

Australian Industry Group

Award Flexibility Retail Sector

Submission and Draft Determination (AM2020/103)

28 January 2021



AWARD FLEXIBILITY – RETAIL SECTOR

1. The Australian Industry Group (**Ai Group**) files this submission and draft determination in response to paragraph [17] of the statement of the Fair Work Commission (**Commission**) dated 21 December 2020.
2. The proposal is also advanced in the context of the Attorney General's correspondence dated 9 December 2020 which identifies the following measures that "could prove critically important for providing business in the most distress part of the economy with the confidence to increase hiring during the recovery":
 - "Potentially simplified pay arrangements in the form of 'loaded rates' and/or 'exemption rates' designed to reduce the cost of administrative burden and address concerns about perceived risks arising from existing pay rate complexities and complexity risks that may lead to, particularly for small business, mistakenly underpaying employees."
3. We have proposed a draft determination that provides for the inclusion of exemption rates in the *General Retail Industry Award 2020* (**the Award**). The draft determination is attached to this submission.
4. The proposal has been developed in light of joint discussions with other employer representatives. We understand that such parties are likely to advance similar but not identical proposals.

Comments relating to the nature of the proposal advanced

5. As identified above, Ai Group proposes a variation in the nature of the inclusion of 'exemption rates'. The proposal advanced is broadly similar in its form and purpose to a longstanding provision of the *Hospitality Industry (General) Award 2020* and similar to the approach taken in a number of other modern awards.
6. In short, the proposal seeks to remove some of the complex and restrictive elements of the Award in the context of certain higher level and managerial classifications provided that the employee agrees to this arrangement and is

being paid an annual salary that is much higher than minimum wage rates contemplated by the Award.

7. The proposal applies two differing exemption rates. The first applies to employees at classification levels 4 and 5. The second relates to employees at classification levels 6, 7 and 8. We have not proposed an exemption rate for lower classification levels.
8. In advancing two exemption rates we have endeavoured to advance a proposal that is relatively simple but nonetheless reflective of the circumstances of different employees and employers.
9. We have also proposed appropriate safeguards. Relevantly:
 - The new provisions only apply if an employer agrees to the application of the proposed clause after being provided with information in writing about the effect of the arrangement;
 - An employer will be required to keep a record of this agreement;
 - The employee must be paid an annual salary that is significantly higher than the minimum wage rates of pay prescribed by the Award; and
 - The FWC would be empowered to arbitrate disputes relating to the operation of the new provisions using the consent arbitration powers in the *Fair Work Act 2009 (the Act)*.
10. The arbitration safeguard would ensure a degree of Commission oversight of the operation of this new flexibility. The approach is analogous to that adopted in the context of new flexibilities inserted into other awards in response to the circumstances flowing from the pandemic.¹

¹ See for example Clause I.1.3 in Schedule I – *Award Flexibility During the Covid 19 Pandemic* to the *Clerks – Private Sector Award 2020*

The nature of the issues that the proposal is intended to resolve

11. Ai Group contends that the proposed variation is necessary to ensure that the Award meets the modern awards objective.²
12. Without seeking to limit the justifications for the proposed variations that we advance in a comprehensive manner, the proposal is intended to relieve parties of the burden and impact of various award-derived rigidities and complexities so as to assist the retail industry to operate more effectively in the current unprecedented environment and to facilitate the maximisation of employment opportunities, including by addressing the following six matters:
13. *Firstly*, by providing for a simpler award-derived regulatory regime, the proposal will reduce the administrative and regulatory burden on employers in this distressed sector.
14. *Secondly*, by removing some of the highly prescriptive regulation in the Award regarding the times at which work is undertaken or rostered and the way remuneration is structured, the proposal will enable employers and employees in higher and managerial classifications to operate in a more agile and responsive manner whilst also creating flexibility for employees. This is particularly important to assist the industry to deal with the turmoil and challenges flowing from the context of the COVID-19 pandemic and to maximise employment opportunities, both now and in the context of the economic recovery.
15. *Thirdly*, the proposal seeks to strike a fair balance between the interests of employers and employees while recognising remuneration practices in the industry that reflect the nature of the roles of employees in higher classifications, including managerial employees, whilst still providing appropriate minimum terms and conditions,

² S.134 and s.138

16. *Fourthly*, the proposal seeks to assist employers to adopt remuneration regimes that provide employees with the benefit of both fair levels of remuneration and greater certainty of earnings; an outcome that we contend is particularly beneficial to employees in the current economic climate.
17. *Fifthly*, the proposal will assist compliance with the Award by providing a simpler and less prescriptive regime in the context of higher level and managerial employees, subject to appropriate safeguards.
18. The proposal is intended to address the above issues through a clause that is relatively simple to understand, and which delivers a mechanism that does not create undue administrative difficulties in its implementation.

Other proposals

19. Ai Group does not propose a loaded rates proposal.
20. We have participated in constructive discussions with employer parties regarding potential variations to the Award. We understand that other employer parties will advance a proposal directed at affording greater flexibility in relation to the Award's treatment of part-time employment. We share the view that there is merit in greater flexibility in relation to the regulation of part-time employment in the retail sector, underpinned by appropriate safeguards.

Submission relating to the conduct of the proceedings

21. We do not propose to identify any particular principles that should guide the conduct of the proceedings, beyond identifying the somewhat trite point that it is of course the framework of the Act that should ultimately govern such matters.
22. We do however submit that it is appropriate for the Full Bench to deal with the current matter as swiftly as possible given the context of the matters raised in the Minister's correspondence that was the catalyst for the proceedings, whilst still ensuring that interested parties are afforded a fair opportunity to be heard in relation to the likely significant matters being considered. The Commission has previously demonstrated a capacity to balance these considerations in the

context of expediting various proceedings initiated by both employer and employee parties in response to the pandemic and the associated economic environment.

23. Ai Group anticipates seeking to address the Commission at the next scheduled conference as to the future course of the proceedings, once there is greater clarity as to the scope of proposals that are advanced in the proceedings and the position of other parties in relation to any such proposals.

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 (AM2020/103)

GENERAL RETAIL INDUSTRY AWARD 2020 [MA000004]

Retail industry

JUSTICE ROSS, PRESIDENT

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MELBOURNE, XX XXX 2021

Variation to the General Retail Industry Award 2021.

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

1. By adding a clause 18 as follows:

Exemption Rate (managerial and higher level staff)

18.1 Clause 18 applies to all employees, other than casuals, classified at Retail Employee Level 4 to Retail Employee Level 8 who:

- (a) in the case of an employee classified at Retail Employee Level 4 to 5, is paid an annual salary that is at least 125% of the minimum weekly rate specified in clause 17.1 for the level 6 classification multiplied by 52.14; or
- (b) in the case of an employee classified at Retail Employee Level 6 to 8 – is paid an annual salary that is at least 125% of the minimum weekly wage rate specified in clause 17.1 for the level 8 classification multiplied by 52.14; and
- (c) has agreed with their employer, in writing, to the application of this clause; and
- (d) has been advised by their employer, in writing and prior to the employee agreeing to the application of this clause, of the annual salary that they will be paid and provisions of the award that will not apply because of the application of this clause.

- 18.2** An employer must keep a record of any agreement reached in accordance with clause 18.1(c) as an employee record until at least 7 years from the date of the employee's employment ending.
- 18.3** An employee to whom this clause applies is not entitled to the benefit of the terms and conditions within the following clauses:
- (a) Clause 10.6 to 10.10—Part-time employees;
 - (a) Clause 15—Ordinary hours of work and rostering arrangements;
 - (c) Clause 16 – Breaks;
 - (b) Clause 19—Allowances, except that clauses 19.6 – Moving expenses and 19.7 – Motor vehicle allowance will continue to apply;
 - (c) Clause 21 —Overtime;
 - (d) Clause 22—Penalty Rates;
 - (e) Clause 28.3—Payment for annual leave loading;
 - (f) Clause 33.3 and 33.4—Payment for work on public holiday or substitute day;
 - (g) Part 6—Shiftwork.
- 18.4** The ordinary hours of an employee to whom this clause applies will be:
- (a) An average of 38 hours per week calculated over a period of up to 4 weeks; or
 - (b) An average of 38 hours per week calculated over a period agreed between the employer and the employee.
- 18.5** An employee must be rostered to have a minimum of 8 days off during each 4-week cycle of work, unless otherwise agreed between the employer and employee in order to meet temporary operational requirements of the employer or personal circumstances of the employee.
- 18.6** An employee who is required to work on a public holiday is entitled to paid time off, during their ordinary hours, of equal length to the time worked on the public holiday. Such time off must be taken within 28 days of being accrued unless otherwise agreed in accordance with clause 18.7.
- 18.7** An employee and an employer may agree to extend the period for taking time off accrued pursuant to clause 18.6 to within 6 months of its accrual subject to the following:
- (a) any such agreement is recorded in writing and retained as an employee record;
 - (b) the accrued time off is taken at a time or times within the period of 6 months agreed by the employee and the employer;
 - (c) if the accrued time off is not taken within the period of 6 months, the employer must pay the employee for the accrued time off in the next

pay period following those 6 months. This must be paid at the rate of pay calculated in accordance with clause 18.8.

- (d) if, on the termination of the employee's employment, accrued time off for working on a public holiday has not been taken, the employer must pay the employee for the accrued time off.

18.8 Calculation of hourly rates

Any calculation required to be made under this award to determine hourly amounts payable to an employee must be made by reference to the weekly equivalent of the annual salary of the employee by 38. The weekly equivalent is determined by dividing the annual salary by 52 and rounding the result to the nearest **\$0.10**.

18.9 Dispute resolution

An employer who has made an agreement with an employee to apply the provisions of clause 18 provides consent to a dispute about the agreement or the operation of clause 18 being settled by the Fair Work Commission through arbitration in accordance with clause 36.5—Dispute resolution and section 739(4) of the Act.

- 2. By renumbering the clauses following clause 18 and updating cross-references in all other clauses accordingly.

- 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