

IN THE FAIR WORK COMMISSION

SUBMISSION

**AWARD FLEXIBILITY–GENERAL RETAIL INDUSTRY AWARD 2020
(AM2021/7)**

FILED ON BEHALF OF:

- **AUSTRALIAN BUSINESS INDUSTRIAL**
- **THE NSW BUSINESS CHAMBER LTD**

31 MAY 2021

BACKGROUND

1. This submission is made on behalf of Australian Business Industrial (**ABI**) and the New South Wales Business Chamber Ltd (**NSWBC**) with respect to the part time provisions in the *General Retail Industry Award 2020 (GRIA)*.
2. This submission is filed in response to a Statement issued by the Fair Work Commission in these proceedings on 18 May 2021 (**18 May Statement**) and the draft determination issued by the Commission on 18 May 2021 (**Draft Determination**).

INTRODUCTORY COMMENT

3. At paragraph 8 of the 18 May Statement, the Commission discusses the proper interpretation of clause 10 of the GRIA and states as follows:

[8] While the conference process has identified some limited points of consensus about the interpretation of clause 10, the views expressed by some parties during the conference differ to the views those parties have expressed in other forums.

4. ABI and NSWBC agree with this comment. It is now apparent that the position advanced the SDA for the vast majority of the proceedings regarding the application of clause 10.6 (and specifically, whether the clause permitted temporary, ad hoc changes to patterns of work) is directly inconsistent with:
 - (a) the previous openly stated position of the SDA regarding how clause 10.6 operates (as expressed by the SDA in multiple Full Bench proceedings)¹; and
 - (b) the position the SDA ultimately confirmed regarding the application of clause 10.6 as part of the Further Report Back to the Full Bench.²
5. Had the SDA been more transparent regarding its views on the application of clause 10.6 to temporary/ad hoc variations to patterns of work for part-time employees, a substantial amount of disputation in these proceedings could have been avoided and the parties could have more constructively engaged on a solution to facilitate the offering of additional hours of work to part time employees.
6. In making these comments, ABI and NSWBC acknowledge that parties should be able to reflect upon and review their positions in light of submissions or evidence filed in proceedings and questions arising from the Bench. However, the stark contrast between the position advanced by the SDA in these proceedings compared to its previous positions

¹ For an example of the positions previously advanced by the SDA regarding clauses 10.5 and 10.6 of the GRIA, see ABI Submissions in these proceedings dated 16 March 2021 at [21] – [25]

² See Further Report Back to the Full Bench [2021] FWC 2126 at [10]-[16]

was never explained (as it should have been) and has had the effect of wasting considerable resources of both the parties and the Commission.

CLAUSE 10.6 IN THE DRAFT DETERMINATION

7. ABI and NSWBC support the variation of clause 10.6 in the manner outlined in the Draft Determination.
8. The variation will make it clear that temporary or ad hoc variations to hours of work can be made by consent between an employer and a part time employee at any time.
9. All parties (other than the AWU) agree that this is how the GRIA presently operates.³ This is a point that was made particularly clear by Mr Cullinan of RAFFWU at the hearing on 17 March 2021.⁴

MINIMUM ENGAGEMENT TERM

10. ABI and NSWBC agree that the minimum engagement term in clause 10.9 of the GRIA would apply to any part time hours as varied by clause 10.6 and that this is clear on the face of the GRIA.
11. This means no additional variation is necessary.

CLAUSE 10.8 – OVERTIME

12. The Commission proposes to vary clause 10.8 to read as follows:

For any time worked in excess of their guaranteed hours, the part-time employee must be paid at the overtime rate specified in Table 10—Overtime rates.
13. The effect of this clause is that overtime does not apply to the working of guaranteed hours. Those guaranteed hours might be the hours initially set under clause 10.5 or guaranteed that have arisen as a result of a variation under clause 10.6.
14. However, clause 10.8 does not expressly state that overtime does not apply to work during guaranteed hours that have been varied pursuant to clause 10.6.
15. Whilst such an express statement is not technically necessary, having regard to:
 - (a) the substantial disputation that has arisen in these proceedings to date regarding the application of clause 10.6 to varying patterns of work and the payment of overtime;

³ See Further Report Back to the Full Bench [2021] FWC 2126 at [10]-[16]

⁴ Transcript 17 March 2021, PN 385

- (b) the existing confusion in the industry regarding how variations to hours of work may be made for part time employees and whether such variations attract overtime entitlements;⁵ and
- (c) the inconsistent and oscillating positions of one of the key unions in the industry regarding these matters over the course of time (the SDA),

there is considerable merit in unambiguously confirming how overtime provisions interact with guaranteed hours that have been varied pursuant to clause 10.6

16. Having regard to these submissions, ABI and NSWBC submit that clause 10.8 should be varied to read as follows (additions underlined):

For any time worked in excess of their guaranteed hours as agreed pursuant to clause 10.5 or varied pursuant to clause 10.6, the part-time employee must be paid at the overtime rate specified in Table 10—Overtime rates.

INCREASES IN GUARANTEED HOURS

17. The 18 May Statement and Draft Determination propose to introduce a mechanism in the GRIA whereby a part-time employee who works in excess of their guaranteed hours on a regular basis over the previous 12 months can request to increase their guaranteed hours (with such request only able to be refused on reasonable business grounds) (**the Conversion Mechanism**).
18. ABI and NSWBC do not consider such a variation is necessary to meet the modern awards objective.
19. Whilst a Conversion Mechanism was proposed by ABI and NSWBC in their own application to vary the GRIA, it was proposed on the basis that it was a safeguard introduced to accompany the introduction of a new flexibility in the Award, whereby 'standing consent' could be provided by employees in order to be offered particular periods of work at ordinary time rates.
20. The standing consent arrangement proposed would be new to the GRIA and the Conversion Mechanism was proposed as a safeguard to protect against abuse or over-utilisation.
21. However, given that the variations now proposed by the Fair Work Commission regarding the changing of part-time work patterns do not increase the flexibility of the Award

⁵ The Commission has already identified that this confusion is apparent from the 'Gollan Report' - *Award flexibility—General Retail Industry Award 2020* [2021] FWCFB 1608 at [76]

provisions at all regarding the offering of additional hours (the changes merely re-state how clause 10.6 already works), the Conversion Mechanism is not necessary as a safeguard.

22. In the absence of any evidence supporting the need for including the Conversion Mechanism in the GRIA, ABI and NSWBC submit that a cogent basis does not exist to introduce this new arrangement into an award that has only recently been reviewed as part of the 4 Yearly Review of modern awards.

ONGOING MERIT FOR STANDING CONSENT ARRANGEMENT

23. Finally, ABI and NSWBC submit that there remains merit in enabling employers and part-time employees agreeing to a standing arrangement whereby:
- (a) the employees agree to be offered additional ordinary hours (up to a maximum of 38 in any week) from time to time - the agreement confirms the employees' preparedness to work these additional hours at single time rates;
 - (b) employers are not compelled to offer such hours; and
 - (c) the employees retain the ability to refuse any hours offered on a case by case basis.
24. In essence, such a standing arrangement would indicate a preparedness by employees to work additional hours at single time rates (where the hours arise) and would help to facilitate the offering of additional hours by employers.
25. The standing arrangement is accordingly consistent with the modern awards objective as it promotes:
- (a) an increase to part time/permanent employment and thereby serve the needs of the low paid (see section 134(1)(a) of the FW Act);
 - (b) the offering of additional hours and thereby social inclusion through workforce participation (see section 134(1)(c) of the FW Act);
 - (c) modern and flexible work practices and the efficient and productive performance of work (see section 134(1)(d) of the FW Act); and
 - (d) a solution that takes into account the impact of the modern award on business, including on productivity, employment costs and the regulatory burden (see section 134(1)(f) of the FW Act).
26. For these reasons, ABI and NSWBC maintain the view that the variation proposed by the "Joint Employer Parties" and filed on 15 March 2021 has merit and should be adopted by the Commission.

Filed on behalf of ABI and NSWBC by



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