



# DECISION

*Fair Work Act 2009*

s 158—Application to vary or revoke a modern award

s 160—Application to vary a modern award to remove ambiguity or uncertainty or correct error

## Application by The Australian Retailers Association

(AM2024/9)

## Variation on the Commission’s own motion

(AM2023/17)

## GENERAL RETAIL INDUSTRY AWARD 2020

[MA000004]

Retail industry

JUSTICE HATCHER, PRESIDENT

DEPUTY PRESIDENT CLANCY

COMMISSIONER MATHESON

SYDNEY, 2 APRIL 2024

*Proposed variation on the Commission’s own motion – separate application by The Australian Retailers Association – General Retail Industry Award 2020 clause 15.2(c) – ‘establishment’ v ‘retailer’.*

### Introduction and background

[1] Clauses 15.1 and 15.2 of the *General Retail Industry Award 2020*<sup>1</sup> (Retail Award) currently provide:

- 15.1 Ordinary hours may be worked by an employee on the day specified in column 1 during the span of ordinary hours specified in column 2 of **Table 2—Span of hours**.

**Table 2—Span of hours**

| <b>Column 1<br/>Days</b>    | <b>Column 2<br/>Span of hours</b> |
|-----------------------------|-----------------------------------|
| Monday to Friday, inclusive | 7.00 am – 9.00 pm                 |
| Saturday                    | 7.00 am – 6.00 pm                 |
| Sunday                      | 9.00 am – 6.00 pm                 |

15.2 However, ordinary hours may be worked:

- (a) from 5:00 am in a newsagency; or
- (b) until midnight in a video shop; or
- (c) until 11.00 pm if the trading hours of the establishment extend beyond 9.00 pm on a Monday to Friday or 6.00 pm on a Saturday or Sunday.

[2] On 17 July 2023, the Commission commenced a matter (AM2023/17) on its own motion pursuant to s 160(2)(a) of the *Fair Work Act 2009* (Cth) (FW Act), proposing to vary clause 15.2(c) of the Retail Award to replace the word ‘establishment’ with ‘retailer’. This was commenced following correspondence from The Australian Industry Group (Ai Group) stating that it considered the substitution of ‘establishment’ for ‘retailer’ as part of a variation which took effect on 1 October 2020<sup>2</sup> and which replaced the entirety of the terms of the Retail Award (2020 variation) inadvertently made the clause ambiguous or uncertain. The 2020 variation occurred as part of the Commission’s plain language redrafting process. Prior to this variation, the analogous clause provided:

- (iii) in the case of retailers whose trading hours extend beyond 9.00 pm Monday to Friday or 6.00 pm on Saturday or Sunday, the finishing time for ordinary hours on all days of the week will be 11.00 pm.

[3] On 6 February 2024, The Australian Retailers Association (ARA) filed an application (matter AM2024/9) pursuant to s 158(1) and/or s 160(2)(c) of the FW Act to vary several clauses of the Retail Award. Proposed variation E in the ARA’s application includes the replacement of ‘establishment’ with ‘retailer’ as in matter AM2023/17, but also adds ‘on all days of the week’ immediately after ‘11.00 pm’:

- (c) until 11.00 pm on all days of the week if the trading hours of the ~~establishment~~ retailer extend beyond 9.00 pm on a Monday to Friday or 6.00 pm on a Saturday or Sunday.

[4] On 29 February 2024, the presiding member held a directions hearing in respect of both matters AM2023/17 and AM2024/9. The parties present agreed that the ARA’s proposed variation E should be determined separately from the balance of its application, and that the determination should be expedited. Directions issued on 1 March 2024. The ARA and other interested parties filed submissions in accordance with the directions.

[5] This decision deals (only) with proposed variation E in matter AM2024/9,<sup>3</sup> as well as the entirety of matter AM2023/17.

[6] For the reasons explained below, we will consider and determine both matters pursuant to s 160 of the FW Act.

### **Relevant legislation**

[7] Section 160 of the FW Act provides:

**160 Variation of modern award to remove ambiguity or uncertainty or correct error**

- (1) The FWC may make a determination varying a modern award to remove an ambiguity or uncertainty or to correct an error.
- (2) The FWC may make the determination:
  - (a) on its own initiative; or
  - (b) on application by an employer, employee, organisation or outworker entity that is covered by the modern award; or
  - (c) on application by an organisation that is entitled to represent the industrial interests of one or more employers or employees that are covered by the modern award; or
  - (d) if the modern award includes outworker terms--on application by an organisation that is entitled to represent the industrial interests of one or more outworkers to whom the outworker terms relate.

[8] The principles concerning the proper interpretation and application of s 160 were recently summarised as follows:

[51] The principles applicable to the interpretation and application of s 160 are well established. It is first necessary to determine if the award provisions under consideration are ambiguous, uncertain or attended by error. To find ambiguity in respect of an award provision, there must usually be rival contentions as to the proper meaning of the provision which are reasonably arguable. The words 'ambiguous' and 'uncertain' are not synonyms, and uncertainty may be established even if the provision at issue has a clear meaning and is not ambiguous, since uncertainty may arise from the application of unambiguous terms to a given set of circumstances or if the provision is doubtful, vague or indistinct in its expression. Error will be demonstrated if some sort of mistake is shown, in that a provision of the award was made in a form which did not reflect the tribunal's intention. It is only if ambiguity, uncertainty or error is found that a variation to remedy this may be considered.

[52] The Commission has a discretion as to the terms of the variation to be made, subject to the variation determined having the purpose and effect of removing the identified ambiguity or uncertainty or correcting the identified error.<sup>4</sup>

(footnote omitted)

[9] As to the date of operation of variations to modern awards, s 165 relevantly provides:

**165 When variation determinations come into operation, other than determinations setting, varying or revoking modern award minimum wages**

*Determinations come into operation on specified day*

- (1) A determination under this Part that varies a modern award (other than a determination that sets, varies or revokes modern award minimum wages) comes into operation on the day specified in the determination.
- ...
- (2) The specified day must not be earlier than the day on which the determination is made, unless:
  - (a) the determination is made under section 160 (which deals with variation to remove ambiguities or correct errors); and

- (b) the FWC is satisfied that there are exceptional circumstances that justify specifying an earlier day.

*Determinations take effect from first full pay period*

- (3) The determination does not take effect in relation to a particular employee until the start of the employee's first full pay period that starts on or after the day the determination comes into operation.

## **Submissions**

### *ARA*

[10] The ARA submits that its proposed variation E would restore the wording of clause 15.2(c) to that of the previous analogous clause (27.2(b)(iii)) prior to the 2020 variation. It submits that the current wording is ambiguous and/or uncertain because 'establishment' could mean a specific workplace, or the entirety of an employer's operations. The other uses of 'establishment' in the Retail Award do not clarify its meaning. Replacing 'establishment' with 'retailer' would render the clause's meaning clear and certain, because the Commission has already determined in *Application by Vickers*<sup>5</sup> (*Vickers*) that 'retailer' in previous clause 27.2(b)(iii) meant 'a retailer business as a whole, not an individual shop or store'.<sup>6</sup>

[11] The ARA contends that clause 15.2(c) is also ambiguous and/or uncertain because it could mean that, where an employer's trading hours are relevantly extended, ordinary hours may be worked until 11:00 pm only on those days of the week on which trading hours are extended, or on any day of the week. Its proposed variation would clarify this in favour of the latter, which it asserts is 'the understood position, and existing practice'.<sup>7</sup>

[12] In addition or alternatively, the ARA submits that the replacement of 'retailer' with 'establishment' as a result of the plain language redrafting process was a clear error, as none of the redrafting was intended to alter the award's legal effect. The current wording of clause 15.2(c) was present in several exposure drafts of the plain-language Retail Award, but none of the corresponding Full Bench decisions addressed the change from 'retailer' to 'establishment'. Accordingly, that change 'went beyond the intended scope'<sup>8</sup> of the plain language redrafting process, creating latent uncertainty rather than clarifying the meaning of the clause.

[13] Finally, the ARA submits that proposed variation E should have retrospective effect, as an inadvertent error in the course of an extensive award review by a Full Bench of the Commission constitutes exceptional circumstances. It submits the variation should be made effective from 1 October 2020, being the date from which the determination substituting 'establishment' for 'retailer' in clause 15.2(c) took effect.

### *Ai Group*

[14] The Ai Group submits that the ARA's proposed variation E broadly remedies the concerns raised in its original correspondence that led to the commencement of matter AM2023/17, and is also consistent with its submissions to the 'making awards easier to use' stream of the Modern Awards Review 2023-24 in respect of clause 15.2(c). Like the ARA, the

Ai Group contends that the change from ‘retailer’ to ‘establishment’ arguably has unintended substantive effects and has thereby led to uncertainty. The facts that no party sought such a change in the plain language redrafting process and that that process expressly sought not to disturb the legal effect of the award show that the change was an error, and mean that the previous wording of the clause should be restored as the ARA proposes.

*National Retail Association (NRA)*

[15] The NRA supports both aspects of the ARA’s proposed variation E, describing the previous change from ‘retailer’ to ‘establishment’ as ‘substantively and inadvertently’ altering the meaning of the clause. It submits that the original position was that an employer whose trading hours extended beyond the relevant times at any of its locations was permitted to consider hours worked until 11:00 pm on any day of the week as ordinary hours, and the proposed variation is expressly restoring that position.

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

[16] The SDA does not oppose replacing ‘establishment’ with ‘retailer’ in clause 5.2(c). It notes that parties did not discuss the change to ‘establishment’ in any depth during the plain language redrafting process and describes the change as an ‘obvious error’.

[17] The SDA did not comment on the ARA’s proposed insertion of ‘on all days of the week’.

*Retail and Fast Food Workers Union Incorporated (RFFWU Inc)*

[18] RFFWU Inc opposes replacing ‘establishment’ with ‘retailer’ because the clause is not ambiguous, uncertain or erroneous such as to enliven s 160 of the FW Act. It submits that the use of ‘establishment’ in clause 15.2(c) ought to be retained because it reflects the ‘proper meaning’ of the clause. That is, the ability for an employer to benefit from an expanded span of ordinary hours should be limited to doing so at those individual stores that have extended trading hours. RFFWU Inc submits it would be unfair and impermissible to read the clause as allowing an employer who has relevantly extended trading hours at a single store to roster employees to work their ordinary hours until 11:00 pm at any of its stores. It further submits that *Vickers* was wrongly decided. Finally, RFFWU Inc submits that if the proposed variation is made, the variation should not have retrospective effect.

**Consideration**

[19] We accept that the replacement of ‘retailer’ with ‘establishment’ in what is now clause 15.2(c) has given rise to ambiguity and uncertainty within the meaning of s 160(1) of the FW Act.

[20] The meaning of the word ‘retailer’, which was previously used, was clear. ‘Retailer’, on its ordinary meaning, means an entity or business which sells goods direct to the public. Where a business conducts such sales at multiple stores or other locations, the term ‘retailer’ is apt to describe the entirety of the business and would not be understood as referring to each of the business’ particular stores or locations. Thus, in the equivalent to the current clause 15.2(c) as it was before the 2020 variation, the capacity to work ordinary hours until 11:00 pm was

available based on whether the relevant retail business as a whole had the prescribed extended trading hours. It was not a store-by-store proposition. The approach to the previous version of the clause taken in *Vickers* was consistent with this position, which was well understood and generally applied in the general retail industry.

[21] The 2020 variation occurred as part of the plain English redrafting process of major awards which was conducted as part of the 4 yearly review of modern awards. This process was not intended to change the meaning of existing provisions (unless that intention was made clear in a Commission decision) but rather to express the meaning in clearer language. The Full Bench decision by which the 2020 variation was made<sup>9</sup> discloses no intention to change the meaning of what is now clause 15.2(c).

[22] However, the replacement of ‘retailer’ with ‘establishment’ has arguably changed the meaning of the clause. ‘Establishment’ on its ordinary meaning is more apt to describe a particular ‘bricks and mortar’ retail store or location. The term ‘retail establishment’ is used elsewhere in the Retail Award (in clause 4.1 and Schedule A) and, in *Application by Woolworths Group Limited*,<sup>10</sup> it was construed by a Full Bench in the following way:

[30] ... An ‘establishment’ is, relevantly, ‘a place of business ... and everything connected to it (as furniture, fixtures, grounds, employees)’, so that a ‘retail establishment’ is simply a place of business at which retailing — that is, the sale of goods to consumers or end-users — is conducted...’

(footnote omitted)

[23] The above construction of ‘retail establishment’ would suggest that clause 15.2(c) is now to be applied on a store-by-store basis.

[24] We consider the *uncertainty* within the meaning of s 160(1) of the FW Act has arisen because, on one view, the replacement of ‘retailer’ with ‘establishment’ in the 2020 variation has changed the meaning of the clause without the Commission ever having intended this to occur. This has caused doubt amongst multi-store retail employers about what ordinary hours are now permitted under the clause. We also consider that *ambiguity* has arisen because although, as stated, the word ‘establishment’ is more apt to refer to an individual store or retail location, it is not inarguable that it could describe the entirety of a retail business having regard to the construction of the previous version of the clause adopted in *Vickers* and the lack of any intention by the Commission to depart from that position in making the 2020 variation.

[25] We further consider that the drafting of the clause should revert to the use of the word ‘retailer’ in order to remove this ambiguity and uncertainty. We will also add the additional words proposed by the ARA (‘on all days of the week’) since these words also appeared in the previous version of the clause and made its intended operation clearer.

[26] At this stage, we consider it appropriate only to address the potential unintended consequence of the 2020 variation. It may be that clause 15.2 as a whole should be the subject of a wider review, but this should only occur in the context of a full merits consideration of the ordinary working hours provisions of the Retail Award.

[27] We consider that exceptional circumstances exist such as to permit a retrospective date of operation of the variation under s 165(2) of the FW Act. As stated, any change to the meaning

of clause 15.2(c) by the 2020 variation was not intended by the Commission and, unless rectified retrospectively, the unintended consequence of that variation may give rise to major issues of compliance with potentially significant monetary consequences. Accordingly, the variation will operate from the same date as the 2020 variation.

## Conclusion

[28] We vary clause 15.2(c) of the Retail Award to provide:

- (c) until 11:00 pm on all days of the week if the trading hours of the retailer extend beyond 9:00 pm on a Monday to Friday or 6:00 pm on a Saturday or Sunday.

[29] The variation will operate on and from 1 October 2020. A determination varying the Retail Award in accordance with this decision is published together with this decision.



PRESIDENT

### *Appearances:*

*J Kirkwood SC* for The Australian Retailers Association.

*R Bhatt* and *C Beasley* for The Australian Industry Group.

*L Carroll* for National Retail Association Limited.

*S Burnley* for the Shop, Distributive and Allied Employees Association.

*G Taylor* for The Australian Workers' Union.

*J Cullinan* for Retail and Fast Food Workers Union Incorporated.

### *Hearing details:*

2024.

Sydney by video link using Microsoft Teams (directions):

29 February.

### *Written submissions:*

The Australian Retailers Association: 7 March 2024.

The Australian Industry Group: 7 March 2024.

National Retail Association Limited: 8 March 2024.

Shop, Distributive and Allied Employees Association: 14 March 2024.

Retail and Fast Food Workers Union Incorporated: 14 March 2024.

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<sup>1</sup> MA000004.

<sup>2</sup> [PR722492](#).

<sup>3</sup> The other variations proposed in matter AM2024/9 are listed for conference on 5 April 2024.

<sup>4</sup> *Modern award superannuation clause review* [\[2023\] FWCFB 264](#) at [51]–[52].

<sup>5</sup> [\[2016\] FWC 6350](#).

<sup>6</sup> *Ibid* at [225].

<sup>7</sup> [ARA submissions, 7 March 2024](#) at [23].

<sup>8</sup> *Ibid* at [31].

<sup>9</sup> [\[2020\] FWCFB 4839](#).

<sup>10</sup> [\[2023\] FWCFB 139](#).