

1 December 2020

The Hon Justice Ross
President
Fair Work Commission
11 Exhibition Street
Melbourne VIC 3000

By email: amod@fwc.gov.au

Dear President Ross,

AM2017/60 – Four yearly review of modern awards – General Retail Industry Award 2020 – implementation

The National Retail Association Limited, Union of Employers (**NRA**) makes these submissions in the above matter in accordance with the directions issued by the Full Bench of the Fair Work Commission (**Full Bench**) in at paragraph [103] of [2020] FWCFB 6301 (**the Decision**).

1. The substance of the Decision

- 1.1. Although noting that the substance of the Decision is not the subject of the directions issued by the Full Bench at paragraph [103] of the Decision, the NRA nevertheless wishes to take this opportunity to note several concerns with the Decision on the record.
- 1.2. Specifically, the application under consideration by the Full Bench was for junior rates under the *General Retail Industry Award 2020 (Retail Award)* to be limited to employees classified as Retail Employee Level 1.
- 1.3. It was common ground between the parties, and appears to have been accepted by the Full Bench, that any decision varying minimum rates payable to junior employees enlivened the requirements of subsection 156(3), with reference to subsection 156(4) of the Act.¹
- 1.4. It was acknowledged by the Full Bench that:

“... the SDA has advanced *no* evidence regarding the work value of junior employees employed in the various classification levels in the Retail Award.”²
- 1.5. No other party adduced evidence regarding the work value of junior employees employed in the various classification levels of the Retail Award.
- 1.6. Consequently, it appears that the Full Bench has exercised its discretion under subsection 156(3) of the Act in the absence of any evidence justifying a variation of modern award minimum wages on the basis of work value reasons.
- 1.7. Further, the Decision does not appear to canvas any consideration of work value reasons justifying the variation determined to be made by the Full Bench.

¹ [2020] FWCFB 6301 at [26]

² [2020] FWCFB 6301 at [75]



- 1.8. Paragraphs [83] to [86] of the Decision describe the current treatment of junior rates in the Retail Award as an “anomaly”.
- 1.9. In particular, at paragraph [84] of the Decision the Full Bench emphasises that “the concepts of uniformity and consistency underpin the fixation of minimum wages in modern awards.” This appears to be in reference to the observations of the Expert Panel in the 2012-12 Annual Wage Review as extracted at paragraph [28].
- 1.10. With respect to the Full Bench, the NRA is of the view that the approach adopted by the Full Bench is erroneous on four accounts.
- 1.11. Firstly:
- a) the observations of the Expert Panel in the 2012-13 Annual Wage Review were made in the context of the Fair Work Commission’s functions and powers to set modern award minimum wages under Part 2-6 of the Act;
 - b) the Full Bench, in the Decision, is exercising its powers under Part 2-3, Division 4 of the Act;
 - c) significantly, the Full Bench’s discretion to vary modern award minimum wages under Part 2-3, Division 4 of the Act is limited by subsection 156(3) only to circumstances where the variation is justified by work value reasons; and
 - d) no similar constraint is placed on the discretion of the Fair Work Commission (as constituted by the Expert Panel) when exercising its powers under Part 2-3; and
 - e) consequently, the primacy apparently placed by the Full Bench on the observations of the Expert Panel as extracted in paragraph [28] of the Decision is in error.
- 1.12. Secondly, paragraphs [83] to [86] of the Decision appear to justify the determination of the Full Bench on the basis of seeking consistency with other modern awards. The NRA submits that this is in error as:
- a) “work value reasons” justifying a variation a modern award minimum wages in the Full Bench’s exercise of its discretion under section 156 are limited to the three matters specified at subsection 156(4); and
 - b) consistency with other modern awards does not feature among those matters; and
 - c) consequently, the Full Bench has erroneously conflated “consistency” with the work value reasons specified in subsection 156(4) of the Act; and
 - d) the Full Bench appears to have failed to acknowledge that the classification of Retail Employee Level 4 is not limited to persons holding a trade qualification, but includes persons who hold no qualification at all.
- 1.13. Thirdly, the apparent finding of the Full Bench that the current treatment of junior rates in the Retail Award is an “anomaly” is not supported by the material available to it, as:
- a) the information note published by Commission staff on 5 November 2020 identified 50 modern awards which did not limit the application of junior rates; and
 - b) the SDA submitted that on its analysis, 14 modern awards (including the Retail Award) did not limit the application of junior rates.
- 1.14. Finally, the submissions of the parties in this matter were made in respect of the application advanced by the SDA. No party has been provided with a proper opportunity to make submissions or



lead evidence with respect to the determination ultimately proposed to be made by the Full Bench. In this respect, while the parties have been afforded procedural fairness in relation to the application advanced by the SDA, no party has been afforded procedural fairness in relation to the decision ultimately reached by the Full Bench.

1.15. For the above reasons, the NRA is of the view that the Decision is in error.

2. Clarification of submission by the NRA as to implementation at hearing

2.1. The NRA wishes to take this opportunity to emphasise that its submission as to implementation made at hearing was heavily caveated, noting the limited time that the parties had been given to consider the particular question.

2.2. In particular, we reiterate our submissions made at hearing that any decision needs to not only consider the practical considerations of how businesses may most effectively administer such a change through their payroll systems, but also further consideration of the wider economic context on the best data available.

2.3. We further note:

(a) While an implementation date of 1 February 2021 would align with increases to the minimum wage made by the Annual Wage Review 2019-20, this will be followed in comparatively short order by increases made by the Annual Wage Review 2020-21.

(b) The final increase to evening penalty rates for casual employees is due to take effect on and from 1 March 2021.

(c) The JobKeeper wage subsidy program is due to conclude on 28 March 2021.

2.4. The net consequence of the above is that if the implementation of the proposed determination was to commence on 1 February 2021, it would do so at a time when wage costs under the Retail Award are already in a state of flux and businesses would be under pressure to deal with these.

2.5. There is a risk that additional changes to the Retail Award targeted specifically at junior employees would create a perception of such employees posing an additional cost, even in relation to those employees unaffected by the determination, which may have adverse ramifications for the employment of juniors.

2.6. We urge the Commission to take a cautious approach to safeguarding employee outcomes whilst allowing a modicum of stability for employers, rather than heaping several significant changes on employers in rapid succession.

Yours sincerely,

Handwritten signature of Lindsay Carroll in black ink.

Lindsay Carroll
Deputy Chief Executive Officer
National Retail Association

Handwritten signature of Alexander Millman in blue ink.

Alexander Millman
Senior Workplace Relations Advisor
National Retail Association