THE UNION FOR WORKERS IN
RETAIL. FAST FOOD. WAREHOUSING.

Shop Distributive and Allied Employees' Association

Matter No: 2014/305

FOUR YEARLY REVIEW OF MODERN AWARDS : PENALTY RATES

REPLY SUBMISSION OF THE SDA -

Transitional And Related Matters

Date 21 April, 2017

1. In Part A of these submissions, the SDA responds to the questions on notice published by the Commission in a Statement dated 5 April 2017 relating to submissions filed by various parties in respect of transitional arrangements to give effect to the

Commission's decision in *Four Yearly Review of Modern Awards - Penalty Rates* [2017] FWCFB 1001 (**the decision**).

2. In Part B of these submissions and to the extent that specific issues are not already addressed in Part A, the SDA replies to the submissions filed by employer organisations in respect of proposed transitional arrangements to give effect to the decision.

PART A: COMMISSION'S QUESTIONS ON NOTICE

Question 1.1 - first question

3. The SDA agrees that the Commission should take steps to mitigate the impact of the decision on the affected employees.

Question 1.1 (second question) – Estimate of the number of employees affected by penalty rate reductions by award

4. There are two classes of employees who will be affected by the decision: those whose terms and conditions of employment are prescribed by any of the awards the subject of the decision and thus have one or other of the awards apply to them (**award employees**); and those whose terms and conditions of employment are prescribed by enterprise agreements, but who would otherwise have one or other of the awards apply to them (**enterprise-agreement employees**).

5. As to the enterprise agreement employees, they will only be insulated from the adverse effects of the decision on the assumption that their employment conditions will continue to be as prescribed by an enterprise agreement. Such an assumption, while reasonable in the short term, is unsound in the medium/long term. Any of the following realistic scenarios would result in employees being subject to the a reduced safety net of award terms and conditions of employment by reason of the implementation of the decision:

   (a) If employees cease employment and then commence employment with a new employer in the same industry whose employees' terms and conditions of employment are as prescribed by the relevant award. In that regard it is to be noted that workers in the ANZSIC industry classification "Retail trade" (which

includes employees in the general retail, fast food and pharmacy industries) are more likely to have a shorter duration of employment with a particular employer than workers across all industries.[1]

(b) If employees continue in employment with the same employer which then seeks to bargain for a new enterprise agreement in the context of the reduced safety net of terms and conditions given effect to by the decision; and

(c) If employees continue in employment with the same employer and the enterprise agreement is then terminated, in which event the reduced safety net of award terms and conditions of employment would apply.

6. For the above reasons, although enterprise-agreement employees will not *immediately* be affected by the implementation of the decision while their employment remains governed by terms prescribed by an enterprise agreement, many will nonetheless, at some point in the future, likely be affected by the decision.

7. As at 2016, there were approximately 449,207 workers employed in the ANZSIC industry classification "Retail trade" (which includes employees in the general retail, fast food and pharmacy industries) whose pay was determined by collective agreements.[2]

8. As to the award employees, as at 2016, there were approximately 412,171 workers employed in the ANZSIC industry classification "Retail trade" (which includes employees in the general retail, fast food and pharmacy industries) whose pay was determined by award only.[3]

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1 Decision [1443]. Almost one quarter of workers in retail trade had been with their employer for 1-2 years and around one in five workers had been with their employer for less than 12 months.

2 Determined by reference to [1424] of the decision and the Commission's report *Industry Profile – Retail trade*. Para 6.2 (p. 52) identifies that, as at May 2016, 37.6% of employees in the Retail trade classification had their pay determined by collective agreement.. Table 5.1 identifies that, as at August 2016, there were a total of 1,194,700 employees employed in the Retail trade industry classification. .

3 Determined by reference to [1424] of the decision and the Commission's report *Industry Profile – Retail trade*. Para 6.2 (p. 52) identifies that, as at May 2016, 34.5% of employees in the Retail trade classification had their pay determined by award only. Table 5.1 identifies that, as at August 2016, there were a total of 1,194,700 employees employed in the Retail trade industry classification.

9. All of these 412,171 award employee are affected by the penalty rate reductions determined by the decision, irrespective of whether or not they presently perform any hours of work on a Sunday. This reflects three key features of employment in the Retail trade industry sector:

   (a) under each of the GRIA, the FFIA and the PIA, workers can be required to work on Sundays - work on that day is not voluntary;

   (b) the very limited nature of the restrictions on employers rostering employees to work on Sundays (discussed further below at paragraphs 31 to 36); and

   (c) the fact that about half of award-reliant enterprises in the Retail trade sector operate seven days a week and almost four in ten operate on weekdays and Saturdays.[4]

10. Award employees work in an industry in which weekend and Sunday trade is already extensive. According to the employers, this will only increase as a result of the Sunday penalty rate reductions. In this setting, every award-reliant employee is affected by the Sunday penalty rate cuts because there is little if any impediment to them being required to work on that day for less remuneration than they are currently entitled under the relevant awards.

11. Within this group of 412,171 award employees in the retail trade sector, plainly those most directly affected are those who currently perform work on a Sunday. The evidence does not however permit an estimate of the number of employees in this group.[5]

12. The above submissions analyse the number of employees in the Retail trade industry sector (defined as per the ANZSIC industry classification), which in the SDA's view will be affected by the decision. The numbers referred to above do not however include an estimate of employees employed in the hospitality industry.

Question 1.4 – Comment on ACOSS proposal

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4 The Commission's report *Industry Profile – Retail trade*. Para 7.1.1 (p. 61)

5 The only evidence is in respect of the "total retail workforce" (i.e.; not limited to award-covered employees). In respect of that group, the evidence is that 31-35% worked on a Sunday: decision at [1446].

13. Although it is not entirely clear, the SDA assumes that the reference by ACOSS to payment of "loaded hourly rates" is a proposal to increase the ordinary hourly rates of pay to offset the penalty rate reductions, while maintaining an entitlement to be paid penalty rates for work at certain times as prescribed by the awards (i.e.; the "loaded hourly rate" is not paid lieu of penalty rates).

14. Subject to further consideration of how such a proposal might operate, the SDA broadly supports such an approach.

Question 2.1 – Take Home Pay Orders

15. The SDA is of the view that take home pay orders are not an available option to ameliorate the impact of the proposed reductions on employees.

16. The SDA notes that the Commission has expressed the provisional view that:

> "… It is likely that at least 2 instalments will be required (but less than 5 instalments). **The period of adjustment required will depend on the extent of the reduction in Sunday penalty rates, the availability of 'take home pay orders' and the circumstances applying to each modern award**. The most significant reduction is for full-time and part-time employees covered by the Retail Award (from 200 per cent to 150 per cent), it follows that a longer period of adjustment may be required in this award."[6] (Emphasis added.)

17. Further to this observation, the unavailability of take home pay orders to ameliorate the impact on employees of penalty rate reductions therefore strongly militates in favour of the substantial and protective transitional arrangements of the type proposed by the SDA.

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[6] The decision at [2021(iv)].

Question 3.1 – (first question) - Power to make transitional arrangements

18. The SDA is of the view that the Commission has power to make transitional arrangements relating to the staggered introduction of any reduction to existing Sunday penalty rates.

Question 3.1 (second question) – Comment on Ai Group submission

19. The Ai Group has submitted that, in determining the transitional arrangements for the Sunday penalty rate, the Full Bench "*must act consistently with*" the eight matters set out in para 43 of its submissions.

20. The SDA accepts that, in fixing the transitional arrangements, the Full Bench must act consistently with the matters identified in subparagraphs 43(a), (c), (d), (e), (f) and (g) of the AI Group's submissions. The SDA does not however agree that the Full Bench must (or should) act consistently with the matters described in subparagraphs (b) and/or (h).

Subparagraph (b) – "Fairness"

21. The Ai Group submits that the Full Bench "*must act consistently with ... its principle that fairness is assessed from the perspective of both employer and employee (and not simply from the perspective of the employee)*".

22. However, in the paragraphs of the decision cited in support of this proposition, the Full Bench repeatedly and expressly qualified its statement about the assessment of fairness from the perspective of both employer and employee as being in relation to a particular "*context*", namely, whether the existing Sunday penalty rates prescribed by the awards were fair and relevant. As such, the Full Bench cannot be taken to have enunciated an overarching principle of general application about the approach to be taken to the assessment of "fairness," as is implied by the Ai Group's submissions.

23. The "context" in which the question of fairness now arises is materially different and distinct in two interrelated respects to the above context considered by the Full Bench in the decision. First, having found that the existing award provisions in respect of Sunday penalty rates are not "fair" in the above sense, the Commission's task is now to

determine appropriate transitional arrangements. Insofar as that task involves an assessment of the "fairness" of such transitional arrangements (which, as explained below, is to be attributed with central importance), the very nature and purpose of such arrangements, being the staged introduction of penalty rate reductions, is to ameliorate or mitigate the adverse effects of those reductions *on employees*. Transitional arrangements for the reduction in employee award entitlements self-evidently serve the purpose of protecting the interests of employees. Although other considerations of the type referred to by the Ai Group relevant to determining appropriate transitional arrangements might, in the circumstances of a particular case, weigh in favour of employer interests, the very nature of transitional arrangements means that the question of "fairness" falls to be assessed from the perspective of employees alone.

24. Secondly and in any event, in the circumstances of this case, the Commission has already determined two critical matters: (a) that the question of the fairness of transitional arrangements be assessed from the perspective of employees; and (b) that that assessment be of primary significance in the fixing of appropriate transitional arrangements.

25. These conclusions emerge from the following paragraphs of the decision in which the Full Bench addressed the consideration in s 134(1)(a) ("relative living standards and the needs of the low paid") (emphasis added):[7]

> Section 134(1)(a) requires that we take into account 'relative living standards and the needs of the low paid'. A threshold of two-thirds of median full-time wages provides a suitable benchmark for identifying who is 'low paid', within the meaning of s.134(1)(a). As shown in Chart 54 (see [1458]) a substantial proportion of award-reliant employees covered by the *Retail Award* are 'low paid'. Further, retail households face greater difficulties in raising emergency funds. This suggests that their financial resources are more limited than those of other industry households.
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> As stated in the PC Final Report, a reduction in Sunday penalty rates will have an adverse impact on the earnings of those hospitality industry employees [sic] who usually work on a Sunday. It is likely to reduce the earnings of those employees, who are already low paid, and to have a negative effect on their relative living standards and on their capacity to meet their needs.

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[7] Decision at [1656]-[1661]. This is in relation to the GRIA. The same analysis was adopted by the Full Bench in respect of the FFIA and the PIA: see at [1359] and [1830].

> The evidence of the SDA lay witnesses provides an individual perspective on the impact of the proposed changes. For example, witness SDA Retail 1 said that if Sunday penalty rates were reduced to 150 per cent he would be $74.06 worse off each week – a reduction of 7.88 per cent in his current weekly earnings. 1534
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> The extent to which lower wages induce a greater demand for labour on Sundays (and hence more hours for low-paid employees) will somewhat ameliorate the reduction in income, albeit by working more hours. We note the Productivity Commission's conclusion that, in general, most existing employees would probably face reduced earnings as it is improbable that, as a group, existing workers' hours on Sundays would rise sufficiently to offset the income effects of the penalty rate reduction.
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> The 'needs of the low paid' is a consideration which weighs against a reduction in Sunday penalty rates. But it needs to be borne in mind that the primary purpose of such penalty rates is to compensate employees for the disutility associated with working on Sundays rather than to address the needs of the low paid. The needs of the low paid are best addressed by the setting and adjustment of modern award minimum rates of pay (independent of penalty rates).
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> **We are conscious of the adverse impact of a reduction in Sunday penalty rates on the earnings of retail workers who work on Sundays and this will be particularly relevant to our consideration of the transitional arrangements associated with any such reduction.**

26. And later, specifically in relation to transitional arrangements, the Commission stated (emphasis added): [8]

> …Many of these employees earn just enough to cover weekly living expenses, saving money is difficult and unexpected expenses produce considerable financial distress. We are conscious of the adverse impact the award variations we propose to make upon these employees.
>
> The immediate implementation of all the variations we propose would inevitably **cause some hardship to the employees affected**, particularly those who work on Sundays. **There is plainly a need for appropriate transitional arrangements to mitigate such hardship.**

27. It is apparent from the above parts of the decision that, although the Full Bench found that the needs of the low paid weighed against a reduction in penalty rates, it adopted the view that those needs were best addressed by the setting and adjustment of modern award minimum rates of pay and the fixing of appropriate arrangements for the

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[8] The decision at [1999] and [2000].

proposed cuts in penalty rates. The Full Bench has found that the adverse impacts of the cuts on the earnings of retail workers is "*particularly relevant*" in determining appropriate transitional arrangements.

28. In this way it is apparent that the Full Bench determined not to maintain a clear delineation between the "merits" of its decision as to whether the awards satisfied the modern awards objective and the approach to be adopted to determining the arrangements to give effect to its decision. It identified a clear nexus between those two matters.

29. In particular, it has already determined two matters of present significance. First, that transitional arrangements are needed to *mitigate the hardship to employees* of the cuts to penalty rates. The identification of this interest or purpose shows that, in the circumstances of this proceeding, the Full Bench has, quite properly, conceived of the notion of fairness of transitional arrangements as being one to be assessed from the perspective of employees alone.

30. Secondly, the Full Bench has already expressly found that the adverse impacts of the cuts in the earnings of retail workers is not only relevant, but "*particularly relevant*", in determining appropriate transitional arrangements. Having adopted that approach, it is incumbent on the Full Bench to treat the object of mitigating the adverse impacts and hardship on employees as a matter of central importance and weight in fixing those transitional arrangements. Although that does not preclude the Commission from having regard to other considerations of the type identified by the Ai Group in setting the transitional arrangements, it would be erroneous if the Full Bench gave those other considerations such weight so as to diminish the "particular relevance" to be given to the adverse impact of reduction in Sunday penalty rates on the earnings of employees, as already found by the Commission.

<u>Subparagraph (h) – approach adopted by other Full Benches</u>

31. The SDA does not accept that the Full Bench in this proceeding "*must act*" consistently with the approach adopted by the other Full Benches to the staggered introduction of reductions in penalty rates. The mere fact that another Full Bench in different proceedings determined to phase in the reduction of penalty rates by two instalments necessarily reflects the facts and circumstances of that proceeding and does not

necessarily bind the approach Full Bench should adopt in this proceeding. The employers have not sought to articulate why the Full Bench as presently constituted "must act" consistently with the majority in *Re Restaurant and Catering Association of Victoria*.

Question 3.1 (third question) – relevance of award terms limiting the incidence of Sunday work

32. The SDA accepts that, in principle, the existence of award terms which may limit the incidence of Sunday work is a relevant consideration in the Commission determining appropriate transitional arrangements. However, in the circumstances of this case, this is a matter which should be given little weight for the reasons outlined below.

33. First, it is to be noted that it is only the Retail Associations which have raised this issue and only in respect of the GRIA.

34. Secondly, of the five specific provisions of the GRIA referred to by the Retail Associations (para 14 of submissions), only two relate specifically to Sunday work: clause 27.2 which prescribes that the ordinary hours of work fall between 9am and 6pm (unless the employer trades beyond 6pm in which case ordinary hours continue to 11pm); and clause 28.13 which provides that an employee who regularly works Sundays must be rostered so that they have three consecutive days off (including Saturday and Sunday) each four weeks. The remaining clauses are clauses of general application and do nothing to limit the incidence of work on Sundays in particular.

35. Thirdly, of the two clauses noted above which relate specifically to Sunday, the wide prescription of Sunday ordinary hours made by clause 27.2 will likewise do nothing to limit the incidence of Sunday work.

36. Fourthly, it follows from the above that it is only clause 28.13 which may have some effect in limiting the incidence of Sunday work. In practical terms, the effect of the clause is that employees who regularly work Sundays must be rostered off one weekend in four. That protection is a modest one, particularly in circumstances where under the GRIA Sunday work is not voluntary and employers can compel employees to

work on Sundays. It would mean that an employee could be required to work three out of four Sundays against their wishes.

37. Fifthly, in any event, although these award provisions may have some limited effect on the incidence of Sunday work, they will do nothing to mitigate the loss of take home pay to employees when they are rostered to work on Sundays, being the essential purpose of the transitional arrangements as recognised by the Full Bench.

Question 3.1 (fourth question) – Question posed by ABI and NSWBC

38. The SDA submits that the question posed by ABI and NSWBC is misguided and is not the correct question for the Full Bench to direct itself to in determining appropriate transitional arrangements.

39. As explained in paragraphs 21-30 above, in determining appropriate transitional arrangements, the Full Bench must act consistently with its findings and conclusions in the decision insofar as they concerned such arrangements. The Full Bench reached two critical conclusions in that respect: (a) that transitional arrangements are needed to *mitigate the hardship to employees* of the cuts to penalty rates; and (b) that the adverse impacts of the cuts in the earnings of retail workers is not only relevant, but "*particularly relevant*", in determining appropriate transitional arrangements. Consistent with these conclusions, the Full Bench must treat the object of mitigating the adverse impacts and hardship on employees of the penalty rate cuts as a matter of central importance and weight in the fixing of transitional arrangements.

40. The question posed by the ABI and NSWBC (and the approach submitted by the other employer organisations in their submissions) overlooks or ignores these key aspects of the findings and approach by the Full Bench. Further, the effect of the balancing exercise apparently advanced by the ABI and NSWBC is to devalue and diminish the importance of mitigating the hardship to employees from the penalty rate cuts such that that matter would no longer be of central importance in determining the nature of the transitional arrangements.

41. The question posed by the ABI and NSWBC also proceeds from the false premise that there are identifiable "*employment and regulatory benefits associated with the decision*" which are capable of being balanced against the provision of a "*substantive opportunity to employees to mitigate any adverse effects*" of the decision.

42. As to the claimed employment benefits associated with the decision, the Full Bench's findings in that regard were qualified and limited. In relation to the GRIA, although the Retail Associations selectively quote [1620] of the decision,[9] they make no reference to the immediately following paragraph, which provides a more qualified observations about the positive employment effects as follows:

> It is not suggested that the likely changes identified above will apply uniformly across all retail businesses. The actual impact of a reduction in Sunday penalty rates will depend on the circumstances applying to individual businesses or stores. **An assessment of a range of considerations (including the level of Sunday penalty rates) may mean that particular businesses or stores do not change their existing Sunday trading hours**. For example: the business may not be trading profitably and any reduction in costs will be applied to facilitate a return to profitability (see Gough at [1533] above); the shopping centre in which the store operates may not open on a Sunday (see Barron at [1515] above); or there may be insufficient consumer demand. (emphasis added)

43. The Commission ultimately made the following qualified finding about the positive employment effects from a reduction in Sunday penalty rates: "*On the basis of the evidence before us, we have concluded that reducing penalty rates **may have a modest positive effect on employment***"[10] (emphasis added). The Commission did not affirmatively find that additional labour hours **will** be offered as a result of the decision.

44. As to the "*regulatory benefits associated with the decision*" referred to by the ABI and NSWBC, the Commission has not made any findings that there will be any such findings and should not now do so. In relation to the Hospitality Awards, the Commission has noted that it was not contended that the proposed reductions would impact on regulatory burden.[11] The ABI and NSWBC seem to be contending that existing Sunday penalty rates have a high regulatory burden in the retail industry

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9 The Submissions of the Retail Associations at [28].
10 The decision at [688].
11 The decision at [852].

because of low profit margins and low business survival rates.[12] On any view these matters are not "regulatory" in nature and cannot support a submission that there are regulatory benefits associated with the planned reductions.

45. Furthermore, even if there were identifiable and ascertainable "*employment and regulatory benefits associated with the decision*" as found by the Commission, what exactly is meant by the balancing exercise referred to by the ABI and NSWBC is unarticulated, vague and uncertain. How precisely is the Commission to assess whether a particular transitional proposal will provide a substantive opportunity to employees to mitigate the adverse effects of the decision, whilst "*not significantly prejudicing*" its claimed employment and regulatory benefits ?

Question 3.5 – Justification for the proposed 2 year delay

46. The SDA submits that the 2 year deferral in implementing the proposed reductions in penalty rates is justified for the following reasons.

(a) First, as set out above, in determining appropriate transitional arrangements, the Full Bench must treat the object of mitigating the adverse impacts and hardship on employees of the penalty rate cuts as a matter of central importance and weight in the fixing of transitional arrangements. The initial deferral of the reductions is consistent with this imperative.

(b) Secondly, the deferral will allow the SDA's application in the 2016/2017 Annual Wage Review to be dealt with, and a similar application in the 2017/2018 Annual Wage Review to be prepared and made. In light of the Commission's findings about the adverse effects of the reductions and its conclusion that the "*needs of the low paid are best addressed by the setting and adjustment of modern award minimum rates of pay,*" it would be unfair and unjust for the reductions in penalty rates to commence before the SDA has been able to seek appropriate increases to minimum rates of pay in light of the decision.

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[12] Submissions of the ABI and NSWBC at [4.2].

(c) Thirdly, as has been noted, it appears to be common ground that take home pay orders are not available to ameliorate the impact on employees. The unavailability of this means of mitigating the hardship to employees strongly militates in favour of the deferral of the reductions in penalty rates.

(d) Fourthly, the following evidence, which was accepted by the Commission,[13] indicates that retail workers will face particular hardship when penalty rates are reduced:

(i) The relative earnings of workers in the retail industry vis-à-vis all industries has declined;[14]

(ii) The exposure of retail households to difficult financial circumstances is worse than that of other households;[15]

(iii) Retail households face greater difficulties in raising emergency funds;[16]

(iv) The lower earnings of the retail workforce and their greater incidence of being low paid, translate into lower living standards at the household level;[17] and

(v) The fact that 31-35% of retail workers work on Sundays.[18]

(e) Fifthly, in relation to the GRIA, the Commission has accepted that because employees covered by the award will suffer the largest penalty rate reduction, this may justify a longer period of adjustment for the reductions under that award. For the same reasons, the size of the cuts justifies the deferral contended for by the SDA.

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13 The decision at [1411].
14 SDA 35 at page 31 - 38.
15 SDA 35 at page 59 and the decision at [1465] and[1656].
16 SDA 35 at page 59 and the decision at [1465] and [1656].
17 SDA 35 at page vii.
18 SDA 36 at page 2 and the decision at [1446].

Question 4.1 (first question) – Source of power to preserve current Sunday penalty rates

47. The SDA submits that s 165(1) of the Act gives the Commission power to make transitional arrangements which would include provisions preserving Sunday penalty rates for existing employees.

48. As submitted by the Ai Group,[19] pursuant to s 165(1) of the Act, the Commission could specify in a determination that:

    (a) a new term about penalty rates comes into effect on a specified day ("Day One");
    (b) that the above term ceases on a later date ("Day 365');
    (c) that a different term comes into effect on the next day ("Day 366"); and
    (d) that that different term ceases on a later specified date.

49. There is no limitation, as a matter of power, on a determination prescribing a succession of terms to the above effect continuing over time such that it could reflect the phased reductions in penalty rates set out in paragraphs 20, 26 and 27 of the SDA's primary submissions.

50. Neither is there any limitation on the Commission's power to exclude the operation of the above terms to particular classes of employees, such as those employed at a certain date, and for the determination to make separate provision for the penalty rates to be paid to that class of employees (i.e.; "the preserved rate").

Question 4.3 – Necessity to phase in penalty rate reduction if red-circling adopted

51. Although existing employees will suffer the specific types of (additional) detriments described in paragraph 12 of the SDA's submissions upon a reduction in penalty rates, if the SDA's red circling proposal is adopted, it remains necessary to phase in the penalty rate reductions because the detriment occasioned by those reductions is not confined to existing employees.

52. The nature of that detriment reflects and derives from the following key matters:

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[19] Ai Group submissions paras 39-41.

(a) As noted earlier in these submissions, there is a high level of turnover of workers in the ANZSIC industry classification "Retail trade" (which includes employees in the general retail, fast food and pharmacy industries), with employees in those industries more likely to have a shorter duration of employment with a particular employer than workers across all industries.[20] In the case of the fast food industry, as noted by the Ai Group,[21] the evidence before the Commission establishes that 60% of employees in the accommodation and food services industry remain in employment with their employer for between 0-2 years.

(b) The relatively high turnover and short duration of employment in these industries in combination with the significant proportion of employees in the Retail trade industry sector whose wages are determined solely by award,[22] means that it is highly likely that some employees currently employed in the retail trade industry sector will change employers within the industry and be employed under diminished award conditions in the form of reduced penalty rates. These employees will suffer financial hardship, just as they would if they had remained in employment with their initial employer following the reduction in penalty rates.

(c) The nature of the hardship suffered by this group of workers should not be ignored given the Commission's acceptance that a reduction in Sunday penalty rates will likely reduce the earnings of employees who are already low paid and have a negative effect on their relative living standards and on their capacity to meet their needs.

Question 5.1 – Does the decision to reduce Sunday penalty rates apply equally to shiftworkers?

53. After appropriately acknowledging that shift workers are not specifically addressed in the decision, the Retail Associations submit that the decision to reduce Sunday penalty

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20 Decision [1443]. Almost one quarter of workers in retail trade had been with their employer for 1-2 years and around one in five workers had been with their employer for less than 12 months.

21 Ai Group submissions, para 48.

22 See fn 3 above.

rates should apply equally to those workers.[23] This is opposed by the SDA. It is an impermissible attempt to invite the Commission to introduce a further reduction to penalty rates which is not the subject of the decision. The Commission has invited the parties to make submissions on transitional matters, not to request further cuts after the substantive case has been conducted. This submission should be rejected.

54. This is particularly so given that it has long been recognised that shift work is distinct and separate to day work and that shift workers experience unique and peculiar disamenities and losses associated with such work. The Retail Associations' submission that "*there is nothing before the FWC to suggest that shiftworkers should be treated any differently to permanent employees under the Retail Award*" flies in the face of the long-established recognition by the Commission of the unique and particular challenges faced by shift workers and the evolution of award conditions directed at those special features.

55. In the conduct of the proceeding, the employer associations did not advance any evidence or argument in support of proposed changes to penalty rates for shift workers. Unsurprisingly then, the SDA likewise did not advance any such argument or evidence. In those circumstances, it would be a denial of procedural fairness if the Commission was to accede to the Retail Association's claim that the decision to reduce Sunday penalty rates be applied equally to shiftworkers.

PART B: REPLY TO EMPLOYER ORGANISATIONS' SUBMISSIONS

56. In this Part of the submissions, the SDA replies to the submissions by employer organisations on transitional arrangements, to the extent that specific issues raised by employer organisations are not already addressed in Part A above.

Fundamental problem with employer organisations' submissions

57. The employer organisations have largely ignored the findings already made by the Full Bench in the decision which bear directly upon the approach to be adopted in the fixing

[23] The Submissions of the Retail Associations at [53] to [55].

of appropriate transitional arrangements. As explained in detail in paragraphs 21-30 above, the Commission has determined two matters which are critical for present purposes:

(a) That transitional arrangements are needed to *mitigate the hardship to employees* of the cuts to penalty rates. The identification of this interest or purpose shows that, in the circumstances of this proceeding, the Full Bench has, quite properly, conceived of the notion of fairness of transitional arrangements as being one to be assessed from the perspective of employees alone.

(b) That the adverse impacts of the cuts in the earnings of retail workers is not only relevant, but "*particularly relevant*", in determining appropriate transitional arrangements.

58. Having adopted the above approach, it is accordingly incumbent on the Full Bench to treat the object of mitigating the adverse impacts and hardship on employees as a matter of central importance and weight in fixing transitional arrangements.

Submissions of the Retail Associations

59. The following submissions respond to the submissions made by the Australian Retailers Association, National Retail Association and Master Grocers Australia (**the Retail Associations**).

The purpose of the transitional arrangements

60. The Retail Associations submit that the Commission *"...cannot be required or expected to **eliminate** hardship, and is certainly not required to ensure no employee is worse off as a result in the decision."*[24] (emphasis added). The SDA acknowledges that in light of the cuts in penalty rates proposed in the decision, it will not be possible to eliminate hardship by the setting of transitional arrangements. As a result of the decision, many employees covered by the SDA Awards will be worse off. This is the inevitable result of the Commission's decision to reduce penalty rates for already low-

[24] The Submissions of the Retail Associations at [7].

paid workers at a time of record low wages growth.[25] There is simply no transitional period that could eliminate the hardship that low paid workers will ultimately face. This inevitable hardship for already low-paid workers who are under financial strain has guided the primary position of the SDA.

61. The Retail Associations submit that the Commission *"...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 reductions are not negatively impacted*" and that "*…the level of mitigation should be tempered where there is a likelihood that the arrangements would limit the positive employment impacts of the decision*".[26] See also at para 46. These submissions are contrary to the decision and should be rejected for the reasons outlined in paragraphs 21-30, 38- 45 and 57 above.

Hardship to be suffered by employees

62. The Retail Associations refer to data that was before the Commission and assert that this data identifies the limited nature of the hardship to flow from the decision.[27] The Retail Associations claim that between 6.5% and 7.5% of retail industry employees will be impacted in any way by the reduction in Sunday penalty rates.[28] Later, they make the submission that the cohort of employees who are likely to be adversely impacted by the reductions is "small".[29] This attempt to diminish the extent of the hardship that will flow from the decision should be rejected for the following reasons.

63. The Retail Associations calculate the range of between 6.5% and 7.5% in reliance on the erroneous assumption that "*only between 31% and 35% of retail industry employees work on Sundays.*"[30] The Employer Associations have misrepresented the evidence

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25 The trend and seasonally adjusted indexes for Australia both rose 1.9% through the year to the December quarter 2016. This result equals the record low wages growth seen in the September quarter 2016. See *6345.0 - Wage Price Index, Australia, Dec 2016.*

26 The Submissions of the Retail Associations at [9] - [10].

27 The Submissions of the Retail Associations at [12].

28 The Submissions of the Retail Associations at [13].

29 The Submissions of the Retail Associations at [15].

30 The Submissions of the Retail Associations at [12(e)].

before the Commission on this point and the corresponding finding that was made. The evidence given by Peetz and Watson (which was accepted by the Commission) was: [31]

(a) the proportion of the total retail workforce that usually worked on weekends (either one of or both of the weekend days) was between a little below 60% and 62%; and

(b) between 31% and 35% of the retail workforce **usually** worked on a Sunday. (emphasis added)

64. The reductions in penalty rates will result in a reduction in the conditions of the 34.5% of employees in the retail industry who are covered by an award. Although many employees currently employed under enterprise agreements may be affected by the decision in the future for the reasons explained earlier in these submissions, it is the 34.5% of employees in the retail industry who are presently covered by an award who will be immediately affected by the decision. For the reasons explained in paragraphs 4-11 above, the Commission should not accept that hardship will be limited to a small group as claimed.

65. The Retail Associations submit that the "*absolute upper end of the potential detriment brought about by the Sunday penalty rate reduction*" is a full time retail shop floor employee (non-shift worker) engaged at retail Employee Level 1.[32] This submission is misguided as this hypothetical employee is nowhere near the upper end. A part time employee who only worked hours on Sundays would suffer the maximum level of detriment. Such an employee would suffer a 25% reduction to their take home pay once the decision is implemented. The Retail Associations' bold claim that "*...the extreme for a full time Retail Level 1 is a detriment of $21.22 per week for a period of 12 months between 1 July 2018 and 30 June 2019*"[33] should therefore be rejected.

66. In fact the Commission accepted evidence that some individual employees would suffer extreme hardship as a result of the reductions. For example the Commission observed:

> "The evidence of the SDA lay witnesses provides an individual perspective on the impact of the proposed changes. For example, witness SDA Retail 1 said

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31 The decision at [1446] and [1441].
32 The Submissions of the Retail Associations at [16].
33 The Submissions of the Retail Associations at [19].

> that if Sunday penalty rates were reduced to 150 per cent he would be $74.06 worse off each week – a reduction of 7.88 per cent in his current weekly earnings"[34]

67. A further problem with the above calculation is that the Retail Associations have included a notional 2.5% increase in the wage rates in the GRIA in each year of the transition, on the basis that this is the increase that the Retail Associations have projected.[35] This is despite the fact that, in the 2016/2017 Annual Wage Review, the Australian Retailers Association has submitted that the rates under the GRIA ought increase by only 1.2%,[36] while Master Grocers Australia has submitted that the rates ought to be increased by only 1.1%.[37]

68. The Retail Associations submit that the Commission should consider the employee witness lay evidence and consider the impacts on each of them when considering the appropriate transitional arrangements.[38] In adopting this approach, the Retail Associations have mischaracterised the nature of the employee witness lay evidence. The SDA's employee lay evidence was led in support of the SDA's contentions that:

(a) "existing penalty rates are an essential part of the minimum safety net"[39];

(b) "there needs to be proper compensation for the negative impacts of working unsociable hours"[40];

(c) "there is an inability to offset the negative impacts of working unsociable hours"[41]; and

(d) "there is limited or no choice regarding working unsociable hours."[42]

69. In summary, the evidence of the subjective experiences of a small number of employees was led to demonstrate and personalise the disutility of Sunday work. This was recognised by the Commission's statement that "*The evidence of the SDA lay*

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34 The decision at [1658]
35 The Submissions of the Retail Associations at [18] and [22].
36 The Australian Retailers Association's Submission to the Minimum Wage Review 2016/2017 at page 5.
37 Master Grocers Australia's Submission to the Minimum Wage Review 2016/2017 at page 3.
38 The Submissions of the Retail Associations at [20] to [27]
39 See SDA's submissions dated 21 March 2016 at [328(a)].
40 See SDA's submissions dated 21 March 2016 at [328(b)].
41 See SDA's submissions dated 21 March 2016 at [328(c)].
42 See SDA's submissions dated 21 March 2016 at [328(d)].

witnesses provides an individual perspective on the impact of the proposed changes"[43] and that "*[t]he evidence of the United Voice and SDA lay witnesses puts a human face on the data and provides an eloquent individual perspective on the impact of the award variations*"[44] The SDA lay evidence was not adduced to prove *the extent* of Sunday work, nor the common patterns of Sunday work.

70. It is therefore unsurprising that, during the proceeding, no employer parties sought findings based on the SDA's lay witness evidence about the extent of the impacts on employees, nor were any such findings made by the Commission.

71. For the above reasons, no weight should be given to the Retail Associations' submissions at [20] to [27] or Appendix A to the submissions.

The Commission's findings about positive employment effects

72. The Retail Associations also do not fairly or accurately characterise the findings made by the Commission about the positive employment effects from a reduction in Sunday penalty rates. The SDA refers to and relies on its submissions in paragraphs 42-43 above.

73. The Retail Associations submit that the *"...more quickly the reduced labour costs are implemented the more quickly the additional labour hours will be offered*."[45] This submission is untenable because the Commission has not concluded that additional labour hours **will** be offered as a result of the decision.

74. The Retail Associations claim that employment benefits will mitigate hardship on employees because additional hours will be offered.[46] This should be rejected. As explained above, the Commission has not found that additional hours **will** be offered. The claim also conflicts with the Commission's observation that:

> "The extent to which lower wages induce a greater demand for labour on Sundays (and hence more hours for low-paid employees) will somewhat ameliorate the reduction in income, albeit by working more hours**. We note the Productivity Commission's conclusion that, in general, most existing**

43 The decision at [1658].
44 The decision at [1999].
45 The Submissions of the Retail Associations at [31].
46 The Submissions of the Retail Associations at [39].

> **employees would probably face reduced earnings as it is improbable that, as a group, existing workers' hours on Sunday's would rise sufficiently to offset the income effects of the penalty rate reduction**"[47] (Emphasis added.)

75. Moreover, even if in some workplaces additional hours were offered, this would do little to mitigate the adverse impacts on employees. Firstly, an employee working additional hours on a Sunday at a reduced rate of pay in an attempt to make up for wages lost a result of the reductions is no solution to the hardship suffered by them – it simply means that the employee would be working more hours on a Sunday with the further resultant disutility that flows from this. Secondly, in any event, any additional hours will presumably be offered at peak trading times, which is more than likely the time the existing employee is already working. Thirdly, if other employees receive hours of work on a Sunday, the employee that has faced a reduction in their take home pay does not derive any benefit from this. Plainly, even if the reductions in Sunday penalty rates do result in more hours of Sunday work being available, there is no necessity that those hours be provided to employees already working on a Sunday.

Fair notice

76. The fact that review proceedings in relation to penalty rates have been on foot for 5 years, provides no basis for the claim that retail employees have been on proper notice of the proposed cuts in penalty rates. The claims by employers in the Interim Review (which commenced in 2012) for cuts in penalty rates in the GRIA and the FFIA were rejected by the Commission. No such claim was made in respect of the PIA. Employees have only been on notice of the proposed cuts since the decision was delivered on 23 February 2017. Further, the operative date of the reductions is still unknown.

Submissions of the NRA

Industry progression and attitudes

77. The NRA submits that the extent of disutility associated with Sunday work has noticeably decreased and this supports a shorter implementation period for the proposed reduction in Sunday penalty rates.[48] This claim is a misplaced submission in support of

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47 The decision at [1659].

48 The Submissions of the NRA at [18].

the merits of the reductions. Further in any event, it misunderstands the primary purpose of the transitional arrangements already recognised by the Commission: the SDA relies on the submissions made above at paragraphs 21-30. For the same reasons, the NRA's claims that "*... a longer transitional period would stifle the industry's progression and conflict with current attitudes*"[49] and that "*...to achieve the modern awards objective, pursuant to s.134 of the FW Act, it is necessary to implement the proposed reduction in Sunday penalty rates in two annual instalments (of equal value) for both the Retail and Fast Food Awards*"[50] are misconceived.

The Commission's findings about positive employment effects

78. The NRA submits that "*...a reduction in penalty rates is likely to lead to increased trading hours, a reduction in hours worked by business owners (particularly in small business), an increase in the level and range of services offered and an increase in overall hours worked.*"[51] As with the Retail Associations' submissions, this claim mischaracterises the findings made by the Commission about the positive employment effects. The SDA relies on the submissions made above at paragraphs 42-43 and 72-75 above.

Submissions of the Pharmacy Guild of Australia

79. The SDA makes the following submissions in response to the submissions of the Pharmacy Guild of Australia (**the Guild**).

80. The Guild submits that "*...to some extent the reduction in Sunday penalty rates in the PIA will be offset by the opportunity to work additional hours.*"[52] The SDA submits that the adverse impacts of the reductions on employees covered by the PIA will not be offset by the opportunity to work additional hours in any meaningful way. In the decision, the Commission relevantly observed that "*We note the Productivity Commission's conclusion that, in general, most existing employees would probably face reduced earnings as it is improbable that, as a group, existing workers' hours on*

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49 The Submissions of the NRA at [22].
50 The Submissions of the NRA at [32].
51 The Submissions of the NRA at [23].
52 The submissions of the Guild at [5]

Sundays would rise sufficiently to offset the income effects of the penalty rates reduction."[53]

81. The SDA also relies on the Submissions made above at paragraphs 41-42 and 72-75. In summary, the SDA submits that the Commission should not be satisfied that the adverse impacts will be offset in a meaningful way and thus the Commission should place little weight on the Guild's submission in setting the appropriate transitional arrangements.

The submissions of the Ai Group

82. The SDA agrees with the Ai Group's submission that the Commission has power to make transitional arrangements.[54]

83. As to the Ai Group's submissions on the purpose of and factors relevant to the determination of transitional arrangements, the SDA relies on its submissions in paragraphs 19-31 above.

84. The AIG appropriately acknowledges that the Commission has found that the increase in employment under the FFIA is likely to only result in a modest increase in employment.[55] The SDA submits that, even if in some workplaces additional hours were offered, this would do little to mitigate the adverse impacts on employees. The SDA relies on the submissions made above at paragraphs 41-42 and 72-75 above.

85. The AIG opposes the introduction of red circling on the basis that such an arrangement "*...introduces the potential for disharmony and conflict between employees performing the same work (including those adjacent to each other) but on different conditions.*"[56] This submission should be rejected. The FFIA already permits employees performing the same work to be paid up to 60% less than other workers performing the same work

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53 The decision at [1828].
54 The Submissions of the AIG at [36] to [42].
55 The Submissions of the AIG at [47].
56 The Submissions of the AIG at [53(a)].

because of their age.[57] Further, there are various historical examples of the use of red-circling by predecessors to this Commission and State Commissions.[58]

86. The AIG opposes the introduction of red circling on the basis that such arrangements would increase the "regulatory burden" of the FFIA.[59] This submission should be rejected. Given the incidence of junior rates, there are numerous rates that are currently applicable under the FFIA depending on classification and age. The Commission should not be satisfied that the introduction of preserved rates (which will only apply temporarily) will materially change the regulatory burden on employers.

87. The AIG opposes the introduction of red circling on the basis that such arrangements would undermine a simpler and easier to understand modern award system.[60] The red circling of current rates for existing employees will not materially affect whether the FFIA is simple and easy to understand.

88. The AIG opposes the introduction of red circling on the basis that such arrangements would preserve Sunday penalty rates that have been found to no longer be fair nor relevant.[61] The SDA's red circling proposal addresses the AIG's concern. The SDA's red circling proposal calls for the *temporary retention* of existing rates to mitigate the impacts on employees. Under this proposal, in order to mitigate hardship existing Sunday rates for existing employees would only be preserved until the rate of pay for Sunday work under the Award equals or exceeds the preserved rate.[62] Red circling is one form that transition can take.

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57 See clause 18.

58 *Retail and Wholesale Industry – Shop Employees – Australian Capital Territory – Award 2000* (AW794740CRA): clause 24, clause 21.5.1, clause 21.5.2 and clause 29.4; (NSW) *Shop Employees (State Award* (AN120499): clause 4, clause 13 and clause 14; *Shop, Distributive and Allied Employees Association – Victorian Shops Interim Award 2000* (AW796250CRV): clause 27; (Qld) *Retail Industry Award – State 2004* (AN140257): clause 6.1.

59 The Submissions of the AIG at [53(b)].

60 The Submissions of the AIG at [53(c)].

61 The Submissions of the AIG at [53(d)].

62 See the SDA's submissions dated 24 March 2017 at [14].

Clause 34.1A of the Restaurant Award

89. The Commission has invited the parties to indicate whether it is considered necessary to include in the FFIA a term similar to clause 34.1A of the *Restaurants Award.*[63] The AIG has submitted that it opposes the introduction of such a clause.[64] The SDA submits that such a clause should be introduced.

90. First, notwithstanding the operation of Part 3-1 of the FW Act, the clause would serve an important role in educating employees and employers about the right of employees to not suffer discrimination or disadvantage as a result of the decision.

91. Secondly, when clause 34.1A of the *Restaurants Award* was introduced a Full Bench determined that it was an appropriate term to be included in a modern award.[65]

92. Thirdly, the clause is necessary to be included in the FFIA in order for the award to achieve the modern awards objective. Alternatively, if this submission is not accepted, the clause should be introduced pursuant to section 142(1) of the FW Act, which permits the inclusion of "incidental terms." It is submitted that the clause meets the definition of an incidental term. It is incidental to the terms to be introduced which will introduce differential penalty rates between classification levels, and is essential to making these new terms operate in an appropriate and fair manner.

Submissions of ABI and NSWBC

93. The ABI and NSWBC submit that the Commission ought to balance the needs of employers and employees in implementing the decision.[66] The SDA submits that this submission misunderstands the primary purpose of transitional arrangements as already found by the Commission and relies on its submissions in paragraphs 21-30, 38-45 and 56-57 above.

94. The ABI and NSWBC seem to suggest that particular weight should be placed on the evidence given to the Commission about profit margins and business survival rates in

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63 The decision at [1397].
64 The Submissions of the AIG at [54].
65 *Re Restaurant and Catering Association of Victoria* [2014] FWCFB 1996 at [143]
66 The Submissions of the ABI and NSWBC at [4.1] to [4.7].

the retail industry.[67] This submission is misguided. The Commission has already ruled that mitigating the adverse impacts on employees is the primary purpose of the transitional arrangements. Making unprofitable businesses more profitable at the expense of low paid workers by rushing the introduction of the reductions should not be entertained.

Submissions of ACCI

95. ACCI submits that an important benefit that will flow from the decision is "*increased overall hours worked.*"[68] This claim does not fairly characterise the findings made by the Commission. The SDA relies on the submissions made above at paragraphs 41-42 and 72-75 above.

96. ACCI makes the submission that the Commission has already taken into account impacts on employees.[69] This submission is misguided. The Commission has already determined that mitigating the adverse impacts on employees is the primary purpose of the transitional arrangements. The SDA relies on the submissions made above at paragraphs 20-29, 37-44 and 56-57 above.

97. ACCI opposes any red circling Sunday rates for existing employees.[70] In response to this submission the SDA relies on the submissions made above at paragraphs 20-29, 37-44 and 56-57 above.

Dated: 21 April 2017

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67 The Submissions of the ABI and NSWBC at [4.2].
68 The Submissions of ACCI at [8(c)].
69 The Submissions of ACCI at [11].
70 The Submissions of ACCI at [25].