In the matter of:

Fair Work Act 2009
S157 – FWC may vary etc. modern awards if necessary to achieve modern awards objective

Award Flexibility – General Retail Industry Award 2020

(AM2021/7)

SUBMISSIONS IN REPLY FILED ON BEHALF OF THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES ASSOCIATION (SDAEA)

1. The SDAEA files the following further submissions in reply pursuant to directions issued in the Statement issued by the Full Bench of the Fair Work Commission issued 18 May 2021.

2. In their submissions filed on 31 May 2021, the ABI and NSWBC offer comments critical of the SDAEA which are not supported on the material previously filed by the SDAEA. The SDA rejects this criticism as being misconceived, even mischievous and ultimately unhelpful in an exercise in which the Commission has at at every stage encouraged a bipartisan approach from employee and employer stakeholders to identify and negotiate agreement as to parameters intended to deliver award flexibility improvements for the benefit of all.

3. The suggestion in ABI PN16 that the overtime clause provision needs to be changed is as ABI and the NSWBC themselves note unnecessary (ABI PN15).

4. ABI and NSWBC then propose that a conversion mechanism should not be included as, in their view, the Award as proposed to be recast does not provide additional flexibility for part-time hours ie guaranteed hours but rather merely clarifies the operation of an existing clause. This submission however ignores the other proposed changes to the Award which on their face remove some of the existing protections part-time employees enjoy for which a conversion mechanism will now offer some replacement protections and safeguards. One such proposed change accommodating employer complaints concerns the practical inflexibility of changing a part-time roster as it had to comply with the initial hours as originally contracted. This proposed change is expressly acknowledged in the NRA's Submissions.

5. Further, the ABI and NSWBC's submissions fail to acknowledge the proposed clause has perhaps unintended consequences of removing other existing roster provisions which the SDAEA has drawn attention to in its Submission dated 31 May 2021 (PN 3).

6. The NRA has raised a concern in relation to some perceived difficulty in recording in writing the additional hours a part time employee may agree to work during his or her shift on the same day (PN 1.6). The SDA opposes the NRA's suggested change for a number of reasons.

7. First, the NRA's claim that during a shift there is no opportunity to sign an agreement to work additional hours at ordinary rates is anecdotal and lacks probative weight or substance. Such a written agreement can be expressed in simple terms. It may at times be no more than a one line note such as : *'I (name) agree to work to 5pm today the XX/xx/xx as part*

of my ordinary hours' . The securing of such agreement and the formal written record made of it does not involve a lengthy complicated process.

8. Second, nothing precludes a proactive employer preparing a simple written template document that the employer could largely complete with the details and have the employee sign. Such pro-formas could also be something drafted and provided by employer associations to their members.

9. A claim as to a lack of opportunity merely to endorse a document (whether a single line of text or a pre-prepared pro forma) would arguably equally apply to the employer not being able to identify a convenient moment to formally ask the employee to work such hours. If the employer can find the time to make a request that the employee work additional hours, the employer can also find the time to obtain some written acknowledgment from the employee as to the agreement reached.

10. The primary concern if no written record is made prior to the work being performed is that it will lead to possible disputation as to what was agreed. In the absence of written documentation, the record will show that the employee worked particular additional hours but what rate is to applied to those additional hours? Did the employee agree to work the hours as overtime? Did the employer fail to communicate its intentions clearly? Avoiding the very likely scenario of there being a miscommunication or misunderstanding between the employer and employee is a matter that any amendment to the Award to promote flexibility needs to support, particularly where simple record keeping puts the possibility of misunderstanding beyond controversy.

11. The NRA's Submissions (PN 2.4) also suggest that there is some new supposed ambiguity in proposed clause 10.3. The SDA submits that such a provision as proposed is common in Awards. The clause and its language has been reviewed as part of the PLED provision and was not then identified as causing an issue or misunderstanding. The NRA provides no evidence, for example, that this has been a problem in the industry of 'lay' persons confused as to whether they need to provide RDOs to part-time employees (GRIA, clause 15.6).

12. The broadbrush approach of the NRA to change the clause could have unattended consequences of removing benefits to part-time employees. The NRA's proposal should be resisted on that basis.

13. If and to the extent that there is such confusion possible in relation to the extent to which clause 15.6 of the GRIA operates, the proposal of the SDA (PN 3)(c)) should be adopted as that amendment makes it clear that clause 15.6 is not one applying to part time employees.

14. As to the submissions filed on behalf of the Newsagents Association of NSW and ACT, the SDAEA does not take issue with including the clarification that 'in writing' should be followed by the word 'including'. The amendment is probably not necessary when reading the whole provision in its context but it does not change the intention of the clause.

15. The SDAEA does not agree that casuals are never part of a roster. Some employers do roster casuals. The change proposed to the roster clause to specifically exclude casuals should be rejected. It is not supported by argument or evidence that this provision has caused any issue or difficulty over the last eleven years of the GRIA's operations. No amendment effecting Award flexibility should have an unintended impact on the possible scope of operation of an existing GRIA clause in the absence of a proper case being made for the change.

DATED: 7 June 2021

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