



FURTHER REPORT TO THE FULL BENCH

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)

Retail Industry

COMMISSIONER HAMPTON

ADELAIDE, 28 APRIL 2021

Further Report to Full Bench – Award Flexibility – Part-time employment – Full Bench decision – additional conference conducted – General Retail Industry Award 2020.

Background

[1] A Full Bench of the Commission is considering a joint application to amend the provisions applying to Part-time employees in the *General Retail Industry Award 2020* (Retail Award). The [joint application](#), and various other [competing proposals](#), are each directed at achieving some additional flexibility in connection with part-time employees. In particular, to enable agreements to be reached between an employer and certain part-time employees to work more ordinary hours than the hours agreed upon commencement of employment under clause 10.5 of the Retail Award, up to a maximum total of 38 ordinary hours per week.

[2] Earlier, Statements were issued by the Commission on 1 March 2021¹ and 4 March 2021² and additional background information is set out in the Report to the Full Bench issued on 15 March 2021.³

[3] The Full Bench in its most recent decision ([\[2021\] FWC FB 1608](#)), declined to vary the Retail Award at that juncture, but stated the next steps in considering the various proposals as follows:

“[156] As mentioned earlier, the proper construction of the existing clause 10 is a threshold issue in our consideration of both the Joint Application and the ABI proposal. Further:

1. It is our view that clause 10 is uncertain and requires variation to resolve that uncertainty.

¹ [\[2021\] FWC 1088](#).

² [\[2021\] FWC FB 1198](#).

³ [\[2021\] FWC 1297](#).

2. It is our provisional view that there may be merit in the variation of the Retail Award to introduce a mechanism whereby a part-time employee who regularly works additional hours may request that their guaranteed hours be reviewed and increased, and their employer cannot unreasonably refuse such a request.

[157] The next step in progressing these issues will be for Commissioner Hampton to convene a further conference to discuss the meaning and intent of clause 10 of the Retail Award and our provisional view regarding the variation of the Retail Award (at [155] above).

[158] In particular, the conference participants will be invited to address the following issues:

- Does clause 10.6 permit an agreement between an employer and a part-time employee to vary the regular pattern of work they have agreed under clause 10.5 so that the part-time employee may work additional ordinary hours (paid at the employees' ordinary time rate)?
- Does clause 10.6 permit an agreed permanent variation to the regular pattern of work agreed under clause 10.5?
- In the context of clause 10 as a whole, does clause 10.6 permit an agreed ad hoc or temporary variation to the regular pattern of work agreed under clause 10.5? If permitted, can such a temporary variation:
 - increase the number of ordinary hours to be worked on a particular day?
 - vary the days of the week on which the employee will work?
 - vary the start and finish times?
 - vary when meal breaks are taken and their duration?
- Must a clause 10.6 variation be 'in writing'?
- Does 'in writing' include by electronic means, such as a text message?
- If clause 10.6 permits the agreed temporary variation of a regular pattern of work does the variation agreement have to be recorded in writing before the additional hours (are) worked?
- To what extent does clause 15 apply to variations agreed under clause 10.6? Which elements of clause 15 apply?
- How does an agreed variation to work 'additional hours' interact with the minimum engagement term?
- In what other ways does clause 10 give rise to uncertainty?

[159] To inform the discussion at the conference, we draw the parties' attention to the [Information Note](#) we published today regarding the history of the part-time provisions in the Retail Award.

[160] We intend to address the uncertainty attending the operation of clause 10 and in particular the parameters regarding the working of additional ordinary hours as a matter of priority.

[161] We propose to act on our own initiative under s.160(2)(a) to address these issues.

[162] The conference process set out above will conclude by no later than Friday 9 April. We expect that a Report will then be provided by Commissioner Hampton. We will publish a provisional draft variation in the week commencing Monday 12 April 2021. Parties will be given an opportunity to file submissions in respect of any such proposal.”⁴

[4] This Further Report discusses the positions adopted by the parties in response to the issues identified by Full Bench.

The conference

[5] The conference was conducted by this arm of the Commission on 20 April 2021. The organisations participating in the conference are listed at the conclusion of this Report.

[6] Parties were encouraged to provide written submissions addressing each of the issues identified by the Full Bench in advance of the conference. Submissions were provided by the following:

- Australian Business Industrial and New South Wales Business Chamber (ABI)
- National Retail Association (NRA)
- Retail and Fast Food Workers Union Incorporated (RAFFWU)
- Shop Distributive & Allied Employees' Association (SDA)
- Australian Industry Group (Ai Group)
- Australian Newsagents Association of NSW and ACT Ltd (NANA)
- Master Grocers Australia (MGA)
- The Australian Workers' Union (AWU)

⁴ The schedule for the conference was subsequently delayed by the Commission at the request of various parties.

[7] As a result of the conference, some parties sought to clarify and expand upon their submissions. As a result, an opportunity was provided to supply additional submissions, which were ultimately received from the following:

- Ai Group
- Australian Retailers Association (ARA).⁵

[8] The consolidated submissions have now been published on the [Commission's website](#) and will be provided in full to the Full Bench. This Further Report summarises but does not seek to reflect all of the submissions made.

The responses to the issues raised by the Full Bench

[9] For convenience, I set out clause 10 of the Retail Award:

“10. Part-time employees

- 10.1** An employee who is engaged to work for fewer than 38 ordinary hours per week and whose hours of work are reasonably predictable, is a part-time employee.
- 10.2** An employer may employ part-time employees in any classification defined in Schedule A—Classification Definitions.
- 10.3** This award applies to a part-time employee in the same way that it applies to a full-time employee except as otherwise expressly provided by this award.
- 10.4** A part-time employee is entitled to payments in respect of annual leave and personal/carer's leave on a proportionate basis.
- 10.5** At the time of engaging a part-time employee, the employer must agree in writing with the employee on a regular pattern of work that must include all of the following:
- (a) the number of hours to be worked each day; and
 - (b) the days of the week on which the employee will work; and
 - (c) the times at which the employee will start and finish work each day; and
 - (d) when meal breaks may be taken and their duration.
- 10.6** The employer and the employee may agree to vary the regular pattern of work agreed under clause 10.5 with effect from a future date or time. Any such agreement must be in writing.

⁵ The ARA did not provide a written submission prior to the conference and to the extent that it now seeks to summarise the positions of other organisations in the subsequent submissions, no party has had an opportunity to provide any submissions in response.

- 10.7** The employer must keep a copy of any agreement under clause 10.5, and any variation of it under clause 10.6, and give another copy to the employee.
- 10.8** For any time worked in excess of the number of hours agreed under clauses 10.5 or 10.6, the part-time employee must be paid at the overtime rate specified in Table 10—Overtime rates.
- 10.9** The minimum daily engagement for a part-time employee is 3 consecutive hours.
- 10.10** Changes to roster
- (a) The roster of a part-time employee, but not the number of hours agreed under clause 10.5, may be changed by the employer giving the employee 7 days, or in an emergency 48 hours, written notice of the change.

NOTE: Clause 15.7 contains additional rostering provisions.

- (b) The roster of a part-time employee, but not the number of hours agreed under clause 10.5, may be changed at any time by mutual agreement between the employer and the employee.
- (c) However, the roster of a part-time employee must not be changed from week to week or fortnight to fortnight or to avoid any award entitlements.

NOTE: See clause 27—Rostering restrictions for the rosters of shiftworkers.”

Does clause 10.6 permit an agreement between an employer and a part-time employee to vary the regular pattern of work they have agreed under clause 10.5 so that the part-time employee may work additional ordinary hours (paid at the employees’ ordinary time rate)?

[10] All parties making submissions agreed that clause 10.6 did permit agreements of the kind contemplated in this question. Some parties posited that the variation must involve additional hours to those agreed under clause 10.5.

[11] I observe that clause 10.6 does not directly address whether the additional hours are paid at ordinary time rates; however, this would appear to arise from the provisions of the Retail Award more generally, provided that the hours fall within the scope of ordinary hours as otherwise provided.

Does clause 10.6 permit an agreed permanent variation to the regular pattern of work agreed under clause 10.5?

[12] All parties making submissions agreed that clause 10.6 did permit agreements which provided a permanent variation of the kind contemplated in this question.

In the context of clause 10 as a whole, does clause 10.6 permit an agreed ad hoc or temporary variation to the regular pattern of work agreed under clause 10.5? If permitted, can such a temporary variation:

- increase the number of ordinary hours to be worked on a particular day?
- vary the days of the week on which the employee will work?
- vary the start and finish times?
- vary when meal breaks are taken and their duration?

[13] All parties making submissions, with one exception, agreed that clause 10.6 did permit agreements of the kind, and with the scope of matters, contemplated in this question. Some submissions posited that any temporary agreement may need to clearly outline the length of the agreement, and the return to the pre-existing clause 10.5 agreement terms, if that was intended.

[14] The AWU contended as follows:

“The AWU agrees with the Full Bench’s conclusion at paragraph [120] of the 24 March 2021 Decision, it is uncertain whether or not temporary or ad hoc variations are permitted by clause 10.6.

It does appear from the Decision in [2010] FWAFB 305 that the relevant Fair Work Australia Full Bench intended to provide this degree of flexibility for the retail industry. However, clause 10.6 only refers to a variation to the “regular pattern of work”, that wording does not sit comfortably with temporary ad hoc variations.”⁶

Must a clause 10.6 variation be ‘in writing’?

Does ‘in writing’ include by electronic means, such as a text message?

[15] I deal with these 2 questions together.

[16] All parties making submissions agreed that the clause 10.6 variation must be in writing. Further, provided that the record created was capable of being retained and subsequently accessed as a formal employee record, electronic means of recording⁷ the agreement were, or should be, permitted.

If clause 10.6 permits the agreed temporary variation of a regular pattern of work does the variation agreement have to be recorded in writing before the additional hours are worked?

[17] All parties making submissions recognised that the agreement had to be made in advance of the additional hours being worked. Most parties recognised that whilst the provision

⁶ AWU submission at paras 7 and 8.

⁷ By reference to s.12(1) of the *Electronic Transactions Act 1999* (Cth).

does not expressly state that the agreement must be recorded in writing prior to that work, this was the likely intention of the award.

To what extent does clause 15 apply to variations agreed under clause 10.6? Which elements of clause 15 apply?

[18] Clause 15 of the [Retail Award](#) provides various parameters for, and limitations to, the establishment of ordinary hours and rosters applicable to full and part-time employees.

[19] It appears to be common ground that clause 15 applies in general terms to part-time arrangements, including those made under clause 10.6. Further, clause 15.6 applies only to full-time employees and would not be relevant, unless the agreed variation was to, in effect, become a full-time employee. Beyond that, there is a significant diversity of views about how clause 15 is to be applied in practice to part-time arrangements under clause 10.

[20] Several employer organisations differentiate between changes to regular roster hours and additional hours that may be agreed for part-time hours outside of the roster process. The positions advanced included:

- Clause 15.9 concerns notification of and changes to rosters. These provisions would apply to a part-time employee whose roster is changed. It would not apply to additional hours that are offered and agreed outside the rostering process - ABI⁸
- There is a difference between ad hoc changes (to hours) and changes to the rostered hours – NANA⁹
- Clause 15.9 deals with rostering arrangements and applies in relation to part-time employees. Clause 10.10 also deals with rostering arrangements for part-time employees. Clause 10.6 provides a different means through which an individual's hours of work may be varied. The interaction between clause 10 and both clauses 15.8 and 15.9 is far from simple and easy to understand. This arguably gives rise to an uncertainty in the terms of the award – Ai Group.¹⁰

[21] Alternatively, other parties advanced the view that all of the relevant provisions of clause 15 apply according to their terms, including the following positions:

- All provisions of clause 15 apply to variations agreed under clause 10.6, with the exception of clause 15.6 which is expressly limited to full-time employment – NRA.¹¹
- All clause 15 elements, that apply to part-time employees, apply to any agreement under clause 10.6 – RAFFWU.¹²

⁸ Para 8.5 of ABI's submission.

⁹ NANA submission at para 7.

¹⁰ Ai Group original submission at paras 22 and 23.

¹¹ NRA submission para 7.1.

¹² RAFFWU submission para 4.

- Clause 15 applies according to its full terms in relation to variations made under clause 10.6 - AWU.¹³

[22] The SDA submitted as follows:

“The rostering provisions of Clause 15 apply to any variation under clause 10.6. Any work as ordinary hours must comply with the rostering standards ie length of days, days off etc. Clause 15.6 would not generally apply unless the Part time employee is being engaged on a full time basis for a period of time. Clause 10.10 makes specific provision about the change of rosters for part-time employees. 10.10(a) is inconsistent with 10.5 and 10.6, both of which require agreement. Given the nature of part time employment, which often if not always involves an employee structuring hours around other commitments such as childcare or other family obligations, it is reasonable that changes should only be made by agreement. Given the history of the award, it would seem that the introduction of 10.6 should have been accompanied by the removal of 10.10(a). The interaction with cl.15.9(e) is also problematic, as it assumes a right for the employer to change agreed hours and days unilaterally which is inconsistent with cl. 10.5 and 10.6.”¹⁴

How does an agreed variation to work ‘additional hours’ interact with the minimum engagement term?

[23] I observe that clause 10.9 states that “the minimum daily engagement for a part-time employee is 3 consecutive hours”.

[24] It was common ground that, in effect, a part-time employee’s regular pattern of work must include a minimum of 3 hours (whether ordinary hours, overtime or a combination of both) on each day that the employee is to work. This includes a regular pattern of work as varied under clause 10.6. An employee and employer could agree to work fewer than 3 **additional** hours provided these hours are continuous with existing hours, and at least 3 hours in total are worked/paid.

In what other ways does clause 10 give rise to uncertainty?

[25] As outlined above, a number of parties raised issues about the uncertain interaction between clauses 10 and 15 of the Retail Award.

[26] Further, some parties raised potential uncertainties arising from the different subsections of clause 10 itself, including the following submissions:

- Given the ability to make ongoing variations, the term “regular pattern of work” may not be the most accurate way of describing the hours of work that must be agreed upon under clauses 10.5 and 10.6. The term “agreed pattern of work” may be more appropriate – ABI.

¹³ AWU submission at par 12.

¹⁴ SDA submission at para 7.

- Clause 10.10(b) is misleading as the number of hours agreed under clause 10.5 can be changed by mutual agreement, in accordance with clause 10.6 – ABI.
- NRA contended:
 - There is a degree of ambiguity as to whether overtime applies to work performed by a part-time employee on days and times outside of their agreed pattern of work. Such ambiguity arises out of the use of the word “excess” in both clauses 10.8 and 21.2(b), and the use of the word “number” in clause 10.8.¹⁵
 - There is an uncertain interaction between clauses 10.5, 10.6, 10.10 and overtime provisions.¹⁶
 - Clause 10.10(b) contradicts clause 10.6.¹⁷
 - Clause 10.10(c) appears to contradict clauses 10.6, 10.10(b) and 15.9(d).¹⁸
- There is, as noted above, an inconsistency between 10.5, which requires days of the week and times at which an employer will start and finish work each day to be specified by written agreement and clause 10.10 which permits changes to an employee’s roster. This tension is further exacerbated by clause 10.1 which describes the part-time employee as one whose hours are “reasonably predictable” rather than fixed. Previous versions of this part time clause (GRIA 2010 etc) had under the equivalent provision of 10.5, that any variation had to be in writing. This was deleted in the PLED 2020 GRIA – SDA.¹⁹
- Clause 10.3 states that the Retail Award applies to part time employees in the same way as full-time employees, except as otherwise expressly provided. However, Clause 10.1 does not expressly state that the hours of a part time employee could be averaged over a period, just that the part time employee must work “fewer than 38 ordinary hours per week”- MGA.²⁰
- Clause 10.8’s language relating to when overtime may be triggered is different from Clause 10.5. Clause 10.8 requires the payment of overtime if an employee works in excess of “the number of agreed hours”, when Clause 10.5 refers to a “regular pattern of work”. Further differences in the language are seen in Clause 10.10, which refers to changes to “rosters” instead of the previous terms used - MGA.²¹

¹⁵ NRA submission at paras 9.1 and 9.2. The NRA accepts that the approach generally applied is that that overtime applies to hours of work performed outside of the agreed days and times.

¹⁶ NRA submission at para 9.5 to 9.8.

¹⁷ NRA submission at para 9.9 to 9.12.

¹⁸ NRA submission at para 9.13 to 9.18.

¹⁹ SDA submission at para 9.

²⁰ MGA submission at para 5(j).

²¹ Ibid.

- Clause 10.10(a) is inconsistent with clause 10.5 and 10.6 and also with the originating concept of part-time employment as identified by the Casual and Part-time Employment decision and cited by the Full Bench in paragraph [141] of its 24 July 2021 Decision. Specifically, the ability of an employer to unilaterally vary the days and times of work for a part-time employee is inconsistent with the “distinctive features of the award regulation of part-time work – the requirement for written agreement specifying the number of hours to be worked and the days and times in the week when these hours are to be worked, alterable by written agreement only – AWU.”²²

[27] The supplementary submission provided by the Ai Group outlined a contrary approach to the application of clause 10.1(a), which reflected the views of several employer organisations advanced during the conference, in the following terms:

“Ai Group opposes any contention that clauses 10.6 and 10.10(a) are inconsistent or incompatible. Clause 10.6 of the Award permits a variation to a part-time employee’s ordinary hours of work by agreement, whilst clause 10.10(a) affords an employer a unilateral right to vary a part-time employee’s hours, within the parameters prescribed by that clause. The two provisions contemplate variations to a part-time employees’ ordinary hours of work in different ways. No incongruity arises from these provisions.”²³

[28] The ARA also posited that:

“Clause 10.10(a), read in conjunction with clauses 10.5 and 10.6, is consistent with the overarching definition of a part-time employee, provided for at clause 10.1 of the award, as being one whose hours of work are reasonably predictable. Clause 10.10 has in-built protections to ensure that reasonable predictability of hours is maintained, prohibiting rosters from being changed from week to week or fortnight to fortnight.”²⁴

[29] Other issues were raised by parties and included the following.

[30] RAFFWU submitted:

“It would appear that some employers are unaware of their obligations under clause 35 and to the extent they rely on the rostering terms of clause 10 and 15, reference should be drawn to those obligations under clause 35.

A further uncertainty, ambiguity or error arises in the interaction between clause 10.5(a) and clause 16.2. This uncertainty, ambiguity or error arises because clause 16.2 uses the word “or” rather than “and”:

An employee who works the number of hours in any one shift specified in column 1 of Table 3—Entitlements to meal and rest break(s) is entitled to a rest break or rest breaks as specified in column 2 **or** a meal break or meal breaks as specified in column 3.

²² AWU submission at paras 14 and 15.

²³ Ai Group additional submission at para 3.

²⁴ ARA submission at para 10.

The uncertainty, ambiguity or error arises because it may be erroneously put clause 10.5 does not involve any meal break because the entitlement is optional between rest or meal breaks. This is clearly wrong but may be perceived as uncertain or ambiguous by some employers.”²⁵

[31] RAFFWU also raised a proposed provision²⁶ to permit part-time employees to seek a permanent increase in hours. This is relevant to the matter more generally but is beyond the scope of this Further Report.²⁷

[32] NANA contended that the use of marginally different terms in clause 10 and 15 gives rise to uncertainty.²⁸

Observations to assist the Full Bench

[33] In assessing the present operation of the Retail Award, and in determining whether a variation to the part-time provision is necessary in response to the joint application and the other proposals, it is apparent that there are ambiguities, or at the very least uncertainties, arising from the present award terms. For reasons set out by the Full Bench,²⁹ any variation should endeavour to clarify the proper application of the award for the benefit of those who are covered by its terms.

[34] That clarification should ideally make clear:

- The intended operation of clause 10.6, and if thought appropriate, that a variation to the hours and arrangements originally agreed upon the commencement of employment under clause 10.5 may be varied on an ad hoc basis, for a temporary defined period, or as an ongoing replacement agreement.
- The intended operation of clause 10.10 and the interactions between clause 10 and clause 15 for part-time employees. This would include consideration as to whether there should be a distinction between rostered hours and the (clause 10.5/10.6) agreed hours parameters and whether the limit on (unilateral) changes to the agreed hours through roster variations is intended to be restricted only to the total number of hours to be worked. Further, the provisions might usefully also clarify which of these hours by a part-time employee are to be treated as ordinary hours not attracting overtime.

[35] In assessing any potential amendments, consideration might also be given to a number of less fundamental drafting issues raised by the parties, including:

- Confirming when and in what form written agreements are required;

²⁵ RAFFWU submission at para 4.

²⁶ RAFFWU submission at para 3.

²⁷ Parties did not generally address the provisional views of the Full Bench and concentrated upon the stated questions.

²⁸ NANA submission at para 9.

²⁹ [2021] FWCFB 1608 at [119].

- Reviewing the use of similar terms and concepts to ensure consistency where the same meaning is intended; and
- Other proposals set out in the written submissions of the parties.

[36] Further, the challenge will be to provide this clarity in a form that is consistent with the purpose of, and structure provided by, the recent plain language exercise³⁰ completed by the Commission in connection with the Retail Award.

[37] As set out in the recent Full Bench decision,³¹ any draft determination being considered by the Commission in light of this process should be provided to the parties for further submissions before any final decision is made.



COMMISSIONER

Participating Organisations (in alphabetical order):

Australian Business Industrial.
Australian Chamber of Commerce and Industry Inc.
Australian Council of Trade Unions.
Australian Industry Group.
Australian Newsagents Federation Ltd trading as Australian Lotteries and Newsagents Association.
Australian Retailers Association.
The Australian Workers' Union.
Council of Small Business Organisations Australia.
Master Grocers Australia.
National Retail Association.
Newsagents Association of NSW and ACT Ltd.
New South Wales Business Chamber.
Retail and Fast Food Workers Union Incorporated.
Shop Distributive & Allied Employees' Association.

³⁰ 4 yearly review of modern awards—Plain language re-drafting—General Retail Industry Award 2010 (AM2016/15) – see [2019] FWCFB 3626.

³¹ [2021] FWCFB 1608 at [162].

Conference details:

2021

April 20.

By Video.

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