



REPORT TO THE FULL BENCH

Fair Work Act 2009

s.157–FWC may vary etc. modern awards if necessary to achieve modern awards objective

Award flexibility–General Retail Industry Award 2020

(AM2021/7)

Retail Industry

COMMISSIONER HAMPTON

ADELAIDE, 15 MARCH 2021

Report to Full Bench – Award Flexibility – Part-time employment – conciliation conferences conducted – General Retail Industry Award 2020.

Background

[1] The background to this application is set out in Statements issued by the Commission on 1 March 2021¹ and 4 March 2021.²

[2] In brief, on Friday 26 February 2021 the Shop, Distributive and Allied Employees’ Association (SDA), the Australian Workers’ Union (AWU) and Master Grocers Australia (MGA) (the Joint Applicants) filed a joint application³ to vary the Retail Award (the Joint Application, AM2021/7). The [amended joint application](#) seeks to insert a new schedule – Schedule I – Additional flexibility measures – Part-time employees – into the *General Retail Industry Award 2020* (Retail Award). In very broad terms the proposed new Schedule I is designed to facilitate agreements between an employer and certain part-time employees to work more ordinary hours than their guaranteed number of hours agreed under clause 10.5 (an additional hours agreement), up to a maximum total of 38 ordinary hours per week.

[3] The joint application is supported by the Australian Council of Trade Unions and the Council of Small Business Organisations Australia.

[4] Submissions opposing the joint application were received from:

- Australian Business Industrial, NSW Business Chamber and the Australian Chamber of Commerce and Industry ([ABI](#)) dated 4 March 2021
- National Retail Association ([NRA](#)) dated 4 March 2021
- Retail and Fast Food Workers Union ([RAFFWU](#)) dated 4 March 2021

¹ [\[2021\] FWC 1088.](#)

² [\[2021\] FWC 1198.](#)

³ [Amended on 28 February 2021.](#)

- The Australian Industry Group ([Ai Group](#)) dated 4 March 2021
- The Australian Retailers Association ([ARA](#)) dated 4 March 2021.

[5] Of these groups, ABI, NRA, and ARA indicated that an alternative proposal to vary the Retail Award in connection with the same subject matter, which follows an earlier proposal made to the Commission ([AM2020/103](#)), would now be advanced if given the opportunity to do so.

[6] Ai Group reserved its position and RAFFWU indicated that it opposed the present joint application and the foreshadowed joint employer proposal.

[7] As a result of proceedings conducted by the Full Bench on 5 March 2021, the hearing of the joint application was adjourned to permit ABI and some other employer organisations to settle and submit a different proposal to vary the Retail Award (Joint Employer proposal) and all parties to provide further materials in support of their respective submissions. The adjournment also enabled the Commission to convene one or more conciliation conferences between interested parties.

[8] The hearing of the joint application, and any alternative proposals and positions, was originally set down for Tuesday 16 March 2021, and subsequently for Wednesday 17 March 2021, to provide more time for the parties to potentially revise and confirm their positions in light of the ongoing discussions.

[9] This Report deals with the conciliation conferences conducted by this arm of the Commission.

The conferences

[10] I have conducted conciliation conferences on 10 and 11 March 2021. The list of participating organisations is set out at the conclusion of this Report.

[11] In the lead up to the conferences I issued a short framework document outlining the context, an indicative list of issues for discussion, and confirmation that a report of this nature would be provided. Amongst other matters this document also confirmed:

- The conciliation discussions were designed to narrow the issues between the parties, particularly those supporting some form of change.
- Ultimately, the Full Bench will determine whether there is to be a variation to the Award, and if so, what form that would take.
- Unless otherwise agreed by the relevant parties, the Report issued to the Full Bench would not disclose positions advanced during the conference.
- Parties may be requested to confirm their positions to the Full Bench following the publication of the Report.

[12] Also, before the conciliation conferences were conducted, ABI, with the support of the ARA and NRA, provided a further joint employer proposal on the basis that this would be pursued as an option before the Full Bench, subject to the outcome of the present process.

The issues based upon the initial proposals

[13] The issues discussed at the conciliation conferences included the basis upon which some parties opposed both the joint application and the Joint Employer proposal. In relation to the issues of difference between the two proposals, the specific issues canvassed are set out below. It should be appreciated that the many of the issues flowed from the different scope and nature of the additional hours arrangements initially proposed by the parties and are generally interrelated.

Joint Applicants	Joint Employers
Structure of Provision	
1. Appendix	Variation to the existing award provisions
2. Stated life with sunset provision and extension by application	Ongoing and subject to review by application in the normal course
3. The parties may agree to an additional hours arrangement	The employer may offer (additional hours) and the employee may agree
Eligibility/Preconditions	
4. P/T employee engaged to work more than 9 hours per week	No expressed minimum hours to be eligible
5. Whether an additional hours arrangement can be agreed as a condition of securing employment?	
Nature of agreement and presumption as to work and payment	
6. Specified shift or period of time	All options including standing agreement
7. Paid the additional agreed hours even if not required	No obligation for employee to accept rostered additional hours (paid if worked) If rostered within agreed range and not declined – becomes part of ordinary hours of work
Overtime presumption – different drafting emphasis	
8. Paid overtime unless conditions met	Overtime will not apply to voluntary additional hours
Interaction with roster provisions (clause 15) and consultation provisions (clause 35)	
9. Whether express provisions are required, and if so, what? (roster provisions/constraints do not apply to agreed additional hours)	
10. Whether capacity to roster additional hours is consistent with the obligation in clause 35 to consult about changes to rosters and hours of work?	
Review trigger and expectation	
11. Regularly work additional hours (above the hours set under clause 10.5) for at least 6 months.	Work in excess of hours set under clause 10.5 in a consistent and predictable pattern for at least 12 months.

Discuss and seek to genuinely agree.	
Employer to refuse to establish the additional hours as new ongoing hours (for the purposes of clause 10.5) only on reasonable business grounds.	Employer to refuse to establish the relevant additional hours as new ongoing hours (for the purposes of clause 10.5) only on reasonable business grounds.
Arbitration	
12. Consent for private arbitration of disputes	Reliance on existing award DRP

[14] The participating parties constructively discussed their respective proposals and clarified the intended operation of each. This included how the proposals differ from the present operation of clauses 10.5 and 10.6 of the existing Award.

[15] The relevant provisions are as follows:

“10.5 At the time of engaging a part-time employee, the employer must agree in writing with the employee on a regular pattern of work that must include all of the following:

- (a) the number of hours to be worked each day; and
- (b) the days of the week on which the employee will work; and
- (c) the times at which the employee will start and finish work each day; and
- (d) when meal breaks may be taken and their duration.

10.6 The employer and the employee may agree to vary the regular pattern of work agreed under clause 10.5 with effect from a future date or time. Any such agreement must be in writing.”

[16] There is some tension between the parties as to the precise intent of clauses 10.5 and 10.6 and whether the Retail Award properly permits **temporary** additional (ordinary) hours to be worked by part-time employees, with a reversion back to the (original) clause 10.5 arrangements. An assessment of this aspect might be an important consideration both as whether there is a need to vary the Retail Award and if so, in what form.

[17] Despite the above tensions, there appears to be common ground amongst those supporting a change that some additional clarity and/or flexibility in part-time employment arrangements is necessary and appropriate. That is, to enable additional (ordinary) hours to be provided to, and worked by, part-time employees, beyond those set out in the arrangements agreed to in accordance with clause 10.5 (and clause 10.6) of the Retail Award. There is also common ground that the additional flexibility arrangements should contain some appropriate parameters and safeguards and that the procedural requirements for making an agreement should include the capacity to record it through exchange of text messages and emails (and potentially other electronic means). The various proponents of change also agree that there should be some review mechanism to consider the potential conversion of additional hours to an ongoing clause 10.5 arrangement.

[18] At the outset of the second conference, the Joint Applicants advised that following consideration of the first discussions, a revised proposal would be advanced. That revision would clarify that an additional hours agreement under their clause would require the employer and employee concerned to agree something akin to the kind of matters that are set out in clause 10.5.

[19] The parties also discussed the degree to which the competing proposals should, and could, comprehend some form of standing arrangement with appropriate safeguards.

[20] The Joint Applicants have confirmed that a revised proposal is to be advanced to the Full Bench. This revised proposal, in the form of a [Joint Applicant's Draft Determination](#), has just been provided to the Commission. The Joint Employers had earlier also confirmed that a significantly revised version of their proposal would also be submitted to the Commission at the upcoming hearing. To that end, a [revised Draft Determination](#) has also very recently been provided on behalf of the Joint Employers. It appears that discussions between the interested parties are also continuing with a view to narrowing the remaining issues between them.

[21] Considering these developments, it is appropriate that this Report be issued now given the upcoming hearing. However, in these circumstances the following refers to the range of issues that arise from the discussions that have been conducted in the conferences convened in this matter, having regard to the latest revised proposals. As a result, some of what is set out below may need to be reviewed in light of the nature and detail of any further proposals that may be advanced by the respective parties.

The major issues arising from the various proposals

A. The nature of any additional hours agreement for ordinary hours beyond clauses 10.5 and 10.6

Joint Applicants – Limit to ad hoc shift and specific time-based written agreements, which create an obligation on both parties, to work and pay respectively, for the agreed shifts. The agreement would contain the detailed arrangements, including its duration and the items provided by clause 10.5,⁴ and the provision requires that the agreement be genuinely made without coercion or duress. The agreement would also need to be made and recorded in writing, as soon as is reasonably practicable for a rostered shift agreement, and before the start of any period of time arrangement. The agreement can be terminated (only) by mutual agreement, with consent not being unreasonably withheld.

Joint Employers – Provide for standing written agreements that permit the employer to roster within the constraints of the agreed arrangements but do not generally commit the employee to work, or the employer to pay, the additional hours (unless the additional hours are worked). An employee can revoke (or vary by subsequent agreement) a standing hours agreement at any time. Where an employee is rostered within the agreed range of additional hours, this may still be declined by the employee. Where an employee has agreed to work additional hours

⁴ This appears to be intended as a result of a proposed note to be added to the main provision (clause 1.2 of the draft determination).

under the standing agreement in a roster period, the variation or revocation would apply from the commencement of the next roster period.

The revised Joint Employer proposal also seeks to modify the existing clause 10.6 to clarify the scope of variations to the existing arrangements agreed under clause 10.5.

I observe that the nature of any additional hours agreement presently represents the most significant conceptual difference between the two proposals. Further, whether some form of standing arrangement (in addition to any other options) is appropriate and workable, might depend upon the view formed by the Full Bench as to operation of the present award provisions, the practical difference between the time-limited and standing arrangements (with the associated safeguards), and the degree to which the respective proposals meet the practical needs of the part-time employees and their employers.

B. The preconditions for making an additional hours agreement

Joint Applicants – Part-time employees engaged for more than 9 hours with an express prohibition on having the additional hours agreement made a condition of securing employment and on signing such an agreement concurrently with an offer of employment.

Joint Employers – No limit on the minimum number of part-time hours to enable access to an additional hours agreement.

The revised Joint Employer proposal now also contains an express prohibition upon making a standing written agreement as a condition of offering employment and would prevent signing this form of agreement concurrently with an offer of employment.

The remaining competing element appears to be a concern that without a proper minimum number of hours, the new arrangements might lead to a reduction in the extent of agreed hours set under clause 10.5 of the Retail Award. Alternatively, any “arbitrarily” set minimum could exclude part-time employees who might otherwise benefit from access to additional hours of work.

C. The review triggers for increasing (converting) additional hours, the process and access to arbitration

Joint Applicants – Request for conversion to ongoing hours where an employee has regularly worked additional hours (above the hours set under clause 10.5) for at least 6 months. An obligation to discuss and seek genuine agreement. Access to arbitration where agreement cannot be reached and more broadly about the operation of the new provision.

Joint Employers – Request for conversion to ongoing hours where employee has regularly worked additional hours in excess of hours set under clause 10.5 and clause 10.6 for at least 12 months. An obligation for the employer to discuss and explore whether an agreement can be reached. Guaranteed access to consent arbitration on the operation of the new provisions, with the exception of any dispute pertaining to whether there were reasonable business grounds for refusing a (conversion) request.

Common positions – Written requests and responses. Access to award dispute resolution procedure (including conciliation and FWC expressing an opinion) on all aspects of the new

provisions. Employer to refuse to establish the relevant (eligible) additional hours as new ongoing hours (for the purposes of clause 10.5) only on reasonable business grounds.

The significant contrasting elements are:⁵

- When – 6 or 12 months; and
- Guaranteed access to arbitration for disputes about a decision by an employer to decline conversion on reasonable business grounds.

D. Interaction between extended hours provisions and other aspects of the Retail Award

Both proposals contemplate that any additional ordinary hours must fall within the span of hours identified in clauses 15.1 to 15.5.

Whether express provisions are required to deal with the interaction with the roster provisions in clause 15 and the overtime provision in clause 21, and if so, what?

Amongst other matters, Clause 15 provides a number of requirements for the setting and alteration of rosters. The issue is whether all of these constraints do and should apply to the agreed additional hours.

Clause 21 makes provision for overtime payments in defined circumstances.

The revised Joint Applicants' proposal notes that an additional hours agreement will be an agreement to change the roster to include the increased hours into a roster.

The revised Joint Employer proposal contains a new provision, in subclause 15.9(h), that the subclause will not apply to additional hours worked under the new part-time arrangements.

The revised Joint Employer proposal also contains a new provision, in subclause 21.2(b) – which deals with overtime, that the subclause will not apply to additional hours worked under the new part-time arrangements.

Whether the proposed capacity to roster additional hours is consistent with the obligation in clause 35 to consult about changes to rosters and hours of work?

Clause 35 of the Retail Award provides as follows:

“35. Consultation about changes to rosters or hours of work

- 35.1 Clause 35 applies if an employer proposes to change the regular roster or ordinary hours of work of an employee, other than an employee whose working hours are irregular, sporadic or unpredictable.
- 35.2 The employer must consult with any employees affected by the proposed change and their representatives (if any).

⁵ There are additional issues of emphasis in the drafting of the proposals.

- 35.3 For the purpose of the consultation, the employer must:
- (a) provide to the employees and representatives mentioned in clause 35.2 information about the proposed change (for example, information about the nature of the change and when it is to begin); and
 - (b) invite the employees to give their views about the impact of the proposed change on them (including any impact on their family or caring responsibilities) and also invite their representative (if any) to give their views about that impact.
- 35.4 The employer must consider any views given under clause 35.3(b).
- 35.5 Clause 35 is to be read in conjunction with any other provisions of this award concerning the scheduling of work or the giving of notice.”

The resolution of this issue is related, in part, to the form of any additional hours provision, including whether agreement is required for any additional hours and whether the process required under the proposals is sufficient to meet any relevant consultation obligations that arise. The import of clause 35.5 would also need to be considered.

E. The duration of any new provision

Joint Applicants – To be placed into an Appendix with a life of 18 months – to be extended only upon successful application. The revised proposal also provides that an additional hours agreement may have an end date up to 6 months after the life of the proposed award provision.

Joint Employers – To be placed in the Award proper with a life until September 2022. A review is to be conducted as to whether the new provisions will continue to operate.

This difference now appears to be largely a matter of form and drafting preference, rather than substance.

Outcomes

[22] Whilst the discussions have led to the further modifications of some elements of each proposal, there is no agreement between those supporting a change to the Retail Award as to the precise form of the variation, including some limited elements of the parameters and safeguards. Some parties may also remain opposed to the notion of any present variation to the Retail Award dealing the additional hours for part-time employees and in any event the Full Bench will need to be satisfied that any variation to the Retail Award is necessary.⁶

[23] Consistent with the arrangements for the conciliation conferences, it would be appropriate for the organisations involved to formally confirm their respective positions to the Full Bench (and each other) in light of this Report prior to the scheduled hearing. This should be undertaken no later than **4.00pm (AEDT) Tuesday 16 March 2021** in line with the amended directions recently issued by the Full Bench.

⁶ Section 157 of the *Fair Work Act 2009*.



COMMISSIONER

Participating Organisations (in alphabetical order):

Australian Business Industrial.
Australian Chamber of Commerce and Industry Inc.
Australian Council of Trade Unions.
Australian Industry Group.
Australian Newsagents Federation Ltd trading as Australian Lotteries and Newsagents Association.
Australian Retailers Association.
The Australian Workers' Union.
Master Grocers Australia.
National Retail Association.
Newsagents Association of NSW and ACT Ltd.
New South Wales Business Chamber.
Retail and Fast Food Workers Union Incorporated.
Shop Distributive & Allied Employees' Association.

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