IN THE FAIR WORK COMMISSION

AM2014/305

FOUR YEARLY REVIEW OF MODERN AWARDS

PENALTY RATES

SUBMISSIONS OF AUSTRALIAN RETAILERS ASSOCIATION, NATIONAL RETAIL ASSOCIATION AND MASTER GROCERS AUSTRALIA (THE RETAIL ASSOCIATIONS) – TRANSITIONAL ARRANGEMENTS (SUNDAY PENALTY RATES)

1. These submissions respond to two key matters raised by the Fair Work Commission (**FWC**) in its decision in this matter (**Penalty Rates Case**),[1] being:

   (a) what transitional arrangements should apply to the reduction of the Sunday penalty rate under the *General Retail Industry Award 2010* (**Retail Award**); and

   (b) are take home pay orders available to employees impacted by the reduced Sunday penalty rate?

2. The Retail Associations note the provisional view of the FWC[2] in relation to "red-circling" of employees and that they are opposed to any such red-circling. The Retail Associations consider that red-circling of employees would be contrary to a number of matters that are required to be considered by the FWC in exercising its powers in relation to varying the Retail Award, most notably the requirement to ensure a simple, easy to understand, stable and sustainable modern award system (section 134(1)(g)) and the impact on employment costs and the regulatory burden (section 134(1)(f)).

3. The Retail Associations have been extensively involved in this matter and accordingly, are well placed to provide submissions regarding the principles which should be adopted in reference to transitional provisions which apply to the Sunday penalty rates under the Retail Award.

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[1] [2017] FWCFB 1001

[2] ibid at [2021]ii and [2040]ii

4. We submit that the following transitional arrangements appropriately balance the needs of employers and employees:

   (a) from 1 July 2017 permanent and casual employees will be paid a Sunday penalty of an additional 75% (inclusive of the casual loading for casual employees); and

   (b) from 1 July 2018 permanent employees will be paid a Sunday penalty of an additional 50%.

A. Purpose of Transitional Provisions

5. The FWC has identified that the immediate implementation of all the variations proposed in its decision would "*inevitably cause some hardship to the employees affected…There is plainly some need for appropriate transitional arrangements to mitigate such hardship*".[3]

6. The Retail Associations agree that there is some need for transitional arrangements to mitigate any hardship to affected employees arising from the reduction in Sunday penalty rates. The determination of how those transitional arrangements should operate should take into account the following contentions.

7. First, as set out in paragraph 4 of these submissions, the FWC has determined that the purpose of transitional arrangements is to <u>mitigate</u> hardship. In considering this it is important to note that the FWC has already undertaken a balancing exercise in considering the employment and other benefits to retail employers and employees against any adverse impact on retail employees in making its decision. Implicit in this is an understanding that there will be some employees who will be worse off as a result of the decision, and transitional arrangements are not intended to entirely eliminate this impact.

8. While the FWC rightly should mitigate against any hardship, it cannot be required or expected to <u>eliminate</u> hardship, and is certainly not required to ensure no employee is worse off as a result of the decision.

[3] Ibid at [85]

9. Secondly, the FWC should ensure that the transitional provisions balance the need to mitigate hardship with the need to ensure that the benefits which the FWC has accepted are likely to flow from the reduced Sunday penalty rate are not negatively impacted.

10. It follows from this that the transitional arrangements determined by the FWC should go no further than mitigating the adverse financial impact on retail employees. Further, the level of mitigation should be tempered where there is a likelihood that the arrangements would limit the positive employment impacts of the decision.

What is the "hardship"?

11. There has been extensive media coverage since the Penalty Rates Case decision, much of which has, in the Retail Associations' submission, exaggerated the likely impact of the Sunday penalty rate reduction. It is essential that the FWC focus on the evidence before it, and not be distracted by media coverage that has focused on the extreme, in determining what arrangements should be implemented.

Aggregate data

12. The starting point for this is that the evidence before the FWC in the Penalty Rates Case identified the limited nature of the "hardship". Based on the data that was before the FWC:

    (a) only 34.5% of retail industry employees have their pay set by the an Award (as at May 2016);[4]
    (b) 61.5% of award reliant businesses in the retail industry use the Retail Award;[5]
    (c) applying these together, it is reasonable to conclude that approximately 21% of retail industry employees have their pay set by the Retail Award;
    (d) only 40.6% of retail business operate 7 days each week;[6] and
    (e) only between 31% and 35% of retail industry employees work on Sundays.[7]

[4] ABS, *Employee Earnings and Hours*, Australia, May 2016, Catalogue No. 6306.0
[5] Fair Work Commission, *Award Reliance Survey*, 2013
[6] Fair Work Commission, *Australian Workplace Relations Study*, 2014
[7] Exhibit SDA 36 at Table 1

13. Taking this information together, it is reasonable to conclude that only between 31% and 35% of the 21% of retail industry employees who have their pay set by the Retail Award work on Sundays. This means that somewhere between 6.5% and 7.5% of retail industry employees will be impacted in any way by the reduction in Sunday penalty rates.

Limitations Imposed by the Retail Award

14. The Retail Award itself further limits the incidence of Sunday work in the following ways:

    (a) ordinary hours of work on Sundays under the Retail Award fall between 9.00am and 6.00pm (unless the employer trades beyond 6.00pm, in which case ordinary hours continue to 11.00pm);[8]

    (b) during those hours an employee must be given a break of between 30 and 60 minutes if they work more than 5 hours;[9]

    (c) employees may only be rostered for a maximum of 9 ordinary hours on any day (save for one day each week when this can be extended to 11 hours);[10]

    (d) an employee who regularly works Sundays must be rostered so that they have three consecutive days off each four weeks, and the consecutive days off must include Saturday and Sunday;[11] and

    (e) hours worked outside these parameters are overtime.[12]

15. The FWC should conclude that the cohort of retail industry employees who are likely to be adversely impacted by the Sunday penalty reduction is small, and that the Retail Award itself contains a number of provisions which minimise that impact.

Identifying the extreme

16. For a full time retail shop floor employee (non-shiftworker) engaged at Retail Employee Level 1 under the Retail Award the extreme, being the absolute

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[8] *General Retail Industry Award 2010* at clause 27.2
[9] ibid at clause 31.1
[10] ibid at clause 27.3
[11] ibid at clause 28.13
[12] ibid at clause 29.2(a) and (c)

upper end of the potential detriment brought about by the Sunday penalty rate reduction, can be quantified using the limitations imposed by the Retail Award. Given the provisions of the Retail Award highlighted above, the following applies to this calculation:

(a) the employee can only work a maximum of three Sundays in each four week period;

(b) only the hours between 9.00am and 6.00pm on a Sunday are impacted by the penalty rate reduction (unless the retail business trades beyond 6.00pm);

(c) an employee who worked the entirety of the spread of hours between 9.00am and 6.00pm on a Sunday would be entitled to a break of at least 30 minutes, meaning that they would work a maximum of 8.5 hours on each Sunday at the reduced penalty rate; and

(d) therefore a full time retail employee can be required to work a maximum of 25.5 hours on Sundays in any 152 hour, four week period.

17. For the purpose of calculating the maximum detriment we have presumed that the employee who works on Sunday does not work any other hours which attract penalty rates under the Retail Award over the remainder of their 152 hour, four week roster.

18. The impact on such an employee, taking into account the transitional arrangements proposed by the Retail Associations and a notional 2.5% increase in the Retail Award rates in each year of the transition, is set out in the table below.

Current			
Sunday	Other	Total	
25.5 x $38.88	126.5 x $19.44	$3,450.60	
1 July 2017			
Sunday	Other	Total	**Reduction from current**
25.5 x $34.88	126.5 x $19.93	$3,410.59	$40.01 per 4 weeks
1 July 2018			
Sunday	Other	Total	**Reduction from current**
25.5 x $30.64	126.5 x $20.43	$3,365.72	$84.88 per 4 weeks

19. Considering the above, and based on the transitional arrangement proposed by the Retail Associations, the extreme for a full time Retail Employee Level 1 is a detriment of $21.22 per week for a period of 12 months between 1 July 2018 and 30 June 2019.

20. This is clearly, however, the extreme, and is not consistent with the evidence that was before the FWC in the Penalty Rates Case, and to which it must have regard in its consideration. Given this, the extreme should be rejected by the FWC, and the actual evidence be considered. That evidence is as follows:

    (a) the maximum number of hours worked by any retail employee lay witness on a Sunday is 6.5 hours (see Attachment A);

    (b) retail employer lay witnesses limit trading hours on Sundays;[13]

    (c) the Retail Survey identified that 88.3% of respondents trade for fewer hours on Sundays than on weekdays;[14] and

    (d) retail employer lay witnesses limit the number of hours worked by employees on Sundays.[15]

Lay witness evidence

21. The Retail Associations have reviewed the witness evidence of each of the retail employee lay witnesses, identifying the hours worked by each and then calculating what they were entitled to be paid under the Retail Award at current rates. We have then applied the transitional provisions we have proposed to each employee's earnings, and have factored into this an estimate of the likely decision of the FWC's Minimum Wage Panel. The calculations are attached at Annexure A to these submissions.

22. In relation to the Minimum Wage Panel decision we acknowledge this is uncertain. It is, however, reasonable to say that the prevailing economic conditions, in particular in relation to inflation, interest rates, employment and wage growth, are largely unchanged from those that existed when the FWC reached its two previous decisions. Further, it is not expected that these conditions will be the subject of any drastic variation in the next 15 months.

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[13] [2017] FWCFB 1001 at [1670]
[14] ibid at [1619]iii
[15] ibid

Accordingly, we have projected a 2.5% increase in the rates under the Retail Award.

23. Based on the analysis in Annexure A:

    (a) all but two of the seven retail employee lay witnesses would experience an increase in pay if the two stage transition the Retail Associations have proposed is implemented; and

    (b) the remaining two retail employee lay witnesses would experience a reduction in their pay from their current rates, but that reduction is extremely small (12 cents for Witness SDA Retail 4 in the first stage and 78 cents per week for Witness SDA Retail 4 and 16 cents per week for Witness SDA Retail 5 in the second stage).

24. Other relevant matters arising from the retail employee lay witness work schedules are:

    (a) only one of the seven works every Sunday;

    (b) the remaining six work every second Sunday;

    (c) the average length of a Sunday shift is 4.96 hours, compared to 6.57 hours on weekdays and 6.05 hours on Saturdays; and

    (d) a number of the Sunday hours worked by the witnesses are unaffected by the reduction in Sunday penalty rates as they are worked outside the spread of ordinary hours, and as such will continue to be paid as overtime at a double time rate (see witnesses 1, 3, 4 and 7).

25. The Retail Associations submit, based on the retail employee lay witness evidence, that the following contentions should be accepted by the FWC:

    (a) the implementation of a two stage transition, as proposed by the Retail Associations, will, based on the lay witness evidence before the FWC, have little or no deleterious impact on retail employees;

    (b) the retail employee lay witness evidence was led by the SDA, at least in part, to demonstrate that reducing Sunday penalty rates would have a

deleterious impact on the income of those employees, and the retail store workforce more broadly;[16] and

(c) given (b) above, it is open to the FWC to conclude that the retail employee lay witnesses were called by the SDA because they provided the best evidence available to the SDA of the deleterious impact of a reduced Sunday penalty rate.

Conclusion

26. The Retail Associations submit that the "hardship" associated with the reduction in the Sunday penalty rate under the Retail Award would be substantially or entirely ameliorated under the transitional arrangements proposed above. This should cause the FWC to conclude that the proposed arrangements are suitable to mitigate the hardship associated with the reduction.

27. If the FWC concludes that the hardship that it is required to mitigate goes beyond that identified in the evidence before it in the Penalty Rates Case, the Retail Associations submit that, for the reasons set out below, the transitional arrangements we have proposed should be implemented having regard to the need to maximise the positive employment impacts of the reduction.

B. Ensuring Maximum Employment Benefits

28. There was substantial evidence before the FWC concerning the interaction between labour costs and Sunday trading in the retail industry, and directly under the Retail Award. The FWC accepted that such evidence supported "*the proposition that 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). In particular, a reduction in Sunday penalty rates is likely to lead to:*

(a) more stores being open on Sundays,
(b) increased Sunday trading hours,
(c) a reduction in hours by some owner operator,

[16] See Submissions of the SDA dated 21 March 2016 at paragraph 328(a)(v)

(d) *an increase in overall hours worked in retail stores, 65.5 per cent of respondents to the Retail survey said that they would allocate more hours to employees on Sunday if the Sunday penalty rate was reduced (from 200 per cent to 150 per cent).*"[17]

29. The FWC also found that, "*it is common for retail businesses to fix labour budgets to a proportion of retail sales, hence labour costs, such as Sunday penalty rates, (or sales) may impact on the amount of labour rostered*".[18]

30. For a number of reasons, these findings weigh against the FWC implementing transitional arrangements which extend beyond those proposed by the Retail Associations.

31. First, it naturally follows that because retailers fix labour budgets against retail sales, the more quickly the reduced labour costs are implemented the more quickly the additional labour hours will be offered. An example of this can be taken from the evidence of Heath Goddard. Mr Goddard gave evidence that:

"… Pillow Talk would almost certainly provide more hours of work to existing employees and/or engage new employees. In the 21 stores that were part of the Sample Data Set alone 2072.5 hours were worked on Sundays. For those stores, a reduction to a 50% Sunday penalty would mean that 936.25 additional ordinary hours of work could be put into those stores without any impact on labour cost percentages.

While I am unable to exactly predict the increase in employment and/or the volume of additional hours which would be provided to employees, Pillow Talk would not simply look to accept the labour cost savings and keep hours in stores at current levels. As a customer service focused business, and given the relative importance of Sunday as a trading day, the business would like to add greater staffing volume on Sundays and a reduction in Sunday labour costs would provide the business with the opportunity to do so. Further, the wage costs for Pillow Talk have already been budgeted for 12 months' in advance. Therefore a reduction in penalty rates would result in a saving which could be

[17] [2017] FWCFB 1001 at [1620]
[18] Ibid at [1558]

spent on more hours of work for existing employees or hours of work for new employees."[19]

32. If the reduced penalty rates are delayed, or implemented via a greater number of stages and a longer period of time than the Retail Associations have proposed, the quantum of additional hours that retail employers are likely to offer will be reduced.

33. Secondly, the positive employment impacts of the reduced penalties through the opening of stores that are currently closed do not proceed in a proportionate manner. It is not a matter that if a quarter of the penalty rate reduction is implemented then a quarter of stores that are currently closed will open. The evidence of Barry Barron (Group Chief Operating Officer of the Sussan Group), at paragraphs 12, 13 and 28 of his statement, highlights this:

"*If Sunday penalties were reduced to an additional 50% most of the stores we close could become viable. Attached to this statement and marked BB1 is an analysis of the viability of opening a number of these stores at different penalty rates.*

Reduced Sunday penalty rates would allow us to open additional stores and provide more hours of work on Sundays, while engaging employees to work beyond purely selling activities, e.g. restocking, administration task, etc…

Given the earlier observations I made about customer service levels and the need to match our operations with our customer needs, I firmly believe we would redirect all, or at very least the substantial majority, of the labour cost savings brought about by a reduced Sunday penalty rate back into store labour budgets. The changes we would implement would include:

(a) opening some stores that are currently closed on Sundays;
(b) extending trading hours in stores that are open;
(c) allowing stores to undertake administrative tasks in addition to sales service on Sundays; and

[19] Exhibit Retail 4 at paras 31-32

(d) *putting more money into store labour budgets for the hours that they already trade in order* to provide better service."

34. Relevantly, based on Mr Barron's statement, to break even at the current Sunday penalty rate, stores need to do 15% more sales, than is required for them to break even at a 150% penalty rate.[20] Mr Barron's evidence is that it is the reduction to a 50% Sunday penalty rate which would make it viable for Sussan to open most of its stores which are currently closed on Sundays. It can be implied from this that the tipping point for opening those stores will not come about until the penalty rate reduction is fully, or at least substantially, implemented.

35. Thirdly, the positive employment impacts that can be expected through the extension of trading hours, extension of operational functions and increase in shop floor employee numbers on Sundays similarly do not proceed in a proportionate manner. It is not a matter that a retail business can implement a quarter or a third of its operational changes because a quarter or a third of the penalty rate reduction is implemented. For example, Graham Gough gave evidence, which was accepted by the FWC, that if the penalty rate was reduced to an additional 50% he would open the bakery in his store on Sundays.[21] It follows it is unlikely that Mr Gough will implement this until the reduction is fully, or at very least substantially, implemented.

36. Similarly, the evidence of Jorge-Daniel Leroy d'Oreli (General Manager Retail of Jeanswest) was that:

With a reduction in the Sunday penalty rate Jeanswest would extend the trading hours for 28 stores that currently trade on Sundays. Specifically, there are 8 stores in Western Australia, 3 in New South Wales, 2 in Victoria, 11 in Queensland, 2 in South Australia, and 2 in Tasmania whose trading hours would extend."[22]

37. It can be implied that the likely extension of Jeanswest's trading hours is based on the full implementation of the Sunday penalty reduction.

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[20] Transcript, at PN16072-PN16080
[21] See [2017] FWCFB 1001 at [1531]
[22] Exhibit Retail 8 at paras 14, 20 and 21

38. The evidence of Belinda Daggett is that a reduction to a Sunday penalty rate of 50% would cause her to cease work on Sundays (and therefore roster another employee to work) and to extend the working hours of her bakers on Sundays.[23] It can be implied that these changes will only be implemented if the Sunday penalty rate reductions are fully or substantially implemented.

Employment benefits will mitigate hardship

39. The FWC found that the reduced Sunday penalty rate is likely to have a positive impact on employment in terms of additional hours being rostered,[24] which can have a positive impact on existing employees and those seeking employment. For existing employees, the employment benefits have the potential to directly minimise the hardship which is to be mitigated. As referred to above, there are two retail lay witness employees who would see a very small reduction in their pay as a result of the transitional arrangements the Retail Associations have proposed. If each of those employees was the beneficiary of just 15 minutes of additional work each week as a result of the Sunday penalty reduction, the hardship would be eliminated and each employee would receive an increase in their pay.

Conclusion

40. Given the above, the FWC should conclude that delays in the implementation of the Sunday penalty rate reduction, and breaking the transition down into more stages than the Retail Associations have proposed, will delay, and potentially negatively impact on, the positive impacts of the reduction on employment.

C. Balancing the Considerations

41. As set out earlier in these submissions, the FWC, in determining appropriate transitional arrangements for the Sunday penalty reduction, should focus on balancing the need to mitigate the hardship that can be identified as flowing from the reductions with the need to maximise the positive employment impacts. The Retail Associations submit that the only evidence the FWC can consider in relation to hardship is that which was put before it in the Penalty Rates Case. That evidence is that the hardship is limited, and is entirely or

[23] See [2017] FWCFB 1001 at [1553]
[24] ibid at [1671]

almost entirely eliminated through the implementation of the two stage arrangements proposed by the Retail Associations.

42. If the FWC finds that the hardship that is to be mitigated goes further than the evidence that was before it in the substantive matter, the FWC should not be attempting to eliminate that hardship. The FWC should instead minimise that hardship to the extent that does not undermine the positive employment impacts. The Retail Associations submit that this balance is best achieved by the proposed two stage transitional arrangements.

D. Other Relevant Factors

43. The FWC should also take into account the following factors in determining the appropriateness of transitional arrangements.

I. Historical Application of Sunday Penalty Rates

44. For those retail employees engaged in New South Wales, Queensland (by exempt or independent shops) and the Australian Capital Territory prior to the introduction of the Retail Award, the reduced Sunday penalty rate is a return to what was an historical standard in each jurisdiction.

45. In New South Wales, the *Shop Employees (State) Award* has provided for a 50% Sunday penalty rate since a decision of the Full Bench of the New South Wales Industrial Relations Commission on 27 September 1991.

46. Similarly, from 1 December 1994, employees employed by independent or exempt shops under the *Retail Industry Award (State)* in Queensland were entitled to a 50% Sunday penalty rate.

47. Since at least 1996 employees in the Australian Capital Territory were entitled to a 50% Sunday penalty rate under the terms of the Retail & Wholesale Industry – Shop Employees – Australian Capital Territory Award 1996.

48. That the Penalty Rates Case decision represents, for a large proportion of the Australian retail industry, a return to pre-modern award Sunday penalty rates is a factor which should weigh against a lengthy transitional period.

II. Fair Notice

49. Employees within the retail industry have been on notice for 5 years that there was the potential for Sunday penalty rates to be reduced. Retail Industry Associations applied for reductions to the Sunday penalty rates as part of the 2012 Award Review. As early as August 2012, the ACTU was campaigning against the reduction of weekend penalty rates through the modern award review process.[25]

50. Similarly, the SDA campaign "Save our Weekend. Protect Penalty Rates" campaign has been operating since at least August 2015.[26]

51. Both the ACTU and the SDA have actively put their members, and the greater community, on notice of the potential for penalty rates to be reduced through the modern award process.

52. The Retail Associations submit that the fair notice provided to affected employees supports a shorter transitional period.

E. Shiftworkers

53. Despite not being specifically addressed in the Penalty Rates Case decision, the Retail Associations have operated on the basis that the decision to reduce the Sunday penalty rate, applies equally to shiftworkers under the Retail Award.

54. The Retail Associations make this assumption on the basis of the FWC's findings that the current Sunday penalty rate is neither fair nor relevant, and the disutility of Sunday work has reduced over time. There is nothing before the FWC to suggest that shiftworkers should be treated any differently to permanent employees under the Retail Award.

55. As such, these submissions of the Retail Associations are intended to apply equally to shiftworkers under the Retail Award. The Retail Associations propose that from 1 July 2017 the rate for shiftwork performed on Sundays be 175% (200% for casuals) of the ordinary time rate.

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[25] http://www.actu.org.au/actu-media/archives/2012/business-push-to-remove-weekend-penalty-rates-would-cut-take-home-pay-of-working-australians (accessed 20 March 2017)
[26] http://www.saveourweekend.org.au/ (accessed 21 March 2017)

F. Take Home Pay Orders

56. Take home pay orders are derived from Schedule 5, Part 3, s.8 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) ("**Transitional Act**"), which provides that (our underlining):

Part 10A award modernisation process is not intended to result in reduction in take-home pay

(1) The Part 10A award modernisation process is not intended to result in a reduction in the take-home pay of employees or outworkers.

(2) An employee's or outworker's take-home pay is the pay an employee or outworker actually receives:

(a) including wages and incentive-based payments, and additional amounts such as allowances and overtime; but

(b) disregarding the effect of any deductions that are made as permitted by section 324 of the FW Act.

Note: Deductions permitted by section 324 of the FW Act may (for example) include deductions under salary sacrificing arrangements.

(3) An employee suffers a modernisation-related reduction in take-home pay if, and only if:

(a) a modern award made in the Part 10A award modernisation process starts to apply to the employee when the award comes into operation; and

(b) the employee is employed in the same position as (or a position that is comparable to) the position he or she was employed in immediately before the modern award came into operation; and

(c) the amount of the employee's take-home pay for working particular hours or for a particular quantity of work after the modern award comes into operation is less than what would have been the employee's take-home pay for those hours or that quantity of work immediately before the award came into operation; and

(d) that reduction in the employee's take-home pay is attributable to the Part 10A award modernisation process.

57. The Explanatory Memorandum to the Transitional Act provides further guidance as to the application of take home pay orders (our underlining):

An order can be sought (under item 9) in respect of a modernisation-related reduction in take-home pay. An employee suffers such a reduction if, and only if:

- *the modern award starts to apply to the employee when it commences operation - that is, the orders are only available in respect of current award covered employees;*
- *the employee is employed in the same position (or a position that is comparable to) the position they were employed in immediately before the modern award came into operation. This makes clear that the provision is designed purely to ensure a fair transition from the old award to the new - it is not intended that this provision apply where employees change jobs, or where working arrangements change;*
- *the employee's take-home pay for working particular hours (including a particular shift pattern or spread of hours) or for a particular quantity of work is less than it would have been immediately before the modern award came into operation; and*
- *the reduction is attributable to the modernisation process – the intention is that orders can only be made where modernisation is the operative or immediate reason for a reduction in take-home pay.* [27]

It is not intended that there be a time limit on the making of an application, however, it is expected that the ability to draw a connection between a reduction in take-home pay and the award modernisation process will diminish over time.[28]

The provisions regarding take-home pay orders are intended to ensure that an employee or outworker is not disadvantaged in his or her take-home pay in the transition from the old system to the new modern award.[29]

58. The FWC confirmed this reasoning in *Fisher, Bjoern v Glad Security Pty Ltd*, whereby Senior Deputy President Hamberger stated that, "*On any reasonable*

[27] Paragraph 201
[28] Paragraph 206
[29] Paragraph 212

construction, for award modernisation to be the 'operative or immediate reason' the reduction in take home pay must be attributable to a reduction in relevant award entitlements between the 'old' award and the modern award". [30]

Has an employee suffered a reduction in take home pay as a result of the "award modernisation process"?

59. The *Fair Work Act 2009* (Cth) ("**FW Act**") defines the "award modernisation process" as the process of making modern awards under Part 10A of the *Workplace Relations Act 1996* ("**WR Act**"), as continued by Part 2 of Schedule 5 of the Transitional Act.[31]

60. The award modernisation process was commenced in accordance with the award modernisation request issued by the Australian Government on 1 April 2008 (and subsequently amended on 26 August 2009) ("**Request**").[32]

61. Under the WR Act, the award modernisation process must be completed in accordance with the timing provided for in the Request. The Request (as amended) states that the award modernisation process was to be completed by 31 December 2009.[33]

62. The decision handed down in this matter comes as a result of an application under section 156 of the FW Act.

63. It is clear that take home pay orders were only available to employees who suffered a reduction in pay due to the award modernisation process. As set out above, the award modernisation process was the process of making new modern awards, not varying existing modern awards.

64. Any reduction in pay which may flow to an employee as a result of the decision in this matter, comes not from the award modernisation process under Part 10A of the WR Act, but as a result of an application to vary a modern award under section 156 of the FW Act. As such, it is our submission that take home pay orders are not available in these circumstances.

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[30] [2010] FWC 3678 at [9]
[31] Section 12
[32] As required by the *Workplace Relations Act 1996* (Cth), s.576C
[33] At paragraph 19

65. The *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009* (**Regulations**) were amended in 2010 inserting additional provisions associated with modern award or transitional arrangements resulting in a reduction in take-home pay.[34]

66. Regulation 3B.04 supplements the Transitional Act as follows (our underlining):

Part 3A--Avoiding reductions in take-home pay from modern award or transitional arrangements

13A Modern award terms giving FWA power to make take-home pay orders

(1) A modern award may include terms that give FWA power to make an order (a take-home pay order) remedying a reduction in take-home pay suffered by an employee or outworker, or a class of employees or outworkers, <u>as a result of the making of a modern award or the operation of any transitional arrangements</u> in relation to the award (whether or not the reduction in take-home pay is a modernisation-related reduction in take-home pay).

(2) An employee's or outworker's take-home pay is the pay an employee or outworker actually receives:

(a) including wages and incentive-based payments, and additional amounts such as allowances and overtime; but

(b) disregarding the effect of any deductions that are made as permitted by section 324 of the FW Act.

Note: Deductions permitted by section 324 of the FW Act may (for example) include deductions under salary sacrificing arrangements.

(3) This Part applies to an employee or outworker, or a class of employees or outworkers, to whom a modern award applies if the employee, employees, outworker or outworkers are likely to suffer a reduction in take-home pay <u>attributable to the making of a modern award or the operation of any transitional arrangements</u> in relation to the award.

[34] *Fair Work (Transitional Provisions and Consequential Amendments) Amendment Regulations 2010 (No.1) (SLI No 77 of 2010)*

67. The Explanatory Statement (**Statement**) issued in relation to the amended Regulations identifies two key purposes of regulation 3B.04:

(i) to remove the potential argument that take home pay provisions in modern awards were invalid on the basis that FWA's powers are conferred by statute, rather than the terms of an award; and

(ii) in specific circumstances, to extend the class of employees to whom take home pay orders may be available.

68. The Statement provides further clarification as follows (our underlining):

New item 13A is intended to allow modern awards to include terms protecting the take-home pay of a broader class of employees than the take-home pay provisions in Part 3 of Schedule 5 to the Act. Modern awards include provisions allowing <u>new employees</u> (i.e. those employed after the commencement of the modern award) <u>to obtain a take-home pay order with respect to reductions in take-home pay that occur as a result of the transitional arrangements</u> in the award (<u>a reference to the phasing in of differences between the pay rates in pre-modernised awards and modern awards</u>). This is different to the take-home pay provisions in Part 3 of Schedule 5 which require the employee to be employed in the same position as the position he or she was employed in immediately before the modern award came into operation (see item 8(3)(b) of Schedule 5 to the Act). The validation of these provisions in modern awards furthers the commitment made by the Government that the award modernisation process not reduce the take-home pay of employees.

69. Essentially, regulation 3B.04 was intended to provide employees covered by a modern award (who commenced after 1 January 2010), access to a take home pay order where such employees suffered a reduction in pay as a result of the transitional arrangements. The provision recognises that some penalty rates in modern awards reduced over time by virtue of phasing in from pre-modern awards. Such circumstances satisfy the requirement that a reduction in pay be attributable to the making of a modern award (or associated transitional arrangements).

70. The situation described in paragraph 69 above does not apply in the circumstances of this case. That is, any reduction in pay experienced by an employee as a result of the reduced Sunday penalty rate, will not occur due to the phasing of pay rates from pre-modernised awards to the Retail Award.

71. The amended Regulations also introduced a new regulation 3B.05, to address modernisation-related reduction in take-home pay from a variation to a modern award:

8A Variation of modern award not intended to result in reduction in take-home pay

(1) The process of varying a modern award was not intended to result in a reduction in the take-home pay of employees or outworkers.

(2) In this item, varying a modern award means varying a modern award:

(a) under item 14; or

(b) under section 157 of the FW Act before 1 July 2010.

Note: Item 14 was inserted into this Act by regulation 3B.01 and ceased to have effect on 31 March 2010.

72. This regulation has the effect of recognising certain variations to modern awards as a "modernisation-related reduction in take home pay". However, such variation must have occurred under item 14 (which ceased operation on 31 March 2010), or under section 157 of the of FW Act, <u>before 1 July 2010</u>. Neither of those circumstances apply in this case, and as such, regulation 3B.05 does not apply.

73. Importantly, the Statement also provided that:

It is not intended that an employee be entitled to a take-home pay order if the employee suffers a reduction between the amount the employee would have received under a modern award in its form on 1 January 2010 and what the employee receives after that modern award is varied by the FWA. The relevant comparison is between the amount of take-home pay an employee received for performing certain work before the modern award came into operation on 1 January 2010…and what the employee receives (or is likely to receive) for the

same work under the modern award, taking into account any variations to the modern award made by FWA.

74. It is apparent that regulations 3B.04 and 3B.05 were intended to provide protection to employees as a result of residual circumstances associated with the transition from the old award system to the new modern award system.

75. Any reduction caused by the reduction of the Sunday penalty rate cannot be said to be residual to the award modernisation process. The 2014 Award Review process cannot reasonably be held to be residual to the award modernisation process. It is an entirely separate process conducted under an entirely separate legislative regime.

76. For the reasons set out above, the Retail Associations submit that take home pay orders are not available in these circumstances.

24 March 2017

ANNEXURE A

Summary of impact of proposed transition on Retail Employee Lay Witnesses

Witness	Current	From 1/7/17	Change from current	From 1/7/18	Change from current
SDA Retail 1	$ 980.47	$ 984.25	$ 3.78	$ 987.64	$ 7.17
SDA Retail 2*	$ 1,645.29	$ 1,654.10	$ 8.81	$ 1,662.19	$ 16.90
SDA Retail 3*	$ 1,025.57	$ 1,043.78	$ 18.21	$ 1,062.17	$ 36.60
SDA Retail 4	$ 741.23	$ 741.11	-$ 0.12	$ 740.45	-$ 0.78
SDA Retail 5*	$ 1,305.05	$ 1,305.35	$ 0.30	$ 1,304.73	-$ 0.32
SDA Retail 6*	$ 1,105.77	$ 1,113.53	$ 7.76	$ 1,120.89	$ 15.12
SDA Retail 7	$ 690.19	$ 692.53	$ 2.34	$ 694.49	$ 4.30

*Amounts are fortnightly based on a two week roster

Witness SDA Retail 1

Roster	Hours worked	Mon - Fri	Weekday Eve	Saturday	Sunday	Overtime 150%	Overtime 200%
Monday	5.30am to 1.30pm	6				1.5	
Tuesday	5.30am to 1.30pm	6				1.5	
Wednesday	1.00pm to 9.30pm	5	3				
Thursday	1.30pm to 9.30pm	4.5	3				
Friday							
Saturday							
Sunday	5.30am to 1.30pm				4		3.5
TOTAL	0	21.5	6	0	4	3	3.5

Applicable rates

	Current	1st transition*	2nd transition**
Monday to Friday	$ 20.22	$ 20.72	$ 21.24
Weekday Evening	$ 25.27	$ 25.90	$ 26.55
Saturday	$ 25.27	$ 25.90	$ 26.55
Sunday	$ 40.43	$ 36.26	$ 31.86
Overtime 150%	$ 30.32	$ 31.08	$ 31.86
Overtime 200%	$ 40.43	$ 41.44	$ 42.48

*Sunday penalty 75% plus 2.5% increase

**Sunday penalty 50% plus 2 x 2.5% increases

Overall Pay

Current	$ 980.47
01-Jul-17	$ 984.25
01-Jul-18	$ 987.64

Assumptions

30 minute unpaid break at midpoint of shift of more than 5 hours

Witness SDA Retail 2

Roster	Hours worked	Mon - Fri	Weekday Eve	Saturday	Sunday	Overtime 150%	Overtime 200%
Week 1							
Monday	9.00am to 5.30pm	8					
Tuesday	9.00am to 5.30pm	8					
Wednesday	9.00am to 5.30pm	8					
Thursday	9.00am to 3.30pm	6					
Friday							
Saturday	9.00am to 5.00pm			7.5			
Sunday	10.00am to 5.00pm				6.5		
Week 2							
Monday	9.00am to 5.30pm	8					
Tuesday	9.00am to 5.30pm	8					
Wednesday							
Thursday	9.00am to 5.30pm	8					
Friday	10.30am to 7.00pm	7	1				
Saturday							
Sunday							
TOTAL		61	1	7.5	6.5	0	0

Applicable rates

	Current	1st transition*	2nd transition**
Monday to Friday	$ 19.44	$ 19.93	$ 20.43
Weekday Evening	$ 24.30	$ 24.91	$ 25.53
Saturday	$ 24.30	$ 24.91	$ 25.53
Sunday	$ 38.88	$ 34.88	$ 30.64
Overtime 150%	$ 29.16	$ 29.89	$ 30.64
Overtime 200%	$ 38.88	$ 39.86	$ 40.85

*Sunday penalty 75% plus 2.5% increase

**Sunday penalty 50% plus 2 x 2.5% increases

Overall Pay

Current	$	1,645.29
01-Jul-17	$	1,654.10
01-Jul-18	$	1,662.19

Assumptions

30 minute unpaid break at midpoint of shift of more than 5 hours

Witness SDA Retail 3

Roster	Hours worked	Mon - Fri	Weekday Eve	Saturday	Sunday	Overtime 150%	Overtime 200%
Week 1							
Monday	5.00am to 10.30am	3				2	
Tuesday	5.00am to 10.30am	3				2	
Wednesday							
Thursday							
Friday							
Saturday							
Sunday							
Week 2							
Monday	5.00am to 10.30am	3				2	
Tuesday	5.00am to 10.30am	3				2	
Wednesday	5.00am to 10.30am	3				2	
Thursday							
Friday	5.00am to 10.30am	3				2	
Saturday	5.00am to 10.30am			3		2	
Sunday	5.00am to 10.30am				1.5		3.5
TOTAL		18	0	3	1.5	14	3.5

Applicable rates

	Current	1st transition*	2nd transition**
Monday to Friday	$ 19.44	$ 19.93	$ 20.43
Weekday Evening	$ 24.30	$ 24.91	$ 25.53
Saturday	$ 24.30	$ 24.91	$ 25.53
Sunday	$ 38.88	$ 34.88	$ 30.64
Overtime 150%	$ 29.16	$ 29.89	$ 30.64
Overtime 200%	$ 38.88	$ 39.86	$ 40.85

*Sunday penalty 75% plus 2.5% increase

**Sunday penalty 50% plus 2 x 2.5% increases

Overall Pay

Current	$	1,025.57
01-Jul-17	$	1,043.78
01-Jul-18	$	1,062.17

Assumptions

30 minute unpaid break at midpoint of shift of more than 5 hours

Witness SDA Retail 4

Roster	Hours worked	Mon - Fri	Weekday Eve	Saturday	Sunday	Overtime 150%	Overtime 200%
Monday	5.15pm to 8.15pm	3					
Tuesday	8.15am to 6.15pm	9					
Wednesday	10.15am to 8.15pm	6.75	2.25				
Thursday							
Friday							
Saturday	3.00pm to 8.15pm			5.25			
Sunday	7.45am to 12.45pm				3.75		1.25
TOTAL	0	18.75	2.25	5.25	3.75	0	1.25

Applicable rates

	Current	1st transition*	2nd transition**
Monday to Friday	$ 19.44	$ 19.93	$ 20.43
Weekday Evening	$ 24.30	$ 24.91	$ 25.53
Saturday	$ 24.30	$ 24.91	$ 25.53
Sunday	$ 38.88	$ 34.88	$ 30.64
Overtime 150%	$ 29.16	$ 29.89	$ 30.64
Overtime 200%	$ 38.88	$ 39.86	$ 40.85

*Sunday penalty 75% plus 2.5% increase
**Sunday penalty 50% plus further 2.5% increase

Overall Pay

Current	$ 741.23
01-Jul-17	$ 741.11
01-Jul-18	$ 740.45

Assumptions

60 minute unpaid break Tuesday and Wednesday
No meal break other days

Witness SDA Retail 5

Roster	Hours worked	Mon - Fri	Weekday Eve	Saturday	Sunday	Overtime 150%	Overtime 200%
Week 1							
Monday							
Tuesday							
Wednesday	9.00am to 1.00pm	4					
Thursday	1.00pm to 9.00pm	4.5	3				
Friday	9.00am to 5.30pm	8					
Saturday							
Sunday							
Week 2							
Monday							
Tuesday							
Wednesday	9.00am to 5.30pm	8					
Thursday	9.00am to 6.00pm	8.5					
Friday	9.00am to 5.30pm	8					
Saturday	9.00am to 5.00pm			7.5			
Sunday	10.00am to 5.00pm				6.5		
TOTAL		41	3	7.5	6.5	0	0

Applicable rates

	Current	1st transition*	2nd transition**
Monday to Friday	$ 19.44	$ 19.93	$ 20.43
Weekday Evening	$ 24.30	$ 24.91	$ 25.53
Saturday	$ 24.30	$ 24.91	$ 25.53
Sunday	$ 38.88	$ 34.88	$ 30.64
Overtime 150%	$ 29.16	$ 29.89	$ 30.64
Overtime 200%	$ 38.88	$ 39.86	$ 40.85

*Sunday penalty 75% plus 2.5% increase

**Sunday penalty 50% plus 2 x 2.5% increases

Overall Pay

Current	$	1,305.05
01-Jul-17	$	1,305.35
01-Jul-18	$	1,304.73

Assumptions

30 minute unpaid break at midpoint of shift of more than 5 hours

Witness SDA Retail 6

Roster	Hours worked	Mon - Fri	Weekday Eve	Saturday	Sunday	Overtime 150%	Overtime 200%
Week 1							
Monday	1.30pm to 5.30pm	4					
Tuesday	9.00am to 1.30pm	4.5					
Wednesday	1.30pm to 5.30pm	4					
Thursday	9.00am to 4.00pm	6.5					
Friday							
Saturday							
Sunday							
Week 2							
Monday	1.30pm to 5.30pm	4					
Tuesday	9.00am to 5.30pm	8					
Wednesday	1.30pm to 5.30pm	4					
Thursday	1.30pm to 9.00pm	4.5	2.5				
Friday							
Saturday	10.00am to 3.00pm			5			
Sunday	1.00pm to 5.00pm				4		
TOTAL		39.5	2.5	5	4	0	0

Applicable rates

	Current	1st transition*	2nd transition**
Monday to Friday	$ 19.44	$ 19.93	$ 20.43
Weekday Evening	$ 24.30	$ 24.91	$ 25.53
Saturday	$ 24.30	$ 24.91	$ 25.53
Sunday	$ 38.88	$ 34.88	$ 30.64
Overtime 150%	$ 29.16	$ 29.89	$ 30.64
Overtime 200%	$ 38.88	$ 39.86	$ 40.85

*Sunday penalty 75% plus 2.5% increase

**Sunday penalty 50% plus 2 x 2.5% increases

Overall Pay

Current	$	1,105.77
01-Jul-17	$	1,113.53
01-Jul-18	$	1,120.89

Assumptions

30 minute unpaid break at midpoint of shift of more than 5 hours

Witness SDA Retail 7

Roster	Hours worked	Mon - Fri	Weekday Eve	Saturday	Sunday	Overtime 150%	Overtime 200%
Monday	9.00am to 3.00pm	6					
Tuesday	7.00am to 4.00pm	8.5					
Wednesday	10.00am to 3.00pm	5					
Thursday	9.00am to 3.30pm	6					
Friday							
Saturday							
Sunday	7.00am to 12.00pm				3		2
TOTAL	0	25.5	0	0	3	0	2

Applicable rates

	Current	1st transition*	2nd transition**
Monday to Friday	$ 19.44	$ 19.93	$ 20.43
Weekday Evening	$ 24.30	$ 24.91	$ 25.53
Saturday	$ 24.30	$ 24.91	$ 25.53
Sunday	$ 38.88	$ 34.88	$ 30.64
Overtime 150%	$ 29.16	$ 29.89	$ 30.64
Overtime 200%	$ 38.88	$ 39.86	$ 40.85

*Sunday penalty 75% plus 2.5% increase

**Sunday penalty 50% plus 2 x 2.5% increases

Overall Pay

Current	$ 690.19
01-Jul-17	$ 692.53
01-Jul-18	$ 694.49

Assumptions

30 minute unpaid break on Tuesday and Thursday

No meal break Monday despite shift length of 6 hours