

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 respond to the application and submissions of the Shop, Distributive and Allied Employees' Association (**SDA**), Australian Council of Trade Unions (**ACTU**) and Master Grocers Australia (**MGA**).

#### Executive Summary

2. The Australian Retailers Association:
  - a. contends the application should be dealt with in conjunction with the earlier joint application of the ARA and National Retail Association (**NRA**) and the application of Australian Business Industrial and the New South Wales Business Chamber (**ABI**); and
  - b. opposes the application on the basis that the variation is not necessary having regard to section 157 of the *Fair Work Act 2009* (Cth) (**Act**).

#### Process

3. On 28 January 2021, the ARA and NRA filed a joint application, and ABI filed a separate application, seeking a variation to the *General Retail Industry Award 2020* (**GRIA**) which would have the effect of creating greater flexibility with respect to part time employment. The two applications were in substantially the same terms.
4. On 5 February 2021, the Commission held a conference in relation to, inter alia, the ARA/NRA and ABI applications. During that conference His Honour Justice Ross made the following observations:

**PN31**

*I will be similarly blunt, Mr Izzo, and the difficulty that I apprehend is not about the merits or anything like that, but it may affect the timing of the hearing of this aspect of the matters in the retail industry. If, for example - and I'm not suggesting this is a timetable - this matter was to go on and be the subject of proceedings at the same time as the bill is being debated in parliament, then it seems to me there is a real risk that even any questions from the Commission about aspects of the claim may be translated into the political arena and be used by one group or another in relation to the debate on the bill.*

**PN32**

*Even your comments that you don't think the bill - look, I understand the full context in which you put your remarks. I understand that you're not opposing the bill or anything like that, but that won't be how it's reported. There is a risk as you run the parallel proceedings that people - we have already seen this in the debates around the legislation.*

**PN33**

*I, for myself, am pretty reluctant to sort of jump into a political process and nor do I want to be in a position where the questions that I might put to you or provisional views, or however you frame it, then get used as a club to beat someone on some side to death with. It sort of drags us into that process. Look, I just wanted to raise that. I mean, we'll see how this develops, but I didn't want you to at least, you know, not be aware of that concern.*

5. His Honour also raised a number of questions in relation to the architecture of the proposed variation to the GRIA's part-time provisions and their effect. Additionally, Mr Izzo for ABI identified that concerns had been raised with him by a representative of another employer association regarding the content of the ABI application. Mr Izzo advised His Honour that he would work to achieve an agreed employer position with respect to the part-time provisions.
6. Later in the conference the following exchange occurred between Mr De Bruin on behalf of Master Grocers Australia (**MGA**) and His Honour:

**PN73**

MR DE BRUIN: Thank you, your Honour. Just in regards to the part-time employment matter that we've been discussing, we would certainly like to look into Mr Izzo's proposals more closely. As far as family and privately owned businesses are concerned, in our industry sector and throughout COSBOA, what we're looking for is a very, very simple approach to part-time employment that allows us flexibility, that allows us to offer additional hours without the burden of administration. We'd certainly like to have a look at what Mr Izzo has proposed, but we would certainly like to avoid complexity.

**PN74**

JUSTICE ROSS: So, Mr De Bruin, do I understand your position that you're looking - let's leave aside the drafting or any issues associated with that, for the moment, but the outcome that you seek is one that where you've engaged a part-timer, under the award, and let's say you've got the guaranteed hours, they work four hours on a Tuesday and four hours on a Thursday for you. You're looking for an arrangement that if you require them, you've got a position where, perhaps the owner of the business has to be away on another day of the week, a Wednesday, for a morning, you want to be able to approach the part-timer to say, 'Look, would you mind - are you available to do the morning next Wednesday?', for example. If they are then they could do those as additional hours that would be regarded as ordinary hours

rather than overtime hours. Is that basically the - you want a mechanism where that could work, in a practical way, is that it?

PN75

MR DE BRUIN: Your Honour, that's absolutely (indistinct)

7. Finally, when His Honour turned to the issue of exemption rates and the application of the Australian Industry Group and the joint application and ARA and NRA, which were different in substantive ways, His Honour made the following observations:

PN149

*JUSTICE ROSS: It's really they're your proposals, I'm proposing to give you whatever time you need. I'm not proposing to set a time period within which you need to do those - have those discussions. I would say, from the perspective of someone who's heard cases where there have been multiple employer claims directed at the same issue, it usually ends up in chaos. The focus tends to be on what the differences are between the various proposals. I make the same observation about union claims directed at the same issue and the SCHADS case has been an exemplar of that.*

PN150

*At the end of the day, you're left trying to sort out what the hell the things are directed at and why would you prefer one to the other. It does soak up a lot of time and energy focusing on what are, on the face of it - there may be good reason for the different positions but, on the face of it, the differences don't appear to be substantial. So I would certainly encourage that.*

8. On 26 February 2021, the application which brought about the present proceedings was filed jointly by the SDA, Australian Workers Union (**AWU**) and MGA. The application was different in terms, although contained some common features, and what the ARA says is a common intent, with the ARA and NRA application and the ABI application. At that time no indication was given by the proponents that any urgency was attached to the application.
  9. On 28 February 2021 the proponents filed an amended application and for the first time at this point they appear to have concluded there was a sense of urgency attached to the application, which they communicated to the Commission.
  10. The ARA raises this background because it raises issues of fairness. The ARA, we consider reasonably, took the views expressed by His Honour during the conference of 5 February 2021 to be a clear preference from the Commission that:
    - a. the consideration of the merits of part-time flexibility, and the provision of evidence and submissions on the matter, would be more appropriately dealt with separately in time to the consideration of the part-time provisions in the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020*; and
    - b. the efficiency of any Commission process would be enhanced if the Commission was presented with a single application for consideration.
  11. The ARA also took from the views expressed by the MGA during the conference that it wished to give consideration to the applications that had been made. Similarly, the SDA also expressed a willingness to consider the applications.

12. Given the above, and given the failure of the proponents to identify in their submissions any urgency that would cause the Commission to elevate their application in priority over the earlier applications, it would be unfair for the Commission to hear and determine this application prior to those earlier applications. If the Commission was to determine that the variation sought by the proponents should be made it can be presumed that the critical interest in having a stable modern award system would have a severely detrimental impact on the ability for those earlier applications to be granted.
13. The ARA therefore proposes that consideration of the merits of this application be deferred to allow consideration of whether the alignment in terms of the principles founding the various applications can result in a consent position between the parties. This would prevent the unfairness attached to prioritizing a later application over an earlier application and would either narrow the issues to be determined by the Commission or present the Commission with a position that is agreed between all parties. This would in turn increase the efficiency of the process and limit the impact on the time of the Commission and the parties.

## Merits

14. The ARA supports a number of the contentions contained within the SDA submission.
15. The ARA agrees there is merit in providing more simplified arrangements under which part-time employees can be offered, and can at their discretion elect to work, additional hours at ordinary rates of pay.
16. The ARA agrees that a flexible part-time arrangement will encourage employers to offer the opportunity to work additional hours to part-time employees who would otherwise not be given that opportunity.
17. The ARA agrees that more flexible part-time provisions will allow greater flexibility in employment, greater productivity and will reduce the regulatory burden for retail employers in managing their rostering.
18. The ARA agrees that the implementation of flexible part-time provisions with appropriate employee protections will allow for opportunities for additional hours which did not previously exist for those part-time employees.
19. The ARA agrees that more flexible part-time provisions will assist in maintaining employment and the viability of retail businesses, which will directly contribute to some degree to the sustainability and performance of the national economy.
20. The ARA's concerns, however, are with the structure of the variation proposed by the proponents. The proposed Schedule is complex of itself and there are significant questions as to its interaction with existing part-time provisions. Clause 10.6 of the GRIA allows an employer and part-time employee to agree to vary the regular pattern of work, including by agreeing to increase the hours of work. That agreement must be in writing, which includes agreement in electronic form. If an employer and a part time employee who works more than 9 hours per week reach such an agreement, the proposed variation would mean that both clauses could apply. This creates a level of uncertainty, and an ambiguity, that is contrary to the modern awards objective.

21. On that basis alone, the proposed variation should not be accepted. Further, however, the variation is also entirely unclear on a number of matters, including:

- a. Is the variation to hours under such an agreement temporary or permanent?
- b. Can a variation be limited to a particular period (for example, to reflect work required to be performed on a particular day or in a particular week)?
- c. Does an employee automatically revert to their pre-agreement hours at the end of a defined period, or does a separate agreement need to be entered into?
- d. Given the assessment period for a right to have core hours increased is 6 months, how do known peak trading periods, such as the Christmas trading period, impact on that assessment?

### **Conclusion and proposed path forward**

22. The proposed variation is a sub-optimal response to a legitimate need in the retail industry. The ARA believes there are much better ways to achieve flexible part-time provisions which properly balance employer operational needs and employee benefits and protections. Taking on board the questions raised by His Honour at the conference on 5 February 2021, the ARA, in conjunction with the other major employer parties, has developed a proposed variation to the GRIA that will achieve the aims of the ADA, AWU and MGA application while delivering the simplicity and clarity that this application lacks. The fruits of this work can be found in the Draft Determination filed today by ABI.
23. The ARA proposes that a conference be convened in the matter at a time convenient to the Commission at which the parties are given an opportunity to narrow the differences between their positions. If a consensus position is unable to be achieved via this process, the ARA proposes that the matters programmed to be heard jointly.

Australian Retailers Association  
4 March 2021