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

In the matter of:

Application to vary a modern award

Shop, Distributive and Allied Employees' Association (**SDA**)

Australian Workers' Union (**AWU)**

Master Grocers Australia Limited (**MGA**)
(collectively the **Applicants)**

OUTLINE OF SUBMISSIONS FILED ON BEHALF OF THE SDA

1. By Statement issued 1 March 2021 [2021] FWC 1088, his Honour President Ross responded to an application jointly brought by the Applicants which, in terms, submits that the Commission should determine to vary the General Retail Industry Award 2020 (**GRIA**) pursuant to s157(3)(b) of the Fair Work Act 2009 (Cth) (the **Act**).

2. The Applicants seek variation of the GRIA in the following terms:

   "That the General Retail Industry Award 2020 (the Award) be varied by including new Schedule I to the Award in the following terms:

   "Schedule I – Additional flexibility measures – Part time employees

   I.1 Schedule I operates from [insert commencement date] until [insert date 18months later]. The period of operation can be extended on application. Additional hours agreements

I.2 Subject to clause 15, an employer and a part-time employee who is engaged to work more than 9 hours per week in accordance with clause 10.5, may make an agreement (an additional hours agreement) for the employee to work more ordinary hours than the number of hours agreed under clause 10.5 (the additional agreed hours), to a maximum total of 38 ordinary hours per week.

I.3 If an employer and part-time employee make an additional hours agreement, the employee must be paid for the additional agreed hours at their ordinary rate of pay, even if they are not required to work those hours.

I.4 The employee must be paid overtime for any additional agreed hours worked unless the following conditions are met: (a) the additional hours agreement is genuinely made by the employer and the individual employee without coercion or duress; and (b) if the additional hours agreement is for a particular rostered shift, it must be recorded in writing at or by the end of the affected shift, or as soon as is reasonably practicable; and (c) if the additional hours agreement is for a specified period of time other than a particular rostered shift, it must be recorded in writing before the start of the first period of additional agreed hours; and (d) the employer must keep a copy of the additional hours agreement. (e) the additional hours agreement cannot be made a condition of securing employment and cannot be signed concurrently with an offer of employment.

Note: The agreement could be recorded in writing through an exchange of text messages or emails.

I.5 The parties to an additional hours agreement may, by mutual agreement, terminate the agreement with 24 hours notice. Review of number of hours

I.6 Where a part-time employee has regularly worked additional agreed hours for at least six months, the employee may request in writing that the employer vary the agreement under clause 10.5 to reflect the ordinary hours regularly being worked.

I.7 The employer must respond in writing to the employee's request within 21 days.

I.8 The employer may refuse the request only on reasonable business grounds.

EXAMPLE: Reasonable business grounds to refuse the request may include that the reason that the employee has regularly worked additional agreed hours is temporary—for example where this is the direct result of another employee being absent on annual leave, long service leave or worker's compensation.

I.9 Before refusing a request made under clause I.6, the employer must discuss the request with the employee and genuinely try to reach agreement on an increase to the number of hours agreed under clause 10.5 that will give the employee more predictable hours of work and reasonably accommodate the employee's circumstances.

I.10 If the employer and employee agree to vary the agreement under clause 10.5, the employer's written response must record the agreed variation. If the employer and employee do not reach agreement, the employer's written response must set out the grounds on which the employer has refused the employee's request.

I.11 The employer and employee parties to an additional hours agreement consent to any dispute in relation to Schedule I being settled by the Fair Work Commission through arbitration in accordance with clause 36 – Dispute resolution and section 739(4) of the Act.

NOTE: A dispute about the employer's handling of a request under clause I.6 can be dealt with under clause I.11. This could include a dispute about whether the employer's refusal of a request was reasonable, whether the employer discussed the request with the employee as required under clause I.9, or whether the employer responded in writing to the request as required under clauses I.7 and I.10."

Statutory Framework

3. Section 157(1) (a) of the Act relevantly provides that:

> *"(1) The FWC may:*
>
> *(a) make a determination varying a modern award, otherwise than to vary modern award minimum wages or to vary a default fund term of the award; …*

…

If the FWC is satisfied that making the determination…is necessary to achieve the modern awards objective."

4. Section 157(3) of the Act provides that:

> *"(3) The FWC may make a determination …under this section:*
> *(a) on its own initiative;*
> *(b)* on application under section 158*."*

Modern Awards Objective

5. Section 134(1) of the Act sets out the modern awards objective. It relevantly provides that:

> *"(1) The FWC must 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:*
>
> *(a) relative living standards and the needs of the low paid; and*
> *(b) the need to encourage collective bargaining; and*
> *(c) the need to promote social inclusion through increased workforce participation; and*
> *(d) the need to promote flexible modern work practices and the efficient and productive performance of work; and*
> *(da) the need to provide additional remuneration for:*
> *(i) employees working overtime; or*
> *(ii) employees working unsocial, irregular or unpredictable hours;*
> *(iii) employees working on weekends or public holidays; or*
> *(iv) employees working shifts; and*
> *(e) the principle of equal remuneration for work of equal or comparable value; and*

(f) the likely impact of any exercise of modern award powers on business including on productivity, employment costs and the regulatory burden; and

(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

This is the modern awards objective."

6. The within Application, as acknowledged by his Honour the President's Statement issued 1 March 2021, arises from:

(a) correspondence dated 9 December 2020 from the Minister of Industrial Relations to the President inviting consideration by the Commission of an exercise of its powers pursuant to section 157(3)(a) of the Act to determine to vary modern awards in industry sectors significantly impacted by the COVID pandemic. The Government invited particular consideration by the Commission to "*key changes that could potentially support Australia's economic recovery"*; and

(b) a subsequent clarifying statement from his Honour the President dated 10 December 2020 inviting discussions as between interested stakeholders with a view to identifying jointly agreed variation positions.

7. The present Application is made on behalf of the Applicants as a result of discussions between them. It also has the support of the ACTU and COSBOA. It is apparently however to be opposed by other employer organisations. The submissions which follow are made on behalf of the SDA.

8. The Commission has had previous occasion **([2020] FWCFB 1837**) to exercise its powers pursuant to s157(3)(a) of the Act as a response to the COVID pandemic. The Commission determined to insert a new Schedule X into, amongst other modern Awards, the GRIA, as an

interim measure to address particular issues arising from the impact of COVID19 on identified industry sectors.

9. The consideration by the Commission in that earlier proceeding (the **Schedule X decision**) in relation to the Commission's exercise of powers pursuant to s157 of the Act and the consideration required of the modern awards objective in doing so are submitted to be no less applicable in the present proceedings. Further, the Commission's statement of principle at paragraphs [112]-[117] of the Schedule X decision is submitted to be correct and uncontroversial. For convenience, those principles (omitting footnotes) are set out as follows:

> *"The modern awards objective*
>
> *[112] The Commission may make a determination varying a modern award if the Commission is satisfied the determination is necessary to achieve the modern awards objective. 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).*
>
> *[113] The modern awards objective is very broadly expressed. It is a composite expression which requires that modern awards, together with the National Employment Standards (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.*
>
> *[114] 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.*

[115] 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 characterised 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.

[116] Section 138 of the Act emphasises 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.'

[117] 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."

10. The Applicants formally adopt this statement of principle by the Commission and also adopt the evidentiary material separately considered by the Commission in relation to its exercise of power in the Schedule X decision, particularly the report of Professor Jeff Borland entitled "*Benefit from Greater Flexibility in Employment Arrangements"* and the conclusions of Professor Jeff Borland so far as they identify adverse impact on the GRIA from the COVID19 pandemic.

11. It follows from the above that any interested party or parties moving the Commission to exercise its powers pursuant to section 157of the Act must address, with reference to the

proposed variation, each of the section 134 considerations to the extent that they are relevant having regard to the proper context of the application.

Proper Context of the Application

12. The Applicants propose the insertion of a new Schedule I into the GRIA which, it is contended, will confer greater flexibility in employment arrangements as between retail sector employees and employers in relation to the capacity for employers to offer part time employees additional hours of work within a simple framework that provides employees certainty.

13. The amendment, having regard to its character as a COVID19 response initiative, is temporally limited. It would operate with safeguards intended to ensure that it is only operative in circumstances of genuine agreement and only then in circumstances where the arrangement as made can be easily terminated by the parties. Importantly, the Schedule provides that any dispute arising from the operation of an additional hours agreement can be the subject of an arbitrated decision by the Commission. Additionally employees gain the right to request that additional hours worked for at least six months can be made permanent hours. Such a request can only be refused on reasonable business grounds. Any such refusal is subject to arbitration by the Commission.

14. The variation seeks to introduce into the workplace rostering the primary intention of which is to encourage employers in an industry sector identified by the Minister as particularly impacted by COVID19 to offer additional hours of work to part-time employees willing to work them without having to engage casual employees for such a purpose. The variation is submitted to support part-time employment permanency and greater job security whilst at the same time creating workplace flexibility which will deliver increased remuneration to a low-paid and vulnerable workforce.

Section 134 Considerations

S134(1)(a): Relative living standards and the needs of the low paid

15. The Commission in the Schedule X decision considered section 134(1)(a) of the Act in the broader context of its application to a range of modern awards into which it was proposed to insert Schedule X. To the extent that the conclusions reached by the Commission in the Schedule X decision rely upon a benchmark of two-thirds of median full time wages as providing a suitable and operational benchmark for identifying who is low paid, it is submitted that the Commission has already determined that there are employees in the awards there varied (which included the GRIA) who can be accepted to be 'low paid'.

16. The Commission has also previously accepted in the Penalty Rates Decision (**[2017] FWCFB 1001)** that a substantial proportion of award-reliant employees in the retail sector (amongst other sectors) are low paid. The Commission should accept that its findings in the Penalty Rates Decision in that regard are still currently applicable to the award reliant employees who would be advantaged by the variation as proposed. There is nothing to suggest that the structural issues that informed them have changed.

17. To the extent that the proposed variation will encourage employers to offer the opportunity to work additional hours to permanent part-time employees who would otherwise not be given such an opportunity, s134(1)(a) of the Act is a consideration which weighs heavily in favour of approving the variation. The opportunity for part-time employees to enter into additional hours agreements will provide an additional entitlement for such employees, effectively at the election (ie contingently upon the approval) of the employee.

S134(1)(b) the need to encourage collective bargaining

18. The present application may be accepted to be a temporary response to the COVID19 pandemic. To that extent, section 134(1(b) of the Act is submitted to be a neutral or irrelevant consideration in the context of the application.

S134(1)(c) the need to promote social inclusion through increased workforce participation

19. This consideration is directed at obtaining employment or increased hours of employment amongst the permanent part-time workforce. The Commission should conclude that the

variation will facilitate the retention of employees in employment (and with increased hours) during the currency of the COVID19 emergency and its aftermath.

S134(1)(d) & (f) the need to promote flexible modern work practices and the efficient and productive performance of work and the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden

20. These s134(1) considerations are appropriate to consider together. The Commission should be satisfied that the inclusion of Schedule I will have a positive impact on business. The variation will allow greater flexibility in employment, greater productivity and, to the extent that additional hours agreements will substitute for the need to secure casual engagement at short notice, reduce the regulatory burden for employers in managing their rostering. These are all considerations which weigh in favour of making the variation proposed.

S134(1)(da) the need to provide additional remuneration for employees working overtime etc

21. The variation as proposed will, only with the agreement of the employee and subject to specified safeguards, create an opportunity for employers to pay part-time employees for additional hours worked at ordinary hourly rates rather than overtime rates specified by the GRIA. To that extent, it may be accepted that the variation, prima facie, circumvents the right to additional remuneration (additional to the employee's ordinary hourly rate) for working overtime. In circumstances however where an additional hours agreement will create opportunities which did not previously exist and which would not otherwise exist for an employer to offer a part-time employee additional working hours, it is submitted that the variation may nonetheless be considered favourable to the employee or at least, a neutral consideration. An entitlement on the part of a part-time employee to overtime under the GRIA is illusory if the employer will not consider the employee for overtime in preference to engaging casual employees.

S134(1)(e) the principle of equal remuneration for work of equal or comparable value

22. This is not a relevant consideration in the context of the present application.

S134(1)(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards

23. The proposed schedule makes the implementation of working arrangements simpler for employees and employers. It provides a clear mechanism to be utilised by the employees and employers in reaching arrangements at the workplace.

S134(1)(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy

24. The variation will assist in maintaining employment and the viability of retail businesses. This will directly contribute to some degree to the sustainability and performance of the national economy as a whole. The variation proposes an opportunity to agree as between employers and their part-time employees in relation to a workplace flexibility initiative that will facilitate and encourage permanent employment in the workplace. This is a positive consideration in terms of the variation sought. It will also provide a pathway for part time employees to increase their contracted hours if this is reasonable

Conclusion

25. It is submitted that the Commission can and should be satisfied that a variation in the terms sought by the applicants, with the safeguards and protections expressly identified and with the ultimately capacity for arbitrated dispute resolution conferred upon the Commission, meets the modern awards objective, looked at in the context of the current COVID19 impacting upon the retail sector.

Other matters

26. The Applicants have noted media reports and press releases issued by representatives on behalf of employer organisations (other than the MGA) which would suggest that the present application is opposed by them. It is not possible to deal with the proposed arguments of employer groups who oppose the application until they have been received.

27. Given the urgency attaching to the directions for the filing of submissions, the Applicants make the following brief observations in response to what they understand to be objections which will be maintained on behalf of those other interested parties.

28. There appears to be a general complaint that those other employer organisations were not consulted prior to the filing of the current Application on behalf of the Applicants. The Commission for its part invited interested stakeholders to consider framing joint applications where there was agreement to do so. The Applicants as between themselves reached a consensus in relation to terms for variation acceptable to all of them. They have acted conformably with the invitation of the Commission to engage in identifying mutual agreement where possible.

29. There was no obligation to broadly consult with all parties and it is not clear from the media releases issued by the objectors that they for their part are suggesting that they have done so.

30. Moreover, the Minister's s.157 referral requested that any changes be made as expeditiously as possible, preferably not later than 31 March 2021. The applicants have, it is submitted, appreciated the urgency of this matter and acted appropriately. No clearly formulated proposals have been presented by those opposing this variation. In the circumstances it would be inappropriate to delay matters even further without a clearly articulated alternative proposal with broad support being put forward.

31. The variation, if made, creates no binding obligation on either employer or part-time employee to use it. It simply creates a mechanism by which an additional hours agreement may (not must) be struck between employer and employee. There is no compulsion on employers to make use of the flexibility offered by proposed Schedule I nor can any employee compel the constituents of the objectors to have recourse to it.

32. The foreshadowed objections of the employer organisations appear misconceived or at least not properly directed towards the relevant matters that must inform the pre-requisite satisfaction on the part of the Commission as to whether the application, if given operative effect, will meet the modern awards objective.

33. Schedule I as proposed provides enforceable rights (contingent upon agreement) for employees to lock in additional hours as they become regular and confers power on the Commission to arbitrate any disputes that might arise. Agreements can be flexibly recorded and evidenced in emails and text messages as soon as reasonably practicable and additional hours agreements for specified periods must be recorded in advance.

34. The amendments provide certainty that if an employee agrees with his or her employer to work additional hours but is then not required to do so, they will be paid. Where employees work the agreed hours they will receive payment at the appropriate ordinary hourly rate but not overtime but including penalty rates where they apply. Where agreement is reached, payment is guaranteed. The extra hours are not casual hours that can be removed by unilateral decision on the part of the employer.

35. Where employees seek to vary underlying agreements to incorporate the additional hours as ordinary (predictable) hours as the economy and the retail industry sector recovers, employers will only be able to refuse the request on reasonable business grounds. Again, disputes in relation to this issue can be arbitrated by the Commission.

36. The variation if granted is a temporary change with appropriate safeguards which is responsive to evidence of increasing casualisation in critical industry sectors. Such casualisation has the potential to undermine the necessary core of permanent employment that underpins job security and which ultimately drives economic recovery.

A J MACKEN & CO.

DATED: 2 March 2021