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Sent: Thursday, 28 January 2021 3:48 PM

To: AMOD <AMOD@fwc.gov.au>

Cc: Chambers - Ross J <Chambers.Ross.j@fwc.gov.au>; Lindsay Carroll <l.carroll@nra.net.au>; Nick Tindley <nrt@fcbgroup.com.au>

Subject: AM2020/103 - Award flexibility - Hospitality and Retail Sectors - Draft Determination

Dear Registrar,

Please see **attached** the joint proposal of the National Retail Association (**NRA**) and the Australian Retailers Association (**ARA**) with respect to the *General Retail Industry Award 2020* in relation to the above matter.

The NRA and ARA reserve the right to make further comment in relation to this proposal or applicable principles.

Yours sincerely,

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DRAFT DETERMINATION

Fair Work Act 2009

s.157—FWC may vary etc. modern awards if necessary to achieve modern awards objective



Award flexibility - Hospitality and Retail Sectors

(AM2020/103)

GENERAL RETAIL INDUSTRY AWARD 2020

[MA000004]

Retail industry

JUSTICE ROSS, PRESIDENT

XX

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MELBOURNE, XX XXX 2021

Variation to the General Retail Industry Award 2021.

A. Further to the decision [[2021] FWCFB XX] issued by the Full Bench on XX XXX 2021, the above award is varied as follows:

1. By amending clause 2 by inserting the following immediately after the definition of *long term casual employee*:

minimum annual salary, for a classification, means the amount specified in column 2 of Table 4 – Minimum Rates for the relevant classification, multiplied by 52.14.

2. By adding a clause 18 as follows:

Exemption Rate (managerial and higher level staff)

18.1 Clause 18 applies to all employees classified at Retail Employee Level 4 to Retail Employee Level 8 as defined by Schedule A—Classification Definitions and who:

- (a) are paid:
 - (i) in the case of full-time employees – a salary that is at least **125%** of the minimum annual salary applicable to the employee’s classification; or
 - (ii) in the case of part-time employees – pro rata of the amount prescribed in clause 18.1(a)(i); and
- (b) have agreed with their employer in writing to be engaged in accordance with clause 18; and
- (c) has been advised by their employer, in writing and prior to the employee agreeing to the application of this clause, of the annual

salary that they will be paid and provisions of the award that will not apply because of the application of this clause.

18.2 An employer must keep a record of any agreement reached in accordance with clause 18.1(b) as an employee record until at least 7 years from the date of the employee's employment ending.

18.3 An employee to whom this clause applies is not entitled to the benefit of the terms and conditions within the following clauses:

- (a) Clause 10—Part-time employees, save that clauses 10.1, 10.2 and 10.4 shall continue to apply;
- (b) Clause 15—Ordinary hours of work and rostering arrangements
- (c) Clause 19—Allowances, save that clauses 19.6 – Moving expenses and 19.7 – Motor vehicle allowance shall continue to apply;
- (d) Clause 21 —Overtime;
- (e) Clause 22—Penalty Rates
- (f) Clause 28.3—Additional payment for annual leave
- (g) Clauses 33.3 and 33.4—Payment for work on public holiday or substitute day
- (h) Part 6—Shiftwork

Commented [AM1]: Please note that if Item 3 of this draft determination is adopted, these references will need to be amended to refer to clauses 10.1 to 10.3 (inclusive).

18.4 The ordinary hours of an employee engaged pursuant to this clause 18 are:

- (a) a maximum of 152 hours in a four-week cycle of work; or
- (b) an average of 38 hours per week calculated over a period agreed between the employer and the employee.

18.5 An employee must be rostered to have a minimum of 8 days off during each 4-week cycle of work, unless otherwise agreed between the employer and employee in order to meet temporary operational requirements of the employer or personal circumstances of the employee.

18.6 An employee who is required to work on a public holiday is entitled to paid time off of equal length to the time worked on the public holiday. Such time off must be taken within 28 days of being accrued unless otherwise agreed in accordance with clause 18.7.

18.7 An employee and an employer may agree to extend the period for taking time off accrued pursuant to clause 18.6 to within 6 months of its accrual subject to the following:

- (a) any such agreement is recorded in writing and retained as an employee record;
- (b) the accrued time off is taken at a time or times within the period of 6 months agreed by the employee and the employer;

- (c) if the accrued time off is not taken within the period of 6 months, the employer must pay the employee for the accrued time off in the next pay period following those 6 months; and
- (d) if, on the termination of the employee's employment, accrued time off for working on a public holiday has not been taken, the employer must pay the employee for the accrued time off.

18.8 Any calculation required to be made under this award to determine hourly amounts payable to an employee, whether engaged on a full-time or part-time basis, must be done by:

- (a) dividing the amount that would be owing to a full-time employee pursuant to clause 18.1(a) by 52.14; and then
- (b) dividing the amount calculated pursuant to clause 18.8(a)(i) by 38.

18.9 Dispute resolution

An employer and an employee who have made an agreement pursuant to clause 18.1(b) each provide consent to a dispute about the agreement or the operation of clause 18 being settled by the Fair Work Commission through arbitration in accordance with clause 36.5—Dispute resolution and section 739(4) of the Act.

2. By renumbering the clauses following clause 18 and updating cross-references in all other clauses accordingly.
3. By deleting clause 10 and inserting in lieu a new clause 10 to the following effect:

10. Part time employees

10.1 Classifications

An employer may employ part-time employees in any classification defined in Schedule A - Classification Structure and Definitions.

10.2 Definition of part-time employee

A part-time employee is an employee who:

- (a) is engaged to work at least 8 and fewer than 38 ordinary hours per week (or, if the employer operates a roster, an average of at least 8 and fewer than 38 hours per week over the roster cycle); and
- (b) has reasonably predictable hours of work.

10.3 A part-time employee is entitled, on a proportionate basis, to the same pay and conditions as those of full-time employees who do the same kind of work.

10.4 Setting guaranteed hours and availability

At the time of engaging a part-time employee, the employer must agree in writing with the employee on all of the following:

- (a) the number of hours of work which is guaranteed to be provided and paid to the employee each week or, where the employer operates a roster, the number of hours of work which is guaranteed to be provided and paid to the employee over the roster cycle (**the guaranteed hours**); and
- (b) the days of the week on which, and the hours on those days during which, the employee is available to work the guaranteed hours (**the employee's availability**).

10.5 Any change to a part-time employee's guaranteed hours may only be made with the written consent of the employee.

10.6 Rostering

The employer may roster a part-time employee to work their guaranteed hours and any additional hours in accordance with clause 15—Ordinary hours of work and rostering arrangements, save that to the extent that any matter in clauses 15.7 or 15.8 may be altered by agreement, the employee's availability shall constitute such agreement.

10.7 However, a part-time employee:

- (a) must not be rostered to work any hours outside the employee's availability; and
- (b) must have at least 2 days off each week; and
- (c) must not be rostered for less than three consecutive hours in each engagement.

10.8 Increasing guaranteed hours to match regular work pattern

If a part-time employee has regularly worked a number of ordinary hours in excess of their guaranteed hours for at least 12 months, then they may request in writing that the employer agree to increase their guaranteed hours.

10.9 If the employer agrees to a request under clause 10.8, then the employer and the part-time employee must vary the agreement made under clause 10.4 to reflect the employee's new guaranteed hours. The variation must be recorded in writing before it occurs.

10.10 The employer may only refuse a request under clause 10.8 on reasonable business grounds. The employer must notify the part-time employee in writing of a refusal and the grounds for it.

10.11 Change in employee's circumstances that changes their availability

If there is a genuine and ongoing change in the part-time employee's personal circumstances, then they may alter the times they are available by giving 14 days' written notice of the alteration to the employer.

10.12 If the employer cannot reasonably accommodate the alteration to the part-time employee's availability under clause 10.11, then (regardless of clause 10.5):

- (a) the part-time employee's guaranteed hours agreed under clause 10.4 cease to apply; and
- (b) the employer and the part-time employee must agree a new set of guaranteed hours under clause 10.4.

10.13 Payment rates

- (a) An employer must pay a part-time employee for ordinary hours worked in accordance with clause 17—Minimum rates.
- (b) An employer must pay a part-time employee at the rates prescribed in clause 21.2 —Payment of overtime for all time worked in excess of:
 - (i) 38 hours per week or, if the employee works in accordance with a roster, an average of 38 hours per week over the roster cycle; or
 - (ii) the maximum daily hours limitations specified in clause 15.1 (Ordinary hours of work); or
 - (iii) the employee's rostered hours.

4. By deleting paragraph 21.2(b) and replacing it with the following:

- (b) An employer must pay a part-time employee for hours worked outside the conditions specified in clause 10.13(b) at the rate specified in Column 2 of Table 10 – Overtime Rates.

B. This determination comes into effect on XX XXX 2021. In accordance with s.165(3) of the Fair Work Act 2009 this determination does not take effect until the start of the first full pay period that starts on or after XX XXX 2021.

PRESIDENT