



STATEMENT

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)

JUSTICE ROSS, PRESIDENT

MELBOURNE, 1 MARCH 2021

Industrial relations reform working groups – letter from Minister – award flexibility – loaded rates – exemption rates – classification structures – General Retail Industry Award 2020

1 BACKGROUND

[1] On 9 December 2020, I received a [letter](#) from the Minister for Industrial Relations in which the Minister expressed the Government’s view that:

‘...in the extraordinary circumstances that have been caused by the COVID pandemic that it would be in Australia’s economic best interest for the Fair Work Commission to use its powers under s.157(3)(a) of the *Fair Work Act 2009* (the Act) to undertake a process to ensure several priority modern awards in sectors hardest hit by the pandemic be amended. The process would be envisaged, if you considered it appropriate, to maintain a focus on key changes that could potentially support Australia’s economic recovery. The Government would obviously provide every available assistance to ensure the timely and comprehensive conduct of this process.’

[2] The awards identified by the Minister as the priority modern awards included the *General Retail Industry Award 2020* (the Retail Award).

[3] On 10 December 2020, I issued a [Statement](#) which commenced a process in relation to the awards identified in the Minister’s correspondence. The process commenced with conferences on 17 and 18 December 2020. Parties were encouraged to engage in discussions to see if any joint positions could be advanced.

[4] Late on Friday 26 February 2021 the Shop, Distributive and Allied Employees’ Association (SDA), the Australian Workers’ Union (AWU) and Master Grocers Australia (MGA) filed a joint application to vary the Retail Award (the joint application, AM2021/7). The joint application is said to flow from an indication by the Commission that parties should act collaboratively to reach consensus on proposed changes to the Award.

[5] The joint application seeks to insert a new schedule – Schedule I – Additional flexibility measures – Part-time employees – into the Retail Award. In broad terms the proposed new Schedule I facilitates agreements between an employer and certain part-time employees to work more ordinary hours than their guaranteed number of hours agreed under clause 10.5 (an

additional hours agreement), up to a maximum total of 38 ordinary hours per week. Such 'additional hours' are to be paid at the employee's ordinary time rate of pay, and are subject to the restrictions in clause 15 of the Retail Award and clause 1.4 of the proposed Schedule I.

[6] The grounds advanced in support of the proposed variation are, in summary form,:

- the Retail Award is one of the awards identified in the Minister's letter of 9 December 2020 which requested that the Commission undertake a process to vary the relevant awards in relation to 'key changes that could potentially support Australia's economic recovery'.
- the Commission has instituted proceedings (AM2020/103) in response to the Minister's correspondence and has invited interested parties to make applications (including jointly, where possible) for variations considered by those parties to fall within the framework of the Minister's letter.
- the amendments proposed are temporary (for 18 months), subject to a right to apply for an extension, and provide additional flexibility measures by prescribing a mechanism for 'additional hours agreements' between an employer and a part-time employee, subject to appropriate safeguards.
- it is submitted that the proposed variation will assist small to medium sized enterprises: 'in meeting the unique circumstances presented by the recovery from the COVID-19 pandemic and associated Government responses in a way that is balanced and equitable, taking into account the interests of their workplaces and with appropriate safeguards.'
- it is submitted that the proposed variation falls within the Federal Government's descriptor of a 'key change' affording a measure of necessary workplace flexibility that 'could prove critically important for providing businesses in the most distressed part of the economy with the confidence to increase hiring during the recovery'. To that extent, given current economic circumstances, it is submitted that the proposed variation is necessary to achieve the modern awards objective.

[7] The parties filed an amended joint application on 28 February 2021, which corrects some cross-referencing errors in the original application.

[8] The parties request that the application be dealt with urgently.

[9] A copy of the amended joint application is available [here](#).

[10] The joint application is supported by the Australian Council of Trades Unions and the Council of Small Business Organisations Australia.

[11] In accordance with the request of the parties the Commission will deal with the application expeditiously. The following directions are issued:

1. The applicants are to file a submission in support of the joint application by no later than **4pm Tuesday, 2 March 2021**.
2. Any other interested party (whether supporting or opposing the joint application) is to file a submission by no later than **12 noon Thursday, 4 March 2021**.
3. The joint application will be heard at **10.30am (AEDT) on Friday 5 March 2021**. Any party who wishes to attend the hearing should send an email to chambers.ross.j@fwc.gov.au specifying a name, organisation and contact telephone number by **12noon on Thursday, 4 March 2021**.

PRESIDENT

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