Submissions in response to Conference Information for Parties - General Retail Industry Award 2020

AM2021/7

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19 April 2021

BY EMAIL AMOD@fwc.gov.au

Modern Award Review Team
Fair Work Commission
Level 4, 11 Exhibition Street
Melbourne VIC 3000

Dear AMOD Team

AM2021/7 – Award flexibility – General Retail Industry Award 2020
Response to questions raised in [2021] FWCFB 1608

We write to provide the preliminary position of Australian Business Industrial and the NSW Business Chamber Limited in relation to the questions posed by the Full Bench in [2021] FWCFB 1608.

1. 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)?

1.1 Yes. Clause 10.5 requires an employer and a part-time employee to agree on a regular pattern of work. This regular pattern of work does nothing more than fix the hours that the part-time employee will work. It does not determine whether these hours are ordinary hours, nor does it determine the rate at which these hours are paid. These matters are determined by other provisions within the Award.

1.2 If a part-time employee works in accordance with the regular pattern of work, they will be paid their ordinary time rate for any hours that fall within the parameters of ordinary hours set out in clause 15. If any of the hours fall outside the scope of ordinary hours then the part-time employee will be entitled to overtime payments.

1.3 Clause 10.6 allows the part-time employee to vary the regular pattern of work. Again, such agreement only concerns when the part-time employee is to perform work and does not determine whether these hours are ordinary hours or the rate at which they are paid.

1.4 If an agreement made under clause 10.6 increases the number of hours that are to be worked, then such hours will be ordinary hours if they fall within the parameters of ordinary hours set out in clause 15. Such hours would be paid at the employee's ordinary time rate. If the additional hours fall outside of the scope of ordinary hours then they would be payable at overtime rates.

2. DOES CLAUSE 10.6 PERMIT AN AGREED PERMANENT VARIATION TO THE REGULAR PATTERN OF WORK AGREED UNDER CLAUSE 10.5?

2.1 Yes.

3. 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?

3.1 Yes, nothing in clause 10.6 limits the duration of any variation to a part-time employee's regular pattern of work. A variation under clause 10.6 could be temporary if the employer and part-time employee:

(a) agreed that the variation was to be in effect for a specified period before the regular pattern of work reverted back;

(b) agreed that the variation was to be in effect for a specified period before a different regular pattern of work was to apply; or

(c) did not agree to either of the above at the time, but later entered into a subsequent agreement under clause 10.6 to revert/further vary the regular pattern of work.

4. 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?

4.1 Yes. Clause 10.6 deals with variations to the regular pattern of work agreed in accordance with 10.5. This includes all of the above elements.

5. MUST A CLAUSE 10.6 VARIATION BE 'IN WRITING'?

5.1 Yes. Clause 10.6 explicitly states that "*Any such agreement must be in writing*".

6. DOES 'IN WRITING' INCLUDE BY ELECTRONIC MEANS, SUCH AS A TEXT MESSAGE?

6.1 Yes, by virtue of section 12(1) of the *Electronic Transactions Act 1999* (Cth), electronic means are a sufficient method of recording agreement.

7. 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 AS WORKED?

7.1 Clause 10.6 makes it clear that the agreement to vary the regular pattern of work must be made before the additional hours are worked (variations are made "*with effect from a future date or time*").

7.2 While the requirement that "*any such agreement must be in writing*" does not expressly state *when* the agreement must be put in writing, our clients accept that the intention is for the agreement to be recorded in writing prior to it taking effect.

8. TO WHAT EXTENT DOES CLAUSE 15 APPLY TO VARIATIONS AGREED UNDER CLAUSE 10.6? WHICH ELEMENTS OF CLAUSE 15 APPLY?

8.1 The parts of clause 15 that are relevant to part-time employees remain relevant to part-time employees who have varied their hours under clause 10.6.

8.2 Clauses 15.1 to 15.5 provide limits on when ordinary hours may be worked. These apply to the regular pattern of work that a part-time employee and their employer have agree to work under clause 10.5, including when varied in accordance with clause 10.6.

8.3 Clause 15.6 applies only to full-time employees and is not relevant for present purposes.

8.4 Clauses 15.7 and 15.8 provide limits on how an employee's hours of work are to be rostered. These clauses would apply to part-time employees with respect to roster changes.

8.5 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.

9. HOW DOES AN AGREED VARIATION TO WORK 'ADDITIONAL HOURS' INTERACT WITH THE MINIMUM ENGAGEMENT TERM?

9.1 Clause 10.9 states that "the minimum daily engagement for a part-time employee is 3 consecutive hours".

9.2 Accordingly, 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 can agree to work fewer than 3 additional hours provided they are continuous with existing hours.

10. IN WHAT OTHER WAYS DOES CLAUSE 10 GIVE RISE TO UNCERTAINTY?

10.1 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.

10.2 Clause 10.10(b) states that:

> *"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."*

10.3 This is misleading as the number of hours agreed under clause 10.5 can be changed by mutual agreement, in accordance with clause 10.6.

19 April 2021

If you have any questions, please contact Rhys Kingston on 02 9458 7586.

Yours sincerely,

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16 April 2021

Modern Award Review Team
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Melbourne VIC 3000

By email: amod@fwc.gov.au

Dear Modern Award Review Team,

AM2021/7 – Award flexibility – *General Retail Industry Award 2020*
Response to matters raised in [2021] FWCFB 1608

In [2021] FWCFB 1608 (**the Decision**), at paragraph [157], the Full Bench of the Fair Work Commission (**Full Bench**) directed that a series of conferences be convened by Hampton C to discuss the meaning and intent of clause 10 of the *General Retail Industry Award 2020* (**the Award**).

At paragraph [158] of the Decision, the Full Bench set out a number of issues which participants in that conference process will be invited to address.

At paragraph [5] in the note "Conference Information for Parties" as revised on 31 March 2021, parties are asked to provide a brief outline of responses to those issues in advance of the first conference.

This document sets out the initial response of the National Retail Association Limited, Union of Employers (**NRA**) to those issues.

1. 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 employee's ordinary time rate)?

1.1. Yes.

1.2. Clause 10.8 specifically provides that overtime rates are payable to a part-time employee for hours worked in excess of the number of hours agreed under *either* clause 10.5 *or* 10.6.

1.3. This is reiterated in clause 21.2(b), which provides that overtime is payable to part-time employees for hours worked in excess of those agreed under 10.5 *or as varied* under clause 10.6.

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

2.1. Yes.

2.2. There is nothing in clause 10.6 which limits it application to temporary variations only. To assert that clause 10.6 is limited to temporary variations only would be to read words into the Award which are not there.

2.3. Further, as clause 10.5 only deals with the regular pattern of work agreed to "at the time of engaging a part-time employee", to limit clause 10.6 to temporary variations only would render a part-time employee's regular pattern of work incapable of being changed on an ongoing basis.

2.4. In such a circumstance, the only mechanism for making an ongoing change to a part-time employee's regular pattern of work would be for their employment to be terminated, and then for the employee to be "re-engaged", thereby re-enlivening clause 10.5.

3. 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?**

3.1. In the NRA's view, the answer to both of the propositions above is "yes", subject to some limitations.

3.2. The first of these limitations is that in order for a variation to the pattern of work to be temporary, the agreement will need to record the timeframe within which the variation is to have operation. This could be for a particular shift or a longer period of time.

3.3. The second of these limitations is that the agreement must be made ***before*** the variation commences, and to this is extent there is a limitation on clause 10.6 being effective in the provision of *ad hoc* work; it will only be effective where agreement is made before the *ad hoc* hours are worked.

3.4. There are however ambiguities around this, which are outlined at paragraphs 9.1 to 9.18 below.

4. Must a clause 10.6 variation be in writing?

4.1. Yes.

4.2. The last sentence of clause 10.6 provides that "Any such agreement must be in writing."

5. Does "in writing" include by electronic means, such as a text message?

5.1. In the NRA's view, yes.

6. 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 as (sic) worked?

6.1. In the NRA's view, yes.

6.2. The NRA notes that clause 10.6 is ambiguous on this point, as while it states that agreement must be reached at such a time as to take effect "from a future date or time", it does not expressly state the agreement must recorded in writing before that future date or time arrives.

6.3. Despite this, prior to the republication of the Award in October 2020, clause 12.3 of the Award (as it then was) expressly stated that any agreement to vary the regular pattern of work had to be made in writing before the variation occurred.

6.4. Given:

(a) the history of the relevant provision; and

(b) the requirement that the agreement must be recorded in writing; and

(c) the requirement that agreement must be reached before the varied hours commence;

the NRA's view is that taken as a whole the clause tends towards a conclusion that an agreement under clause 10.6 must be recorded in writing before the variation takes effect.

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

7.1. It is the NRA's view that 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.

8. How does an agreed variation to work 'additional hours' interact with the minimum engagement term?

8.1. Any additional hours agreed would be subject to the requirement in clause 10.9.

8.2. That is, if an employee agrees to work additional hours on a day on which they otherwise would not work, then they must be engaged for a minimum of three consecutive hours.

8.3. Conversely, if the employee agrees to work additional hours on a day on which the ordinarily work, then the total number of continuous hours – usual hours and additional hours – must be at least three.

8.4. The NRA also notes that where additional hours are worked on a day on which the employee ordinarily performs work, those additional hours would need to be continuous with the employee's usual hours in order to avoid a contravention of clause 15.3.

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

Application of overtime outside the agreed pattern of work

9.1. The NRA considers that 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.

9.2. 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.

9.3. In each case, it is open on an ordinary construction of the text to conclude that the words used refer only to the total number of hours worked, not when the work is performed.

> Example
>
> A part-time employee's agreed pattern of work is 15 hours a week, worked in a pattern of 7.5 hours each on Monday and Tuesday, 9:00AM to 5:00PM (with a 30-minute meal break).
>
> If the employee works 15 hours in a given week, but performs those hours on Thursday and Friday (assuming that none of the provisions in clause 10.10 are enlivened), is the employee entitled to overtime on those hours?
>
> The employee has still worked 15 hours, and therefore have not worked hours "in excess of the number of hours agreed under clause 10.5".

9.4. Notwithstanding this, the NRA accepts that:

(a) the approach generally applied in retail businesses is that overtime applies to hours of work performed outside of the agreed days and times; and

(b) this is consistent with the notion that the regular pattern of work is intended make part-time work predictable and secure.

Interaction between clause 10.5, 10.6, 10.10 and overtime provisions

9.5. A further question as to when overtime rates apply to part-time employees arises when it is recognised that clause 10.10(a) provides a means by which the employer may unilaterally vary a part-time employee's roster, but not the total number of hours, by the provision of notice.

9.6. We note that neither clause 10.8 nor clause 21.2(b) make any reference to clause 10.10 when describing the hours to which overtime rates apply.

9.7. If it is assumed that overtime rates apply to all hours worked outside of the days and times agreed under clause 10.5 or 10.6, then an employer may validly utilise the facility provided by clause 10.10(a) and still be required to pay overtime rates. In such a case, the employee would become disentitled to receive superannuation or leave accruals on those hours.

9.8. If, however, it is assumed that overtime applies only to the number of hours worked, not the days and times on which they are worked, then the protection in clause 10.10(a) (that the total number of hours cannot be changed by the provision of notice) becomes more meaningful.

The contradictory nature of clause 10.10(b)

9.9. Clause 10.10(b) provides that an employee's roster, but not the total number of hours, can be changed at any time by mutual agreement between the employer and the employee.

9.10. If clause 10.6 is read as allowing a variation to the "regular pattern of work", this meaning the days and times on which a part-time employee will work (i.e. their roster), without necessarily altering the total number of hours, then the effect of clause 10.10(b) would appear to be redundant.

9.11. However, if clause 10.6 is read as allowing only a variation to the total number of hours, and not the part-time employee's roster, then clause 10.10(b) would appear to prohibit any such agreement.

9.12. Finally, if clause 10.6 is read as allowing both a variation to the total number of hours and the part-time employee's roster, then 10.10(b) would similarly be both prohibitive of the first and redundant to the second.

The point and purpose of clause 10.10(c)

9.13. Finally, clause 10.10(c) appears to be a catch-all provision which, whether inadvertently or by design, contradicts clauses 10.6, 10.10(b), and 15.9(d).

9.14. Clause 10.6 places no limitations on how often the employer and the employee can agree to vary the regular pattern of work.

9.15. Clause 10.10(b) provides that the employer and the employee may agree to vary the employee's roster "at any time".

9.16. Clause 15.9(d) provides that, in cases of unforeseen operational requirements, the roster of an employee may be changed by agreement at any time before the employee arrives for work; again, there is no limitation on how often or how regularly this may occur.

9.17. Clause 10.10(c) appears to place a limit on all three of these provisions by requiring that the roster of a part-time employee may not be changed "week-to-week or fortnight-to-fortnight". This also infringes on any flexibility which may be afforded by the aforementioned provisions.

9.18. This also creates something of a paradox in that the part-time employee's roster cannot be changed week-to-week or fortnight-to-fortnight, but in the absence of any specific prohibition ***can*** be changed over a shorter or longer timeframe, such as day-to-day or month-to-month.

Yours sincerely,

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Senior Workplace Relations Advisor
National Retail Association

IN THE FAIR WORK COMMISSION

AM2021/7

IN THE MATTER OF:

APPLICATION TO VARY THE GENERAL RETAIL INDUSTRY AWARD 2020

BRIEF OUTLINE OF RESPONSES OF
RETAIL AND FAST FOOD WORKERS UNION (RAFFWU)

A. INTRODUCTION

1. The Retail and Fast Food Workers Union Incorporated ("**RAFFWU**") made submissions in the earlier hearings of the matter.

2. This Submission is responsive to the decision in [2021] FWCFB 1608 and the request for a brief outline of responses to the issues at [157] and [158] of that decision.

3. In relation to [156, (2)] which is noted in [157] we submit the Full Bench should vary the Award to make the change. We note the relevant term in the *Woolworths Supermarkets Agreement 2018* has been in place for many years with only minor modification and covers the largest retail employer in Australia. It is a suitable term to use as a basis for including in the Award. It is:

> **8.5. Permanent increase in contract hours or conversion to full-time employment**
>
> a. Once a part-time team member has been working additional hours for at least 1 year, the team member can elect to increase their contract hours by the average number of additional hours worked each week in the previous 52 weeks (excluding any hours worked as part of a fixed-term contract arrangement under clause 12, and excluding any time rostered outside of this Agreement).
> b. Woolworths will then increase the team member's contract hours and adjust the team member's standard roster to add the new hours at times and days suitable to the team member, subject to the operational needs of Woolworths.
> c. A team member can elect to increase their contract hours on a yearly basis at the end of each further 52-week period if the team member is continuing to accept additional hours on top of their contract hours.
> d. In exceptional circumstances that have given rise to a period where Woolworths does not have additional hours to roster (including a renovation or refurbishment, a natural disaster or the entry of new competition), Woolworths can delay the implementation of an increase to a team member's contract hours by up to 3 months.
> e. If, under this provision, a part-time team member works additional hours and over a period of time increases their contract hours to 36 hours per week, and they work 36 hours per week for 1 year, then the team member may elect to become a full-time team member working 38 hours per week.

4. In relation to [158] we provide a brief response to each issue below:

- *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)?*

Yes

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

Yes

- *In the context of clause 10 as a whole, does clause 10.6 permit an agreed ad hoc or temporary variation to the regular patten of work agreed under clause 10.5?*

Yes

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?

Yes

- *Must a clause 10.6 variation be 'in writing'?*

Yes

- *Does 'in writing' include by electronic means, such as a text message?*

Yes, but only to the extent the written variation agreement complies with the Award and is, in fact, an agreement.

- *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 as worked?*

Yes

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

All clause 15 elements, that apply to part-time employees, apply to any agreement under clause 10.6.

- *How does an agreed variation to work 'additional hours' interact with the minimum engagement term?*

The Fair Work Commission moved the minimum engagement term as part of its PLED consideration from what is now 10.5. The minimum engagement term stands as a fundamental term and any 10.6 agreement must comply with clause 10.9.

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

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 (d) 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.

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.

Retail and Fast Food Workers Union

19 April 2021

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)

Conference to discuss the meaning of clause 10 of the Retail Award and the provisional views of the Full Bench set out in [2021] FWCFB 1608

Shop Distributive and Allied Employees' Association outline of responses

19 May 2021

The Commission on the 24th March issued a decision[1] in relation to the Part time Provisions in the General Retail Industry Award 2020 (**GRIA**). At paragraph 158 of this decision a number of questions were posed for parties to provide answers The Commission then proposed that these questions should be addressed by the parties by way of a conference in the revised Conference Information for Parties (31 March 2021)

This information note stated:

> To facilitate the process, those parties seeking to be involved are requested to provide to the Commission in advance of the first conference **a brief outline of responses** to the issues set out at paragraphs [157] and [158] of the Full Bench decision. **This is to be provided to AMOD@fwc.gov.au by no later than 2.00pm (AEST), Monday 19 April 2021.**

Below is the SDA's brief outline for assistance to the Commission.

In addressing the issues set out by the Commission the SDA's position is to ensure that Part time employees are protected from rostering that treats them like casuals. Part time employees are to have a surety of hours and when those hours are to be worked.

Below are the SDA's brief answers to the questions posed in the Full Bench decision. The SDA has numbered the questions from 1 to 9 for easier reference.

1. Q: *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*

[1] [2021] FWFCB 1608

that the part-time employee may work additional ordinary hours (paid at the employees' ordinary time rate)?

A: Yes. Clause 10.6 makes provision for a variation of the hours which were agreed under clause 10.5 at the commencement of employment. In effect, it makes clear that the employer and employee are not forever bound by the initial agreement made at the commencement of employment under 10.5.

2. Q: *Does clause 10.6 permit an agreed permanent variation to the regular pattern of work agreed under clause 10.5?*

A: Yes. That it was it says in terms.

3. Q: *In the context of clause 10 as a whole, does clause 10.6 permit an agreed ad hoc or temporary variation to the regular patten 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?

A: Yes. An ad-hoc or temporary variation is permitted. While the words of clause 10.6 which refer to an agreement "to vary the regular pattern of work" might be read as being confined to an ongoing variation to the regular pattern, that is not necessarily the case. A variation to the regular pattern could also be a one-off variation. Given the ambiguity it is permissible to have regard to the decision of the Full Bench when the predecessor to 10.6 was inserted into the award following the ministerial request. In the decision (2010) AIRCB 305 at paragraph 9 the Full Bench stated:

> *[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.*

This appears to make clear that what was envisaged included a one-off or temporary variation, particularly because of the reference to the employment of part-time employees rather than casual employees.

As to the additional parts of this question the answers are as follows. The increase of the number of hours to be worked on a particular day can be subject to 10.6 variation. The days of the week can be varied by agreement. Start and finishing times can be varied by agreement. Meal breaks can be varied by agreement (subject to compliance with the provisions of the award otherwise).

4. Q: *Must a clause 10.6 variation be 'in writing'?*

A: Yes. A clause 10.6 variation must be in writing as it states in the sub-clause.

5. Q: *Does 'in writing' include by electronic means, such as a text message?*

A: Clause 10.6 requires the agreement to be in writing. This means that the employee's assent must be in writing. Under clause 10.7 the agreement must be kept by the employer and a copy given to the employee. This suggests strongly that the agreement must be constituted by a document. It is unlikely that an exchange of text messages would satisfy this requirement. However, there would seem to be no reason in principle why an exchange of text messages would not be sufficient to evidence agreement. In any event, a copy must be created and retained and given to the employee (electronic or physical). However, it is unclear how an exchange of text messages could satisfy the requirement for record keeping.

6. Q: *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 as (sic) worked?*

A: Yes. Clause 10.6 is specifically confined to agreements "with effect from a future date or time".

7. Q: *To what extent does clause 15 apply to variations agreed under clause 10.6? Which elements of clause 15 apply?*

A: 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.

8. Q: *How does an agreed variation to work 'additional hours' interact with the minimum engagement term?*

A: The minimum engagement to continues to apply. An agreed variation must be for a minimum of three hours unless the hours to be worked are contiguous with hours already being worked.

9. Q: *In what other ways does clause 10 give rise to uncertainty?*

A: 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 provision10.5, that any variation had to be in writing. This was deleted in the PLED 2020 GRIA.

Australian Industry Group

Application to vary the General Retail Industry Award 2020

Further Submission

(AM2021/7)

19 April 2021

AM2021/7 APPLICATION TO VARY THE GENERAL RETAIL INDUSTRY AWARD 2020

FURTHER SUBMISSION RELATING TO THE 20 APRIL 2021 CONFERENCE

INTRODUCTION

1. The Australian Industry Group (**Ai Group**) files this brief submission in response to various questions identified by the Full Bench at paragraph 158 of its decision of 24 March 2021.[1]

2. The submission is provided for the purposes of the conduct of the conference on 20 April 2021.

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)?

3. Yes, clause 10.6 permits a change to a regular pattern of hours of work agreed under clause 10.5. This may include a variation to permit the employee to work additional ordinary hours that are paid at the employee's ordinary hourly rate.

4. For completeness, we note that neither clause 10.5 or clause 10.6 expressly deal with whether the additional hours are ordinary hours or over-time hours.

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

5. Yes

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

[1] [2021] FWCFB 1608

work? - vary the start and finish times? - vary when meal breaks are taken and their duration?

6. The short answer to each of the above questions is yes, although the combined effect of the structure of clause 10 and the wording of clause 10.5 arguably renders the availability of this flexibility less than apparent.

7. Clause 10.5 requires parties to agree on a "regular pattern of work". The agreement must set out the specific matters listed at 10.5(a) to 10.5(b).

8. Clause 10.6 provides that an employer and employee may, "…agree to vary the regular pattern of work agreed under clause 10.5…".

9. It should be uncontroversial that clause 10.6 permits the parties to agree to vary the regular pattern of hours on a permanent basis. That is, it permits the parties to agree to change the regular pattern of work to a different regular pattern of work on an ongoing basis. This may include permitting an agreement to permanently vary any of the matters identified in clause 10.5.

10. Clause 10.6 may also be read as permitting parties to agree to vary the regular pattern of work on an ad hoc basis. The text does not appear to prevent an employer and employee from agreeing that the variation will only apply for a temporary period or on an ad hoc basis. Rather, the provision is cast in a sufficiently broad manner so as to allow for this. Relevantly, the clause merely provides that the parties may 'vary' the regular pattern of work.

11. We have addressed relevant contextual considerations arising from the history of the provision at paragraphs 6 to 22 of our 16 March 2021 submission that support our contention.

Must a clause 10.6 variation be 'in writing'?

12. Yes, the second sentence of clause 10.6 expressly requires that agreement must be in writing.

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

13. Yes, although the clause does not expressly indicate this.

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 as worked?

14. Yes, the variation agreement must be recorded in writing before the additional hours are worked.

15. The first sentence of clause 10.6 permits the parties to agree to vary the regular pattern of work contemplated by clause 10.5, "…with effect from a future date or time". The second sentence provides that, "Any such agreement must be in writing". (emphasis added).

16. Given that the agreement contemplated by clause 10.6 can only be about an arrangement applying from a prospective date or time, and that the agreement must be in writing, there is no capacity for the parties to attend to the setting out of the new arrangements in writing after they have been agreed or implemented. The clause does not permit the mere recording of an agreement to change the pattern of work in writing, as suggested by the question. The agreement itself must be in writing.

17. The approach adopted in clause 10 can be contrasted with that taken in comparable provisions in the *Fast Food Industry Award 2010*:

> **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:
>
> **(a)** the number of hours worked each day;
>
> **(b)** which days of the week the employee will work;
>
> **(c)** the actual starting and finishing times of each day;
>
> **(d)** that any variation will be in writing, including by any electronic means of communication (for example, by text message);
>
> **(e)** that the daily engagement is a minimum of 3 consecutive hours; and
>
> **(f)** the times of taking and the duration of meal breaks.
>
> **12.3** The employer and employee may agree to vary an agreement made under clause 12.2 in relation to a particular rostered shift provided that:
>
> **(a)** any agreement to vary the regular pattern of work for a particular rostered shift must be recorded at or by the end of the affected shift; and
>
> **(b)** the employer must keep a copy of the agreed variation, in writing, including by any electronic means of communication and provide a copy to the employee, if requested to do so

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

18. Clause 15 regulates ordinary hours of work and rostering arrangements. It serves a different purpose to clause 10, although there is some overlap between the subject matter dealt with in the respective provisions.

19. Clauses 15.1 to 15.5 set the parameters within which ordinary hours may be worked for all types of employees. Clause 10.6 does not permit the parties to reach agreement for the working of ordinary hours outside of these arrangements.

20. Clause 15.6 *Full-time employees* relates to full-time employees. It does not apply to part-time employees and as such has no relevance to variations agreed under clause 10.6.

21. Clause 15.8 *Employees regularly working Sundays*, applies to part-time employees. There is the possibility for a tension to arise in practice between the operation of clauses 10.6 and 15.8(a) if an agreement under clause 10.6 causes an employer to contravene clause 15.8(a). If the agreement under clause 10.6 has been entered into at the written request of the employee no difficulty arises given the operation of clause 15.8(a).

22. 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.

23. It must be observed that 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.

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

24. Any variation must not conflict with the requirements of clause 10.9, which sets minimum engagements for part-time employees. For example, if an employee agrees that they will vary the employees regular pattern of work so that the individual undertakes work on another day beyond what was agreed under clause 10.5 the employee must be engaged for a minimum of 3 consecutive hours on that day.

Newsagents Association
of NSW & ACT Limited
NANA since 1891

19 April 2021

Modern Award Review Team
Fair Work Commission

By email to: amod@fwc.gov.au

Subject: AM2021/7 – Award flexibility – General Retail Industry Award 2020
Response to matters raised in [2021] FWCFB 1608

The Newsagents Association of NSW and ACT Ltd offers the following comments in response to matters raised in [2021] FWCFB 1608. Our comments are made on our own behalf and also on behalf of the Australian Newsagents Federation trading as Australian Lotteries and Newsagents Association.

We address the questions in the order in which they appear in [2021] FWCFB 1608 and the Conference Information for Parties (Further Revised 31 March 2021).

1. 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)?

   ANSWER: Yes. The requirements of 10.6 are explicit and clear. However, the variation must be to the "regular" pattern of work.

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

   ANSWER: Yes. The requirements of 10.6 are explicit and clear. The variation must be to the "regular" pattern of work.

3. 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?

   ANSWER: Neither clauses 10.5 nor 10.6 limit an ability to achieve a temporary variation to the regular pattern of work, as long as the change is to the "regular" pattern of work.

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If a temporary variation can be considered a change to the "regular" pattern of work, and if a variation to the regular pattern of work agreed to at 10.5 is achieved by an agreement under 10.6, it should be safe to assume that the 10.6 agreement (which is entered into post engagement) replaces or overrides the original agreement at engagement reached under 10.5.

Clause 10.10 at (a) and (b) may restrict the ability to achieve the flexibility required if it is considered that the temporary clause 10.6 agreement does not replace the original 10.5 agreement, due to the 10.6 agreement being temporary in nature.

4. Must a clause 10.6 variation be 'in writing'?

   ANSWER: Yes. 10.6 is explicit in its wording:

   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. Does 'in writing' include by electronic means, such as a text message?

   ANSWER: Yes.

   The Electronic Transactions Act 1999 (Cwth) at **4 Simplified outline** (and elsewhere) allows for the use of electronic methods of communications. However, there may be limitations under the Electronic Communications Act 1999 in that the recipient of an electronic communication may be required to consent to the notification being given in such a manner.

   See Appendix 1.

6. 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 as worked?

   ANSWER: No.

   10.6 states:

   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.

   Unlike 10.5 which states the agreement must be in writing at the time of engaging a part-time employee, 10.6 does not contain any time limitation on when the agreement to vary the 10.5 agreement must be put in writing.

   10.10 (a) requires notice in writing before a change to the roster. For an in advance written to apply to additional hours worked as a result of a temporary variation agreement, it must first be determined if the temporary variation agreement is considered to be a change to the roster. There is no clarity as to such a requirement in either Clause 10 or Clause 15.

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

   ANSWER: Rostering requirements for part-time employees arise under both clauses 10 and 15.

   Where a clause 10.6 agreement covers an "ongoing" change to the regular pattern of work, the requirements of clauses 10 and 15 will apply as they relate to part-time employees.

   As to whether the rostering requirements of clauses 10 and 15 apply to a temporary variation agreement will depend upon whether the temporary variation agreement constitutes a change to the rostered hours.

8. How does an agreed variation to work 'additional hours' interact with the minimum engagement term?

   ANSWER: 10.9 states:

   10.9 The minimum daily engagement for a part-time employee is 3 consecutive hours.

   A part-time employee must be afforded at least 3 consecutive hours to be worked on any day upon which they are engaged to work.

   For the "additional hours" to be considered ordinary hours the conditions of 15.3 must apply.

   15.3 states:

   15.3 Ordinary hours of work on any day are continuous, except for rest breaks and meal breaks as specified in 16 – Breaks.

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

   ANSWER: Uncertainty and ambiguity arises under clause 10 due to the use of the following terms:

   - ….. a regular pattern of work …..
   - ….. the regular pattern of work …..
   - The roster ….. the number of hours agreed …..

   Clause 15 also includes:

   - ….. reasonable additional hours …..

   The NRA (and to a lesser degree ABI and NSW Business Chamber) has canvased an extensive list of matters which give rise to ambiguity. We agree with the views they have expressed.

Ian Booth
Chief Executive Officer

4 Simplified outline

The following is a simplified outline of this Act:

- For the purposes of a law of the Commonwealth, a transaction is not invalid because it took place by means of one or more electronic communications.
- The following requirements imposed under a law of the Commonwealth can be met in electronic form:
  - (a) a requirement to give information in writing;
  - (b) a requirement to provide a signature;
  - (c) a requirement to produce a document;
  - (d) a requirement to record information;
  - (e) a requirement to retain a document.
- For the purposes of a law of the Commonwealth, provision is made for determining the time and place of the dispatch and receipt of an electronic communication.
- The purported originator of an electronic communication is bound by it for the purposes of a law of the Commonwealth only if the communication was sent by the purported originator or with the authority of the purported originator.
- Part 2A contains provisions applying to contracts involving electronic communications, including provisions (relating to the internet in particular) for the following:
  - (a) an unaddressed proposal to form a contract is to be regarded as an invitation to make offers, rather than as an offer that if accepted would result in a contract;
  - (b) a contract formed automatically is not invalid, void or unenforceable because there was no human review or intervention;
  - (c) a portion of an electronic communication containing an input error can be withdrawn in certain circumstances;
  - (d) the application of certain provisions of Part 2 to the extent they do not apply of their own force.

Source: Electronic Transactions Act 1999

IN THE FAIR WORK COMMISSION

IN THE MATTER OF:

An application pursuant to s 157 of the Fair Work Act 2009 (Cth) – Fair Work Commission may vary etc. modern awards if necessary, to achieve modern awards objective

Award Flexibility – Retail Sector
(AM2021/7)

GENERAL RETAIL INDUSTRY AWARD 2020
[MA000004]

BY:

The Shop, Distributive and Allied Employees' Association ("**SDA**"), Australian Workers' Union, and Master Grocers Australia Limited ("**MGA**")

(collectively, "**the Applicants**")

MGA'S OUTLINE OF RESPONSES TO ISSUES SET OUT IN PARAGRAPHS 157 AND 158 OF THE FULL BENCH'S DECISION, DATED 24 MARCH 2021

Date of Document:	19 April 2021	Solicitors Code:	–
Filed on behalf of:	the Applicants	DX:	–
Prepared by:	MGA	Telephone:	(03) 9824 4111
		Ref:	AM2021/7
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Introduction

1. MGA is a national employer industry association representing the independent grocery industry and other retail outlets including timber and hardware, in all States and Territories of Australia. The businesses range from small to medium and large enterprises and they make a significant contribution to the retail industry accounting for approximately $16 billion in retail sales.

2. COSBOA represents thousands of small businesses across Australia with significant numbers of stores in the retail industry. Most of these employers have between 2 and 14 employees

and they suffered considerable losses during the pandemic. They are now in recovery mode and are seeking to provide more hours of work to employees.

3. There are thousands of small retail businesses across Australia that use the General Retail Industry Award (Retail Award) and most of these are small businesses employing less than 15 employees. Those who have survived the recent pandemic are desperately trying to recover their businesses and where possible provide additional hours of employment. Many employers employ their employees on a casual basis but many also utilise permanent part time employees. These businesses often wish to provide additional part time hours of employment and employees want these additional hours. However, employers want to be assured that such additional hours of work can be provided at the ordinary rate of payment and in most cases, employees are willing to accept this rate of payment. Such an arrangement requires clarity in the industrial instrument that determines the payment for hours worked, namely the Retail Award. Currently, MGA submits, there is uncertainty in the Retail Award regarding the provision of payment for any additional hours of work provided to part time employees and there have been many instances of misunderstanding of the terms of the Retail Award by employers which have resulted in large back payments of wages.

4. MGA recognises that the Retail Award already provides a mechanism for the provision of additional hours of work to part time employees at the ordinary rate of pay but that the provisions of the Retail award are confusing and require clarification in order to avoid the errors that have occurred in the past. MGA welcomes the opportunity to make these brief responses to the issues raised and referred to in paragraphs 157 and 158 of the FWCFB decision 2021, as to the meaning and intent of Clause 10 of the Retail Award and the provisional view regarding the variation of the Retail Award.

5. **MGA Responses to issues in paragraph 158:**

   a. **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 10.5 so that the part time employee may work additional ordinary hours paid at the employees' ordinary time rate?**

      MGA's comment: Clause 10.6 allows the parties to vary the regular pattern of work as defined in Clause 10.5. However, the variation does not *expressly* refer to any agreement to include the additional hours of work at the ordinary rate of pay.

      Additionally, the issue of payment for the change of a rostering arrangement does not arise as presumably the number of hours would remain the same.

   b. **Does Clause 10.6 permit an agreed *permanent* variation to the regular hours of work agreed under Clause 10.5?**

      MGA's comment: There appears to be no reason why the parties cannot agree to a permanent variation to the original agreement to work a specific number of hours to occur at a future date and it is appropriate that the agreement should be in writing.

The words imply that the parties could agree to additional number of hours on an on-going basis.

c. Does Clause 10.6 permit an agreed ad hoc or temporary variation to the regular pattern of work as agreed?

MGA's comment: There does not appear to be any barrier to the parties reaching an agreement to vary the regular pattern of work on an ad hoc basis, including the number of hours, the days of the week, the start and finish times and meal breaks, but currently the changes need to be agreed in writing.

The ambiguity here in Clause 10.6 is whether the employer needs to issue a subsequent variation in writing following an ad hoc or temporary change, to have the employee return to their original agreement.

d. Must a Clause 10.6 variation be in writing?

MGA's comment: It would appear throughout Clause 10 that there is a requirement for a written agreement between the parties. This raises the question of what constitutes a 'written agreement'?

e. Does 'in writing' include 'electronic means'?

MGA's comment: The use of 'electronic means' has become increasingly common as a method of conveying an 'agreement' between parties. Whilst currently there is no provision in the Award for such a measure, yet it is a simple and effective mechanism for reaching a valid agreement between parties in the 21st century. The question of whether there is a requirement to have a contractual arrangement could be made out, but whether this is a requirement in this context is arguable.

f. Does 'in writing' include a text message?

MGA's comment: Whether 'in writing' includes a text message, unfortunately, the Retail Award is unclear on this point. However, prompt action is often appropriate to provide confidence that at least a temporary agreement has been reached and that the contents of such agreement are swiftly conveyed to those who need to know, such as payroll. A prompt record of any increases to hours of work in most cases will ensure payment is made in the appropriate wage cycle and at the right pay. This method of communication is increasingly common and can be utilised and promptly acted upon.

g. 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 worked?

MGA's Comment: Currently, the arrangements for additional hours of work in excess of the agreed number of hours must be paid at the overtime rates (Clause 10.8). If the pattern of work based on the same number of hours is to change and this arrangement is to take place at a future date, then presumably the written agreement to provide for such a change of dates would have to be agreed to at that time.

h. To what extent does Clause 15 apply to variations agreed under Clause 10.6? Which elements of Clause 15 apply?

MGA's Comment: Technically, the whole of Clause 15 should apply to and harmoniously interact with Clause 10.6, however, that may not be the case.

Clauses 15.1 to 15.5 do not impact the operation of Clause 10.6.

Clause 15.6 is irrelevant as it relates to full time employees only.

Clause 15.7 sets out rostering arrangements and Clause 15.8 outlines the rules surrounding employees regularly working Sundays. The conditions of these two Clauses must be adhered to if the regular pattern of work is varied under Clause 10.6.

Finally, Clause 15.9, which relates to notification of rosters. It appears that Clause 10.6 does not expressly meet the requirements of Clauses 15.9(a) and (b) as the variation of the roster would not have been published in line with the Retail Award's requirements if the change is temporary. Additionally, Clause 10.6 seems to contradict the operation of Clause 15.9(i), since a variation under Clause 10.6 ensures that the additional hours are paid at the ordinary rate, instead of the overtime penalty.

i. How does an agreed variation to work 'additional hours' interact with the minimum engagement term?

MGA's Comment: An agreed variation to work additional hours under Clause 10.6 does not conflict with Clause 10.9. The minimum engagement term of Clause 10.9 merely sets out the least number of hours that a part time employee could work per week, being three hours per shift. It is a safeguard for employees to ensure they are guaranteed a certain number of hours per week, vis-à-vis casuals.

j. In what other ways does Clause 10 give rise to uncertainty?

MGA's comment: 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".

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.

6. We thank the Fair Work Commission for the opportunity for making these submissions in further support of the application.

Master Grocers Australia Limited
19 April 2021

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THE AUSTRALIAN WORKERS' UNION STRONGER TOGETHER
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Fair Work Act 2009

FAIR WORK COMMISSION

s. 157 – FWC may vary etc. modern awards if necessary to achieve modern awards objective

AM2021/17 – Award flexibility – *General Retail Industry Award 2020*

AWU BRIEF OUTLINE OF RESPONSES AHEAD OF CONFERENCE

BACKGROUND

1. On 24 March 2021, the Award Flexibility Full Bench issued a Decision[1] concerning part-time conditions in the *General Retail Industry Award 2020* (**"GRIA"**).

2. On 31 March 2021, the Fair Work Commission issued a further revised version of a document headed 'Conference Information for Parties' (**Conference Information Document"**) in relation to Matter AM2021/7.

3. The Conference Information Document requests that interested parties provide a brief outline of responses to nine questions posed by the Full Bench in paragraph [158] of the 24 March 2021 Decision.

4. Brief responses from The Australian Workers' Union (**"AWU"**) to the nine questions are provided below.

1 - 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)?

5. Clause 10.6 permits the regular pattern of work agreed at engagement under clause 10.5 to be varied via a written agreement. If the regular pattern of work is varied to the effect that the regular ordinary hours of work are increased, the additional agreed ordinary hours would be paid at ordinary time rates.

[1] [2021] FWCFB 1608.

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

6. Yes.

 # 3 - In the context of clause 10 as a whole, does clause 10.6 permit an agreed ad hoc or temporary variation to the regular patten 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?

7. 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.

8. 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.

 # 4 - Must a clause 10.6 variation be 'in writing'?

9. Yes.

 # 5 - Does 'in writing' include by electronic means, such as a text message?

10. What constitutes a "written" agreement in the context of electronic communications is not clear from the words in the GRIA. The wording in clause 10.7 does not sit comfortably with agreements being struck via text message.

 # 6 - 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 as worked?

11. The AWU does not consider it can appropriately answer this question given the uncertainty concerning whether temporary variations are permitted.

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

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

 # 8 - How does an agreed variation to work 'additional hours' interact with the minimum engagement term?

13. An employee must be paid for a minimum of three consecutive hours per daily engagement. This entitlement cannot be reduced by agreement under clause 10.5 or 10.6.

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

14. 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*[2] and cited by the Full Bench in paragraph [141] of its 24 July 2021 Decision.

15. 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…"[3]

19 APRIL 2021

[2] [2017] FWCFB 3541.
[3] Ibid at [97].

IN THE FAIR WORK COMMISSION

AM2021/7 – AWARD FLEXIBILITY – GENERAL RETAIL INDUSTRY AWARD 2020

IN THE MATTER OF:

APPLICATION TO VARY A MODERN AWARD BY:

THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION

AND

AUSTRALIAN WORKERS UNION

AND

MASTER GROCERS AUSTRALIA LIMITED

FOUR YEARLY REVIEW OF MODERN AWARDS
GENERAL RETAIL INDUSTRY AWARD 2010

OUTLINE OF SUBMISSIONS OF THE AUSTRALIAN RETAILERS ASSOCIATION

1. These submissions address the questions of the Full Bench outlined at paragraph [158] of its decision in [2021] FWCFB 1608, having regard also to the submissions of other parties and the matters raised in the conference before Commissioner Hampton on 20 April 2021. The submissions also address one aspect of the Full Bench's decision.

Full Bench Questions

2. It is apparent that there is consensus between all parties in relation to the following matters:

   (a) Clause 10.6 permits 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 employee's ordinary time rate).

   (b) Clause 10.6 permits an agreed permanent variation to the regular patten of work agreed under clause 10.5.

   (c) In the context of clause 10 as a whole, clause 10.6 permits an agreed ad hoc or temporary variation to the regular patten of work agreed under clause 10.5.

   (d) Agreed variations can:

      i. increase the number of ordinary hours to be worked on a particular day;

      ii. vary the days of the week on which the employee will work;

      iii. vary the start and finish times; and

      iv. vary when meal breaks are taken and their duration.

   (e) A clause 10.6 variation be 'in writing'.

(f) Save for some initial equivocation from the SDA, and a view from the MGA that the award is unclear on this point, 'in writing' in the context of clause 10.6 includes by electronic means, such as a text message.

3. The matters raised by the Full Bench about which there remains some controversy between the parties are:

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

   (b) To what extent does clause 15 apply to variations agreed under clause 10.6?

   (c) Which elements of clause 15 apply?

   (d) How does an agreed variation to work 'additional hours' interact with the minimum engagement term?

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

4. In relation to these matters, the ARA is of the view that:

   (a) under clause 10.6, a variation agreement must be recorded in writing before the additional hours are worked;

   (b) clause 15 applies to variations agreed under clause 10.6 in the same way that it applies to agreements reached under clause 10.5;

   (c) the elements of clause 15 which apply are the same as those that apply to agreements reached under clause 10.5;

   (d) the total number of hours worked on a particular shift, as a combination of regular and additional hours, must be at least a minimum of 3 consecutive hours;

   (e) the ARA does not consider other provisions of clause 10 to be uncertain.

Submissions of other parties

5. The ARA notes that a number of parties in their written submissions raised a concern regarding various elements of clause 10.10. In their written submissions, and orally during the conference before Commissioner Hampton, the Shop, Distributive and Allied Employees Association (**SDA**) contends there is an inconsistency between clause 10.10(a) and clauses 10.5 and 10.6, and further contends that clause 10.10(a) should have been removed from the award at the same time that clause 10.6 was introduced.

6. The SDA's contention in this regard is without foundation. The SDA appears to contend that clause 10.6 (as it is now) represented a substantial change to the terms of the award such that it removed the need for, or utility of, clause 10.10(a). The difficulty with this proposition is that the part-time provisions of the award from their very first iteration contemplated the capacity to make an agreed variation to the regular pattern of work and also for the employer to alter the days and hours of that work (but not the total number of hours) through rostering provisions. The Information Note prepared by the Commission setting out the history of the part-time provisions of the award identifies the terms of the award as first made on 19 December 2008. Clause 12.3 of the award as made allowed for written agreements to vary

hours of work. Clause 12.8 allowed for a part-time employees roster (being the days of work. hours on those days etc), but not the agreed number of hours, to be altered by the giving of notice (or by mutual agreement).

7. The history of the coexistence of the two terms goes back further than this. In making the award on 19 December 2008, the Australian Industrial Relations Commission said:

   We have generally followed the main federal industry awards where possible and had regard to all other applicable instruments.[1]

8. The main federal industry award in operation at that time was the *Shop, Distributive and Allied Employees Association - Victorian Shops Interim Award 2000*. Clause 10.3 of that award, which was in familiar terms, provided, inter alia:

   10.3 Regular part-time employees

   10.3.1 *An employer may employ regular part-time employees in any classification in this award.*

   10.3.2 *A regular part-time employee is an employee who:*

   10.3.2(a) *works less than full-time hours of 38 per week; and*

   10.3.2(b) *has reasonably predictable hours of work.*

   10.3.3 *At the time of first being employed, the employer and the regular 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;*
   - *variation must be in writing;*
   - *minimum daily employment is three hours;*
   - *all time worked in excess of agreed hours is paid at the overtime rate; and*
   - *the times of taking and the duration of meal breaks.*

   10.3.4 *Any agreement to vary the regular pattern of work must be made in writing before the variation occurs.*

   10.3.5 *The agreement and variation to it must be retained by the employer and a copy given by the employer to the employee.*

[1] [2008] AIRCFB 1000 at [286]

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

10.3.7 *An employee who does not meet the definition of a regular part-time employee and who is not a full-time employee will be paid as a casual employee in accordance with 10.4.*

10.3.8 *A regular employee employed under the provisions of this clause must be paid for ordinary hours worked at the rate of 1/38th of the weekly rate prescribed for the class of work performed.*

10.3.9 Rosters

10.3.9(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 fourteen days or in the case of an emergency 48 hours, by the employer to the employee.*

10.3.9(b) *Rosters shall not be changed from week to week, or fortnight to fortnight, nor shall they be changed to avoid any award entitlements.*

10.3.9(c) *No part-time employee may be employed on more than five days per week other than at the request in writing of the employee concerned.*

9. What the SDA appears to be seeking is a variation of the award to remove clause 10.10(a) and with that remove a right that employers have to vary the rosters of part-time employees, but not the number of hours, with appropriate notice. This is a substantial change that is strongly opposed by the ARA and which should be rejected by the Commission in the absence of evidence of the need for such a variation.

10. 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.

11. What the SDA appears to be contending is that part-time employees should be employees whose hours are fixed. This is inconsistent with the nature of part-time employment and the way part-time employment is generally regulated in modern awards in the retail industry and should be rejected.

Full Bench Decision

12. The ARA seeks to comment on one aspect of the Full Bench's decision. At paragraph [140] the Full Bench says of the proposed variation of ABI, the ARA and the NRA:

[140] It appears from this extract that the purpose of the standing written agreement is to constitute some form of standing consent whereby the employee 'agrees' to work additional hours offered by their employer, subject only to a right to refuse a particular offer on a case by case basis. To the extent that this is the intent of the provision it appears to be inconsistent with the general way in which part-time work is regulated in modern awards.

13. The ARA agrees that the purpose of the standing written agreement is to constitute standing consent. We do not agree that it represents an agreement which is subject only to a right to refuse a particular offer on a case by case basis. The agreement is also subject to a largely unfettered right of the employee to withdraw their standing consent at any time (save that if they do so during a roster period, the withdrawal takes effect at the commencement of the next roster period).

14. The ARA disagrees that the provision appears, or is, inconsistent with the general way in which part-time work is regulated in modern awards. The ARA contends that the provision is consistent with the regulation of part-time employment in modern awards. The essential element of part-time employment regulation under modern awards is reasonable predictability with respect to their hours of work. The provision retains this reasonable predictability. The part-time employee will still have a regular pattern of work. The standing consent provision alters only the administration attached to working additional hours by substantially reducing that administration. The employee maintains ultimate control over whether they work any additional hours and also maintains control over whether they remain under a standing consent arrangement.

Australian Retailers Association
23 April 2021

Australian Industry Group

Application to vary the *General Retail Industry Award 2020*

Submission

(AM2021/7)

23 April 2021

AM2021/7 APPLICATION TO VARY THE *GENERAL RETAIL INDUSTRY AWARD 2020*

1. This submission is made by the Australian Industry Group (**Ai Group**) further to proceedings before the Fair Work Commission (**Commission**) on 20 April 2021. At the conclusion of those proceedings, Commissioner Hampton advised the parties that they would be afforded an opportunity to file a further submission in which:

   (a) The parties may confirm their position in relation to the matters discussed during the aforementioned proceedings; and

   (b) The parties may respond to the submissions filed by other interested parties on 19 April 2021.

2. Ai Group advances the following submissions in relation to the above.

3. *First*, there appears to be general consensus between the parties that the existing clauses 10.5 and 10.6 of the *General Retail Industry Award 2020* (**Award**) permit an employer and part-time employee to agree that the employee will work additional ordinary hours and that such time will be paid at ordinary rates (not overtime). Most of the parties also appear to agree that such an agreement could operate on an ad hoc or ongoing basis.

4. There would in our submission be merit in varying the Award to make this clear.

5. *Second*, 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.

6. *Third*, it remains Ai Group's position that it is not *necessary* that the Award include a mechanism through which a part-time employee can request a permanent increase to their ordinary hours of work, for the reasons expressed in our submission of 4 March 2021 at paragraphs 48 – 55. This is particularly so if the Award is not varied to introduce greater flexibility concerning the ordinary hours of work of part-time employees. There is clearly no justification for introducing such a scheme in the context of the extant Award provisions. There is no material before the Commission that might establish a basis or justification for such a variation to the Award.

7. Further, the provision proposed by RAFFWU, which is found in the *Woolworths Supermarkets Agreement 2018* would be inappropriate for inclusion in the minimum safety net. It does not afford the employer any ability to refuse an employee's election or request to increase their ordinary hours of work. The significant adverse impact that this could have on business is self-evident.

8. *Finally*, interested parties should, in our respectful submission, be given an opportunity to make submissions in relation to any variation that the Commission proposes to make to the Award in relation to the matters being considered in these proceedings.