

**Award flexibility –
General Retail Industry Award 2020**

AM2021/7

[2021] FWCFB 1608

Background

[1] This decision arises out of correspondence from the Minister for Industrial Relations to the President, dated 9 December 2020. In that correspondence 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.’¹

[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, the Commission issued a Statement² which commenced a process in relation to the awards identified in the Minister’s correspondence. Conferences were held on 17 and 18 December 2020 and parties were encouraged to engage in discussions to see if any joint positions could be advanced. On the same day the Commission published an Information Note³ on the retail trade sector which set out some of the characteristics of the retail trade sector of the economy and the characteristics of retail employees.

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

¹ [Letter](#) from Minister for Industrial Relations, 9 December 2020.

² [\[2020\] FWC 6636](#).

³ Fair Work Commission, ‘[Retail Trade](#)’, 10 December 2020.

⁴ [Joint Application](#), 26 February 2021.

[5] The Joint Application was supported by the Australian Council of Trades Unions (ACTU) and the Council of Small Business Organisations Australia (COSBOA).

[6] On 1 March 2021, in accordance with the request of the parties that the application be dealt with quickly, the Commission issued the following:

- ‘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**.’

[7] Submissions opposing the application were received from:

- Australian Business Industrial, NSW Business Chamber and the Australian Chamber of Commerce and Industry ([ABI](#)) dated 4 March 2021, which included a draft determination foreshadowed by ABI as an alternative to the Joint Application
- National Retail Association ([NRA](#)) dated 4 March 2021
- Retail and Fast Food Workers Union ([RAFFWU](#)) dated 4 March 2021
- The Australian Industry Group ([Ai Group](#)) dated 4 March 2021 (filed late at 1:50pm)
- The Australia Retailers Association ([ARA](#)) dated 4 March 2021 (filed late at 12:20pm).

[8] The central issue in the proceedings is the mechanism for facilitating the working of additional ordinary hours by part-time employees.

[9] The submissions filed by the various parties opposing the Joint Application raised several issues, including the following threshold issues:

1. ABI submitted that there is no basis for expediting the hearing of the Joint Application and that the most appropriate way to deal with the Joint Application was to:
 - (a) list the Joint Application for conference so that the determination proposed by the Joint Applicants could be discussed and reviewed having regard to the objections and ABI’s draft determination;
 - (b) join the Joint Application with ABI’s proposal to vary the Award in accordance with ABI’s draft determination given that the two proposals deal with the same subject matter; and
 - (c) depending on the outcome of the conferences, program the matters together for further directions and a hearing if necessary.

2. The NRA also objected to the expedited hearing of the matter and sought that:
 - (a) the hearing listed on Friday 5 March 2021 be adjourned;
 - (b) the Joint Applicants be required to file and serve evidence and more fulsome submissions in support of the Joint Application; and
 - (c) other parties be provided with a more fulsome and fair opportunity to reply to that evidence and those submissions.

[10] The threshold issues were the subject of submissions at a hearing held on Friday 5 March 2021. At that hearing we noted that there was some common ground between the Joint Application and the ABI proposal and that there was merit in conducting facilitated conferences.

[11] After the conclusion of the hearing on 4 March 2021 the Commission issued the following directions:

- ‘1. The Hearing is adjourned and the matter will be relisted for hearing at **9:30AM (AEDT) Tuesday, 16 March 2021.**
2. All interested parties are to file submissions and evidentiary material, including witness statements by no later than **5PM (AEDT) Friday, 12 March 2021.**
3. Interested parties are to provide an indication of which witnesses will be required for cross-examination by **2PM (AEDT) Monday, 15 March 2021.** Such an indication is to be sent to chambers.ross.j@fwc.gov.au.’

The Conciliation Process

[12] Conciliation conferences were conducted by Commissioner Hampton on 10 and 11 March.

[13] On 15 March 2021 the Commission published a Report to the Full Bench⁵ (the Hampton Report) summarising the conciliation conferences and identifying 5 major issues that arose from the proposals, broadly summarised as follows:

1. the nature of any additional hours agreement for ordinary hours beyond clauses 10.5 and 10.6 of the Award;
2. the preconditions for making an additional hours agreement;
3. the review triggers for increasing (converting) additional hours, the process and access to arbitration;
4. the interaction between extended hours provisions and other aspects of the Award; and
5. the duration of any new provision.

⁵ [\[2021\] FWC 1297.](#)

[14] The Hampton Report concluded that while the conferences had led to further modifications of some elements of each proposal, there is no agreement as to the precise form of the variation, including some limited elements of the parameters and safeguards.

The Hearing

[15] In the Decision the Full Bench acknowledged the cooperative manner in which the parties have engaged with this issue. In particular, the level of cooperation and agreement between the parties to the Joint Application – the SDA and MGA; with the support of the ACTU, AWU and COSBOA – is unprecedented in this sector. The Full Bench also acknowledged the cooperative way in which all parties participated in the conciliation process and endeavoured to narrow the issues in dispute.

[16] Broadly speaking the revised variation determination filed by the Joint Applicants is supported by the ACTU, AWU, MGA and COSBOA. The ABI proposal is supported by the ARA, NRA and (with some caveats) Ai Group. RAFFWU opposes the ABI proposal.

[17] It is common ground between various interests supporting either the Joint Application or the ABI proposal that there is a need for an additional degree of flexibility for part-time employees to work ‘additional hours’ beyond what is currently permitted in the Retail Award. We note that ABI characterises the additional flexibility provided by the Joint Applicants’ draft variation as ‘insignificant’.

[18] There is a broad consensus that facilitating the working of additional ordinary hours by part-time employees will:

- encourage employers to offer additional hours;⁶
- increase hours of employment amongst part-time employees, thereby promoting social inclusion through increased workforce participation;⁷
- have a positive impact on business and productivity;⁸
- have a positive impact on employees by allowing for the more efficient allocation of labour to part-time employees, rather than that labour being allocated to casual employees;⁹ and
- support employment growth, and the performance of the economy as a whole.¹⁰

[19] Both the Joint Application and the ABI proposal include a number of protections for employees, including the requirement that an additional hours agreement cannot be a condition of employment and cannot be entered into concurrently with an offer of employment.

⁶ SDA Submission, 2 March 2021 at [17]; Senior Professor Paul J. Gollan, Associate Professor Martin J. O’Brien, Honorary Professor Jonathan M. Hamberger, ‘Employers and the use of casuals in the Australia Retail Sector’, University of Wollongong, March 2021, p 12 (the Gollan Report).

⁷ SDA Submission, 2 March 2021 at [19]; ACTU Submission, 2 March 2021 at [33]; Gollan Report, pp 12 – 13.

⁸ SDA Submission, 2 March 2021 at [20]; ACTU Submission, 2 March 2021 at [35], [40].

⁹ SDA Submission, 2 March 2021 at [21]; ACTU Submission, 2 March 2021 at [38].

¹⁰ SDA Submission, 2 March 2021 at [24]; ACTU Submission, 2 March 2021 at [46].

[20] Both proposals also provide a mechanism whereby a part-time employee who has regularly worked additional hours in excess of the number of hours agreed under clauses 10.5 or 10.6 may request that their employer vary the agreement under clause 10.5 to reflect the ordinary hours regularly being worked.

[21] Both proposals contain the following elements:

- A part-time employee who has regularly worked additional agreed hours in excess of the number of hours agreed under clauses 10.5 or 10.6 may request in writing that the employer vary the agreement under clause 10.5 to reflect the ordinary hours regularly being worked.
- The employer must respond in writing to the employee's request within 21 days.
- Before refusing a request the employer must discuss the request with the employee and [genuinely try to reach agreement – Joint Application] or [explore whether they can reach agreement – ABI proposal].
- An employee request can only be refused on 'reasonable business grounds'.
- The employer must notify the employee in writing of a refusal and the grounds for it.
- If the employer agrees to a request then the employer and employee must vary the agreement under clause 10.5 to reflect the employees new regular pattern of work (this is expressed differently in the two models – Joint Application at clause 1.11 and ABI proposal at 10.12(c)).

[22] There are two points of distinction between the two models in respect of this aspect of the proposals:

- The minimum period before a request can be made (Joint Application - 6 months; ABI proposal – 12 months).
- The access to arbitration in respect of a dispute pertaining to whether there were reasonable business grounds for refusing an employee request (Joint Application – yes; ABI proposal – no).

[23] In relation to the last point both the Joint Application and the ABI proposal both provide for the arbitration of disputes arising under their terms, with the parties to an 'additional hours agreement' providing consent to such arbitration. The difference between the proposals is limited to whether such arbitral power extends to an assessment of whether an employer has reasonable business grounds to refuse an employee's regular additional hours becoming a permanent part of their agreed hours.

[24] More generally there are 3 broad key points of distinction between the Joint Application variation determination and the ABI proposal:

1. The Joint Application proposes the insertion of a schedule into the Retail Award, with a limited period of operation (18 months) subject to extension on application. The ABI proposal seeks to vary the Retail Award by inserting new clauses 10.11 to 10.12 subject to review to determine whether they will continue to operate beyond 15 September 2022 (i.e. after about 18 months operation).

2. The ‘model’ for facilitating the working of ‘additional hours’ by part-time employees in the Joint Application is by individual agreement by reference to specific agreed shifts or for specific hours for an agreed period. The ABI proposal facilitates the working of ‘additional hours’ by means of a ‘standing written agreement’ between an employer and part-time employee.
3. There are a number of other differences between the two proposed models:
 - The Joint Application model only applies to part-time employees who ‘work more than 9 hours per week in accordance with clause 10.5’; the ABI proposal contains no such limitation.
 - The Joint Application model provides that if an additional hours agreement is made ‘the employee must be paid for the additional agreed hours, even if they are not required to work those hours’. The ABI proposal contains no specifically identified limitations.
 - The Joint Application model provides that an additional hours agreement may be terminated, by mutual agreement with 24 hours’ notice, such agreement not to be unreasonably withheld. The ABI proposal contains no such mechanism. The ABI proposal provides that a part-time employee’s ‘standing written agreement’ may be varied or revoked at any time (see clause 10.11(e)), but if the employee accepts an offer of additional hours those hours constitute ordinary hours and the agreement to work those ordinary hours cannot be rescinded.
 - The ABI proposal provides:
 - The employer is not required to offer additional hours.
 - The employee has the right to refuse any request to work additional hours.
 - The employee may vary or revoke their standing written agreement at any time.

These features are not provided (or at least not in the same terms) in the Joint Application variation.

The Evidence

[25] ABI filed a research report by Senior Professor Paul Gollan and others (the Gollan Report) in support of the variation it proposes.

[26] The Full Bench concluded that the Gollan Report supports a finding that:

‘there is a level of confusion among Retail employers about the operation of various provisions of the Retail Award and, in particular, about the capacity for part-time employees to work additional hours at ordinary time rates under the current terms of the Retail Award. Beyond that

the Gollan Report says very little about the respective merits of the Joint Applicants' proposed variation and the ABI proposal.

We agree with the SDA's observation that the Gollan Report also lends support to the proposition that some employers prefer to employ casuals because of the flexibility they provide and that they would prefer to employ part-time employees if they could be utilised with greater flexibility.¹¹

The Decision

[27] The Full Bench accepted the submission of ABI that the proper construction of clause 10 is a threshold issue in respect of its consideration of the Joint Application *and* the ABI proposal.

[28] After canvassing the range of submissions and the Gollan Report the Full Bench concluded:

'It is apparent that there is no unanimity of view as to how clause 10.6 operates in relation to the working of additional hours and the evidence suggests that the relevant award provisions are poorly understood by some retail sector employers. We agree with the MGA that the existing terms lack clarity. Further, such lack of clarity is inconsistent with the need to ensure 'a simple, easy to understand... modern award system' (s.134(1)(g)).

The evident confusion in the operation of the current award and the impact of the COVID-19 pandemic on the Retail sector (as documented in the Information Note referred to earlier) warrant consideration being given to the variation of the Retail Award to provide certainty regarding the circumstances in which part-time employees may work 'additional hours' (that is in addition to the agreed hours under clause 10.5), without those hours being regarded as overtime. As the Commission has noted previously, a modern award 'should be able to be read by an employer or employee without needing a history lesson or paid advocate to interpret how it is to apply in the workplace.

In our view clause 10 is uncertain and requires variation to resolve that uncertainty.¹²

[29] The Full Bench stated that once the proper construction of clause 10 (and any required variations) are determined it can give more detailed consideration to the terms of the Joint Application and the ABI proposal. However, as the Full Bench had the benefit of detailed submissions regarding the merits of the Joint Applicants' proposed variation and the ABI proposal it proceeded to make some preliminary observations about both proposal (see [123] – [155] of the Decision).

[30] The Full Bench concluded as follows:

'The proper construction of the existing clause 10 is a threshold issue in our consideration of *both* the Joint Application *and* the ABI proposal. Further:

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

¹¹ *Award flexibility – General Retail Industry Award 2020* [2021] FWCFB 1608 at [76] – [77].

¹² *Award flexibility – General Retail Industry Award 2020* [2021] FWCFB 1608 at [118] – [120].

2. It is our *provisional* view that there may be merit in the variation of the Retail Award to introduce a mechanism whereby a part-time employee who regularly works additional hours may request that their guaranteed hours be reviewed and increased, and their employer cannot unreasonably refuse such a request.¹³

Next Steps

[31] The next step in progressing these issues will be for Commissioner Hampton to convene a conference to discuss the meaning and intent of clause 10 of the Retail Award and the Full Bench's *provisional* view regarding the variation of the Retail Award.

[32] The conference participants will be invited to address the following issues:

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

¹³ *Award flexibility – General Retail Industry Award 2020* [2021] FWCFB 1608 at [156].

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

[34] The Full Bench 'intend[s] to address the uncertainty attending the operation of clause 10 and in particular the parameters regarding the working of additional ordinary hours as a matter of priority'¹⁴ and proposed to act on its own initiative under s.160(2)(a) to address these issues.

[35] The conference process set out will conclude by no later than Friday 9 April. A *provisional* draft variation will be published in the week commencing Monday 12 April 2021 and parties will be given an opportunity to file submissions in respect of any such proposal.

[36] The Full Bench concludes the Decision in the following terms:

'Our objective is to ensure that the Retail Award provides a simple, clear and easy to understand means whereby a part-time employee can agree with their employer to work additional ordinary hours.

As the Commission has noted previously, a modern award 'should be able to be read by an employer or employee without needing a history lesson or paid advocate to interpret how it is to apply in the workplace.'¹⁵

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This statement is not a substitute for the reasons of the Fair Work Commission nor is it to be used in any later consideration of the Commission's reasons.

– ENDS –

¹⁴ *Award flexibility – General Retail Industry Award 2020* [2021] FWCFB 1608 at [160].

¹⁵ *Award flexibility – General Retail Industry Award 2020* [2021] FWCFB 1608 at [163] – [164].