

BEFORE THE FAIR WORK COMMISSION

MATTER NO. AM2021/7

S157 – VARIATION OF MODERN AWARDS TO ACHIEVE THE MODERN AWARDS OBJECTIVE
– Schedule I – Additional flexibility measures – Part time employees

ACTU SUBMISSION

Introduction

1. This submission is made by the Australian Council of Trade Unions ('ACTU') in support of the Applicants' - being the Shop, Distributive and Allied Employees' Association (SDA), the Australian Workers' Union (AWU) and Master Grocers Australia Limited (MGA) – application to vary *the General Retail Industry Award 2020 (GRIA)*, as made on 26 February 2021 and amended on 28 February 2021 (Application).
2. The Applicants apply to vary the GRIA by inserting Schedule I, which is titled "Additional flexibility measures – Part time employees".
3. Schedule I is intended to operate for a period of 18 months and would allow for an employer to make an agreement with a part-time worker for that worker to perform "additional agreed hours". This would deliver an ability for employers to respond to increased demand as Australia recovers from the COVID-19 pandemic using their permanent workforces. Schedule I also balances the interests of employees through a series of safeguards. This latter feature distinguishes the proposal in this application from other proposals that have been canvassed thus far in the matter AM2020/103.
4. The proposal has the clear support of the Applicants, who are comprised of both worker (SDA and AWU) and employer representatives (MGA), as well as the support of COSBOA, who represent the interests of small business employers.

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5. The ACTU supports the submissions of the applicants and submits that the GRIA should be varied in the terms applied for. This submission is supported as follows.

Employment in the retail sector

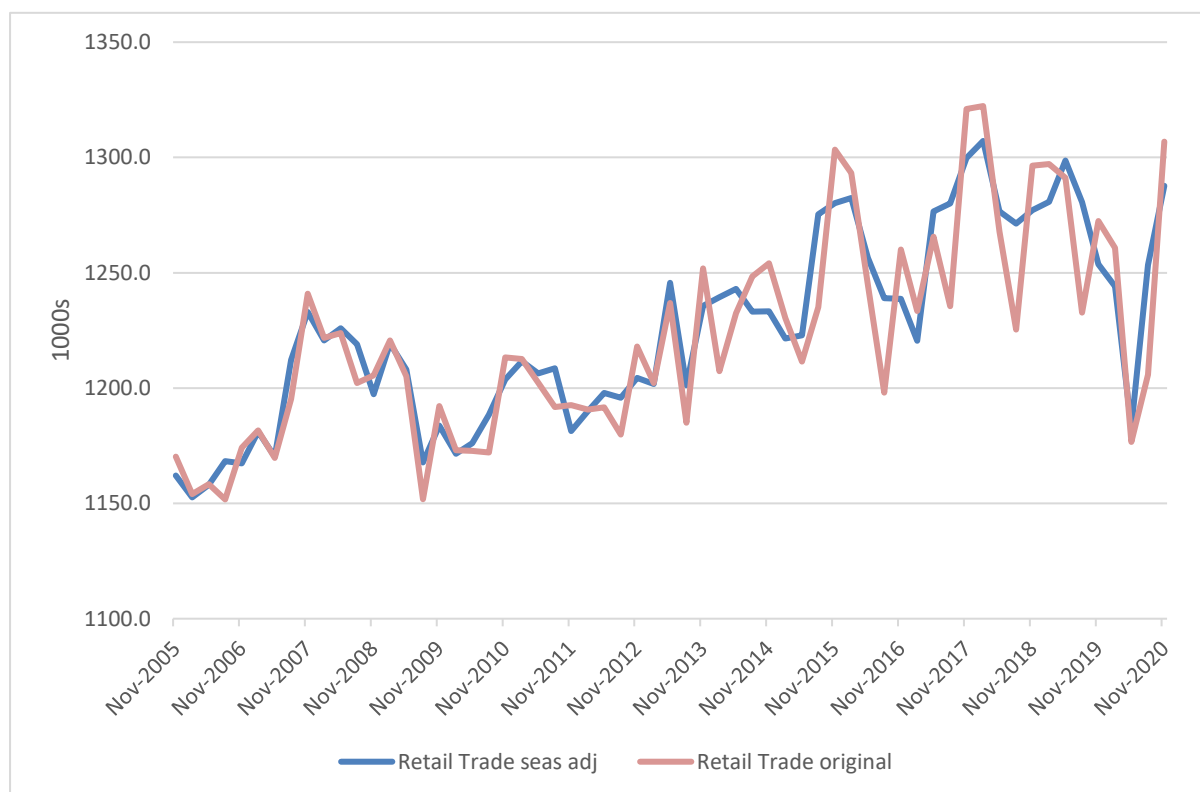
6. As this submission develops below (under the heading “*Consideration 134(1)(a)-relative living standards and the needs of the low paid.*”):
 - Retail trade is a highly award reliant industry;
 - Many retail workers can be considered to be low-income workers; and
 - A high proportion of employees in the industry work on a part-time basis.
 - Small business accounts for almost a third of all employment in the retail sector.¹
7. Owing to these idiosyncratic features, any changes to the GRIA will have a widespread effect on employers and workers in the Retail industry.
8. Accordingly, the ACTU submits that changes to the GRIA which improve employment opportunities, combat underemployment and insecure work and result in greater remuneration for low-income workers are desirable. However, it is paramount that any changes are accompanied by appropriate and robust protections (such as genuine opt-in arrangements and the right to access arbitration) to ensure that workers are not disadvantaged.
9. In particular, the changes contemplated in the Application will have a significant positive effect for small businesses and their employees, who are more likely to be award reliant.²

¹ Australian Small Business and Family Enterprise Ombudsman, July 2019, ‘*Small Business Counts*’ <<https://www.asbfeo.gov.au/sites/default/files/documents/ASBFE0-small-business-counts2019.pdf>> p16

² FWC, 10 December 2020, ‘Retail Trade’ <<https://www.fwc.gov.au/documents/sites/award-flexibility-hospitality-retail/background/am2020-103-information-note-retail-trade-2020-12-10.pdf>> p2

Employment Figures

Figure 1 Employment in the Retail trade sector, original and seasonally adjusted, 1000s



Source: ABS 6291004

10. After falling slightly in 2019, employment in the retail sector fell sharply in early 2020 before rebounding strongly.
11. Employment in Retail trade plunged 61,300 in seasonally adjusted terms, or by 4.9%, between the Feb 2020 quarter and the May 2020 quarter. This was rapidly made up as retail employment rebounded by 70,600 or 6.0% between the May quarter 2020 and the August quarter 2020, increasing another 34,200, or 2.7% from August 2020 quarter to the November quarter 2020.³ It is noted that employment in Retail trade had been falling over the year prior to the onset of the pandemic, from May 2019 quarter to May 2020 quarter.
12. Employment in Retail trade of 1,182,900 at the May quarter 2020 was the lowest for a May quarter in 10 years - since May 2010 when it was 1,176,000, seasonally adjusted. The level of employment in November 2020 quarter had reached

³ ABS, January 2021, 'Labour Force, Australia, Detailed' <https://www.abs.gov.au/statistics/labour/employment-and-unemployment/labour-force-australia-detailed/latest-release#industry-occupation-and-sector> ABS 6291004

1,287,000 seasonally adjusted, the highest since the May quarter 2019 when it was 1,298,700 seasonally adjusted.

13. 57.5% of retail employees are engaged on part-time hours.⁴ 3 in 5 of these workers are casual employees, which is higher than the average across all industries.⁵
14. As the above figures have shown, job losses in the retail sector have been matched by more recent job gains. As more employees are engaged in the retail sector while Australia recovers economically from the COVID-19 pandemic, the ACTU submits that it is critical to consider the characteristics of the jobs that are being created.
15. The ACTU submits that the policy and statutory framework should support the creation of permanent and secure work over the increased adoption of insecure employment practices and that the Application, if granted, forms part of a reasonable strategy towards achieving this.

Schedule I

16. The ACTU submits that the proposed Schedule I strikes an appropriate balance between the Post-COVID-19 recovery needs of employers and the interests of workers.
17. The Application, if granted, will deliver an ability for employers to reach agreement with their part-time workers on the working of additional ordinary hours. These agreements are of limited duration and at any rate are entirely voluntary for both parties. If adopted, additional hours agreements will provide certainty of increased working hours for both parties over their specified duration.
18. Schedule I contains important safeguards for workers which are submitted as necessary in circumstances on the basis that they are reasonable and proportionate to the adoption of the mechanism. These include:
 - The entirely voluntary nature (for both employer and worker) of adoption.
 - A requirement that an agreement be formed in writing by both parties;

⁴ FWC, 10 December 2020, 'Retail Trade' <<https://www.fwc.gov.au/documents/sites/award-flexibility-hospitality-retail/background/am2020-103-information-note-retail-trade-2020-12-10.pdf>> Appendix B

⁵ FWC, 10 December 2020, 'Retail Trade' <<https://www.fwc.gov.au/documents/sites/award-flexibility-hospitality-retail/background/am2020-103-information-note-retail-trade-2020-12-10.pdf>> p5

- A requirement that an agreement cannot be made a condition of employment;
- A requirement that once voluntarily agreed between the parties, the employer must provide (or pay for) the additional hours of work;
- A requirement for an agreement to be either for a particular shift or a specified duration;
- The application of existing rostering provisions;
- An ability for a worker to seek a permanent variation of their ordinary working hours to reflect additional hours that have been worked for over a 6 month period;
- The right for workers and employers to seek arbitration of any disputes arising, through such consent to arbitrate being provided upon the making of an additional hours agreement;

19. Accordingly, and for the reasons that follow, the ACTU submits that Schedule I is necessary to achieve the modern awards objective.

The Modern Awards Objective

20. *The Fair Work Act 2009 (Cth) (FW Act)* s 134(2) provides that the modern awards objective (as defined in s 134(1)) applies to the performance or exercise of the FWC's modern award powers (which includes its powers under s 157).

21. The FW Act s 157 provides that the FWC may make a determination varying a modern award on application on satisfaction that doing so is necessary to achieve the modern awards objective.

22. In *Hospitality Industry (General) Award 2010* ([2020] FWCFB 1574) the Fair Work Commission said:

[44] The modern awards objective is to 'ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions', taking into account the particular considerations identified in ss.134(1)(a)–(h) (the s.134 considerations).

[45] The modern awards objective is very broadly expressed. It is a composite expression which requires that modern awards, together with the NES, provide

'a fair and relevant minimum safety net of terms and conditions', taking into account the matters in ss.134(1)(a)–(h). Fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question.

[46] The obligation to take into account the s.134 considerations means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision-making process. No particular primacy is attached to any of the s.134 considerations and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.

[47] It is not necessary to make a finding that the award fails to satisfy one or more of the s.134 considerations as a prerequisite to the variation of a modern award. Generally speaking, the s.134 considerations do not set a particular standard against which a modern award can be evaluated; many of them may be characterized as broad social objectives. In giving effect to the modern awards objective the Commission is performing an evaluative function taking into account the matters in s.134(1)(a)–(h) and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance.

[48] Section 138 of the Act emphasizes the importance of the modern awards objective:

'Section 138 Achieving the modern awards objective

A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.'

[49] What is 'necessary' to achieve the modern awards objective in a particular case is a value judgment, taking into account the s.134 considerations to the extent that they are relevant having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence.

A Fair and Relevant Minimum Safety Net

23. The specific considerations contained in s134 are considered below. It is important to bear in mind the well-established principle that the section 134 considerations serve an overall objective.⁶ Here, the broad concerns of fairness and relevance are critical.
24. In 4 yearly review of modern awards – *Penalty Rates Decision*,⁷ the Full Bench observed:

“... the word ‘relevant’ is defined in the Macquarie Dictionary (6th Edition) to mean ‘bearing upon or connected with the matter in hand; to the purpose; pertinent’. In the context of s.134(1) we think the word ‘relevant’ is intended to convey that a modern award should be suited to contemporary circumstances. As stated in the Explanatory Memorandum to what is now s.138:

‘527 ... the scope and effect of permitted and mandatory terms of a modern award must be directed at achieving the modern awards objective of a fair and relevant safety net *that accords with community standards and expectations.*’ (emphasis added)”

Section 134(1) considerations

Consideration 134(1)(a)- relative living standards and the needs of the low paid.

25. In 2013, the Minimum Wage Full Bench observed:

*The minimum wages objective and the modern awards objective both require us to take into account two particular matters, relative living standards and the needs of the low paid. These are different, but related, concepts. The former, relative living standards, requires a comparison of the living standards of award-reliant workers with those of other groups that are deemed to be relevant. The latter, the needs of the low paid, requires an examination of the extent to which low-paid workers are able to purchase the essentials for a “decent standard of living” and to engage in community life. The assessment of what constitutes a decent standard of living is in turn influenced by contemporary norms.*⁸

⁶ Annual Wage Review 2016-17 [2017] FWCFB 3500 at [128]

⁷ [2017] FWCFB 1001 at [120]. See also [2016] FWCFB 8025, [2009] AIRCFB 800 at [4]

⁸ [2013] FWCFB 4000 at [361]; See also [2019] FWCFB 3500 at [47]

26. A 2011 report by the Productivity Commission found that retail workers earn less on average than employees in most other industries, attributing this in part to the high proportion of part-time work:⁹

Employees in the retail industry earn less on average than employees in most other industries, reflecting the low average skill level of retail employees. In February 2011, average weekly earnings (AWE) for all retail employees (\$614.00 per week) were 61 per cent of the average across all industries. This outcome is strongly influenced by the high proportion of retail employees who are paid junior rates of pay and/or work part time. However, even among full time adult employees, average weekly ordinary-time earnings in retail are only about three-quarters of the average across all industries (with this ratio slightly lower for male employees and slightly higher for female employees) (ABS 2011b).

27. In the 2012 review of *the General Retail Industry 2010*, the FWC acknowledged that many retail workers “can be described as low-paid”.¹⁰

28. A FWC information note published in this matter states:¹¹

Retail trade is a highly award-reliant industry, with around 3 in 10 non-managerial employees paid exactly the award rate and only 4 industries had a higher proportion of award reliance among non-managerial employees. Over half of employees in small businesses are award reliant. Relatively few enterprise agreements are made in this industry.

29. It is broadly accepted that retail workers are low-paid. That this stems in part from high levels of award reliance and a high proportion of part-time work weighs in favour of amending the GRIA to enable greater working hours and certainty for part-time workers in a way that also contains sufficient safeguards against the misuse of those provisions to the detriment of those workers.

30. The ACTU submits that the Application, if granted, would achieve this. Further, Schedule I would allow for the improvement of part-time retail workers’ living

⁹ Productivity Commission, 4 November 2011, ‘*Economic Structure and Performance of the Australian Retail Industry*’ <<https://www.pc.gov.au/inquiries/completed/retail-industry/report/retail-industry.pdf>>

¹⁰ [2013] FWC 6056 (Modern Awards Review 2012—General Retail Industry Award 2010) at [26] <<https://www.fwc.gov.au/documents/decisionssigned/html/2013fwc6056.htm>>

¹¹ FWC, 10 December 2020, ‘Retail Trade’ <<https://www.fwc.gov.au/documents/sites/award-flexibility-hospitality-retail/background/am2020-103-information-note-retail-trade-2020-12-10.pdf>> p2

standards relative to full-time retail employees and workers in other sectors; once again through the provision of additional work opportunities in a fair and reasonable manner that is subject to safeguards.

31. In particular, the ACTU submits that the provisions of Schedule I which allow a part-time employee who has regularly worked additional agreed hours for at least 6 months to request a variation to their underlying agreed hours (pursuant to GRIA cl 10.5) will increase relative living standards and the needs of low paid workers by providing a mechanism for workers to seek permanent increases to their working hours and income resulting from that.

Consideration 134(1)(b) – the need to encourage collective bargaining

32. As a short to medium term measure, the Applicants' claim would neither encourage nor discourage collective bargaining.

Consideration 134(1)(c)- promotion of social inclusion through increased workforce participation

33. The Application, if granted, will allow for employers and workers to reach agreement on additional working hours which is certain and predictable. It is submitted that this will lead to increased workforce participation, particularly in relation to under-participation.

Consideration 134(1)(d) – flexible modern work practices and the efficient and productive performance of work

34. Schedule I allows for greater flexibility in the workplace, without sacrificing employee interests and rights.
35. Further, by allowing for greater working hours to be performed by permanent staff, instead of casual employees, it allows for work to be performed by employees who may be more familiar with the operation of the business and therefore able to perform work more efficiently and productively.

Consideration 134(1)(da)

36. Schedule I would not disturb any existing or arising obligations in respect of additional remuneration for working shifts, unsociable hours, or on weekends or public holidays. Penalty rates would continue to apply as per the current provisions of the GRIA.

37. Schedule I would permit a worker to agree to work hours additional to those already agreed under the GRIA cl 10.5 at ordinary rates of pay for a particular shift or specified duration.
38. A worker will further have the right to request an ongoing variation of their working hours to reflect their actual hours of work over a 6 month period. This request could only be rejected on reasonable business grounds. This feature of Schedule I will enable employees to obtain regular increased working hours on an ongoing basis.

Consideration 134(1)(e)- equal remuneration for work of equal or comparable value.

39. This consideration is not directly relevant, however it should be noted that workers in the retail industry are predominantly female, and that part-time employment is more prevalent than full-time employment.¹² Accordingly, this proposal which allows part-time workers to voluntarily work additional hours within a protective framework of safeguards, and also to subsequently seek ongoing increases to their working hours will have a positive gendered effect insofar as it addresses underemployment.

Consideration 134(1)(f) –impact on business, productivity, employment costs and regulatory burden.

40. The Application, if granted, will have a positive effect on business productivity for the reasons above. The Application will also reduce employment costs and regulatory burden, without reducing employees' rights.
41. The Application, if granted, will provide a cost-effective mechanism for employers to engage part-time workers for additional hours by agreement.
42. Contrary to any alarmist claims which may be made, the regulation that attaches to Schedule I is straightforward, necessary and easy to navigate. The safeguards simply require agreements to be clear and in writing, which is already a feature of good practice. Arbitration is available (where standing consent is given by virtue of making an additional hours agreement) to provide both parties with an efficient means to resolve any issue which may arise without recourse to complex and costly litigation.

¹² FWC, 10 December 2020, 'Retail Trade' <<https://www.fwc.gov.au/documents/sites/award-flexibility-hospitality-retail/background/am2020-103-information-note-retail-trade-2020-12-10.pdf>> Appendix B— Characteristics of retail employees

43. Compliance with the safeguards is no more onerous than any existing award provision that presently applies, and strongly justified by the protections they offer to workers. At any rate, the adoption of Schedule I is entirely voluntary, with each employer who chooses to use the provisions of that schedule essentially calculating that it is in their interests to do so and that any associated regulation is justified.

Consideration 134(1)(g) – a simple, easy to understand, stable and sustainable modern award system that avoids unnecessary overlap.

44. The ACTU submits that the proposed Schedule I is straightforward, easy to understand and complements existing provisions of the GRIA.
45. The way in which additional hours interact with existing ordinary hours avoids any unnecessary overlap.

Consideration 134(1)(h) – employment growth, inflation and sustainability, performance and competitiveness of the national economy.

46. The Application, if granted, could only have a positive effect on employment growth. Where employers choose not to, it is open to them to not adopt the provisions of Schedule I.
47. Where, on the other hand, retail employers are experiencing higher volumes as a result of the post-COVID19 economic recovery, they may choose to use Schedule I to allocate more working hours to their existing permanent workforce.
48. Where jobs are created, it is likely that while Schedule I is in operation, these jobs will be permanent rather than casual.

Conclusion

49. Prior to this application there have been a number of significant variations to modern awards made and granted in response to the COVID-19 pandemic.
50. This application now arises at a time when Australia is optimistic about its economic recovery following the pandemic. However it is still a time where employers claim the need for measures to assist in that economic recovery and it remains as important as ever to ensure that working conditions and income levels receive support and are safeguarded.
51. As demand returns to the retail sector it is important to ensure that employment growth is a growth in permanent, secure jobs, not a growth in insecure ones.

52. For the reasons above, the ACTU submits that the Commission should be satisfied that granting the Application would be consistent with the modern awards objective.
53. Accordingly, the ACTU submits that the FWC should grant the Application.

AUSTRALIAN COUNCIL OF TRADE UNIONS

2 March 2021