. In the alternative, the ARA notes, as provided for in Information Note - Retail Industry and COVID-19 released by the Commission, that there are significant economic

⁸ Ibid at paragraph 4

⁹ [2017] FWCFB 3001 at [43]

challenges faced by the retail industry as a result of COVID-19. This can be contrasted with the SDA, which has “cherry picked” two small pieces of data and characterises this as revealing “a more promising picture”.¹⁰ The ARA contends that the Commission should adopt a cautious approach to retail sales data as that data is likely to be subject to substantial variation brought about by COVID-19. What the Commission should be particularly mindful of is the precarious employment position of the retail industry as identified at paragraphs 24 to 27 of the Information Note.

Is the Variation Necessary?

10. The Commission is only permitted to vary the GRIA if the variation is necessary to achieve the MAO.¹¹ In order for the SDA application to be successful, the Commission must be satisfied that the GRIA is not achieving the MAO and requires variation.¹² Given the Commission, in issuing the Transitional Decision, was mindful that it only include transitional arrangements with respect to the Sunday penalty rate to the extent they were necessary to meet the MAO¹³ it is to be presumed that the MAO is being met with the current transitional provisions.
11. The ARA agrees with the SDA’s submissions at paragraphs 7 to 10 in relation to the MAO.
12. We now turn to the specific matters in section 134(1) of the Act.

Section 134(1)(a) - relative living standards and the needs of low paid

13. The ARA contends that the Commission should reject the proposition advanced by the SDA that this consideration strongly favours the proposed variation. The Commission in the Penalty Rates Decision concluded that the “needs of the low paid are best addressed by the setting and adjustment of modern award minimum rates of pay” and not through penalty rates.¹⁴
14. While it is not argued that retail employees working on Sundays will see a reduction in their Sunday rate of pay if the application is not successful, this has already been taken into account by the Commission in the Penalty Rates Decision and should not be the subject of reconsideration now. Further, this needs to be balanced against

¹⁰ SDA Submission at paragraph 16

¹¹ Section 157 *Fair Work Act 2009* (Cth).

¹² [2017] FWCFB 3001 at [52]

¹³ *Ibid* at [65]

¹⁴ [2017] FWCFB 1001 at [1660]

the negative impact on employees if the application is granted. In the Penalty Rates Decision the Commission concluded:

- (a) that it is common for retail businesses to fix labour budgets to a proportion of retail sales and that as a result changes in labour costs may impact the amount of labour rostered;¹⁵
- (b) a lower Sunday penalty rate would increase service levels with a consequent increase in employment (in terms of hours worked by existing employees or the engagement of new employees);¹⁶

15. The Commission should therefore conclude that a deferral of the Sunday penalty reduction may defer any increases in employment hours offered (to existing and new employees) as a result of the reduced labour costs. This is particularly critical at a time where employment levels are falling significantly. On this basis, the needs of the low paid is either a neutral consideration or weighs against the application being granted.

Section 134(1)(b) - the need to encourage collective bargaining

16. The ARA agrees this is a neutral consideration in relation to the SDA's application.

Section 134(1)(c) - the need to promote social inclusion through increased workplace participation

17. As referred to at paragraph 14 of these submissions, the Commission in the Penalty Rates Decision acknowledged the connection between labour costs and hours of work offered by retail employers. The Commission identified that obtaining employment is the focus of s.134(1)(c)¹⁷, concluded that a reduction in the Sunday penalty rate was likely to lead to some additional employment¹⁸ and determined that this was a factor weighing in favour of reducing the Sunday penalty rates. These finding should stand in relation to this application, and the Commission should conclude that this factor weighs against granting the application.

Section 134(1)(d) - the need to promote flexible modern work practices and the efficient and productive performance of work

¹⁵ Ibid at [1619]

¹⁶ Ibid at [1620]

¹⁷ Ibid at [1665]

¹⁸ Ibid at [1666]

18. The ARA agrees this is primarily a neutral consideration in relation to this application, save that the reduction in Sunday penalty rates will result in lower employment costs, which will naturally mean that the cost component of the productivity equation reduces. A deferral of that reduction will defer this cost component and therefore impact on productivity.

Section 134(1)(da) - the need to provide additional remuneration

19. This is a neutral consideration.

Section 134(1)(e) - equal remuneration for equal work

20. The ARA agrees this is a neutral consideration in relation to the SDA's application.

Section 134(1)(f) - the impact on business including on employment costs and regulatory burden

21. As noted by the SDA, the delay in reduction of the Sunday penalty rates will result in the maintenance of existing employment costs for employers for the period of the delay. This counts strongly against the application. The proposition advanced by the SDA that the minimum wage outcome is relevant as a countervailing consideration is misconceived and should be rejected.

Section 134(1)(g) - simple and easy to understand Modern Award system

22. The ARA agrees this is a neutral consideration in relation to the application, save that what the SDA is asking the Commission to do is to implement a significant change to the GRIA a very short period of time prior to the change coming into effect.

Section 134(1)(h) - the impact on employment growth, inflation etc

23. There are likely to be negative impacts on employment growth in the short term as a result of the application, and this weighs against it being granted.

Conclusion

24. For the reasons outlined above, the SDA's application should be dismissed.

29 June 2020

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