

IN THE FAIR WORK COMMISSION

AM2014/305

FOUR YEARLY REVIEW OF MODERN AWARDS

PENALTY RATES

**SUBMISSIONS OF AUSTRALIAN RETAILERS ASSOCIATION, AND MASTER
GROCERS AUSTRALIA (THE RETAIL ASSOCIATIONS) –PUBLIC HOLIDAY
PENALTY RATES DRAFT DETERMINATION**

1. These submissions respond to the Draft Determination issued by the Fair Work Commission (**FWC**) varying clause 29.4(d)(i) of the *General Retail Industry Award 2010* (Retail Award).
2. The Retail Associations agree with the content of the Draft Determination as it relates to the operative date of the variation to the Retail Award. The Retail Associations consider it is not necessary to implement transitional provisions in relation to public holiday penalty rate reductions given the small number of employees and days that are impacted by them. The Retail Associations also consider there should be no unnecessary delay in implementing the reductions, and a commencement date of 1 July 2017 is therefore appropriate.
3. The Retail Associations hold minor drafting concerns with two aspects of the Draft Determinations. First, the framing of the clause is inconsistent with the remaining sub-clauses of 29.4 in relation to the way the penalty is referenced (as a percentage of the ordinary rate as opposed to as an additional amount), and with the direction of the clause (an employer's obligation rather than an employee's entitlement. We assume, however, that given the Retail Award will proceed through a Plain Language Redrafting process the remaining clauses will be amended to a form that is consistent with the Draft Determination. We base this assumption on the way other award penalty rate clauses have been treated during the process. On the basis that our assumption is correct we would withdraw this concern.
4. The second concern we hold is that the Draft Determination refers to work "*on a public holiday or substituted day*", and we consider this wording has the potential to create ambiguity or uncertainty. The Retail Award deals with

substitution of public holidays in only one sense (at clause 34.2) – it allows a majority of employees and their employer to agree to substitute another day for a public holiday. The ambiguity arises from there being a more common reference to substituted days arising from State and Territory-based public holidays legislation and the National Employment Standards, being circumstances where a public holiday falls on a weekend and is substituted to another day. In order to ensure the reference in the clause to substituted days is limited to those days substituted by agreement by virtue of clause 34.2, the relevant provision of the Draft Determination should be amended as follows:

(i) An employer must pay a full-time or part-time employee at the rate of 225% of the minimum hourly rate for hours worked on a public holiday or substituted (in accordance with clause 34.2) day. The rate for a casual employee is 250% of the minimum hourly rate (inclusive of the casual loading).

27 March 2017