

IN THE FAIR WORK COMMISSION

AM2014/305

FOUR YEARLY REVIEW OF MODERN AWARDS

PENALTY RATES

**REPLY SUBMISSIONS OF THE AUSTRALIAN RETAILERS ASSOCIATION,
NATIONAL RETAIL ASSOCIATION AND MASTER GROCERS AUSTRALIA**

(THE RETAIL ASSOCIATIONS)

– TRANSITIONAL ARRANGEMENTS (SUNDAY PENALTY RATES)

1. On 23 February 2017 the Fair Work Commission (**Commission**) issued its Decision in the Penalty Rates Common Issue (**Penalty Rates Decision**). Relevantly to the Retail Associations, the Commission determined that the Sunday penalty rates under the *General Retail Industry Award 2010* (**GRIA**) should be reduced. In the Penalty Rates Decision the Commission expressed a preliminary view as to appropriate transitional provisions to mitigate the hardship for employees as a result of the reduced penalty rates. The Commission then sought the views of interested parties in relation to appropriate transitional arrangements.
2. On 24 March 2017 the Retail Associations filed submissions seeking two stage transitional arrangements. Submissions were also received from a number of other interested parties. On 5 April 2017 the Commission issued a Statement (**the 5 April Statement**) which raised a number of questions in relation to the submissions of the parties.
3. These submissions deal with two key matters. The first is the Retail Associations' response to submissions filed by interested parties, in particular those of the Shop, Distributive and Allied Employees' Association (the **SDA**). The Retail Associations have not responded to all submissions of all interested parties, as a number of the submissions filed fail to engage with the matters on which the Commission sought the views of the parties. Further, given a number of submissions followed the same theme we have grouped these together where appropriate. The second key matter dealt with in these

submissions is the Retail Associations' responses to relevant questions raised by the Commission in the 5 April Statement.

A. SDA SUBMISSIONS

4. The SDA has proposed, as its primary position, that no Order be made by the Commission to implement the Penalty Rates Decision. As an alternative, the SDA proposes an effective seven year transitional period. Under this proposal there would be a two year delay in the commencement of the transition followed by a six step transition from 1 July 2019, meaning the Penalty Rates Decision, as it relates to the GRIA, would not be fully implemented until 1 July 2024. For the reasons set out below, the Retail Associations submit that the SDA's proposal should be rejected.

No Order be Made

5. The SDA's primary position is that the Commission should not make any Order implementing the Sunday penalty rate reduction. This approach should be rejected. The SDA is effectively asking the Commission to revoke the Penalty Rates Decision, which the Commission is not permitted to do under section 603(3) of the *Fair Work Act 2009 (FW Act)*.
6. We note the SDA asserts, at paragraph 8 of its submission, that:

"The legislative framework establishing the award safety net is not one which permits a cut to take home pay for low paid workers".
7. No basis is provided by the SDA for this assertion, which is unsurprising given there is nothing in Part 2-3 FW Act, or within the FW Act more broadly, which precludes the Commission from reducing take home pay for low paid workers. If the Parliament intended that award safety net conditions could never decrease then it would have made this clear in the FW Act. That it did not means the SDA's assertion is wrong.
8. The Commission is required, by virtue of sections 134(1) of the FW Act, to ensure the GRIA, in conjunction with the National Employment Standards, provides a fair and relevant minimum safety net of terms and conditions, and in doing so must take into account the needs of the low paid. The needs of the

low paid is one of a number of matters the Commission is required to take into account under section 134, and the Commission clearly took this matter into consideration in reaching its decision.

9. If the SDA is aggrieved by the Penalty Rates Decision, and believes the Commission has erred, it is open to the SDA to seek judicial review of the Penalty Rates Decision.

Seven Year Transition

10. As an alternative to its primary position, the SDA has proposed transitional arrangements which would delay the full implementation of the Sunday penalty rate reductions until 1 July 2024. The SDA's proposal would see the Sunday penalty rate under the GRIA phased in over five increments, commencing from 1 July 2019. The basis for this is set out at paragraph 10 of the SDA submissions, where the SDA relies on four matters.

- i) ***Opportunity to make arrangements***

11. The SDA submits, at paragraph 10(a), that *"a period of 5 years is necessary give employees some opportunity to make whatever arrangements they can to mitigate the adverse effects of the reduction in penalty rates"*.
12. The SDA has failed to identify what these "adverse effects" are, and has not directed its submission to any evidence to support its claim that, what is essentially a seven year transitional period, is necessary to mitigate such "adverse effects". The evidence before the Commission as to the adverse effects of the Sunday penalty rate reductions was summarised by the Retail Associations in the submissions filed on 24 March 2017. That summary identified that only two of the seven retail employee witnesses who gave evidence in this matter would suffer a pay reduction under the two-stage transition proposed by the Retail Associations, with the largest reduction amounting to approximately 78 cents per week.¹

¹ Retail Associations' Submissions (24 March 2017) at paragraphs [21]-[25].

13. The SDA has also failed to identify what “arrangements” retail employees might need to make, and why it would take retail employees a combined 7 years to make those arrangements.

ii) Application for award minimum rates of pay

14. The SDA has submitted that any transitional arrangements should be delayed until 1 July 2019 on the basis that it would allow it and others to prepare an application for increases in modern award minimum rates of pay. This should be rejected.

15. What the SDA is asking the Commission to do is to delay the commencement of the transitional provisions so that it can prepare a case to eliminate the hardship that the transitional provisions were to address. Similar to the question asked by the Commission of the SDA at paragraph [27] of the 5 April Statement, it is appropriate for the SDA to explain why, if the Commission was to delay the commencement of the transitional provisions to allow it to prepare an application to increase modern award minimum rates of pay, it would be necessary to phase in the changes at all. If the hardship is eliminated through a successful SDA application to increase award minimum rates then transitional provisions have no work to do.

16. Further, any delay to the commencement of the transitional arrangements will cause a Sunday penalty rate which has been determined to be neither fair nor relevant². This should be rejected.

iii) Modern award transitional arrangements

17. The SDA, at paragraph 10(c) of its submission, refers to a five year transitional process which applied with the making of modern awards, in particular the transition from a 50% penalty rate to a 100% penalty rate for New South Wales retail workers, and submits that *“fairness and equal treatment of employees and employers demands that the same transitional period be afforded to employees will who (sic) suffer an equivalent reduction in penalty rates”*. There are a number of problems with this submission.

² [2017] FWCFB 1001 at [1701]

18. Firstly, the transitional arrangements that applied with the commencement of modern awards was a four year process, commencing on 1 July 2010 and ceasing on 1 July 2014, and not a five year process as asserted by the SDA.
19. Secondly, the SDA's proposal is not the same as the 2010 transition, and therefore it offends the "fairness and equal treatment" the SDA submits is necessary.
20. Thirdly, the SDA mischaracterises the post-2010 transition to the GRIA. That transition involved the transition from a significant number of State and Territory based awards and Federal awards to a single modern award. This involved increases and reductions of a substantial number of provisions, including base rates of pay, casual loadings and penalty rates. The "hardship" in that instance involved hardship visited on employers and employees, and impacted in some way on almost every employee. The Sunday Penalty Decision impacts a limited number of employees in limited circumstances.

iv) Absence of Take Home Pay Orders

21. The Retail Associations accept the SDA submission to the extent that Take Home Pay Orders are not available. The Retail Associations reject the SDA's position that the absence of the availability of such orders warrants the extended transitional period they have proposed.

Different transitional arrangements for classes of employees

22. The preservation of the Sunday penalty rate for existing employees under the GRIA, as submitted by the SDA, would have the effect of adding complexity and regulatory burden to retail employers, whilst simultaneously eliminating the employment and productivity benefits likely to be achieved through the reduced penalty rate.
23. The SDA acknowledges that the regulatory burden on business is a consideration under s 134(1)(f) of the *Fair Work Act 2009* (Cth), but submits

that no particular weight should be attached to one consideration over another.³

24. However, the SDA then goes on to submit that it is “*incumbent on the Commission to give substantial weight to s.134(1)(a)*”.⁴
25. The SDA has provided no basis for its contradictory submission that s.134(a) should be afforded greater weight, and therefore it should be rejected.

B. Various Government/Opposition and other submissions

26. The Commission has received a substantial number of submissions from various State and Territory Governments, political parties and organisations asking that the Commission not to implement the Penalty Rates Decision. The Retail Associations submit that those submissions should be rejected for the reasons outlined at paragraphs 5 to 9 of these submissions.

C. Submissions of Equity Economics

27. Equity Economics has filed a submission purporting to model the impact of the Sunday penalty rate reductions on employees under the GRIA. The Retail Associations submit that the submissions of Equity Economics should be rejected for a number of reasons.
28. Firstly, Equity Economics’ submission contains significant inaccuracies in its assessment of the impact of the Sunday penalty rate reductions on retail employees, and substantially overstates the impact of the reductions even on the hypothetical employee roster used in their model.
29. Equity Economics models a Level 1 Retail Employee working 40 hours per week. The modelling assumes the employee is currently paid 8 hours at a rate of double time on Sundays, and that this will reduce to 8 hours at time and a half. The issues with this modelling are:

- (a) most rostering and pay cycles run from Monday to Sunday, in which case two of the hours that are currently paid at double time are

³ SDA Submissions at paragraph [16]

⁴ SDA Submissions at paragraph [18]

worked as overtime. These two hours will continue to be paid at double time after the Sunday penalty rate is reduced;

(b) a full time employee is not able to work every Sunday under the GRIA given the limitations set out in clause 28.13, and as such, if the hypothetical employee used in the model was required to work every Sunday then they would be paid at overtime rates every fourth Sunday.

(c) the combined effect of (a) and (b) above means that the model overstates the impact of the change by \$140 (using the 2017-18 rate used by Equity Economics against the 14 hours by which the model incorrectly assumes a change in rate) every four weeks. This means the actual impact, using the hypothetical employee in the model, is \$45 per week, not the \$80 per week contained within the model; and

(d) the model does not take into account annual, personal and compassionate leave entitlements, which are paid at base rates of pay (plus leave loading for annual leave, unless ordinary rates plus penalty rates for the period of leave would be higher – see clause 32.3 of the GRIA).

30. Secondly, the model is not reflective of any of the evidence before the Commission in the Penalty Rates Case. The Retail Associations summarised the working patterns of the Retail Employee Lay Witnesses, and the financial impact of the reduced Sunday Penalty Rate on them, in our submission of 24 March 2017. The modelling of Equity Economics is based on a pattern of work that is not consistent with the evidence.

31. A further criticism of Equity Economics is that they make assertions about the impact of the Commission's decisions in relation to both the Sunday penalty reduction and the transitional arrangements on employees covered by enterprise agreements without identifying any basis for those decisions.

D. Commission's Statement

32. The Retail Associations respond to those matters put to the parties by the Commission in the 5 April Statement below.

Question 1.1 - Estimate of employees affected by the penalty rate reductions

33. At paragraph 12 of the submissions filed by the Retail Associations we provided an estimate of the percentage of retail industry employees who would be impacted by reduced Sunday penalty rates. That estimate was that between 6.5% and 7.5% of retail industry employees would be impacted by the Sunday penalty rate reduction. Given there were approximately 1,228,200 people employed in the retail industry in February 2017⁵ this would mean that somewhere between 79,833 and 92,115 retail industry employees may be impacted by the reduction.
34. We have reviewed this data against other data sources, and have set out below a separate method of calculation.
35. As at May 2016 there were 367,600 non-managerial employees in the Retail Industry (defined as ANZSIC Division G) whose pay was set by an award⁶.
36. While we note that the data relied on relates only to non-managerial employees, it should be noted that the cohort of managerial employees is very small, and it is possible to estimate how many would have their pay set by an award. Data Cube 5 of the ABS data, at Table 4, identifies that there were, at February 2017, 768,900 Retail Trade employees whose pay was set by an award or collective agreement. Data Cube 4 at Table 4 identifies that there were 367,600 non-managerial employees whose pay was set by an award, and 400,500 whose pay was set by a collective agreement, a combined total of 768,100. This means there are only 800 managerial employees whose pay is set by either an award or collective agreement. It is reasonable to assume the distribution between those whose pay is set by an award and those whose pay is set by a collective agreement will be similar to that of non-managerial employees. Given 47.86% of non-managerial employees had their pay set by

⁵ ABS *Labour Force, Australia, Detailed, Quarterly, February 2017*

⁶ ABS *Employee Earnings and Hours, Australia, May 2016* at Data Cube 4, Table 4

an award, it can be assumed that 383 of the 800 managerial employees have their pay set by an award. This gives a combined total of 367,983 Retail Trade employees whose pay was set by an award.

37. This number, however, includes the following sub-divisions which are not covered by the GRIA:

- (a) subdivision 39 – Motor Vehicle and Motor Vehicle Parts Retailing;
- (b) subdivision 40 – Fuel Retailing;
- (c) subdivision 43 – Non-Store Retailing and Retail Commission-Based Buying and/or Selling.

38. It is possible to estimate the percentage of the 367,983 total Retail Trade employees whose pay is set by the GRIA, assuming there is consistency across subdivisions as to award application. Of the 1,228,200 employees employed in Retail Trade as at February 2017, 415,700 were employed in Food Retailing (subdivision 41)⁷ and 622,600 in Other Store-Based Retailing (subdivision 42)⁸, which are the subdivisions to which the GRIA would, absent the existence of an enterprise agreement, have application. Therefore 1,038,300 of the 1,228,200 Retail Trade employees worked in Food or Other Store-Based Retailing, giving a percentage of approximately 84.5%. It should be noted that this figure is likely to be inflated given subdivision 42 includes Class 4271 (Pharmaceutical, Cosmetic and Toiletry Goods Retailing) of Group 427 (Pharmaceutical and Other Store-Based Retailing), to which the *Pharmacy Industry Award 2010 (PIA)* would likely apply in the majority of circumstances.

39. Table 70 of the Penalty Rates Decision the Commission, using 2011 Census data, identified there were around 62,553 employees employed in Class 4271. We have completed two separate calculations in relation to this cohort of employees, one where they are all removed from the figures and one where they are all included (see paragraph 38). We have done this because while it is likely the substantial majority of these employees are employed under the PIA, there are also businesses operating under the GRIA who would fit within this Class, and it is not possible to accurately estimate where each falls. If the cohort was removed from the total, then there would be 975,747 Retail Trade

⁷ ABS Labour Force, Australia, Detailed, Quarterly, February 2017, series ID A84602541X

⁸ *ibid*, series ID A84602421F

employees for whom the GRIA, absent the existence of an enterprise agreement, would have application. This represents approximately 79.4% of Retail Trade employees.

40. The table below sets out the two estimates:

Class 4271 Included	
Retail Trade Award employee total	367,983
% within relevant subdivisions	84.5%
Relevant subdivisions employee total	310,946
% of employees who work on Sundays	31 to 35% ⁹
Total Affected Employees	96,393 to 108,831
Class 4271 Excluded	
Retail Trade Award employee total	367,983
% within relevant subdivisions	79.4%
Relevant subdivisions employee total	292,179
% of employees who work on Sundays	31 to 35%
Total Affected Employees	90,575 to 102,262

41. The above calculations assumes an even distribution of award coverage, that is that the percentage of employees whose pay is set by an award is consistent across the subdivisions, such that the same percentage of employees have their pay set by an award in fuel, motor vehicle and non-store retailing as in food and other store-based retailing. The Retail Associations consider this to be a reasonable assumption in the absence of any data to the contrary.

42. The calculations set out above provide a reasonable estimate (lower and upper limits) of the number of employees impacted by the Sunday penalty rate reductions under the GRIA. For the sake of completeness, the Retail Associations submit that between 79,833 and 108,831 employees will be affected by the penalty rate reductions under the GRIA.

Question 1.2 – Employment benefits to minimise hardship

⁹ Exhibit SDA 36 at Table 1

43. The Commission has asked the Retail Associations to explain how the submission made that the employment benefits of the reduced penalty rate “have the potential to directly minimise the hardship which is to be mitigated” sits with the observation in the Penalty Rates Decision at [1657] – [1659].
44. The Retail Associations’ submission of 24 March 2017, at paragraph 39, asserted that the impact of the Sunday penalty rate reduction had the potential to be minimised for existing employees by the allocation of additional hours of work. This is consistent with the observation of the Commission at paragraph [1659] that a greater demand for labour “*will somewhat ameliorate the reduction in income*”.
45. It should also be noted that the Productivity Commission’s conclusions, as set out in paragraph [1659], are based on the assumption that the move to the reduced Sunday penalty rate would occur without any transition. We are therefore unable to assume what the Productivity Commission’s conclusions would be under a two stage transition to the reduced penalty rate.
46. The Retail Associations’ submission is not that every existing retail employee who works on Sundays will, following the implementation of the Sunday penalty rate reduction, be rostered to work sufficient additional hours such that the reduction in income will be eliminated. Rather, the Retail Associations submit that the employment benefits will offset the reductions to some extent. This position is supported by the evidence of the retail employer lay witnesses (see paragraphs [1513], [1524]-[1525], [1540]-[1541], [1548] and [1555]-[1556] of the Penalty Rates Decision).

Question 1.4 – ACOSS Proposal

47. The Retail Associations submit that the ACOSS proposal is both unworkable and contrary to the matters the Commission is required to have regard to. While it is unclear how the proposal might operate, and ACOSS has been asked to detail this, it appears there are two possible models. The first is that loaded rates are paid for all Sunday workers, regardless of the number of hours they work on Sundays. The other is that loaded rates are paid just to compensate for the reduced income, and therefore act as a quasi-take home pay order.

48. Neither of these options should be considered. Loaded rates applying to all Sunday workers would have the effect of over compensating some workers and under compensating others for the reduction in pay occurring as a result of the Sunday penalty rate reduction. Further, the loaded rates would effectively constitute a continuation of the existing Sunday penalty rates under the GRIA, and would therefore amount to a continuation of a provision of the GRIA which has, as set out earlier in these submissions, been determined to be neither fair nor relevant.
49. Loaded rates applying as quasi-take home pay orders would both continue provisions which have been determined to be neither fair nor relevant and would offend section 134 of the FW Act in that they would substantially increase the regulatory burden and create a modern award that is not simple to understand.
50. The Retail Associations reserve the right to provide further submissions in relation to the ACROSS proposal once ACROSS has clarified how its proposal might operate in practice.

Question 3.1 – Relevant considerations for the Commission

51. The Retail Associations accept the proposition of AI Group in relation to the obligations of the Commission when making transitional arrangements (as set out at paragraph [19] of the 5 April Statement).
52. The Retail Associations further submit that the limitations as to the incidence of Sunday work provided for in the GRIA are relevant to the Commission's consideration of appropriate transitional provisions. The Commission is to determine the scope of the "hardship" any transitional provisions are directed to. Provisions of relevant awards which limit the incidence of Sunday work naturally go to that hardship, and as such must be taken into account.

Question 3.3 – Questions for the NRA

53. The NRA withdraws its submission in relation to the impact of transitional arrangements on collective bargaining.

21 April 2017