

Fair Work Commission: 4 yearly Review of modern awards

SUBMISSION

**AWARD FLEXIBILITY–GENERAL RETAIL INDUSTRY AWARD 2020
(AM2021/7)**

FILED ON BEHALF OF:

- **AUSTRALIAN BUSINESS INDUSTRIAL**
- **THE NSW BUSINESS CHAMBER LTD**

4 MARCH 2021

BACKGROUND

1. This submission is made on behalf of Australian Business Industrial (**ABI**) and the New South Wales Business Chamber Ltd (**NSWBC**).
2. This submission is filed in response to a Statement (the **1 March 2021 Statement**) issued by the Commission on 1 March 2021¹, inviting interested parties to file submissions in relation to a revised application filed on 28 February 2021 (**Application**) to vary the General Retail Industry Award 2020 (**Award**).
3. The Application was filed on behalf of the Shop, Distributive and Allied Employee's Association (**SDA**), the Australian Workers' Union (**AWU**) and Master Grocers Australia Limited (**MGA**), (collectively, "**the Applicants**") and is supported by the Australian Council of Trades Unions (**ACTU**) and the Council of Small Business Organisations Australia.

SUMMARY OF ABI AND NSWBC POSITION

4. ABI and NSWBC oppose the granting of the Application on several grounds:
 - (a) It is inappropriate for the matter to be determined on Friday 5 March 2021, having regard to the historical context applicable to the proceedings and the need to afford parties procedural fairness in relation to any response to the Application.
 - (b) The Application lacks merit as it is inconsistent with the modern awards objective.
 - (c) There is a far more meritorious Award variation proposal with respect to part time employment, advanced by the major employer groups representing employers covered by the Award (the **Draft Joint Employer Determination**²), which should be given effect to by the Commission – naturally after affording procedural fairness to any opponents of this alternative proposal.
 - (d) Finally, having regard to the above, the appropriate means of dealing with the present Application would be to:
 - (i) list the Application for conference so that the determination proposed by the Applicants can be discussed and reviewed having regard to the objections raised and the Draft Joint Employer Determination;
 - (ii) join the Application with ABI and NSWBC's proposal to vary the Award in accordance with the Draft Joint Employer Determination, given that the two proposals deal with the same subject matter; and

¹ [2021] FWC 1088

² The Draft Joint Employer Determination has been filed together with these submissions and has broad support at a conceptual level from Ai Group, ARA, NRA and ABI/NSWBC

(iii) depending on the outcome of the conferences, program the matters together for further directions and a hearing if necessary.

5. Each of these grounds is addressed separately below.

GROUND 1 - TIMING OF THE APPLICATION AND THE HISTORICAL CONTEXT

6. The Application was accompanied by a covering email which stated:

“The Application flows from an earlier indication from his Honour, the President (responding to correspondence from the Minister for Industrial Relations) that stakeholders interested in a proposal by the Commission to move to vary identified Awards of its own motion pursuant to s157(3)(a) of the Act should act collaboratively, where possible, to reach consensus on changes that the parties consider ought appropriately be the subject of such variation determinations.”

7. The Applicants accordingly assert that the Application is responsive to proceedings commenced by the Commission (AM2020/103) following a letter issued by the Minister to the President on 9 December 2020 (**the Ministerial Letter**).

8. The Applicants have sought that the Application be dealt with urgently.³

9. However, the Applicants have *not* identified that their filing of the Application appears to have arisen at a late stage with respect to both proceedings AM2020/103 and the Ministerial Letter. Nor do the Applicants identify that there are existing claims already on foot to vary part time employment provisions in the Award in response to the Ministerial Letter and proceedings AM2020/103.

10. The actual chronology is as follows:

- (a) On **9 December 2020**, the Ministerial Letter was sent, requesting that certain modern awards (including the Award) be reviewed to determine whether changes could be made to support Australia’s economic recovery.⁴
- (b) On **10 December 2020**, the President issued a Statement, scheduling a conference for 18 December 2020 with respect to the Award and commencing proceedings AM2020/103. In that Statement, the President indicated that the Commission would be canvassing with relevant parties the types of variation that the parties might seek with respect to the Award.⁵
- (c) On **18 December 2020**, the conference in the proceedings was held with respect to the Award. During the conference, neither the SDA, the AWU nor the MGA

³ 1 March Statement at [8], [11]

⁴ [2020] FWC 6636

⁵ [2020] FWC 6636

indicated that any of them were considering any variation to the part time employment provisions of the Award.⁶

- (d) On **21 December 2020**, following the conference, a further Statement was issued, in which the Commission requested that parties submit any award variation proposals by 28 January 2021:⁷

[17] Parties with an interest in the Retail Award are directed to file any proposals for award variations and any other relevant comments (including any general principles to guide this process) by 4 pm on Thursday 28 January 2021.

[18] A further conference will be convened on Friday 5 February 2021. A separate listing notice will be issued in due course.

- (e) On **28 January 2021**, ABI and NSWBC as well as the Australian Retailers Association (**ARA**) and National Retailers Association (**NRA**) filed separate draft determinations (in the same terms) in which they sought to vary the part time employment provisions in the Award. None of the SDA, AWU nor MGA filed any proposed variation to vary the part time employment provisions in the Award.
- (f) On **5 February 2021**, a conference was held in the proceedings. In the conference, exchanges were canvassed between the President and Mr Izzo (for ABI and NSWBC) regarding the proposed variations to the part time provisions of the Award. Mr Izzo undertook that the employer parties would take some time to reconsider their proposed draft determination in light of some of the comments made by the President in the conference before reverting with a revised determination.

In response to this exchange and the draft determinations filed by ABI and NSWBC, the SDA indicated that it did not support the proposed change.⁸ The SDA and AWU both indicated that they would await the revised employer proposals before finalising a view on the proposed variations:⁹

At no stage during the 5 February 2021 conference did any of the SDA, AWU or MGA indicate that they were considering their own proposal to vary part time employment provisions that they would seek to have made by the Commission.

Furthermore, Mr Friend (on behalf of the SDA) identified that any proposal to vary the Award would need to be supported by evidence.¹⁰

⁶ https://www.fwc.gov.au/documents/sites/award-flexibility-hospitality-retail/transcript/181220_am2020103.htm

⁷ [2020] FWC 6931

⁸ <https://www.fwc.gov.au/documents/sites/award-flexibility-hospitality-retail/transcript/050221-am2020103.htm> at PN80

⁹ <https://www.fwc.gov.au/documents/sites/award-flexibility-hospitality-retail/transcript/050221-am2020103.htm> at PN161

¹⁰ <https://www.fwc.gov.au/documents/sites/award-flexibility-hospitality-retail/transcript/050221-am2020103.htm> at [91]

- (g) On **26 February 2021**, the Application was filed, seeking an urgent variation to the Award.
11. ABI and NSWBC accept that the SDA, AWU and MGA had no obligation to consult with ABI and NSWBC prior to filing the Application.
12. However, having:
- (a) delayed substantially in filing their Application and proposed determination (including filing the determination almost a month after the deadline issued by the directions issued by the Commission on 21 December 2020);
 - (b) been on notice that ABI, NSWBC, ARA and NRA were proposing variations to the part time employment provisions of the Award;
 - (c) failed to file any evidence of their own in support of the Application – notwithstanding the SDA's own insistence that any Award variation would need to be supported by evidence;¹¹ and
 - (d) failed to notify any of ABI, NSWBC, ARA and NRA in advance that they were considering varying the award in the manner now sought,
- there appears to be no basis to expedite the determination of the Application such that it is determined within 4 business days of its publication – as is presently proposed.
13. The reasons against expediting the determination of this matter to this Friday 5 March 2021 are further reinforced by the following:
- (a) Firstly, major employer organisations with substantial representation in the industry (including ABI, NSWBC, ARA, NRA and Ai Group) all oppose the Application.
 - (b) Secondly, ABI & NSWBC intend to file substantive evidence in response to the Application, including an expert witness report commissioned from a leading Australian university regarding the practices of engaging part time and casual employees in the retail industry specifically, as well as impediments to engaging employees on a part time basis in the industry. Whilst ABI and NSWBC are not in a position to file the expert report this week, ABI and NSWBC will be in a position to file this report in the very near term.
 - (c) Thirdly, no evidence has been filed by Applicants in support of the Application. This sits uncomfortably with the Commission's repeated recognition that, where a

¹¹ Ibid

significant change is proposed to an Award, the change must be accompanied by “*probative evidence properly directed to demonstrating the facts supporting the proposed variation*”.¹²

- (d) Fourthly, there is a significant distinction between the present Application and previous COVID-19 applications that were dealt with by the Commission on an expedited basis during 2020 (this is addressed at paragraphs 14 to 29 below).
- (e) Fifthly, the Commission is on notice that an alternative and more meritorious proposed variation addressing the same part time provisions of the Award is being pursued by major employer organisations with members covered by the Award. In this regard, see paragraphs 55 to 58 below.

Distinction between present Application and previously expedited ‘COVID Schedules’

- 14. At the outset, ABI and NSWBC acknowledge that the Application arose in response to the Ministerial Letter¹³ and that this Ministerial correspondence envisaged that any changes to awards would be made:

“as expeditiously as possible, preferably no later than 31 March 2021”

- 15. It is also acknowledged that COVID-19 related award variations are made to address a pressing need associated with the recovery of the Australian economy from a once in a century pandemic and must naturally be dealt with more expeditiously than other variation applications.
- 16. ABI and NSWBC strongly support the Commission acting expeditiously where the circumstances both:
 - (a) *warrant* urgency (that is, there is an urgent need or desirability for the changes); and
 - (b) *permit* urgency (that is, there are no obligations – including the obligation to afford procedural fairness – that prevent an application being determined in a timeframe proposed by the Commission).
- 17. In response to the COVID-19 pandemic, there have been numerous proceedings where the Commission has, to its great credit, acted with impressive speed in determining applications to vary Awards.
- 18. These proceedings are as follows:

¹² 4 Yearly Review of Modern Awards – Preliminary Issues Decision [2014] FWCFB 1788[60]

¹³ Letter of 9 December 2020 to The Hon Justice Iain Ross AO.

| Award | Application Date | Decision Date | Matter No |
|--|-------------------|-------------------|----------------------------|
| Hospitality Industry (General) Award | 24 March 2020 | 25 March 2020 | AM2020/8 |
| Clerks - Private Sector Award | 24 March 2020 | 28 March 2020 | AM2020/10 |
| Restaurant Industry Award | 30 March 2020 | 31 March 2020 | AM2020/11 |
| Educational Services (Schools) General Staff Award | 23 April 2020 | 24 April 2020 | AM2020/17 |
| Fast Food Industry Award | 1 May 2020 | 19 May 2020 | AM2020/20 |
| Vehicle Manufacturing, Repair, Services and Retail Award | 5 May 2020 | 11 May 2020 | AM2020/22 |
| Clerks - Private Sector Award | 19 June 2020 | 01 July 2020 | AM2020/30 |
| Hospitality Industry (General) Award | 26 June 2020 | 29 June 2020 | AM2020/35 |
| Restaurant Industry Award | 26 June 2020 | 29 June 2020 | AM2020/36 |
| Vehicle, Repair, Services and Retail Award | 26 June 2020 | 30 June 2020 | AM2020/37 |
| Vehicle Manufacturing, Repair, Services and Retail Award | 29 July 2020 | 31 July 2020 | AM2020/88 |
| Vehicle Manufacturing, Repair, Services and Retail Award | 27 August 2020 | 31 August 2020 | AM2020/91 |
| Vehicle Manufacturing, Repair, Services and Retail Award | 21 September 2020 | 29 September 2020 | AM2020/94 |
| Clerks - Private Sector Award | 24 September 2020 | 30 September 2020 | AM2020/95 |
| Vehicle Manufacturing, Repair, Services and Retail Award | 30 November 2020 | 2 December 2020 | AM2020/102 |

19. In the vast majority of these applications (that is, all applications other than those highlighted), each of the above variations was made in response to a consent application to which no objections were received.

20. This was a central feature of a number of these extraordinary decisions.
21. In its 25 March 2020 decision to vary the *Hospitality Industry (General) Award*, the Commission addressed the speed in which the matter had been heard:

[8] We are conscious that the notice provided to interested parties is much shorter than the Commission’s standard practice.

*[9] There is no doubt that the Commission is bound to ‘act judicially’, which includes an obligation to afford parties procedural fairness. But the application and content of the doctrine of procedural fairness is determined by the context. As Mason J observed in *Kioa v West*:*

“What is appropriate in terms of natural justice depends on the circumstances of the case and they will include, inter alia, the nature of the inquiry, the subject matter, and the rules under which the decision - maker is acting.”

*[10] The following general observation of Buchanan J (with whom Marshall and Cowdrey JJ agreed) in *Coal Allied Mining Services Pty Ltd v Lawler*, is also apposite:*

“...it is an important aspect of the work of [the Commission]...that it is to proceed without unnecessary technicality and as informally as the circumstances of the case permit...It is not inappropriate to say that the members of [the Commission] have a statutory mandate to get to the heart of matters as directly and effectively as possible.”

[11] Relevantly, s.577(a) and (b) provide that the Commission must perform its functions and exercise its powers in a manner that:

‘(a) Is fair and just; and

(b) Is quick, informal, and avoids unnecessary technicalities;’.

[12] The key contextual considerations in the matter before us are:

- the statutory framework;*
- the consent of the key interested parties;*
- the parties’ joint request for expedition; and*
- the need to respond quickly to a rapidly changing industrial environment.*

[13] In this instance, the consent of the key industrial parties’ is the central consideration.

[14] In the event that this application had been contested then, plainly, different considerations would have been enlivened, necessitating a more protracted hearing process than the one we have adopted in this matter”

(emphasis added).

22. The above consideration was referred to by the Commission in later decisions¹⁴.

Expediency with COVID-Schedules where opposition arose

23. In 4 cases, there were Award variations made introducing COVID-specific schedules where some opposition existed.

24. However, each of these 4 cases differs materially from the present case.

25. Most importantly, in each of these cases, the award variations were intended to operate for a very short time only – generally only 1 to 3 months. This much was recognised by the Full Bench in *Application to vary the Clerks – Private Sector Award 2020* [2020] FWC 3443:

[58] In this context we would note that we accept the submission put by Mr Izzo, on behalf of ABI, that the extent of the evidence required to support a variation depends on the context and what is necessary, from an evidentiary perspective, to support a temporary change to the award safety net in response to extraordinary circumstances is plainly different to that which is required to support a substantive, ongoing variation to a modern award.

26. Specifically:

(a) In AM2020/22, the only party opposing the consent variation in that case (ACAPMA):

- (i) did not oppose the concepts being pursued;¹⁵
- (ii) intervened at a late stage to indicate its opposition;¹⁶ and
- (iii) did not seek more time to file submissions or evidence.¹⁷

Furthermore, the variation operated for less than 2 months.

(b) In AM2020/30, the Application had been the subject of a previous consent position between the parties – notwithstanding that the ASU withdrew its consent for the extension subsequently sought by the applicants in AM2020/30. Additionally, substantive statistical evidence was filed regarding working from home arrangements and changes to working patterns to support the variation. The variation operated for a period of 3 months. No request was made by the ASU for further time to oppose the Application.

(c) In AM2020/95, the variation proposed was substantially agreed between all key parties, including ACCI, Ai Group, the ASU and the ACTU. There was disagreement

¹⁴ See, for example: [2020] FWCFB 1690, [2020] FWCFB 1741 and [2020] FWCFB 2108.

¹⁵ [2020] FWCFB 2367 at [62]

¹⁶ [2020] FWCFB 2367 at [81]

¹⁷ [2020] FWCFB 2367 at [79]

in relation to a single item only in the proposed variation, relating to when the ordinary span of hours would conclude under the Award schedule.¹⁸ 12 evidentiary exhibits were filed in support of the application, detailing significant statistical and survey information in support of the application. The variation operated for a period of 2 months. No request was made by the ASU for further time to oppose the Application.

(d) In AM2020/20, a period of 2 weeks was allowed between the filing of the application and the hearing of the proceedings. The variation operated for less than 2 months.

27. The above circumstances are all markedly different to the circumstances presently before the Commission.

28. In the present case:

(a) There is opposition to the currently expedited hearing. Further time is being sought by opponents.

(b) The Application seeks to vary the Award for a substantial period of 18 months.

(c) No evidence has been filed by the Applicants, whereas ABI and NSWBC are seeking further time to file their own evidence in response.

(d) The Applicants have not acted with haste themselves in relation to the Commission's request for variation applications. Indeed, they filed their draft determination a month after the timetabled request for draft determinations.

(e) Other parties have already identified their own variation proposals to the Commission, which appear to be sidelined (or leapfrogged) by the expedition of this Application.

29. For the above reasons, it is respectfully submitted that the Commission should not approach the Application on the basis that it is an application of a similar nature to those COVID-specific applications that have been the subject of expedition in the past year.

Procedural fairness impaired

30. Having regard to the above, ABI and NSWBC submit that they will not have a substantive opportunity to properly respond to the claim in the current timeframe that has been set aside for the hearing of the Application.

31. This is particularly the case given that ABI and NSWBC are pursuing an alternative variation to the Award that should be considered simultaneously with the Application.

¹⁸ [2020] FWCB 5199 at [11]

32. This alternative variation is in its advanced stages and a copy has been filed together with these submissions (the Draft Joint Employer Determination).
33. In order to ensure that all parties have an equal opportunity to pursue variations to part time employment provisions in the Award, it would be appropriate for both variations to be considered at the same time by the Commission - naturally, after the Applicants have had the opportunity to consider the Draft Joint Employer Determination.

GROUND 2 – THE APPLICATION LACKS MERIT

34. It should be apparent from the draft determinations previously filed by ABI and NSWBC in AM2020/103 (and the Draft Joint Employer Determination now filed in these proceedings) that ABI and NSWBC support varying the part time provisions of the Award to enable part time employees to work additional ordinary hours, without attracting overtime payments, where such hours are voluntarily worked.
35. This appears to be common ground shared between ABI and NSWBC and the Applicants.
36. Based on the SDA and ACTU submissions, it also appears to be common ground that the introduction of provisions allowing additional ordinary hours to be worked by part time employees on a voluntary basis will:
- (a) encourage employers to offer additional hours;¹⁹
 - (b) increase hours of employment amongst part time employees, thereby promoting social inclusion through increased workforce participation;²⁰
 - (c) have a positive impact on business and productivity;²¹
 - (d) have a positive impact on employees because “*an entitlement on the part of a part-time employee to overtime under the GRIA is illusory if the employer will not consider the employee for overtime in preference to engaging casual employees*”²²; and
 - (e) support employment growth, and the performance of the economy as a whole.²³
37. It appears that ABI and NSWBC are aligned with the SDA, AWU and MGA about the general merit of allowing part time employees to work additional hours voluntarily at ordinary rates, up to 38 hours per week.
38. However, the mechanism by which the Applicants seek to achieve this outcome:

¹⁹ SDA Submissions at [17]

²⁰ SDA Submissions at [19], ACTU Submission at [33]

²¹ SDA Submissions at [20], ACTU Submission at [35], [40]

²² SDA Submissions at [21], ACTU Submission at [38]

²³ SDA Submissions at [24], ACTU Submissions at [46]

- (a) adds substantial complexity to the Award; and
- (b) is deleterious to business, disincentivising the granting of additional hours.

39. We address each of these propositions in turn.

The Application adds complexity

40. If given the opportunity, ABI and NSWBC intend to file evidence demonstrating that:

- (a) the demand for labour in retail stores fluctuates; and
- (b) given these fluctuations, employers avoid using part time engagements because they find the Award processes for offering part time employees additional hours too cumbersome and impractical to follow. It also adds unnecessary cost (given the overtime rates applicable for working extra hours under clause 10.8 of the Award). Employers accordingly engage large numbers of 'regular' casual employees in lieu of part time employees.

41. If the Commission is to address this issue substantively, the mechanism that is implemented to allow for the voluntary working of additional hours must be simple to follow and not overly prescriptive. A failure to implement a simple process will feed back into existing perceptions that employing part timers is "too difficult" and will not achieve the increase in part time engagement/workforce participation commended to the Commission by the Applicants.

42. Unfortunately, the process envisaged by the draft determination filed with the Application is not simple.

43. **Firstly**, the draft determination contemplates an employer and an employee reaching an agreement for the working of additional hours.

44. The draft determination only appears to contemplate two types of agreements being reached:

- (a) an agreement for a particular rostered shift (clause 1.4(b)); or
- (b) an agreement for a specified period of time (clause 1.4(c)).

45. The draft determination does not refer to any ability for employees to indicate any standing arrangement pursuant to which they would be willing to work additional shifts.

46. As a result, employers are put to the task of having to agree in writing on the working of additional hours each time such an opportunity arises, or each time they are able to specify a period. This imposes numerous instances of paperwork on businesses which is not necessary.

47. **Secondly**, in the absence of any standing arrangement under which an employee's availability is known, employers do not have an opportunity to be notified in advance of an employee's availability to work additional hours on a voluntary basis under the Award. This places on employers the obligation to directly enquire about employee availability every time additional work might arise.
48. **Thirdly**, the determination does not address how the ability to work additional hours intersects with the rostering provisions of the Award, which ordinarily require 7 days' notice for changes to hours of work (see, for example, clause 15.9(e) and clause 10.10). The determination is silent on whether additional hours are to be the subject of rostering or not.
49. **Fourthly**, even if the draft determination does enable additional hours to be worked without overtime applying in some circumstances, it does little to add to the existing Award regime. Employees and employers can presently agree in writing to vary an employees' hours for a particular week pursuant to clause 10.6 of the Award. There seems to be little that the Application adds to the existing mechanism in clause 10.6.

Application imposes unnecessary cost on business, disincentivising the granting of additional hours

50. **Firstly**, Clause 1.3 of the draft determination compels an employer to pay an employee for additional hours offered/agreed, even if the additional hours are not ultimately worked.
51. This acts as a clear disincentive to reaching any agreement to work additional hours on a standing or ongoing basis (should it even be possible to reach a standing agreement with employees under the determination).
52. Employers will be naturally reluctant to commit to additional hours over any substantive period, lest they face the prospect of having to pay employees for work that is not ultimately performed.
53. **Secondly**, by entitling part time employees to transition to their additional hours on a permanent basis after only 6 months, the draft determination carries with it a disincentive to regularly offering additional hours of work (or at least offering such work to the same employee).
54. ABI and NSWBC accept that flexible part time employment should not be used as an improper means to engage employees on a more insecure basis, when the employer's identified need for the employee's services is greater than their contracted hours. However, the appropriate mechanism to address this concern would be to review an employee's working pattern over an entire year, before compelling employers to convert employees to a greater number of working hours. This ensures that fluctuations across seasons can be

taken into account before employees are granted any right to covert to additional hours on a permanent basis.

GROUND 3 - THERE IS A BETTER ALTERNATIVE

55. As was foreshadowed at the 5 February 2021 conference in proceedings AM2020/103, a number of major employer parties representing businesses in the retail industry are working on a proposal to vary the part time provisions of the Award.
56. The substantially developed product of these discussions has been filed together with these submissions (**Draft Joint Employer Determination**).
57. Although not all employer organisations have yet formally endorsed the Draft Joint Employer Determination, it has broad support at a conceptual level from Ai Group, ARA, NRA and ABI and NSWBC.
58. ABI and NSWBC submit that the Draft Joint Employer Determination is a more favourable solution to addressing existing inflexibilities associated with part time employment and triggering economic recover in the retail industry. This is because the Draft Joint Employer Determination:
 - (a) Allows for part time employees to indicate a standing availability to work additional hours. This enables employers to roster part time employees extra hours with far more confidence than under the proposal made by the Applicants (clause 10.11(b)).
 - (b) Confirms how these additional hours can be allocated - both by way of formal rostering pursuant to the Award, as well as on an ad-hoc basis (clause 10.12). This is not a feature of the Application.
 - (c) Expressly maintains an employee's right to decline additional hours of work - as is the case with the Application (clause 10.11(c)).
 - (d) Provides a 'conversion' mechanism to prevent these new flexibilities being used to make part time employment more insecure, however, the conversion mechanism allows a yearly cycle to be considered (including seasonal fluctuations) before employers are compelled to permanently increase a part time employee's hours.
 - (e) Relies upon the existing dispute resolution mechanism in the Award, as opposed to compelling new dispute resolution provisions on the parties.

DISPOSITION OF THE APPLICATION

59. There are some similarities between (or similar outcomes being sought by) the Application and the Draft Joint Employer Determination.

60. The presence of these similarities suggests that a conference or conferences between all union and employer parties has a prospect of resulting in a bargain that all parties can support. The prospects of such conferences succeeding to the point of a resolution would appear to be greater than is usually the case, given that the parties are all trying to achieve a similar outcome, albeit through differently drafted mechanisms.
61. Having regard to the above, ABI and NSWBC submit that the most appropriate way of dealing with the Application is to:
- (a) list the Application for conference so that the determination proposed by the Applicants can be discussed and reviewed having regard to the objections and the Draft Joint Employer Determination;
 - (b) join the Application with ABI and NSWBC's proposal to vary the Award in accordance with the Draft Joint Employer 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.

Filed on behalf of ABI and NSWBC by:

Luis Izzo

Managing Director - Sydney Workplace

Australian Business Lawyers & Advisors

(02) 9458 7640

luis.izzo@ablawyers.com.au

4 March 2021

DRAFT DETERMINATION

Fair Work Act 2009

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



Award flexibility - Hospitality and Retail Sectors

(AM2021/7)

GENERAL RETAIL INDUSTRY AWARD 2020

[MA000004]

Retail industry

JUSTICE ROSS, PRESIDENT

XX

XX

MELBOURNE, XX XXX 2021

Variation to the General Retail Industry Award 2021.

A. Further to the decision [[2021] FWCFB XX] issued by the Full Bench on XX XXX 2021, the above award is varied as follows:

1. By inserting a new clause 10.11 to 10.13 to the following effect:

10.11 Voluntary Additional Hours

(a) A part-time employee may be offered ordinary hours of work in addition to their regular pattern of work agreed pursuant to clauses 10.5 and 10.6, which may be accepted at the employee's discretion. These are referred to as **Voluntary Additional Hours**.

(b) The employee can accept the Voluntary Additional Hours either:

(i) by agreement in writing, at or after the time they are offered; or

(ii) by way of a standing written agreement, setting out the days of the week on which, and the hours on those days during which, the employee is available to work additional hours.

Note: The agreements above could be recorded in writing through an exchange of text messages, emails or via other electronic means.

(c) A part time employee may decline to work any Voluntary Additional Hours at any time. The provision of a standing written agreement does not require an employee to accept additional hours rostered or offered.

(d) Any agreement made pursuant to clause (b) above must be kept as an employee record.

(e) An employee may vary or revoke their standing written agreement outlining their Voluntary Additional Hours at any time. Any variation must be kept as an employee record. Where an employee has already agreed to work the Voluntary Additional Hours in a roster period, the variation or revocation will apply from the commencement of the next roster period.

10.12 Rostering of Voluntary Additional Hours

(a) Where a standing written agreement has been made, the employer may roster any Voluntary Additional Hours in accordance with clause 15— Ordinary hours of work and rostering arrangements, save that to the extent that any matter in clauses 15.7 or 15.8 may be altered by agreement, the employee’s standing written agreement may constitute such agreement.

(b) Alternatively, the employer may offer Voluntary Additional Hours to be performed on an ad-hoc basis once a roster has already been issued (or at any other time), notwithstanding the provisions of clauses 10.10 and 15.9.

(c) An employee’s regular pattern of work combined with their Voluntary Additional Hours must be less than 38 hours in any week.

Note: A part-time employee may decline the Voluntary Additional Hours rostered or offered pursuant to clauses (a) and (b) above at any time.

10.13 Increasing guaranteed hours to match regular work pattern

(a) If a part-time employee has regularly worked Voluntary Additional Hours in excess of their pattern of work agreed under clauses 10.5 and 10.6 for at least 12 months, then they may request in writing that the employer agree to increase their regular pattern of work.

(b) If the employer agrees to a request under clause 10.13(a), then the employer and the part-time employee must vary the agreement made under clause 10.5 to reflect the employee’s new regular pattern of work. The variation must be recorded in writing before it occurs.

(c) The employer may only refuse a request under clause 10.13(a) on reasonable business grounds. The employer must notify the part-time employee in writing of a refusal and the grounds for it.

2. By inserting a sentence and Note to the following effect to the end of clause 10.8:

Overtime rates will not apply Voluntary Additional Hours.

Note: Voluntary Additional Hours must be ordinary hours and accordingly must fall within the spans identified in clauses 15.1 to 15.5 of the Award.

3. By inserting a sentence to the following effect to the end of clause 21.2(b):

This subclause does not apply to the performance of Voluntary Additional Hours by part time employees.

- B. This determination comes into effect on XX XXX 2021. In accordance with s.165(3) of the Fair Work Act 2009 this determination does not take effect until the start of the first full pay period that starts on or after XX XXX 2021.

PRESIDENT