

WOOLWORTHS GROUP



28 July 2017

Mr Stephen Palethorpe
Secretary
Senate Education and Employment References Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Via Email: eec.sen@aph.gov.au

Dear Mr Palethorpe

We refer to your letter of 26 June 2017 inviting Woolworths to make a submission to the Senate Education and Employment Reference Committee's Inquiry into Penalty Rates. Woolworths is grateful for the opportunity to respond to the Terms of Reference of this important inquiry.

1. Executive summary

- The retail sector is highly competitive and amid dynamic change. New technologies, growing urbanisation, cultural changes, evolving household compositions and new styles of work have all driven seismic shifts in customer behaviour. This means retailers need the flexibility to respond quickly to changes in buying patterns.
- Enterprise bargaining is a key feature of the Australian industrial relations system and it has been crucial in delivering productivity gains for the economy at large. A guaranteed safety net of fair minimum terms and conditions is achieved through the National Employment Standards (**NES**) and modern awards which prescribe minimum wages and conditions on an industry basis.
- The lack of clarity and inconsistency about how the "better off overall test" (**BOOT**) is being applied has the potential to significantly lessen (and potentially removes entirely) incentives for bargaining and is a significant risk to the economy, given the combination of productivity and wages gains that have been made in tandem over the last 20 years.
- Woolworths has always negotiated its enterprise agreements in good faith to achieve a fair outcome for its team members.
- Woolworths has never sought to achieve a competitive advantage over smaller retailers in constructing its enterprise agreements. Indeed the enterprise bargaining

regime is open to all players and, overall, Woolworths provides higher rates of base pay than the Award.

2. Introduction

About Woolworths

The Woolworths Group employs over 205,000 people, operates from over 3,800 locations in Australia and New Zealand and serves more than 29 million customers each week.

As a major employer in the retail sector, Woolworths workforce is diverse, with more than 2,200 indigenous team members and some 79,000 young team members furthering their careers with the Company.

Approximately 65% of the Group's team members work in the Supermarkets business.

Enterprise Bargaining in the Retail Sector

The retail sector is highly competitive and amid dynamic change.

New technologies, growing urbanisation, cultural changes, evolving household compositions and new styles of work have all driven seismic shifts in customer behaviour.

Retailers need the flexibility to respond quickly to changes in buying patterns. Customers expect new services and more flexible trading hours, including non-traditional store opening hours. Saturdays are Woolworths busiest days of the week, with Sunday now the third most popular day to shop. In terms of time of day, while the period between 9am and 5pm remains the most popular time to shop, an increasingly significant amount of shopping occurs outside these hours.

Enterprise bargaining is a key feature of the Australian industrial relations system and it has been crucial in delivering productivity gains for the economy at large. A guaranteed safety net of fair minimum terms and conditions is achieved through the NES and modern awards which prescribe minimum wages and conditions on an industry-wide basis.

The terms and conditions of employment of most Supermarket team members are regulated by enterprise agreements. Over the last 20 years or more, Woolworths' agreements have delivered benefits to team members greater than award standards, while improving efficiency and productivity.

This is consistent with the *Fair Work Act 2010 (FWA)*, one of the Objects of which is "achieving productivity and fairness through an emphasis on enterprise-level collective bargaining" (section 3(f)).

Woolworths' Current Situation

The Woolworths Supermarkets Enterprise Agreement (**EA**) has expired its nominal term. Ordinarily, Woolworths would have negotiated a replacement agreement, thereby ensuring ongoing regular wage increases to team members. However, the combined effect of external

circumstances has placed Woolworths in a position where it has little prospect of negotiating an agreement that will be approved by the Fair Work Commission.

These circumstances include:

- the Fair Work Commission (**FWC**) 2008 modern award decision which made the General Retail Industry Award (**GRIA**), led to a set of new minimum penalty rates by consolidating the different penalty rates from the relevant State awards. The consolidation resulted in a significant increase to the award rates that had applied for many years in some jurisdictions, including importantly, in New South Wales; and
- the FWC's 2017 modern award review Penalty Rates decision of 23 February which in essence addressed the uneven impact of the initial consolidation by reducing certain penalty rates to their pre modern award level. The new Sunday penalty rates when fully implemented, will reflect the rates that applied previously in NSW, SA/NT and in WA (subject to appeal to the Federal Court); and
- the FWC's Penalty Rates transitional arrangements decision, the effect of which is to phase in the new GRIA penalty rates over four years. While the GRIA does not apply to Woolworths' team members who are covered by enterprise agreements, changes to GRIA are directly relevant to the application of the BOOT to future enterprise agreements. A phased reduction to penalty rates over four years creates uncertainty as to the correct test to be applied during this period; and
- The Federal Court appeal by two unions against the Penalty Rates Decision which has created ongoing uncertainty as to the final outcome of the award review; and
- the recent inconsistency of approach by the FWC to the application of the BOOT to proposed enterprise agreements in the retail sector. In particular, the FWC's May 2016 decision to refuse approval of the proposed Coles Supermarkets enterprise agreement; and
- the current application before the FWC to terminate the current Coles enterprise agreement with potential retrospective effect to 2014.

These are an unprecedented set of circumstances that no business could have contemplated and their collective effect has created a 'perfect storm' for Woolworths and other retailers and their employees.

3. Specific Responses to Terms of Reference

On 19 June 2017, the Senate referred the following matter to the Education and Employment References Committee for inquiry and report:

- (a) claims that many employees working for large employers receive lower penalty rates under their enterprise agreements on weekends and public holidays than those set by the relevant modern award, giving those employers a competitive advantage over smaller businesses that pay award rates**

Woolworths has never sought to achieve a competitive advantage over smaller retailers in constructing its enterprise agreements. Indeed the enterprise bargaining regime is open to all players and, overall, Woolworths provides higher base rates of pay to workers than the Award.

Woolworths has participated in collective bargaining since the 1990s and has always complied with the relevant legislative frameworks. The FWA expressly encourages the achievement of productivity through enterprise-level collective bargaining and it is open to any business of any size to utilise. It provides a framework for minimum terms and conditions through modern awards and the NES, and enterprise bargaining, which is available to all workplaces, large and small.

Woolworths Supermarkets has an EA providing base rates higher than the GRIA and this has been the case for at least 10 years. The base pay rates for FY16/17 ranged from 13.2% to 15.7% (depending on State) above the GRIA rate of \$19.44. The current base rates are still above the GRIA by between 9.6% and 11.9% even after the recent National Wage increase of 3.3%.

The higher base rate in the EA is the rate on which percentage penalties including weekend, public holidays and casual loadings are applied. In addition annual, personal, compassionate and long service leave are all calculated on the higher base rate. Superannuation is also paid on the higher base rate.

The Woolworths Supermarkets EA also specifies terms and conditions for broader classification groups including trades and supervisory positions. In relation to supervisory levels, each store offers career path opportunities at rates of pay above the initial entry level.

Additionally, Woolworths' enterprise agreements and/or corporate policies have delivered to team members a wide range of important non-financial benefits, such as:

- more generous leave entitlements, including, for example, 'time off in lieu,' which while not a direct financial benefit to each employee, carry a cost to the employer;
- discretionary benefits such as discount cards; and/or
- paid parental leave and return to work bonuses of 2 weeks' pay.

(b) the operation, application and effectiveness of the Better Off Overall Test (BOOT) for enterprise agreements made under the *Fair Work Act 2009*;

Woolworths has participated in enterprise bargaining for over 20 years. As with previous enterprise agreements, the Woolworths Supermarkets EA was approved by Fair Work Australia (the predecessor to the FWC) in July 2011.

All enterprise agreement negotiations have involved the participation and support of the Shop, Distributive and Allied Employees Association (**SDA**) and received majority support in an employee vote. Woolworths complied with all statutory requirements in successfully filing

the agreements for approval by the Tribunal, as required from time to time. For the reasons above, Woolworths considers that it has met the requirements of the FWA.

The current uncertainty concerning the BOOT is inhibiting bargaining and putting at risk a system of bargaining that has served the Australian economy well. The BOOT provisions require amendment to restore a workable approach.

The Productivity Commission Report said in respect of the BOOT that: *"The application of the better off overall test (BOOT) discourages enterprise bargaining and creates uncertainty during the agreement approval process. The BOOT should be replaced by a no-disadvantage test (NDT)."*¹

Specifically the current emphasis of the FWC on the particular roster worked by individual employees, or potential employees, at a particular point in time renders the BOOT unworkable to all practical purposes.

Employees' work rosters are influenced by a range of factors, primarily customer demand, but also permitted opening hours and availability of team members and their work preferences. Part-time and casual employees often prefer or need to work outside traditional working hours. For example, in the retail industry many casual and part-time employees are students and their hours of availability are driven by their primary student activities. Part-time employees' availability is often also subject to carer responsibilities or other critical personal considerations.

Over time, the needs of the customer and therefore the business will change. In respect to team members, these changes have provided for an increase in permanent part-time work which has, in turn, provided for more flexible work arrangements for team members, the opportunity to increase their core hours of work, either temporarily or permanently, whilst still providing for a level of security of employment.

For these reasons, using rosters at an arbitrary point in time and without regard to the other factors that deliver broader benefits to employees should not be the basis for determining whether an agreement should be approved or not.

This is a point supported by Deputy President Sams in respect of the recent Beechworth Bakery case, where the Deputy President opined:

*"..in some ways, the comparison between the Agreement and the relevant Awards, at the 'test time' is an artificial and unreliable guide as to whether the Agreement throughout its nominal term, will be able to guarantee all employees (let alone prospective employees) will be 'better off overall'. Given the test time is a snapshot in time; that is, when the application to approve the Agreement is filed with the Commission (s196(6)), it is difficult to imagine in a dynamic business environment, that rosters which exist at the 'test time' will remain static and unchanged for the nominal term of the Agreement , of up to four years."*²

¹ Productivity Commission Report Part 2, p645

² Per Deputy President Sams *Beechworth Bakery Employee Co Pty Ltd Enterprise Agreement 2016* [2016] FWCA8862

- (c) **the desirability of amending the *Fair Work Act 2009* to ensure that enterprise agreements do not contain terms that specify penalty rates which are lower than the respective modern award;**

The effect of such an amendment would be to discourage if not remove the basis for almost all enterprise bargaining as it would remove the opportunity to negotiate an agreement that may result in overall benefits to employees in exchange for flexibility on penalty rates.

It would also diminish the role of a modern award which is to provide a fair and relevant minimum safety net taking into account, among other things *"the need to encourage collective bargaining"* and *"the need to promote flexible modern work practices and the efficient and productive performance of work."*³

The Productivity Commission Report noted that *"Sunday penalty rates exist for a range of industries, including retail, are inconsistent across similar work, do not align with changing consumer preferences, and frustrate the job aspirations of the unemployed and those who are only available for work on a Sunday."*⁴

Further, the Productivity Commission Report noted that *"where penalty rates are applicable to an industry, there is a wide variety of rates, eligibility criteria and triggers for when arrangements apply. It is noted that 'the variety exemplifies that **penalty rates are an art borne of history, precedent, compromise and the lack of a coherent overarching set of principles.**'"*⁵

Care should be taken not overreact to the current penalty rates review, which is a consequence of the modern award process of 2008 which resulted in five State Retail Awards being consolidated into one Federal award. The recent penalty rates review, in essence, addressed the uneven impact of the initial consolidation. The new Public Holiday and Sunday penalty rates when fully implemented will in fact revert to the rates that applied previously in NSW, SA/NT and WA.

In the FWC Penalty Rates Decision, the Full Bench concluded: *"It is apparent from an examination of the relevant decisions that the Award Modernisation Full Bench did not undertake a detailed or considered review of the penalty rates in the Retail Award. Rather, understandably enough in view of the time contains [sic] on the award modernisation process, the Full Bench gave effect to the existing penalty rates in the 'critical mass' of pre-reform instruments."*⁶

- (d) **the provisions of the Fair Work Amendment (Pay Protection) Bill 2017; and**

For the reasons identified in (c) above, the proposed changes of the Fair Work Amendment (Pay Protection) Bill 2017 are not necessary and are undesirable.

³ See the Modern Award Objective in section 134(1)(b) and (d) FWA

⁴ Productivity Commission Report Part 1, p23

⁵ *ibid* Part 1, p25 (Emphasis added)

⁶ Fair Work Commission Penalty Rates Decision [2017] FWCFB 1001 Para 1491

(e) any other related matter related to penalty rates in the retail, hospitality and fast-food sectors.

The FWA provides that a modern award does not apply to employees who are covered by an enterprise agreement.

The FWC decided in its statutorily-required review of the GRIA that the existing penalty rates were not an appropriate minimum for the award and accordingly reduced the rates (which had the effect of restoring rates that had previously applied under some State awards). The decision to phase-in the reduction over four years was to mitigate the adverse effects of the reduction for employees who were employed and paid under the GRIA.

Accordingly, the FWC's decision to reduce penalty rates in the GRIA does not have any direct application to Woolworths' team members. However, because the BOOT is applied against the modern award, changes to the GRIA have a bearing on the approval of a future enterprise agreement.

However, the decision has potential implications for team members covered by enterprise agreements because the full benefit of the reduction may not be taken into account for the BOOT until July 2020. This may further inhibit enterprise bargaining and create uncertainty as to the correct application of the BOOT to a proposed new agreement for all of this period.

Thank you again for this opportunity to provide a submission to the Inquiry into penalty rates.

Yours sincerely

Alison Penfold
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