

Part-time provisions in the *General Retail Industry Award 2020*

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Introduction

This information note provides detail on the amendment of part time provisions prior to the commencement of the *General Retail Award 2010* (the Retail Award). It also sets out a brief history of the creation of the modern award.

Making of the General Retail Award 2010

The [General Retail Industry Award 2010](#) (the Retail Award) was created on 19 December 2008 by the Australian Industrial Relations Commission (AIRC) acting pursuant to the award modernisation request made by the Minister for Employment and Workplace Relations under the *Workplace Relations Act 1996*. The award commenced operation on 1 January 2010.

The Award Modernisation Full Bench designated the ‘Retail industry’ as a priority industry in the award modernisation process and initially proposed making one award to cover general retail, pharmacy, hair and beauty and fast food, :

‘...at least at this stage, we do not intend to exclude community pharmacies, fast food outlets or hairdressing services...Obviously the precise scope of a modern retail award cannot be determined at this stage but we intend to include a broad range of awards in our consideration to maximize the potential for rationalisation of award coverage’¹

A number of parties agitated for the creation of multiple awards across the retail sector. In the decision issued on 19 December 2008 the scope of the modern Retail Award was restricted to

¹ [\[2008\] AIRCFB 550](#) at [83]

what was defined as the 'general retail sector'. Separate awards were made to cover employers and employees in the pharmacy, hair and beauty and fast food industries:

'The more awards with disparate provisions are aggregated the greater the extent of changes in the safety net. Changes may be able to be accommodated by a "swings and roundabouts" approach, specific provisions relevant to part of the industry or transitional provisions. However, significant changes may also result in net disadvantage to employees and/or increased costs for employers. The publication of an exposure draft which sought to rationalise the terms and conditions across the various types of retail establishment provided a means whereby the impact of such an approach could be fully evaluated.

We have considered these matters and the submissions of the parties and have decided to make separate awards for general retailing, fast food, hair and beauty, and community pharmacies...

In reaching this decision we have placed significant reliance on the objective of not disadvantaging employees or leading to additional costs. We note that such an approach will not lead to additional awards applying to a particular employer or employee.

The contents of the four awards we publish with this decision are derived from the existing awards and NAPSAs applying to the different sectors. Although the scope of the awards is obviously reduced, this did not eliminate the variations in terms and conditions within each part of the industry. We have generally followed the main federal industry awards where possible and had regard to all other applicable instruments. In this regard we note in particular the significant differences in awards and NAPSAs applying to the fast food and pharmacy parts of the industry.²

In the making of the modern Retail Award the main Federal award was deemed to be the *Shop, Distributive and Allied Employees Association - Victorian Shops Interim Award 2000* (the Victorian Shops Interim Award).³

Applications to vary the part-time provisions

When the modern award was first made on 19 December 2008, it included the following provisions in relation to part-time employment:

12. Part-time employees

12.1 A part-time employee is an employee who:

- (a) works less than 38 hours per week; and
- (b) has reasonably predictable hours of work.

12.2 At the time of first being employed, the employer and the part-time employee will agree, in writing, on a regular pattern of work, specifying at least:

- the hours worked each day;
- which days of the week the employee will work;

² [\[2009\] AIRCFB 645](#)

³ [AP796250](#) CRV

- the actual starting and finishing times of each day;
- that any variation will be in writing;
- minimum daily engagement is three hours; and
- the times of taking and the duration of meal breaks.

12.3 Any agreement to vary the regular pattern of work will be made in writing before the variation occurs.

12.4 The agreement and variation to it will be retained by the employer and a copy given by the employer to the employee.

12.5 An employer is required to roster a part-time employee for a minimum of three consecutive hours on any shift.

12.6 An employee who does not meet the definition of a part-time employee and who is not a full-time employee will be paid as a casual employee in accordance with clause 13.

12.7 A part-time employee employed under the provisions of this clause will be paid for ordinary hours worked at the rate of 1/38th of the weekly rate prescribed for the class of work performed. Overtime is payable for all hours worked in excess of the agreed number of hours.

12.8 Rosters

(a) A part-time employee's roster, but not the agreed number of hours, may be altered by the giving of notice in writing of seven days or in the case of an emergency, 48 hours, by the employer to the employee.

(b) The rostered hours of part-time employees may be altered at any time by mutual agreement between the employer and the employee.

(c) Rosters will not be changed except as provided in clause 12.8(a) from week to week, or fortnight to fortnight, nor will they be changed to avoid any award entitlements.

12.9 Award entitlements

A part-time employee will be entitled to payments in respect of annual leave, public holidays, sick leave and bereavement leave arising under the NES or this award on a proportionate basis. Subject to the provisions contained in this clause all other provisions of the award relevant to full-time employees will apply to part-time employees.

12.10 Conversion of existing employees

No full-time or casual employee will be transferred by an employer to part-time employment without the written consent of the employee. Provided that where such transfer occurs all leave entitlements accrued will be deemed to be continuous. A full-time employee who requests part-time work and is given such work may revert to full-time employment on a specified future date by agreement with the employer and recorded in writing.

On 26 August 2009, the Minister for Employment and Workplace Relations varied the Award Modernisation Request to insert the following new paragraph:

The Commission should ensure that the hours of work and associated overtime penalty arrangements in the retail, pharmacy and any similar industries the Commission views as relevant do not operate to discourage employers from:

- offering additional hours of work to part-time employees; and
- employing part-time employees rather than casual employees.

The AIRC issued a statement on 10 September 2009⁴ which referred to the amended request and said:

'[12] In its decision of 19 December 2008 the Commission made the General Retail Industry Award 2010 and the Pharmacy Industry Award 2010. Any interested party which is of the view that either of those awards, or any other award, should be varied to give effect to the 26 August variation should make an appropriate application. We will endeavour to deal with any such application before the end of 2009.'⁵

The following applications were then made which sought to vary the part-time provisions in the Retail Award:

- [AM2009/24](#)- Application by the National Retail Association (NRA)
- [AM2009/31](#)- Application by the Chamber of Commerce and Industry of WA and the Retail Traders Association of WA (CCIWA)
- [AM2009/77](#)- Application by the Shop Distributive and Allied Employees Association (SDA)

The amendments sought in each of these applications are set out at **Attachment A**.

The AIRC dealt with the applications together. The following submissions were received:

- Australian National Retailers Association dated [13 November 2009](#)
- Australian Federation of Employers and Industries dated [11 November 2009](#) and [23 November 2009](#)
- CCIWA dated [14 October 2009](#)
- NRA dated [23 October 2009](#), [20 November 2009](#) and [27 November 2009](#)
- SDA dated [13 November 2009](#) (in response to the NRA application), [13 November 2009](#) (in response to the CCIWA application) and [27 November 2009](#)

The ANRA and AFEI supported the application of the NRA.

The NRA submitted the following in support of its application:

'The part time provisions of the Award discourage employers from offering additional hours of work to part time employees. A practical example of this is the situation where an employee calls their employer to advise that they are unable to attend work due to illness or injury. The employer has the option of offering that shift to a part time or a casual employee. If the shift is offered to a casual employee they are paid their casual rate of pay which, assuming it is a

⁴ [\[2009\] AIRCFB 835](#)

⁵ *Award Modernisation* [2009] AIRCFB 835 at [11] – [12].

weekday, is the part time rate of pay plus a 25% loading. A part time employee working the same hours would be paid at the part time rate plus 50% for the first 3 hours, and the part time rate plus 100% thereafter. It is therefore significantly more cost effective for the additional hours to be worked by a casual employee. Despite the employer's preference to offer additional hours to part time employees, cost factors will mean that they will instead offer the hours to casual employees.

This is the situation that the Minister's Request is directed to. The current Award provisions clearly discourage employers from offering hours to part time employees, and act as a barrier to engagement of part time employees generally. The proposed variation to the Award will remedy this issue.⁶

In its reply submission the SDA disagreed with the NRA interpretation of the part-time provisions as follows:

39. There is no recognition by the NRA that the part time employment provisions permit additional hours to be worked by a part time employee without the need for the payment of overtime. This can be achieved through the processes included within the part time employment clause which allows for agreed variations to the agreed pattern of work of a part time employee.

40. Where a part time employee agrees to vary their agreed hours of work, then additional hours are not paid at the overtime rate or even at the casual rate, but are merely paid at the ordinary hourly rate.

41. Equally, there is no recognition by the NRA that there is nothing within the current structure of the General Retail Industry Award 2010 which would prevent an employer from offering casual hours to a part time employee, where the casual hours are hours outside the agreed pattern of work of the part time employee. The solution proposed by the NRA to address the amended Ministerial Award Modernisation Request is the simple deletion of a fundamental entitlement of part time employees to overtime payments where they work beyond their agreed hours of work.

42. The NRA proposed solution does not address the amended Ministerial Request. There was nothing in the Ministerial Request that actually requires the removal of overtime rates of pay in relation to part time employees. The Ministerial Request is more directed at ensuring that the package of protections for part-timers also allows a part time employee to work additional hours without the need for overtime payments.

43. The SDA notes that the better way of dealing with the amended Ministerial Request in relation to part time employees is to be found in our application in AM2009/77. In that application, the Association has properly addressed the amended Ministerial Award Modernisation Request to deal effectively with the issue of additional hours being worked by part time employees.⁷

⁶ NRA submission dated 23 October 2009 at 58 and 59.

⁷ SDA submission dated 13 November 2009 at 39 to 43.

In support of its own application, the SDA submitted:

Variation 14 – Clause 12 Part-time Employees

The SDA proposes a number of variations to clause 12 in response to the Ministers amended Award Modernisation Request in relation to part time employees.

...

Whilst the structure of the existing clause permits part-time employees to work additional hours without the need for overtime to be paid this has not been acknowledged by employers who have in most cases sought to construct an artificial argument over the operation of this clause.

There has been much hysteria shown by employers in relation to this issue. The Minister's response in amending the Award Modernisation Request has been measured and appropriate. The SDA's proposed variations address the specific issues raised by the Minister.

In the period since the several retail industry awards of the Commission were simplified in the late 1990's part-time employment clauses identical to that which is in the current Modern Award have operated without any of the adverse consequences occurring which the employers now fear.

Simply because the existing part-time employment clauses have operated without causing employers to have to pay overtime for any additional hours worked by a part-time employee show that it is relatively simple to make the already obvious even more so.

The variations sought by the SDA in relation to part-time employment maintain all existing protections for part-time employees whilst at the same time presenting a clear and unambiguous means for employers to approach part-time employees to work additional hours either at ordinary rates of pay or at casual rates.

The structure of the variations sought by the SDA give effect to the following clear principles:

- A part-time employee cannot be required to work hours additional to the agreed hours for ordinary hourly rates of pay.
- A part-time employee can freely agree to work hours additional to their agreed hours at the ordinary hourly rate of pay, in which case the additional hours will count for the purpose of calculating leave entitlements.
- A part-time employee can freely agree to work hours additional to their agreed hours at the casual rate of pay, in which case the additional hours will not count for the purpose of calculating leave entitlements.
- A part-time employee can, in circumstances where they prefer not to work, be required to work reasonable additional hours to their agreed hours in which case they will be paid the overtime rate.

- An employer can offer additional hours to a part-time employee at either the ordinary hourly rate or at the casual rate, but the employer cannot require the part-time employee to work the additional hours.
- An employer can require a part-time employee to work additional hours to their agreed hours where the request to work such additional hours is reasonable and where the part-time employee does not have a reasonable reason for refusing such a request. In such cases the additional hours required to be worked are paid at the overtime rate of pay.
- Any occasion on which a part-time employee works additional hours to their agreed hours must be recorded in writing as part of the requirement on the employer to keep accurate payroll records.

These principles have always been present in the operation of the part-time employment clause and are clearly present within the structure of the existing provisions of the Modern Award. The variations sought by the SDA simply and explicitly state these principles. The inclusion of Notes to the part-time employment clause gives practical examples of how and when a part-time employee will be paid ordinary rates, casual rates or overtime rates for additional hours.

In a decision issued on 29 January 2010⁸ a Full Bench of the AIRC determined each of these applications as follows:

[8] The Chamber of Commerce and Industry of Western Australia (CCIWA), Retail Traders Association of Western Australia (RTAWA) and the NRA seek changes to the part-time employment provisions. They rely on the terms of cl.53 of the Minister for Employment and Workplace Relations' award modernisation request (the consolidated request).

[9] Clause 53 of the request contains a requirement to ensure that the hours of work and associated overtime and penalty arrangements in the retail, pharmacy and any similar industries do not discourage employers from offering additional hours of work to part-time employees or from employing part-time employees rather than casual employees. Clause 53 was included in the consolidated request by an amendment made on 26 August 2009, after the modern retail award was made.

[10] We have generally agreed to amend part-time provisions regarding overtime, in the light of the change to the consolidated request, to make it clear that when variations to parttime hours are agreed in writing overtime is not payable for such agreed additional hours unless the total hours exceed 38 per week or the other limits on ordinary hours. Such changes assist in making additional hours available to part-time employees subject to their genuine agreement. We will vary the modern award to replace the second sentence of cl.2.7 to read as follows:

“All time worked in excess of the hours as agreed under clause 12.2 or varied under clause 12.3 will be overtime and paid for at the rates prescribed in clause 28.2— Overtime(excluding shiftwork)”

[11] To avoid any confusion we will also delete cl.26.3(b).

⁸ [\[2010\] AIRCFB 305](#)

[12] The SDA also seeks a very detailed alternative part-time employment provision. We do not believe that the level of prescription sought is warranted.

Attachment A—Variations sought to the part-time provisions during award modernisation

NRA Application

The NRA sought to vary clauses 12.7 and clause 26.3 as follows:

12.7 A part-time employee employed under the provisions of this clause will be paid for ordinary hours worked at the rate of 1/38th of the weekly rate prescribed for the class of work performed. ~~Overtime is payable for all hours worked in excess of the agreed number of hours.~~

26.3 Maximum ordinary hours on a day

(a) An employee may be rostered to work up to a maximum of nine ordinary hours on any day, provided that for one day per week an employee can be rostered for 11 hours.

~~(b) A part-time employee may not be rostered to work at ordinary time more than their agreed number of hours on any day.~~

CCIWA Application

The CCIWA sought to delete clauses 12.2, 12.3, 12.4 and 12.6. They sought to vary clauses 12.1 and 12.7 as follows:

12.1 A part-time employee is an employee who ~~works less than 38 hours per week, or an average of 38 hours per week.~~

~~(a) works less than 38 hours per week; and~~

~~(b) has reasonably predictable hours of work.~~

12.7 A part-time employee employed under the provisions of this clause will be paid for ordinary hours worked at the rate of 1/38th of the weekly rate prescribed for the class of work performed. ~~Overtime is payable for all hours worked in excess of the agreed number of hours.~~ Provided further, that a part-time employee shall receive leave entitlements prescribed under this Award on a pro-rata basis in the same proportion as the number of hours regularly worked each week bears to 38 hours.

26.3 Maximum ordinary hours on a day

(a) An employee may be rostered to work up to a maximum of nine ordinary hours on any day, provided that for one day per week an employee can be rostered for 11 hours.

~~(b) A part-time employee may not be rostered to work at ordinary time more than their agreed number of hours on any day.~~

The CCIWA also sought to delete clause 26.3 and replace it with the following:

26.3 Maximum ordinary hours

(a) Subject to this clause and except as provided elsewhere in this Award, the ordinary hours of work shall be a maximum of 38 hours per week, or an average of 38 hours per week, to be worked in one of the following methods:

- i. 38 hours in one week
- ii. 76 hours in two consecutive weeks
- iii. 114 hours in three consecutive weeks
- iv. 152 hours in four consecutive weeks

(b) An employee may be rostered to work up to a maximum of nine ordinary hours on any day, provided that for one day per week an employee can be rostered for 11 hours

SDA application

The SDA sought the following additions to clause 12:

12. Part-time employees

12.1. A part-time employee is an employee who:

- (a) works less than 38 hours per week; and
- (b) has reasonably predictable hours of work.

12.2. At the time of first being employed, the employer and the part-time employee will agree, in writing, on a regular pattern of work, specifying at least: • the hours worked each day; • which days of the week the employee will work; • the actual starting and finishing times of each day; • that any variation will be in writing; • minimum daily engagement is three hours; and • the times of taking and the duration of meal breaks.

12.3. Any agreement to vary the regular pattern of work will be made in writing before the variation occurs. **An agreement made under this provision may be either a permanent agreed variation to the pattern of work or may be temporary., e.g. a single roster period.**

12.4. For the purposes of clauses 12.2 and 12.3 the requirement to have a written variation to the agreed part-time hours will be satisfied where the employee agrees to work additional hours to their agreed hours and where the employer and employee sign or initial a roster which records the additional hours that are agreed to be worked. Such agreed additional hours will be paid for at the rate applicable to such hours and not at the overtime rate.

NOTE: Sue is employed as a part-time employee to work Monday, Tuesday and Wednesday 9.00am to 1.00pm. On Tuesday Mary the store manager, approaches Sue at 10.00am and advises her that Bill, the part-time employee who normally works 2.00pm to 6.00pm Monday, Tuesday and Wednesday will be taking 4 weeks annual leave commencing next week. Mary offers Sue extra part-time hours by covering Bill's hours whilst he is on leave. Mary is quite happy to work the extra hours for the next 4 weeks. As the roster for the full-timers and part-timers at the store is issued each 3 months, Mary and Sue cross out Bills name for the period he will be on leave and writes in

Sue's name and both Sue and Mary initial each change on the roster. Mary photocopies the signed roster and gives one copy to Sue and places the second copy on the notice board and gives the signed roster to Payroll to be kept as a pay record.

12.5 The agreement and variation to it will be retained by the employer and a copy given by the employer to the employee. Where the written variation is constituted by a signed or initialled roster a copy of the signed or initialled roster must be retained by the employer and a copy given to the employee.

12.6. An employer is required to roster a part-time employee for a minimum of three consecutive hours on any shift.

12.7. An employee who does not meet the definition of a part-time employee and who is not a full-time employee will be paid as a casual employee in accordance with clause 13.

12.8. A part-time employee employed under the provisions of this clause will be paid for ordinary hours worked at the rate of 1/38th of the weekly rate prescribed for the class of work performed. Overtime is payable for all hours worked in excess of the agreed number of hours, except where the employer and employee have agreed to a variation to the agreed hours in accordance with clause 12.3 in which case overtime is payable for all hours worked in excess of the agreed varied hours.

NOTE: Sue is employed as a part-time employee to work Monday, Tuesday and Wednesday 9.00am to 1.00pm. On Tuesday Mary the store manager, approaches Sue at 10.00am and advises her that Bill, the part-time employee who normally works 2.00pm to 6.00pm Monday, Tuesday and Wednesday cannot come into work that day. Mary advises Sue that no one else is available to cover Bill's shift. Mary asks Sue if she will agree to vary her hours and work the additional hours that afternoon. Sue, who would prefer to have the afternoon off, declines the offer to work additional hours. Mary then offers Sue casual hours for that afternoon. Whilst Sue knows that she would be paid the casual rate for the afternoon she would prefer to have the time off work. Again Sue declines the offer to work. Mary then tells Sue that Sue is required to work the afternoon shift to cover Bill's absence. Sue would prefer not to work, but Sue knows that the requirement to work the afternoon shift is not unreasonable. Sue works the afternoon shift and is paid overtime for the hours worked.

12.9. Rosters

(c) A part-time employee's roster, but not the agreed number of hours, may be altered by the giving of notice in writing of seven days or in the case of an emergency, 48 hours, by the employer to the employee.

(d) The rostered hours of part-time employees may be altered at any time by mutual agreement between the employer and the employee.

(e) Rosters will not be changed except as provided in clause 1.1(c) from week to week, or fortnight to fortnight, nor will they be changed to avoid any award entitlements.

(f) Rosters may in accordance with clause 12.4 be used for the purposes of clauses 12.2 and 12.3 to record an agreed variation to work additional hours to a part-time employees agreed hours

12.10. Award entitlements

A part-time employee will be entitled to payments in respect of annual leave, public holidays, sick leave and bereavement leave arising under the NES or this award on a proportionate basis. Subject to the provisions contained in this clause all other provisions of the award relevant to full-time employees will apply to part-time employees.

12.11. Conversion of existing employees

No full-time or casual employee will be transferred by an employer to parttime employment without the written consent of the employee. Provided that where such transfer occurs all leave entitlements accrued will be deemed to be continuous. A full-time employee who requests part-time work and is given such work may revert to full-time employment on a specified future date by agreement with the employer and recorded in writing.

12.12. Additional Hours as Casual hours

Nothing in this clause prevents a part-time employee who has worked their agreed hours from working any additional hours, which are not reasonably predictable, as a casual employee, subject to the provisions of this award.

NOTE: Sue is employed as a part-time employee to work Monday, Tuesday and Wednesday 9.00am to 1.00pm. On Tuesday Mary the store manager, approaches Sue at 10.00am and advises her that Bill, the part-time employee who normally works afternoons cannot come into work that day. Mary advises Sue that instead of calling in one of the usual casuals Mary would like to offer Sue a casual shift from 1.30pm to 5.00pm, with 1.00pm to 1.30pm being a meal break, to cover Bill's absence. Sue accepts the offer of a casual shift for the afternoon and is paid the 25% casual loading for that afternoon