

FAIR WORK COMMISSION

Matter No.: AM2017/43

Four Yearly Review of Modern Awards – General Retail Industry Award 2010

OUTLINE OF CLOSING SUBMISSIONS OF THE SHOP DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION

Legislative framework

1. The SDA agrees with the content of the document forwarded to the parties by the Commission on 9 August 2018, subject to one small elaboration. In *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)* (2012) 205 FCR 227, Tracey J observed the following in the context of a judicial review application on the basis of no evidence at [37].

The question under this ground then becomes whether there was material before the Vice President upon which he could reasonably be satisfied that a variation to the Award was necessary, at the time at which it was made, in order to achieve the statutory objective.

2. One question in the present case which arises particularly in the application by the employer groups' (**ARA**) on shiftwork is whether there is anything before the Commission which would establish that the proposed change is necessary.

Matters raised by the Full Bench

3. Attachment A contains some examples of Awards where casuals are paid both their casual loading and a penalty. The list is the result of a quick survey and is by no means comprehensive.

Observations about the evidence

Professor Borland

4. Professor Borland's evidence should be accepted. His estimate sets the outer limit on the potential maximum increase to the total weekly cost of labour that would occur as a result of the SDA's proposed changes.
5. This maximum would be reduced by a range of matters including the following:

- a) If casuals were working times other than weeknights and Saturdays, the maximum would go down;¹
- b) If all employees were younger and on junior rates, the maximum would go down;²
- c) If all employees are covered by EBAs, the maximum would go down;³
- d) He makes no allowance for offsetting effects.⁴

6. Professor Borland's assessment is supported by Mr Slaughter's evidence.

- a) Mr Slaughter's turnover is \$6 million.⁵ Therefore given his stated figure of labour costs representing 10% of sales, direct labour costs are \$600,000.⁶
- b) 3,380 hours are weekday evenings for casuals at \$17.50 per hour.⁷
- c) That would increase to \$21 per hour (a 20% increase) a total of \$70,980 or an increase of \$11,830 over \$59,150.⁸
- d) 3,120 hours on Saturdays at an average rate of \$18.33 per hour (total \$57,189.60).
- e) That would increase to \$20.36 per hour (11.1% increase) giving a new total of \$63,547.64, an increase of \$6,348.04.
- f) Total increase is thus \$18,178 (or \$349.57 per week).
- g) Over a year that is a 3.03% increase.
- h) This figure does not factor in many of the potential reductions identified by Professor Borland at paragraph 4 above.

Dr Sands

¹ Borland XXN, PN125: *My maximum estimate is assuming that casual workers are working all of their hours at these hours where it's proposed that penalty rates will apply.*

² Borland Re-XN, PN175.

³ Borland Re-XN, PN 172-173

⁴ PN177; Borland Report 2.10-2.15.

⁵ Slaughter XXN, PN697.

⁶ Slaughter revised statement, [9].

⁷ Slaughter revised statement, [28].

⁸ Slaughter revised statement, [28].

7. There is a gaping hole in Sands' Report in respect of employees aged under 18 years.

*Dr Sands accepted that his surveys excluded employees' aged under 18 years from participating.*⁹

*He stated he did not have ethical approval to interview minors because he didn't have time.*¹⁰

8. The data was not a representative sample

*Dr Sands knew that the 15-17 year-old age group was an important sector in relation to casual people in retail.*¹¹

*He accepted that his survey told us nothing about this important sector.*¹²

*His claim at paragraph 1.2.1 on page 5 of his report, "the sample was representative of the Australian retail industry store-based employee total sample in terms of gender, age and residential location." was misleading.*¹³

9. The 'net promoter score', which is a satisfaction measure, is negative throughout the Report.¹⁴

10. The Report highlights a series of problems with casual employment.

For example, Table 16 – Satisfaction with casual employment – 53% detractor and 9% promoter.

11. There is clear disutility in working Saturdays and evenings. Also, the focus groups emphasise the disutility of working on Saturdays. This point is emphasised in the 'highlights' notes taken after the focus groups:

Exhibit SDA-7 – Highlights: "My take: definitely more significant disutility for working on Saturday compared any other time, including Sunday – one option would be to swop Sunday penalty rates to Saturday to reflect fact that it is the busiest day."

⁹ Sands XXN, PN246-252.

¹⁰ Sands XXN, PN252-253.

¹¹ Sands XXN, PN254.

¹² Sands XXN, PN 255.

¹³ Sands XXN, PN261-2.

¹⁴ Table 1, 2, 3, 4, 5, 6, 16,

*Dr Sands confirmed this view in cross-examination.*¹⁵

12. There is nothing about money in the quantitative section of the report. Money looms large as a 'driver of satisfaction' in the group summaries.

Examples from Exhibit SDA-6 – Group Summaries

What about other people's intentions? To stay in retail?

No, I am just doing it for the money.

So if something better came along?

*Yes, lately I am working as a metro manager for a sports company which is not in retail but they have retail stores. I am continuing the retail thing just for the money, money and the business.*¹⁶

A range of motivations, no one has really talked about money as a motivator?

*We know that is top.*¹⁷

Employer witnesses

13. Ms Elson's figures were flawed (see attachment B). Figures for her total sales or profit were not provided. It is not possible to assess the effect an increase in penalty payments is going to have on her business. The failure to provide more detailed financial information may be a reflection of a recent downturn in the business.¹⁸
14. It is noted that Ms Elson offers conversion from casual to permanent employment (with penalty rate consequences after one year's employment).¹⁹
15. Generally, the Commission should not accept that there is a linear relationship between an increase in labour cost and a loss of hours for casual employees.
16. Mr Slaughter's evidence supports our case, although his calculations are flawed like Ms Elson's (attachment A). While there is no evidence on his total wage bill or his profitability,

¹⁵ Sands XXN, PN385-389.

¹⁶ Page 6 of the Group Summaries.

¹⁷ Page 37.

¹⁸ Elson XXN, PN 492.

¹⁹ PN 564.

it is clear, even on the information provided, that any increase in labour costs will have a small effect on the business.

17. Ms Dorwald's evidence provides no assistance to the Commission whatsoever. It was constituted by bald assertions. Ms Dorwald was not able to explain how the calculations were done, and a number of them are simply improbable and seem to lack any logic.

So you can't tell us anything about how that figure is arrived at?---No, I trust that they have actually looked at the wages bill that they are accountable for and presenting to the directors every week and - - -

You're the one that's here on - - -?---- - - looking at the relevant systems.

- - - oath giving evidence, Ms Dorwald. You can't tell us how that's calculated. Is that right?---In - with respect to how it's calculated they have calculated that that 25 per cent impost would impose, that 25 per cent increase on that weekday penalty between the hours of six and nine as I understand it.

And you can't tell us how that was done?---Mathematically, no.²⁰

Her evidence should be disregarded.

Response to ARA's proposed findings

18. The SDA's position is contained in attachment C.

ARA Casual submissions

19. The approach suggested by the ARA at paragraph 22 is not the way the Commission should approach its task. The question is what is necessary to achieve the modern awards objective.
20. The ARA's submission at paragraph 25 is also without merit. The change to the Award as sought by the SDA will not inhibit the entry into the labour market of the young because they are still paid less.
21. With regard to the ARA's reliance on the historical basis for the current rates, it is not a particularly helpful area of investigation. The task before the Commission is totally different. The Commission's task starts and ends with consideration of the Modern

²⁰ Dorwald XXN, PN789.

Awards objective. Further, the historical picture is much more complex and varied – see SDA Comments on Background paper of 5 May 2017.

22. With regard to paragraph 38 – these factors should not go to the question of whether a person should be paid less. Rather, the Award structure reflects the matters raised at 38 and the relevant skills and experience those employees have. This is a submission redolent of the arguments which were put in the past to justify the proposition that women should be paid less than men.
23. With regard to the purported 'lower level of disutility' raised at section J – Dr Sands observed that Saturday is the worst day for casuals.²¹
24. With regard to the 'negative impact on employment levels and hours offered' at section K – the evidence does not establish this proposition. There is nothing that arises besides a small increase in labour costs.

Tenets of the modern awards objective

25. The SDA relies on its written submissions in respect of the tenets of the modern awards objective in s 134.

Shiftwork application

26. There is no evidence before the Commission to support this application.
27. The SDA relies on its written submissions.

W L Friend

J Tierney

14 August 2018

²¹ Sands XXN, PN385-389.

ATTACHMENT A

FAIR WORK COMMISSION – Matter No.: AM2017/43

AM2017/43 – General Retail Award 2010 – 4 Yearly Review

Modern Awards with Casual Loading and Penalties

1. *Aboriginal Community Controlled Health Services Award* MA000115 – cl. 10.4(d), cl.24.2, cl.25.
2. *Airline Operations Ground Staff Award 2010* MA000048 – cl.32.1 and cl. 33.2 when read with cl.11
3. *Airport Employees Award 2010* MA000049 – cl. 30 when read with cl.12.
4. *Clerks Private Sector Award 2010* MA000002 – cl.27 when read with cl.12.
5. *Fast Food Industry Award 2010* MA000003 – cl.25.5.
6. *Hair and Beauty Industry Award 2010* MA000005 – cl.13.3.
7. *Health Professionals and Support Services Award 2010* MA000027 – cl.26.2.
8. *Joinery and Building Trades Award 2010* MA000029 – cl.12.6.
9. *Miscellaneous Award 2010* MA000104 – cl.22.3.
10. *Mobile Crane Hiring Award 2010* MA000032 – cl.10.3.

ATTACHMENT B

Employer Witness Calculation Errors

Slaughter Calculation Errors

	Claimed Proposed Increase	Actual Proposed Increase
Weekday evenings (currently avg. \$17.50)	25% \$21.87	20% \$21.00
Total labour costs for weekday evenings for casuals (currently 3,380 hours per year \$59,150 per year)²²	\$73,937.5 Increase of \$14,787.50	\$70,980 Increase of \$11,830
Saturdays (current avg. \$18.33)²³		11.1% \$20.36
Total labour costs for Saturdays For casuals (currently 3,120 hours per year \$57,189.60)²⁴	\$63,290.86 Increase of \$6,290.86 ²⁵	\$63,537.64 Increase of \$6,348.04
Total labour cost increase	\$21,078.36	\$18,178.04
Labour cost increase as percentage of total labour cost	3.5%	3.03%

Elson Calculation Errors

	Elson Claimed Proposed Increase	Actual Proposed Increase
Weekday evenings (currently avg. \$17.66)	25% 22.07	20% \$21.18
Total labour costs for weekday evenings (currently 7,250 hours \$127,545.60)²⁶	\$160,007.5 Increase of \$32,461.9	\$153,555 Increase of \$26,009.4
Saturdays (current average. \$23.37)	?	11.1% 25.964

²² Slaughter revised statement, [29].

²³ Slaughter revised statement, [34].

²⁴ Slaughter revised statement, [34].

²⁵ Slaughter revised statement, [35].

²⁶ Elson statement, [29].

	\$26.29 ²⁷	
Total labour costs for Saturdays (5,434 hours \$129,247.04 per year)²⁸	\$142,859.86 Increase of \$13,612.82	\$141,088 Increase of \$11,840.96
Total labour cost increase	\$46,074.72	\$37,850.36
Labour cost increase as percentage of total labour cost	Not stated	N/A

Dorwald Calculation Errors

	Dorwald Claim	Actual
Weekday evenings increase in casual rate	25% ²⁹	20%
Total hours worked by casuials per year³⁰ Total cost not stated	50,544	-
Total purported reduction in hours	19,102 hours reduced if proposal introduced ³¹ 37.8% of total hours	No explanation is given for the 37.8% reduction. It could not be this high even on Ms Dorwald's calculations.
Saturdays increase in casual rate	25%	11.1%
Total hours worked by casuials per year on Saturdays³²	178,360	
Total purported reduction in hours	40,988 hours reduced if proposal introduced. ³³ 23% of total hours	No explanation is given for the 23% reduction. Even assuming linear reduction in hours to match increase in rate, it could not be higher than 11.1%.

²⁷ Elson statement, [32].

²⁸ Elson statement, [30].

²⁹ Dorwald statement, [25].

³⁰ Dorwald statement, [14].

³¹ Dorwald statement, [24].

³² Dorwald statement, [19].

³³ Dorwald statement, [25].

ATTACHEMENT C

FINDINGS SOUGHT BY THE AUSTRALIAN RETAIL ASSOCIATION AND MASTER GROWERS ASSOCIATION

WITH RESPONSE OF SDA

Retail Industry Employment

1. The *General Retail Industry Award 2010 (GRIA)* is the industrial instrument which underpins the terms and conditions of store based general retail industry employees. An estimated 737,710 people are employed, in varying capacities, in the general retail industry³⁴, although it is unclear what percentage of these are engaged in store based roles.

Accepted

2. When compared with employees in all industries, general retail industry employees:
 - (i) are more likely to be young (35.4% of general retail industry employees are aged between 15 and 24 years compared with 16.6% in all industries)³⁵;
 - (ii) are more likely to be female (60.8% compared with 50% in all industries)³⁶;
 - (iii) are more likely to be students (26.3% compared with 13.7% in all industries)³⁷;
 - (iv) work fewer hours per week (42.4% work between 1 and 24 hours per week, compared with 22.4% in all industries)³⁸; and
 - (v) are more likely to be employed on a part time or casual basis (57.5% compared with 34.2% in all industries)³⁹.

Accepted

Casual retail employees

³⁴ General Industry Profile, data release by the Fair Work Commission, 30 July 2018, p1.

³⁵ *ibid*

³⁶ *ibid.*

³⁷ *ibid*

³⁸ *ibid*

³⁹ *ibid*

3. Store based retail industry casual employees:
- (i) are less likely to rely on their work income as their main source of income (87% compared with 94% of permanent employees)⁴⁰;
 - (ii) are more likely to live with their parents (60% compared with 15% of permanent employees)⁴¹;
 - (iii) are likely to have been working in the retail sector for shorter periods of time (40% have been employed in the retail sector for 2 years or less, compared with 12% of permanent employees, 80% have been employed in the retail sector for 5 years or less compared with 36% of permanent employees)⁴²;
 - (iv) are likely to have been working for their current employer for a shorter period of time (64% have been employed with their current employer for 2 years or less, compared with 26% of permanent employees)⁴³;
 - (v) are more likely to be studying (63% are studying full time or part time compared with 13% of permanent employees)⁴⁴;
 - (vi) are more likely to undertake study activities on Monday to Friday during the day (56% compared with 7% of permanent employees)⁴⁵;
 - (vii) are more likely to work for smaller employers (45% work for businesses with fewer than 50 employees, compared with 32% of permanent employees)⁴⁶;
 - (viii) do have a preference for permanent employment (only 45% of casuals would prefer to be engaged on a permanent basis)⁴⁷;
 - (ix) are more likely to be motivated by opportunities to socialise at work, work life balance and flexible working arrangements when compared with permanent employees⁴⁸; and
 - (x) are more likely to be female (79%) and under 24 years of age (71%)⁴⁹

The ARA/MGA rely largely on the Sands Report in respect of the findings here. The Sands Report excludes a key sector of the retail workforce (employees aged under 18) and thus his findings are not based on a representative sample of employees. Subject to that caveat, the SDA does not cavil within the proposed findings in paragraph 3.

Casual store based weekday evening workers

4. Casual store based weekday evening workers:
- (i) are more likely to choose to work weekday evenings because of study commitments (26% compared with 5% of permanent employees)⁵⁰;

⁴⁰ *Retail Industry Store-Based Employee Experience and Perceptions of Working on a Weekday Evenings and Saturday*, Dr Sean Sands (**Sands Report**), Table 28, page 41.

⁴¹ *ibid*

⁴² *ibid* at Table 30, page 43

⁴³ *ibid*

⁴⁴ *ibid* at Table 32, page 46

⁴⁵ *ibid*

⁴⁶ *ibid* at Table 30, page 43

⁴⁷ *ibid* at Table 17, page 24; Vears statement, paragraph 10; Freeman statement, paragraph 10; Slaughter statement, paragraph 40.

⁴⁸ *ibid* at Table 12, page 20

⁴⁹ *ibid* at Page 3

⁵⁰ *ibid* at Table 18, page 28

- (ii) are more likely to view flexibility around life commitments as a benefit of working weekday evenings (25% compared with 15% of permanent employees)⁵¹;
- (iii) are more likely to view flexibility around study commitments as a benefit of working weekday evenings (23% compared with 6% of permanent employees)⁵²; and
- (iv) are more likely to want to take up additional weekday evening work than permanent employees (65% compared with 41% of permanent employees)⁵³

(Subject again to the concerns raised about the Sands Report), the SDA contends that the findings at paragraphs 4 and 5 may well be correct, but the findings sought here offer no assistance to the Commission in its assessment of whether the modern awards objective is being met.

Casual store based Saturday workers

5. Casual store based Saturday workers:

- (i) are more likely to choose to work weekday evenings because of study commitments (29% compared with 2% of permanent employees)⁵⁴;
- (ii) are more likely to choose to work on Saturdays because of family commitments (6% compared with 4% of permanent employees)⁵⁵;
- (iii) are more likely to choose to work on Saturdays because of other work commitments (4% compared with 2% of permanent employees)⁵⁶;
- (iv) are more likely to view flexibility around family commitments as a benefit of working Saturdays (10% compared with 5% of permanent employees)⁵⁷;
- (v) are more likely to view flexibility around study commitments as a benefit of working Saturdays (20% compared with 2% of permanent employees)⁵⁸;
- (vi) are more likely to enjoy weekend trade (10% compared with 5% of permanent employees)⁵⁹; and
- (vii) are more likely to want to take up additional Saturday work (59% compared with 32% of permanent employees)⁶⁰.

See above

Negative consequences for casual employees and their employers if application granted

- 6. Retail employers set labour budget such that labour costs are maintained at a percentage of store sales⁶¹.

⁵¹ *ibid* at Table 19, Page 29

⁵² *ibid*

⁵³ *ibid* at Table 21, Page 48

⁵⁴ *ibid* at Table 22, Page 32

⁵⁵ *ibid*

⁵⁶ *ibid*

⁵⁷ *ibid* at Table 23, page 34

⁵⁸ *ibid*

⁵⁹ *ibid*

⁶⁰ *ibid* at Table 25, Page 37

⁶¹ Dorwald statement, paragraph 12; Elson statement, paragraph 28.

Accepted. It is noted that the IGA employers set its labour budget at 10% of store sales, whereas the other employer, City Beach, sets its labour budget at 14% of store sales.

7. This budget will affect the composition of the work team on any one shift. If labour costs increase, many retailers are likely to reduce store hours to maintain profitability⁶².

It is accepted that an increase in labour costs *may* in certain circumstances lead to a reduction in store hours. However, the SDA does not accept that there is a clear linear relationship between an increase in labour costs and a reduction in store hours. The evidence does not support the proposition that '*many retailers are likely to reduce store hours to maintain profitability.*'

8. May workers employed on Saturdays and weekday evenings are casual employees⁶³ and:
- (i) many are secondary students⁶⁴;
 - (ii) many are young; some employers expressed that the average age of casual employees working on a Saturday is as young as 16⁶⁵;
 - (iii) many are inexperienced⁶⁶;
 - (iv) many are performing lower level duties that do not require a supervisory component⁶⁷; and
 - (v) many report to or are supervised by a senior permanent employee on that shift⁶⁸.

Accepted. These matters are reflected in the employees' wage level. The reference to Ferrier's proposed evidence should be removed. The footnote to paragraph 8(iii) is not referenced to the Sands Report correctly. The correct reference should be given, or it should be removed.

9. If the casual penalty for employees working on a Saturday is increased, hours will need to be reduced in order to meet store labour budgets⁶⁹. In the event that hours were reduced, it is likely this will have most impact on young casual employees.⁷⁰

The evidence does not justify this proposed finding.

10. If a casual employee has their hours of work on a weekend reduced, this is likely to lead to an overall reduction in hours worked per week as these casual employees cannot work additional shifts during the week due to their availability impacted by school or university studies⁷¹.

⁶² Elson statement, paragraph 28.

⁶³ Elson statement, paragraph 23; Slaughter statement, paragraph 34 and Ferrier statement, paragraph 37.

⁶⁴ Dorwald statement, paragraph 26.

⁶⁵ Slaughter statement, paragraph 25.

⁶⁶ Sands report, p73.

⁶⁷ Dorwald statement, paragraph 15 and 21.

⁶⁸ Slaughter statement, paragraph 19.

⁶⁹ Elson statement, paragraphs 34 and 36, Slaughter statement, paragraphs 29 and 35, Dorwald statement, paragraphs 24 and 25.

⁷⁰ Slaughter statement, paragraph 37, Dorwald statement, paragraph 26, Elson statement, paragraphs 35 and 37.

⁷¹ Slaughter statement, paragraph 30; Elson statement, paragraph 38.

The evidence does not justify this proposed finding.

11. The data suggests casual employees experience disutility in different ways and generally at lower levels when compared to permanent employees.⁷² Working casually and electing what shift(s) are worked can be preferable, with casual employees valuing flexibility to work additional hours when it suits them and to work less if wanting to juggle social commitments and sport⁷³.

This proposition is not accepted. To the contrary, Dr Sands accepted that the greatest level of disutility appears to be Saturday and he did not distinguish between casuals and permanent part-time employees (Exhibit SDA-7, page 7).

12. Casual employment in the retail industry represents an important pathway into the workforce for young people.⁷⁴

Accepted. But the SDA notes Professor Borland's evidence at [4.8] of his Expert Report that other pathways into employment in the retail industry exist.

Permanent employment is not a viable replacement

13. Casual employees who are University students will commonly indicate they are unavailable for entire weeks at a time when they have exams or increase their hours during semester breaks⁷⁵.

Not accepted. The evidence relied on for this proposed finding relates only to Mr Slaughter's experience. No general proposition can be derived from this evidence.

14. Some casual retail employees acknowledge this flexibility cannot be afforded in a permanent role⁷⁶.

Not accepted. The ARA/MGA rely on the evidence of Mr Vears, but it is noted that in the evidence of Mr Freeman, another casual retail employee witness, he acknowledged that he did not realise that flexibility could be afforded in a permanent role (PN747).

15. Some retail employers avoid employing part time employees because they consider the requirements for employing part time employees inflexible and administratively burdensome.⁷⁷

Not accepted. Ms Elson's evidence was that she would be happy to employ more permanent part-time staff and keep them working on Saturdays (PN564-568).

⁷² Sands Report

⁷³ Elson statement, paragraphs 44, Sands Report.

⁷⁴ Elson statement, paragraphs 40 and 41, Slaughter statement paragraph 39,

⁷⁵ Slaughter statement, paragraph 40.

⁷⁶ Vears statement, paragraph 9.

⁷⁷ Elson statement, paragraph 43