

On 4 September 2018 the end of paragraph 10 was amended to include missing text "impacts on the percentages set out in the above table."

**IN THE FAIR WORK COMMISSION**  
**AM2017/43**

**FOUR YEARLY REVIEW OF MODERN AWARDS**  
**PENALTY RATES**  
**GENERAL RETAIL INDUSTRY AWARD 2010**

**SUBMISSIONS OF AUSTRALIAN RETAILERS ASSOCIATION AND MASTER GROCERS AUSTRALIA (THE RETAIL ASSOCIATIONS) – TRANSITIONAL ARRANGEMENTS**

1. The following submissions are made on behalf of the Australian Retailers Association (**ARA**) and Master Grocers Australia (**MGA**) in accordance with the Directions of the Fair Work Commission (**Commission**) made on 24 August 2018.
2. These submissions respond to three key matters raised by the Fair Work Commission (**Commission**) in the above Directions, being:
  - (a) what is the number of, and any other characteristics relating to, shift workers covered by the *General Retail Industry Award 2010* (**GRIA**);
  - (b) proposed transitional arrangements in the event the Commission decides to reduce the Sunday penalty rate under the GRIA for shiftworkers; and
  - (c) proposed transitional arrangements in the event the Commission decides to increase weekday evening and Saturday penalty rates for casual employees under the GRIA.
3. ARA and MGA do not have any comments at this stage in relation to the updated General retail industry profile.

**A. Shift workers under GRIA**

4. ARA and MGA rely on data and evidence that was accepted by the Commission in the Penalty Rates Decision<sup>1</sup>, and on the General Retail Industry profile (**Industry Profile Retail**) dated 22 August 2018 released by the Commission.
5. The Industry Profile Retail identifies the prevalence and types of shiftwork arrangements used in the retail industry in 2014, as drawn from the Commission's *Australian Workplace Relations Study 2014*. This data was accepted and relied on by the Commission in the Penalty Rates Decision<sup>2</sup> and provides that 17.9% of enterprises in the retail industry utilized shiftwork arrangements.

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<sup>1</sup> [2017] FWCFB 1001

<sup>2</sup> Ibid at [1444], Table 62

6. The Commission in the Penalty Rates Decision also accepted and relied on data contained within the Industry Profile Retail drawn from the Household, Income and Labour Dynamics in Australia Survey, which is extracted below<sup>3</sup>:

**Table 63**<sup>1239</sup>  
**Current work schedule in main job, employees, 2015**

|  | Retail sector<br>(%) | All industries<br>(%) |
|--|----------------------|-----------------------|
| A regular daytime schedule                                 | 69.8                 | 75.5                  |
| A regular evening shift                                    | 6.3                  | 3.7                   |
| A regular night shift                                      | 3.4                  | 1.7                   |
| A rotating shift (changes from days to evenings to nights) | 10.1                 | 9.4                   |
| Split shift (two distinct periods each day)                | 1.2                  | 1.4                   |
| Oncall   | 0.4                  | 1.1                   |
| Irregular schedule   | 8.8                  | 6.9                   |
| Other  | 0.1                  | 0.2                   |
| <b>Total</b>   | <b>100.0</b>         | <b>100.0</b>          |

7. It is open to the Commission to conclude, based on the above data, that 6.3 per cent of workers in the retail sector work a regular evening shift, 3.4 per cent of workers in the retail sector work a regular night shift, and that 10.1 per cent of workers in the retail sector work a rotating shift. Taking this information together, it is reasonable to conclude that approximately 19.8 per cent of workers in the retail sector work shiftwork arrangements. This is reasonably consistent with the data from the Commission's *Australian Workplace Study 2014* set out at paragraph 4 above in relation to the number of enterprises which utilize shiftwork arrangements.
8. In order to estimate the percentage of shiftworkers who work on Sundays, ARA and MGA submit it is reasonable to rely on data identifying Sunday workers in the retail industry generally, and apply the percentage of shiftworkers generally to this data. In the Penalty Rates decision the Commission determined that between 31 and 35 per cent of the total retail workforce usually worked on a Sunday.<sup>4</sup>
9. Taking this information together, we have set out in the table below an estimate of the percentage of retail industry employees who are likely to work shiftwork on Sundays.

|                       | Shiftworker<br>percentage | Sunday worker<br>percentage | Sunday shiftworker<br>percentage |
|-----------------------|---------------------------|-----------------------------|----------------------------------|
| <b>Lower estimate</b> | 19.8%                     | 31%                         | 6.14%                            |
| <b>Upper estimate</b> | 19.8%                     | 35%                         | 6.93%                            |

10. ARA and MGA submit that some caution would need to be exercised in relation to this estimate as it relates to the application of this to employees who are either covered by the GRIA or to whom the GRIA applies. As the Commission has previously noted, data on the retail industry relates to the retail industry as defined under ANZSIC

<sup>3</sup> Ibid at [1445], Table 63

<sup>4</sup> Ibid at [1446]

classifications, which is broader than the definition of general retail industry at clause 3.1 of the GRIA. The ANZSIC classification includes industry sectors which would clearly be covered by other modern awards (pharmacy, motor vehicle sales, fuel retailing etc), and would also include employees working within businesses covered by the GRIA, but who are not working in roles or areas within the classification structure of the GRIA (warehousing and distribution, head office roles, managerial roles outside store managerial roles). There is no available data that would allow a concluded view to be reached as to whether this impacts on the percentages set out in the above table.

## **B. Need for Transitional Provisions**

11. The Full Bench of the determined in the Transitional Arrangements Decision 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”*.<sup>5</sup>
12. ARA and MGA submit that there is nothing in the current matter before the Commission that would cause it to reach a different conclusion as it relates to the Sunday shiftworker application.
13. ARA and MGA submit, however, that the need for transitional provisions is clearer for employers impacted by increases in employee entitlements, and that this should also impact on the nature of those transitional provisions. The primary position of ARA and MGA is that the applications for increases in weekday evening and Saturday casual penalties should be rejected. The SDA has failed to make a positive case for change, and this failure should cause the Commission to conclude that the changes proposed are not necessary.
14. In the event the Commission finds against ARA and MGA in that regard, the Commission should conclude that transitional provisions are necessary to minimise the impact on employers. The Commission should conclude that while employees impacted by reductions in penalty and other rates or loadings are protected from the adverse impact of those reductions by minimum wage increases, employers impacted by increases enjoy no such protection.

## **C. Modern Awards Objective**

15. It is noted the Full Bench determined that any transitional arrangements must meet the modern awards objective and must only be included in a modern award to the extent necessary to meet that objective.<sup>6</sup> The Full Bench confirmed that in the setting of transitional arrangements, a particular focus on the following is required:
  - relative living standards and the needs of the low paid (s134 (1)(a));
  - the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden (s134(1)(f)); and

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<sup>5</sup> 4 yearly review of modern award- Penalty Rates- Transitional Arrangements [2017] FWCFB 3001 at [57]

<sup>6</sup> Ibid at [65]

- the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern award (s134 (1)(g)).<sup>7</sup>

16. In agreeing to the proposition that fairness is a relevant consideration, the Full Bench confirmed that fairness in this context is to be assessed from the perspective of both the employees and employers covered by the modern award, and commented that *“While the impact of the reductions in penalty rates on the employees affected is a plainly relevant and important consideration in our determination of appropriate transitional arrangements, it is not appropriate to ‘totally subjugate’ the interests of the employers to those of the employees.”*<sup>8</sup>

#### **D. Transitional Provisions - Sunday Shiftworkers**

17. ARA and MGA submit that the approach adopted by the Full Bench in the Transitional Arrangement should be replicated in relation to Sunday Shiftwork penalty rates. Given the quantum of the reductions aligns with the quantum of reductions for casual employees in relation to the Sunday ordinary hours penalty rate, it is proposed that the reductions in Sunday penalty rate for shift workers be implemented in a three stage transition, as proposed below:

##### **Full-time and part-time employees**

|             |                             |
|-------------|-----------------------------|
| 1 July 2019 | 200 per cent → 195 per cent |
| 1 July 2020 | 195 per cent → 185 per cent |
| 1 July 2021 | 185 per cent → 175 per cent |

##### **Casual employees (inclusive of casual loading)**

|             |                             |
|-------------|-----------------------------|
| 1 July 2019 | 225 per cent → 220 per cent |
| 1 July 2020 | 220 per cent → 210 per cent |
| 1 July 2021 | 210 per cent → 200 per cent |

#### **E. Weekday Evening and Saturday Penalty Rates for Casual Employees**

18. ARA and MGA submit that the Commission should adopt a more cautious approach to transitional provisions if it determines to increase weekday evening or Saturday penalty rates for casual employees under GRIA.

19. As outlined above, the Full Bench has concluded that fairness in the context of the modern awards objective generally, and specifically in relation to transitional provisions, is to be assessed from the perspective of both the employees and employers covered by the relevant award.<sup>9</sup> The Commission has evidence before it that increases to the casual weekday evening and Saturday penalty rates will have an adverse impact on employers and employees, in particular young employees.

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<sup>7</sup> Ibid at [66]

<sup>8</sup> Ibid at [148]

<sup>9</sup> Ibid

20. There was substantial evidence before the Commission concerning the interaction between labour costs and weekday evening and Saturday trading in the retail industry, and directly under the GRIA.

21. In the Penalty Rates Decision, the Commission 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”*.<sup>10</sup>

This has been confirmed in this case. Each of the witnesses called by the ARA and MGA referred to labour budgets being set as a percentage of sales. Witnesses attested that they would reduce hours if the increased penalty rates were implemented. Witnesses attested to the reductions they had made to labour hours offered because of minimum wage increases (see Dorwald at PN829-PN834) and the increases in labour hours on Sundays as a result of Sunday penalty rate reductions (see Elson at PN518-PN522, see Dorwald at PN829-PN834).

22. It follows that because retailers fix labour budgets against retail sales, the more measured the Commission is in implementing increased labour costs the lower the impact on employment costs, and therefore the lower the likelihood of reductions in labour hours will be offered.

23. The Commission should act cautiously in implementing such changes. In taking into account the needs of the low paid, in particular the young casual employees who will be impacted negatively by the changes, and the impact on business, the Commission should conclude that an extensive transitional period is appropriate.

24. Unlike employees, for whom the impact of any penalty rate reductions ameliorated through minimum wage increases, transitional provisions are the only measure that can minimize the impact on business. It is therefore submitted that, in taking into account fairness, the Commission should conclude that it is appropriate to implement a longer transitional period to mitigate the adverse effects of any increase in penalty rates.

25. ARA and MGA submit that the transitional arrangements for the proposed increase to weekday evening and Saturday penalty rates for casual employees be implemented in a five-stage transition, as proposed below:

**Weekday Evening Penalty Rates (inclusive of casual loading)**

|             |           |
|-------------|-----------|
| 1 July 2019 | 25% → 30% |
| 1 July 2020 | 30% → 35% |
| 1 July 2021 | 35% → 40% |
| 1 July 2022 | 40% → 45% |
| 1 July 2023 | 45% → 50% |

**Saturday Penalty Rates (inclusive of casual loading)**

|             |           |
|-------------|-----------|
| 1 July 2019 | 35% → 38% |
|-------------|-----------|

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<sup>10</sup> [2017] FWCFB 1001 at [1558]

|             |           |
|-------------|-----------|
| 1 July 2020 | 38% → 41% |
| 1 July 2021 | 41% → 44% |
| 1 July 2022 | 44% → 47% |
| 1 July 2023 | 47% → 50% |

26. The Retailers Associations submit that the “hardship” associated with the proposed increase in the weekday evening and Saturday penalty rates for casual employees on employers in Australia would be substantially ameliorated under the transitional arrangements proposed above.

**30 August 2018**