DECISION

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)

Retail industry

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT ASBURY
COMMISSIONER HAMPTON MELBOURNE, 24 MARCH 2021

Industrial relations reform working groups – letter from Minister – award flexibility – joint application – part-time additional hours – General Retail Industry Award 2020

Background

[1] On 9 December 2020, the Commission 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.'[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 Statement[2] 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 Note[3] 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. In respect of the sector characteristics:

---

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

[2] [2020] FWC 6636.

[3] Fair Work Commission, 'Retail Trade', 10 December 2020.

- There were more than 130,000 businesses in Retail trade in 2019, making it the 7th largest industry.[4]

- Of those businesses with employees, 92% were small businesses, 7.6% were medium-sized businesses and 0.5% were large businesses.

- A relatively low proportion of enterprise agreements are made in the industry.

- Retail trade is one of the largest industries measured by employment, with over 1.2 million workers.[5] Around 1 in 10 employed persons work in Retail trade.

- The effects of the COVID-19 pandemic among employers and their employees in Retail trade has differed within the industry and over the period. Some businesses operating in the industry were deemed essential while others were forced to change their operations, particularly during Victoria's second lockdown.

- The retail industry has been significantly affected by the responses of consumers to the COVID-19 pandemic.

[4] Appendix B to the Information note sets out the characteristics of employees in the retail sector compared to employees in 'all industries':

Table B1: Characteristics of employees in the retail industry, 2016

	Retail industry		All industries	
	(No.)	(%)	(No.)	(%)
Gender				
Male	288 658	39.2	4 438 604	50.0
Female	448 052	60.8	4 443 125	50.0
Total	736 710	100.0	8 881 729	100.0
Full-time/part-time status				
Full-time	299 173	42.5	5 543 862	65.8
Part-time	404 069	57.5	2 875 457	34.2
Total	703 242	100.0	8 419 319	100.0
Highest year of school completed				
Year 12 or equivalent	464 045	63.6	5 985 652	68.1
Year 11 or equivalent	87 395	12.0	856 042	9.7
Year 10 or equivalent	139 143	19.1	1 533 302	17.4
Year 9 or equivalent	29 759	4.1	273 180	3.1
Year 8 or below	8069	1.1	112 429	1.3
Did not go to school	1401	0.2	26 356	0.3
Total	729 812	100.0	8 786 961	100.0
Student status				
Full-time student	159 063	21.7	715 436	8.1
Part-time student	33 813	4.6	491 098	5.6
Not attending	539 540	73.7	7 618 177	86.3
Total	732 416	100.0	8 824 711	100.0
Age (5 year groups)				

[4] ABS, Counts of Australian Businesses, including Entries and Exits, June 2015 to June 2019.

[5] ABS, Labour Force, Australia, Detailed, August 2020.

15–19 years	122 038	16.6	518 263	5.8
20–24 years	138 728	18.8	952 161	10.7
25–29 years	90 156	12.2	1 096 276	12.3
30–34 years	72 477	9.8	1 096 878	12.3
35–39 years	58 330	7.9	972 092	10.9
40–44 years	58 620	8.0	968 068	10.9
45–49 years	57 077	7.7	947 187	10.7
50–54 years	52 676	7.2	872 485	9.8
55–59 years	43 447	5.9	740 822	8.3
60–64 years	27 848	3.8	469 867	5.3
65 years and over	15 309	2.1	247 628	2.8
Total	736 706	100.0	8 881 727	100.0
Average age	34.2		39.3	
Hours worked				
1–15 hours	182 536	26.0	977 997	11.6
16–24 hours	115 082	16.4	911 318	10.8
25–34 hours	106 452	15.1	986 138	11.7
35–39 hours	133 827	19.0	1 881 259	22.3
40 hours	79 141	11.3	1 683 903	20.0
41–48 hours	43 669	6.2	858 120	10.2
49 hours and over	42 533	6.0	1 120 577	13.3
Total	703 240	100.0	8 419 312	100.0

Note: Part-time work is defined as employed persons who worked less than 35 hours in all jobs during the week prior to Census night. Totals may not sum to the same amount due to non-response. For full-time/part-time status and hours worked, data on employees that were currently away from work (that reported working zero hours), were not presented.

Source: ABS, Census of Population and Housing, 2016.

[5] The Commission also received data from the Attorney-General's Office addressing points that were raised during the December 2020 conferences in respect of the Award Flexibility – Hospitality and Retail Sectors matter (AM2020/103). The data, along with a document prepared by the Attorney-General's Office titled 'Employment size and working patterns of particular sectors of the hospitality and retail industries'[6], was published alongside a Statement[7] by the Commission on 1 February 2021.

[6] 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).[8] 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.

The Joint Application

[7] 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

[6] Australian Government Attorney-General's Department, 'Employment size and working patterns of particular sectors of the hospitality and retail industries', 28 January 2020.

[7] [2021] FWC 478.

[8] Joint Application, 26 February 2021.

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.

[8] 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.

[9] An amended Joint Application[9] was filed on 28 February 2021, which corrected some cross-referencing errors in the original application.

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

[11] The Joint Applicants requested that the application be dealt with urgently.

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

---

[9] Revised Joint Application, 28 February 2021.

'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**.'

[13] Submissions in support of the application were received from:

- ACTU dated 2 March 2021
- AWU dated 2 March 2021
- SDA dated 2 March 2021
- MGA dated 2 March 2021.

[14] 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).

[15] 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.

[16] RAFFWU also objected to the Joint Application being dealt with on an expedited basis and submitted that 'without any evidentiary base it should not be permitted to proceed'.

[17] 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.

The Conciliation Process

[18] 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.'

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

[20] Prior to the conferences the Commission issued a short framework document setting out the context and an indicative list of issues for discussion. The framework document also confirmed:

- The conciliation discussions were designed to narrow the issues between the parties, particularly those supporting some form of change.

- Ultimately, the Full Bench will determine whether there is to be a variation to the Award, and if so, what form that would take.

- Unless otherwise agreed by the relevant parties, the Report issued to the Full Bench would not disclose positions advanced during the conference.

- Parties may be requested to confirm their positions to the Full Bench following the publication of the Report.

[21] In view of the progress made during the conciliation process we decided to provide more time to enable the parties to prepare submissions based on their revised proposals. We issued the following directions:

> '1. All interested parties are to file submissions and evidentiary material, including witness statements by no later than ~~**5PM (AEDT) Friday, 12 March 2021.**~~ **4PM (AEDT) Tuesday, 16 March 2021.**
>
> 2. Interested parties are to provide an indication of which witnesses will be required for cross-examination by ~~**2PM (AEDT) Monday, 15 March 2021.**~~ **10AM (AEDT) Wednesday, 17 March 2021.** Wednesday Such an indication is to be sent to chambers.ross.j@fwc.gov.au.
>
> 3. All submissions and evidence are to be sent in word format to amod@fwc.gov.au.
>
> 4. The Hearing is adjourned and the matter will be relisted for hearing at ~~**9:30AM (AEDT) Tuesday, 16 March 2021.**~~ **1PM (AEDT) Wednesday, 17 March 2021**'[10]

[22] On 15 March 2021 the Commission published a Report to the Full Bench[11] (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.

---

[10] The time of the hearing on 17 March was subsequently amended to 2pm.

[11] [2021] FWC 1297.

[23] 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.

Submissions

[24] On 15 March 2021 we received the following:

- Revised draft determination[12] submitted by the Joint Applicants (**Attachment A**).
- Revised draft determination[13] submitted by ABI containing the award variations sought by ABI, NRA and ARA (**Attachment B**).
- Correspondence[14] from ABI attaching a research report from the University of Wollongong Australia titled 'Employers and the use of casuals in the Australian Retail Sector' by Senior Professor Paul Gollan and others, and related materials.

[25] Submissions were received from the following parties:

- ABI dated 16 March 2021
- ACTU dated 16 March 2021
- Ai Group dated 16 March 2021
- ARA dated 16 March 2021
- MGA dated 16 March 2021
- Newsagents Association of NSW & ACT Limited (NANA) dated 16 March 2021
- NRA dated 16 March 2021
- RAFFWU dated 16 March 2021
- SDA dated 16 March 2021.

[26] The AWU confirmed that it supported the submissions of the SDA and ACTU and did not seek to file any additional material.[15]

---

[12] Revised Joint Applicant Draft Determination, 15 March 2021.

[13] ABI Draft Determination, 15 March 2021.

[14] Email from ABI, dated 15 March 2021.

[15] Email from AWU, dated 16 March 2021.

[27] 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'.

[28] The intention of the Joint Application is to 'encourage employers … to offer additional hours of work to part-time employees willing to work them without having to engage casual employees for such a purpose.'[16]

[29] A similar intention is expressed in relation to the ABI proposal, namely that it is aimed at '… varying the part time provisions of the (Retail) Award to enable part time employees to work additional ordinary hours, without attracting overtime payments, where such hours are voluntarily worked.'[17]

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

- encourage employers to offer additional hours;[18]
- increase hours of employment amongst part-time employees, thereby promoting social inclusion through increased workforce participation;[19]
- have a positive impact on business and productivity;[20]
- have a positive impact on employees by allowing for the more efficient allocation of work to part-time employees, rather than that work being allocated to casual employees;[21] and
- support employment growth, and the performance of the economy as a whole.[22]

[31] 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.

[32] 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

---

[16] SDA Submission, 2 March 2021 at [14].

[17] ABI Submission, 4 March 2021 at [32].

[18] 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).

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

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

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

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

or 10.6 may request that their employer vary the agreement under clause 10.5 to reflect the ordinary hours regularly being worked. The two mechanisms are set out in the table below.

Joint Application	**ABI Proposal**
Review of number of hours I.7 Where a part-time employee has regularly worked additional agreed hours for at least six months, the employee may request in writing that the employer vary the agreement under clause 10.5 to reflect the ordinary hours regularly being worked. I.8 The employer must respond in writing to the employee's request within 21 days. I.9 The employer may refuse the request only on reasonable business grounds. EXAMPLE: Reasonable business grounds to refuse the request may include that the reason that the employee has regularly worked additional agreed hours is temporary—for example where this is the direct result of another employee being absent on annual leave, long service leave or worker's compensation. I.10Before refusing a request made under clause I.7, the employer must discuss the request with the employee and genuinely try to reach agreement on an increase to the number of hours agreed under clause 10.5 that will give the employee more predictable hours of work and reasonably accommodate the employee's circumstances. I.11If the employer and employee agree to vary the agreement under clause 10.5, the employer's written response must record the agreed variation. If the employer and employee do not reach agreement, the employer's written response must set out the grounds on which the employer has refused the employee's request.	**10.12 Increasing guaranteed hours to match regular work pattern** (a) If a part-time employee has regularly worked additional ordinary hours in excess of their pattern of work agreed under clauses 10.5 and 10.6 for at least 12 months, the employee may request in writing that the employer vary the agreement under clause 10.5 to reflect the ordinary hours regularly being worked. (b) The employer must respond in writing to the employee's request within 21 days. (c) If the employer agrees to a request under clause 10.12(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. (d) The employer may refuse the request under clause 10.12(a) only on reasonable business grounds. The employer must notify the part-time employee in writing of a refusal and the grounds for it. (e) Before refusing a request under clause 10.12(a), the employer must discuss the request with the employee and explore whether they can reach agreement on an increase to the number of hours agreed under clause 10.5 that will give the employee more predictable hours of work and reasonably accommodate the employee's circumstances.

[33] 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 I.11 and ABI proposal at 10.12(c)).

[34] There are however 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).

[35] In relation to the last point both the Joint Application and the ABI proposal 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.

[36] 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 specifically identified 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 such 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.

[37] Finally, it is unclear if the limitations in clause 15 apply to 'additional hours' worked pursuant to the ABI proposal. Clause I.2 of the Joint Application variation expressly provides that 'additional hours agreements' are 'subject to clause 15'.

[38] 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.

[39] In relation to the Joint Applicant's proposal RAFFWU submits:

> 'Since the earlier submission the Joint Applicants have confirmed their application is premised on any "agreed additional hours" being subject to the requirements of clause 10.5.
>
> That is, the agreed additional hours must be documented as a regular pattern of work with agreed start times, finish times, days of work and breaks. With those concessions RAFFWU no longer opposes the core basis of the application. That said, the proposed variation itself is deficient in

that it doesn't clearly identify this premise. Until such clarity is ensured, the Full Bench ought not embark on that part of the proposed variation.'[23]

[40] The ACTU submits that the following are pertinent to the disposition of the Joint Application:

- The Joint Applicants consist of worker and employer representatives.
- The Joint Application is supported by the ACTU and COSBOA.
- MGA and COSBOA represent small to medium-sized enterprises, which are more likely to engage employees pursuant to the Retail Award.
- The variation the subject of the Joint Application:
    - is temporary in nature, being scheduled to sunset after a period of 18 months;
    - may be adopted by employers and employees on an entirely voluntary basis;
    - is straightforward and easy to understand;
    - provides certainty for employers and workers; and
    - contains a range of safeguards.

[41] The ACTU opposes the ABI proposal submitting that it:

- Is not supported by any other employer or employee representatives, and is opposed, by the Applicants.
- Provides for a more complicated mechanism, with less certainty, than the variation proposed in the Application.
- Does not contain provisions protecting workers.
- Goes beyond the immediate need to address the effects of the pandemic by seeking to impose permanent radical changes.

[42] The ACTU's submission is encapsulated at [5] – [12] of its submission of 16 March 2021:

'The FWC is asked to choose between two competing proposals. However, it is the ACTU's submission that this is not a choice between equals.

The change proposed by the Applicants, which the ACTU submission supports, is a sensible and measured change. It makes temporary adjustments which deliver to the extent necessary to support the retail industry as it moves through its recovery from the effects of the COVID-19

[23] RAFFWU Submission, 16 March 2021 at [2] – [3].

> pandemic. These changes are supported by a relevant mix of worker and small business advocates.
>
> The competing proposal, advance by ABI, ARA and NRA, seeks a radical and permanent overhaul of working arrangements for part-time retail workers. These changes go further, both substantively and temporally, than is required or justified by the present circumstances.
>
> What is essentially the ongoing wholesale casualisation of part-time employment is neither warranted nor justified by the current economic situation or outlook.
>
> Not only would the ABI proposal casualise part-time employment, it would also have a deleterious effect on full-time employment. By leaving it open to employers to engage part-time workers – without any guarantees – for up to 38 hours per week as and when they need, employers would simply be able to structure their entire workforce on part-time, rather than full-time contracts.
>
> That this is what is being advanced as a competing proposal to this Application is no more than an attempt to fulfill an industrial agenda which existed well prior to the COVID-19 pandemic.
>
> That the changes sought by the ABI, ARA and NRA are permanent in nature greatly exceeds any linkage which might otherwise apply to the present and temporary economic circumstances brought about by the COVID-19 pandemic.
>
> The following section of this submission compares the two proposals that are before the FWC and, in the submission of the ACTU demonstrates why the Applicant's proposal ought be accepted, and the alternative proposal put forward by the ABI should not.'

[43] The ACTU (and MGA) also makes submissions about the nature of the industry covered by the Retail Award which are adopted and summarised by the SDA, in particular:

- Retail trade is highly award reliant
- Many retail workers are 'low income'
- A high proportion of employees work on a part-time basis
- Small business accounts for almost one-third of all employment in the sector.

[44] The SDA submission addresses what it characterises as the 'substantive' and 'technical' objections to the Joint Applicant variation. The 'substantive' objections are addressed at [21] – [35] of the SDA submission; the 'technical' objects are addressed at [36] – [45]. The SDA's objections to the ABI proposal are set out at [46] – [67].

[45] At [46] the SDA identifies the differences between the ABI proposal and the Joint Applicant variation.

[46] ABI opposes the Joint Application and supports the making of the ABI draft determination. In support of their submission, ABI contends:

1. The flexibility that the Application purports to introduce already exists within the existing Award framework.

2. The only additional benefit that would be gained by the Joint Application is the ability for an employer and part-time employee to record an agreement to work additional hours by the end of the shift. Currently the agreement must be recorded prior to the hours being worked. This is of marginal benefit. It is insubstantial.

3. The above 'benefit' would only apply in limited situations and to limited categories of part-time employees. The existing award provisions contain no such limitations.

4. In exchange for the above 'benefit', the variations would introduce unprecedented burdens including the right to permanently increase a part-time employee's regular hours of work and the ability for the Commission to arbitrate any disputes. The existing Award does not contain any such terms.

5. The scheme proposed by the Joint Applicants would operate in parallel with the existing Award provisions. Both methods would contain different eligibility requirements and different consequences once introduced. This would lead to significant confusion and uncertainty.

6. Notwithstanding the above, there appears to be uniform consensus amongst a large number of employer and union parties that the Award should better promote the working of additional hours by part-time employees.

7. The evidence filed by ABI shows that there are real difficulties with the existing Award provisions regulating the working hours of part-time employees. The evidence demonstrates that (both real and perceived) inflexibilities of the Award's part-time provisions prevent employers from engaging more staff in secure, part-time employment.

8. The ABI determination seeks to vary the Award in a more appropriate way than the Joint Application and promotes the offering of additional hours in a manner more aligned with the modern awards objective.

9. The flexibilities contained in the ABI determination are not dissimilar from those found in enterprise agreements applying across the retail industry without issue - many of which have been expressly supported by the SDA.

[47] ABI also refers to a number of enterprise agreements[24] which contain standing consent arrangements and submits that in a number of instances the SDA supported the approval of the agreement. In respect of the SDA's position regarding the approval of these agreements ABI submits:

> 'The position taken by the SDA with respect to standing consent arrangements suggests it has no philosophical objection to the mechanism for offering hours proposed in the Joint Employer Determination.'[25]

---

[24] *Coles Supermarkets Enterprise Agreement 2017*; *Woolworths Supermarkets Agreement 2018*; *Prouds Retail Employees Enterprise Agreement 2019*; *Kmart Australia Ltd Agreement 2018*; *Freedom Retail Enterprise Agreement 2020*; *Betts Group Agreement 2019*; *Fantastic Furniture Enterprise Agreement 2019*; *Dan Murphy's Agreement 2019*; *Champions IGA Supermarket Enterprise Agreement 2019*.

[25] ABI Submission, 16 March 2021 at [126].

[48] NANA supports increased flexibility around the engagement of part-time employees but is concerned that whatever the changes to the Retail Award that may arise from either of the proposals:

- not disturb the existing structure of the plain language version of the Award; and
- not serve to cause confusion for those small business employers which rely on the Award as their main regulatory instrument.

[49] Further, NANA opposes the 9 hour minimum engagement term specified at I.2 of the Joint Applicants' proposal as it would exclude certain groups of part-time employees engaged in its sector.

[50] Ai Group opposes the Joint Applicants' revised variation determination and provides qualified support for the ABI proposal. In relation to the ABI proposal Ai Group expresses some reservations about whether all the safeguards included in the proposal are necessary.[26]

[51] Ai Group also submits that the Retail Award contains an adequate dispute resolution mechanism and that it is not necessary to include the proposed consent arbitration arrangement.

Evidence

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

[53] Senior Professor Gollan was initially engaged by ABI in respect of a proposal to vary the *Social, Community, Home Care and Disability Services Industry Award 2010* to include a new type of employment, named a 'flexible ongoing' employee.

[54] In June 2020, the industry which was to be the subject of the research was changed to the Retail Industry and the Gollan Report only reports on the retail aspects of the research. That research involved focus groups and an employer survey.

[55] Two focus groups of 11 participants were held on 28 and 29 July 2020. Each focus group lasted an hour. It appears that the participants in the focus groups were nominated by the NSW Business Chamber (NSWBC) and the ARA.

[56] The discussions during the focus groups centred around 5 general questions:

1. Why have employers traditionally engaged casual employees in the retail industry?
2. Whether employers consider it desirable or necessary to continue to engage employees on a casual basis. If so, why?

[26] During the course of argument Ai Group withdrew [50] – [52] of its written submission dated 16 March 2021, see Transcript, 17 March 2021 at PN50.

3. Whether employers consider it desirable or necessary to engage employees regularly as casuals. If so, why?

4. Whether employers require an ability to change rosters for staff, even those who have been engaged for some time.

5. Do these organisations engage with employees part-time? If not, why not?

[57] The validity of qualitative research of the type upon which the Gollan Report is based, is widely accepted. The Commission had regard to evidence of this nature in the *Penalty Rates Decision*,[27] in which the Full Bench observed:

> 'Despite the limitations of qualitative research it can provide more detail and context to assist in gaining a deeper understanding about a particular issue.'[28]

[58] Qualitative research based on selected focus groups or interviews cannot usually be said to be representative of the views or experiences of *all* employees in the particular cohort from which the interviewees are drawn. That is the case here. The qualitative research is based on two one hour interviews with 11 participants selected by NSWBC and the ARA. The business of one of the 11 focus group participants ('F' the head of human resources for a café franchise group) is covered by the Restaurant Award *not* the Retail Award.

[59] The Gollan Report identifies three main themes that emerged from the focus groups, and elaborates on these themes by reference to participant commentary. The three main themes said to emerge from the focus groups are:

1. Award rules around the employment of part-timers are seen as restrictive and act as a disincentive to employing more employees on a non-casual basis, especially change of rosters and overtime provisions.

2. Many employees prefer to work as casuals, because of the flexibility and the extra casual loading. Relatively few employees choose to convert to non-casual employment when given the choice.

3. While many casuals are used to respond to peak periods, many work fairly regular hours.

[60] A number of the focus group participants made comments supportive of award provisions which enabled part-time employees to work additional hours at ordinary time rates (see for example, comments by participants 'B' and 'C' at pp 5 – 6 of the Gollan Report). The context leads us to conclude that these participants were of the view that the current terms of the Retail Award did not permit such flexibility.

[61] There also appeared to be some confusion around the operation of clause 35 – Consultation about changes to rosters or hours of work of the Retail Award. One of the focus

---

[27] [2017] FWCFB 1001 at [589] – [595], [609] and [1617].

[28] [2017] FWCFB 1001 at [1617].

group participants (participant 'B') is reported to have said that 'The consultation period on changing anybody's fixed hours is really prohibitive to a retail business'.[29]

[62] Yet clause 35 only requires employers to inform employees affected by a proposed change to their regular roster or ordinary hours of work; invite the employees to give their views on the impact of the proposed changes and consider any views given. In the context of *mutually agreed* changes to a part-time employee's regular pattern of work the consultative provisions in clause 35 would necessarily have been met. The employer and employee will have discussed, however briefly, the proposed change and agreed upon it.

[63] A survey was subsequently distributed by the NSWBC and ARA to their members. The survey was live from 4 November to 15 December 2020. A total of 316 responses were received. Incomplete survey responses were removed from the sample as part of the 'data cleaning process', resulting in a sample of 182 responses, of which 79 were from business that identified as being part of the general retail sector.

[64] ABI acknowledges that the survey is not 'a precise statistically representative survey' which can be automatically extrapolated to the industry as a whole. But ABI contends that, from a qualitative perspective, the research identifies:[30]

- the views of approximately 80 employers in the industry regarding the motivations behind engaging casuals and the challenges associated with employing part-time employees; and

- clear trends that indicate that certain barriers are operating in the retail industry with respect to part-time employment.

[65] As mentioned earlier, there are over 130,000 businesses in the Retail sector. Given the small number of responses and the way in which the survey instrument was distributed (limited to NSWBC and ARA members) the results cannot be said to be representative of the views of retail employers generally. The results simply provide some anecdotal evidence of the views of a limited number of retail employers.

[66] The survey results are discussed at pp 9 – 13 of the Gollan Report. Businesses were asked to rate the importance of a number of factors in their decision to employ casuals, from zero (no importance) to 10 (extremely important). The mean rank of those results reported in table 3 of the Gollan Report:

> 'The flexibility to vary weekly work hours in response to customer demand ranks as the most important reason for employing casuals. Echoing results from the previous section, the importance of labour supply is also prominent, with employee preferences for casual employment ranking as the second most important reason for employing casuals. The ability to "plug gaps" in the roster, ease of employing casual employees compared to non-casual employees, engagement for shorter shifts, and flexibility to engage or disengage on a weekly basis were all deemed important, providing a mean score above 5. Finally, costs considerations

[29] Gollan Report, p 5.

[30] ABI Submission, 16 March 2021 at [94].

were deemed the least important reason for employing casuals. Again, this would confirm views expressed in the focus groups.'

[67] Relevantly, the response 'the provisions within the relevant modern award make it preferable to employ casuals rather than part-time or full-time (no casuals)', only received a mean score of 4.6.

[68] Respondents were also asked, "If certain employment conditions in your Modern Award could be changed, would you employ a greater percentage of your workers on a part-time or fulltime (non-casual) basis and fewer on a casual basis?"

[69] After excluding those businesses that did not employ casuals and those covered by enterprise agreements, some 21% of businesses stated "yes", 52% stated "maybe", and 27% said "no". Those that answered "yes" or "maybe" were asked to rate the importance of various issues as barriers to employing a greater percentage of their workers on a part-time or full-time (non-casual) basis on a 0 to 10 scale. The results are set out in Table 4 of the Gollan Report, which is reproduced below.

Table 4. Barriers to Employing a Greater Percentage of Workers on a Part-time or Full-time (Non-casual) Basis - Mean of Raw Score (0 to 10) and Rank

	Mean Score	Rank
Costs of overtime if weekly fixed hours for part-time employees are exceeded	7.4	(1)
Complexities in changing fixed roster of days / hours	7.3	(2)
General Modern Award compliance complexities	6.9	(3)
Individual flexibility arrangement complexities	6.3	(4)
Staff reluctance to convert from casual to permanent part-time status	5.7	(5)
Difficulties in dismissing part-time or full-time (non-casual) employees	5.4	(6)
Costs associated with paid leave	5.3	(7)

[70] Notably, when asked what types of changes would be required in order to reduce barriers to part-time or full-time engagements:

- The costs of overtime associated with exceeded weekly hours for part-timers was the highest factor considered as a barrier to further permanent engagements, with a mean score 7.4/10.[31]

- 'Complexities' in changing fixed rosters of days/hours ranked second, with a mean score of 7.3/10.[32]

[71] It is apparent from these results that a number of survey respondents identified the costs of overtime if weekly fixed hours for part-time employees are exceeded as a significant barrier to the employment of part-time employees. This suggests that those respondents do not perceive that there is currently the capacity for part-time employees to work voluntary additional hours by mutual agreement, without paying overtime.

[31] Gollan Report, p 13.

[32] Gollan Report, p 13.

[72] A number of parties referred to the Gollan Report and its relevance to the matters before us. In particular, ABI submits:

> 'The survey does not provide all the answers.
>
> Rather, it merely highlights a dissatisfaction on the part of employers with respect to parttime employment provisions - in particular regarding when overtime applies to additional hours and to perceived 'complexities' associated with rostering and changing hours of work.
>
> The Joint Employer Determination addresses these very types of issues.'[33]

[73] Similarly, ARA contends that:

> 'that the consistency between [the Gollan Report] findings and the position of the proponents of changes in this matter establishes the basis for changes to be implemented.'[34]

[74] The NRA submits that the Gollan Report:

> 'confirms on a evidentiary level that the preference for casual labour by employers is closely linked to the flexibility that attends casual employment as compared to permanent employment, particularly part-time employment.'[35]

[75] The SDA takes a contrary view and submits that the Gollan Report 'does not advance the joint employers' case',[36] and that:

> 'The focus groups whose views are discussed in Section 3 are small and hardly representative of anything. Insofar as they express views, they may be summarised as "employers would prefer more flexibility"…
>
> The best you can make of all of this is that some employers prefer casuals because of the flexibility. Further, if they could have flexibility without the costs of casual rates, they would prefer that. The conclusions are hardly revelatory.'[37]

[76] In our view 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.

[77] 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.

---

[33] ABI Submission, 16 March 2021 at [99] – [101].

[34] ARA Submission, 16 March 2021 at [22].

[35] NRA Submission, 16 March 2021 at [2.1.7].

[36] SDA Submission, 16 March 2021 at [60].

[37] SDA Submission, 16 March 2021 at [61] – [63].

[78] But the latter point raises an important issue of principle – namely, the defining characteristics of part-time employment and the features which distinguish it from casual engagement. We return to that issue shortly.

Consideration

[79] The central issue in these proceedings is the mechanism for facilitating the working of additional ordinary hours by part-time employees. At the outset we wish to acknowledge 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. We also acknowledge the cooperative way in which all parties participated in the conciliation process and endeavoured to narrow the issues in dispute.

[80] We recognise the significance of the fact that the Joint Application has the support of the principal union and some, though not all, relevant employer organisations. While such a level of consent is relevant to our consideration of the Joint Application it is not determinative and, for reasons explained in a number of other Full Bench decisions,[38] modern awards are regulatory instruments and the shift in the nature and purpose of awards means that the weight to be given to the views of interested parties is, generally speaking, less now than under past legislative regimes.

[81] We also observe that the level of cooperation evident during the conference process evaporated somewhat once the matter entered the contested hearing phase which, at times, produced more heat than light. The debate surrounding clause I.3 of the Joint Applicants' proposed variation determination serves to illustrate the point.

[82] Clause I.3 states:

> If an employer and part-time employee make an additional hours agreement, the employee must be paid for the additional agreed hours at their ordinary rate of pay, even if they are not required to work those hours.

[83] This provision is characterised as the 'compulsion to pay' provision by those opposing the Joint Application. ABI advanced the following submissions in respect of this aspect of the Joint Application:

> 'Clause I.3 of the Union Application compels an employer to pay an employee for additional hours offered/agreed, even if the additional hours are not ultimately worked.
>
> This acts as a clear disincentive to reaching any agreement to work additional hours on a standing basis (should it even be possible to reach a standing agreement with employees under the Union Application) or even for a fixed term basis in the medium term.

[38] See, for example, *4 yearly review of modern awards – Fast Food Industry Award 2010* [2019] FWCFB 272 at [114].

> 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.'[39]

[84] The NRA[40] and Ai Group[41] similarly criticised clause I.3.[42]

[85] Plainly those opposing the Joint Application – ABI, ARA, NRA and Ai Group – regarded the requirement that an employee be paid for additional agreed hours when they were not required to work those hours, as a disincentive to employers agreeing to such arrangements and which undermined the objective of the proposal.

[86] Yet, as emerged during the hearing, *both* the Joint Application and the ABI proposal deal with this issue in the same way.

[87] During the course of oral argument counsel for the SDA made it clear that it is not the intention of clause I.3 that an employee be paid if he or she is not ready, willing and able to work. The requirement to pay only applies if the employee is not *required* to work.[43] As counsel put it:

> 'There is an entitlement to be paid if the employer says, "You stay home today." This isn't something that the employer can turn off and on. That's one of the important, we say, significant protections for employees which doesn't appear in the ABI proposal. It's one of the significant aspects of part-time employment as opposed to casual employment. The ABI proposal really takes us to casual employment without casual loadings and that's the significant objection we have to it.'[44] (emphasis added)

[88] Contrary to the above submission, the entitlement to be paid *does* appear in the ABI proposal. Clause 10.11(b)(ii) of the ABI proposal provides:

> 'if the employee accepts an offer of additional hours, those hours constitute ordinary hours'.

[89] During the course of oral argument Mr Izzo, for ABI, explained the import of this provision:

> '… once an agreement is reached to work additional hours - that is, the employer has offered and the employee agrees - they would constitute ordinary hours that ordinarily no party could rescind. If the employer sought to pull out from those hours, the employer would still need to pay. Equally, if the employee was unavailable - often you would see that coming up in a form of leave being exercised under the NES - they simply couldn't seek to, having agreed to a particular shift, unilaterally withdraw.'[45] (emphasis added)

[90] Later, Mr Izzo made the same point in response to a submission advanced by the ACTU:

---

[39] ABI Submission, 16 March 2021 at [112] – [114].

[40] NRA Submission, 16 March 2021 at [3.1.5] – [3.1.7].

[41] Ai Group Submission, 4 March 2021 at [45] – [46].

[42] Although Ai Group advanced a different point.

[43] Transcript, 17 March 2021 at PN91-PN92.

[44] Transcript, 17 March 2021 at PN95.

[45] Transcript, 17 March 2021 at PN157-PN158.

> 'The ACTU has raised a concern that our mechanism allows an employer to offer work, the employee to accept that work, and then the employer to cancel. It appears to me from that submission that the ACTU is of the view that employers can pull out of additional hours once they've already been offered and accepted. We do not agree with that. Our response to that is to point to clause 10.11(b)(ii) of our determination which talks about, once they're offered and accepted, the hours constitute ordinary hours.'[46]

[91] The point we wish to make about all this is that despite the various submissions made essentially attacking the opposing group's proposal it is apparent that, in fact, both the Joint Applicants' draft variation and the ABI proposal reach the same point. Once an additional hours agreement has been reached it cannot be unilaterally varied and if the employee is ready, willing and able to work they must be paid for the agreed additional hours whether or not the employer requires them to work those hours.

[92] Returning to the central issue, we begin by addressing the legislative framework.

[93] The Commission may make a determination varying a modern award if the Commission is satisfied the determination is necessary to achieve the modern awards objective. The modern awards objective is in s.134 of the *Fair Work Act 2009* (Cth) (the Act).

[94] It is not necessary to make a finding that the award fails to satisfy one or more of the s.134 considerations as a prerequisite to the variation of a modern award.[47] Generally speaking, the s.134 considerations do not set a particular standard against which a modern award can be evaluated; many of them may be characterised as broad social objectives.[48] In giving effect to the modern awards objective the Commission is performing an evaluative function taking into account the matters in s.134(1)(a)–(h) and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance.

[95] Section 138 of the Act emphasises the importance of the modern awards objective:

> 'Section 138 Achieving the modern awards objective
>
> A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.'

[96] What is 'necessary' to achieve the modern awards objective in a particular case is a value judgment, taking into account the s.134 considerations to the extent that they are relevant having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence.[49]

---

[46] Transcript, 17 March 2021 at PN290.

[47] *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [105]-[106].

[48] See *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [109]-[110]; albeit the Court was considering a different statutory context, this observation is applicable to the Commission's task in the Review.

[49] See generally: *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)* (2012) 205 FCR 227.

[97] Where an interested party applies for a variation to a modern award as part of the Review, the proper approach to the assessment of that application was described by a Full Court of the Federal Court in *CFMEU v Anglo American Metallurgical Coal Pty Ltd (Anglo American)* as follows:[50]

> '[28] The terms of s 156(2)(a) require the Commission to review all modern awards every four years. That is the task upon which the Commission was engaged. The statutory task is, in this context, not limited to focusing upon any posited variation as necessary to achieve the modern awards objective, as it is under s 157(1)(a). Rather, it is a review of the modern award as a whole. The review is at large, to ensure that the modern awards objective is being met: that the award, together with the National Employment Standards, provides a fair and relevant minimum safety net of terms and conditions. This is to be achieved by s 138 – terms may and must be included only to the extent necessary to achieve such an objective. [29] Viewing the statutory task in this way reveals that it is not necessary for the Commission to conclude that the award, or a term of it as it currently stands, does not meet the modern award objective.
>
> Rather, it is necessary for the Commission to review the award and, by reference to the matters in s 134(1) and any other consideration consistent with the purpose of the objective, come to an evaluative judgment about the objective and what terms should be included only to the extent necessary to achieve the objective of a fair and relevant minimum safety net.' [22] In the same decision the Full Court also said: '...the task was not to address a jurisdictional fact about the need for change, but to review the award and evaluate whether the posited terms with a variation met the objective.'[51]

[98] Ascertaining the *effect* of a proposed variation is an essential part of the task of considering whether the variation proposed is *necessary* to achieve the modern awards objective. How does the proposed variation alter the operation of the modern award? To answer that question we must first determine the meaning of those terms of the modern award which are sought to be varied.

[99] The Joint Application and the ABI proposal both seek to vary the operation of the current award terms relating to part-time employees, in particular clause 10.

[100] ABI and others submit that the current clause 10.6 of the Retail Award *already allows* employers and part-time employees to work additional ordinary hours of work, in excess of their agreed regular pattern of work, and be paid at their ordinary hourly rate. In these circumstances it is submitted that the Joint Application amounts to 'a very minor and consequential amendment to an existing flexibility regime'.[52]

[101] As ABI puts it, the flexibility which is said to be introduced by the Joint Application 'already exists within the existing award framework' and that the only additional benefit provided by that application is the ability for an employer and a part-time employee to record an agreement to work additional hours by the end of the shift.[53]

---

[50] *CFMEU v Anglo American Metallurgical Coal Pty Ltd* [2017] FCAFC 123.

[51] *CFMEU v Anglo American Metallurgical Coal Pty Ltd* [2017] FCAFC 123 at [46].

[52] ABI Submission, 16 March 2021 at [34].

[53] See ABI Submission, 16 March 2021 at [7] Contentions 1 and 2, [8] – [37].

[102] The proper construction of clause 10.5 and 10.6 (and related provisions) is central to the argument put. Further, as Mr Izzo put it during the course of oral argument a 'fundamental threshold issue' that 'must be addressed if one is to seriously consider the [Joint Application]'[54] is the proper construction of clauses 10.5 and 10.6. ABI submits that this threshold issue gives rise to 'a s.138 problem':

> 'Section 138 of the Act says that the Commission should only include in modern awards terms to the extent they are necessary to achieve the modern awards objective. If this is a flexibility that already exists, then it's not clear inserting it again is necessary to achieve the modern awards objective'.[55]

[103] We accept that the proper construction of clause 10.6 in the context of the Retail Award more generally is a threshold issue in respect of our consideration of *both* the Joint Application *and* the ABI proposal. We now turn to consider that issue.

[104] Clause 10.5 of the Retail Award requires an employer and employee to agree on a regular pattern of work that must include:

> (a) the number of hours to be worked each day; and
>
> (b) the days of the week on which the employee will work; and
>
> (c) the times at which the employee will start and finish work each day; and
>
> (d) when meal breaks may be taken and their duration.

[105] The agreement, to which clause 10.5 refers must be made at the time the employee is engaged and must be recorded in writing.

[106] It appears that the agreed regular pattern of work can be departed from by an agreement between the employer and part-time employee to change the regular pattern of work under clause 10.6 of the Award.

[107] Clause 10.6 provides as follows:

> The employer and the employee may agree to vary the regular pattern of work agreed under clause 10.5 with effect from a future date or time. Any such agreement must be in writing.

[108] Clause 10.10 deals with roster arrangements for part-time employees and provides:

> '**10.10 Changes to roster**
>
> (a) The roster of a part-time employee, but not the number of hours agreed under clause 10.5, may be changed by the employer giving the employee 7 days, or in an emergency 48 hours, written notice of the change.
>
> NOTE: Clause 15.7 contains additional rostering provisions.

---

[54] Transcript, 17 March 2021 at PN187. The ARA advances a similar submission, ARA Submission, 16 March 2021, at [7].

[55] Transcript, 17 March 2021 at PN209.

(b) The roster of a part-time employee, but not the number of hours agreed under clause 10.5, may be changed at any time by mutual agreement between the employer and the employee.

(c) However, the roster of a part-time employee must not be changed from week to week or fortnight to fortnight or to avoid any award entitlements.

NOTE: See clause 27—Rostering restrictions for the rosters of shiftworkers.'

[109] ABI submits that clause 10.6 enables ad-hoc variations to hours of work on a case by case basis. That is, an employer can agree with a part-time employee to vary his/her working hours from time to time to meet operational needs in a particular week or month, provided that any variation is agreed in writing. Three points are advanced in support of this contention:

1. The natural and ordinary meaning of the words used in clause 10.6 indicate that any of the matters agreed in clause 10.5 can be altered at any time.

2. The nature of the variations that may be made pursuant to clause 10.6 are not constrained in any way (other than that they need to be recorded in writing).

3. In the absence of any restrictions contained in the Award provisions, the words used in clause 10.6 should be given their natural and ordinary meaning (*Re City of Wanneroo v Holmes* [1989] FCA 269).[56] This is particularly the case where the terms of an industrial instrument are clear and unambiguous. In such circumstances, the industrial instrument must be interpreted in accordance with that clear and unambiguous meaning (*Re Clothing Trades Award* (1950) 68 CAR 597).[57]

[110] ABI also submits that its position regarding the proper application of clause 10.6 is reinforced by relevant award history.

[111] ABI concludes that:

'it is clear that clause 10.6 of the Award allows employers and part-time employees to work additional ordinary hours of work, in excess of their regular pattern of work, and be paid at their ordinary hourly rate. This can be done from time to time on an ad-hoc basis as often as the parties desire.

The only prerequisites are that:

(a) the employer and part-time employee must genuinely agree to the arrangement;

(b) the agreement to vary the part-time employee's hours must be recorded in writing; and

(c) the written agreement must be made before the additional hours are worked.'[58]

---

[56] Cited with approval in *Transport Workers' Union of Australia v Linfox Australia Pty Ltd* [2014] FCA 829, *Construction, Forestry, Mining and Energy Union v Hail Creek Coal Pty Ltd* [2015] FCA 532.

[57] Cited with approval in *Transport Workers' Union of Australia v Linfox Australia Pty Ltd* [2014] FCA 829, *Construction, Forestry, Mining and Energy Union v Hail Creek Coal Pty Ltd* [2015] FCA 532.

[58] ABI Submission, 16 March 2021 at [9] - [10].

[112] Ai Group is far less emphatic regarding the application of clause 10.6:

> 'Clause 10.6 of the Award arguably permits the kind of flexibility contemplated by the proposal advanced by the Applicants. That is, it potentially permits an employer and employee to agree to changes to the hours agreed upon at engagement, including by agreeing that the employee will work hours *in addition to* those agreed upon engagement. By virtue of clause 10.8 of the Award, in such circumstances, a part-time employee is entitled to overtime rates where they work outside their agreed hours, *as varied*.'[59] (emphasis added)

[113] Further at [22] of its submissions Ai Group says:

> 'We acknowledge that the relevant extant provisions of the Award are potentially not sufficiently clear and would, to that end, benefit from variations that are directed towards putting beyond doubt that they permit an employer and parttime employee to reach agreement that the part-time employee will work hours in addition to those agreed upon engagement on an ongoing or ad hoc basis, and that overtime rates are not payable in respect of such work.'[60]

[114] Similarly, the MGA submits that at present the Retail Award 'lacks clarity in respect of offering additional hours of work which has led to errors being made by both employers and employees'.[61]

[115] Further, the Gollan Report suggests that the respondents to the survey do not perceive that there is currently the capacity for part-time employees to work voluntary additional hours by mutual agreement, without paying overtime. Comments by the focus group participants also suggest that they think that the current terms of the Retail Award do not permit such flexibility.

[116] We also note the following observation in the Hampton Report:

> 'There is some tension between the parties as to the precise intent of clauses 10.5 and 10.6 and whether the Retail Award properly permits **temporary** additional (ordinary) hours to be worked by part-time employees, with a reversion back to the (original) clause 10.5 arrangements. An assessment of this aspect might be an important consideration both as whether there is a need to vary the Retail Award and if so, in what form.'[62]

[117] Finally, we note that during the course of oral argument ABI accepted that employers (and some employer organisations) have difficulty understanding what clause 10.6 permits and does not permit.[63]

[118] 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)).

---

[59] Ai Group Submission, 16 March 2021 at [7].

[60] Ai Group Submission, 16 March 2021 at [22].

[61] MGA Submission, 16 March 2021 at [5].

[62] *Report to the Full Bench* [2021] FWC 1297 at [16].

[63] Transcript, 17 March 2021 at PN197-PN211.

[119] 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.[64]

[120] In our view clause 10 is uncertain and requires variation to resolve that uncertainty. Without clarification, any additional arrangements proposed by the parties are likely to also be uncertain, and the relationship with the award provisions more generally, problematic.

[121] In 'Next Steps' we set out the process for addressing this issue.

[122] Once the proper construction of clause 10.6 (and any required variations) is determined we can give more detailed consideration to the terms of the Joint Application and the ABI proposal. However, we have had the benefit of detailed submissions regarding the merits of the Joint Applicants' proposed variation and the ABI proposal and it is appropriate that we make some preliminary observations about each proposal.

[123] We turn first to the Joint Applicants' proposal.

[124] The central operative provision in the Joint Applicants' revised draft determination is clause I.2, which states:

> 'Subject to clause 15, an employer and a part-time employee who is engaged to work more than 9 hours per week in accordance with clause 10.5, may make an agreement (an additional hours agreement) for the employee to work more ordinary hours than the number of hours agreed under clause 10.5 (the additional agreed hours), to a maximum total of 38 ordinary hours per week.
>
> **Note:** For the avoidance of doubt clause 10.5 applies to the Additional Hours Agreement at the time the agreement is made. Making an additional hours agreement will be an agreement to mutually change a roster to include the increased hours into the roster.'

[125] Two things may be said about this proposed term. First, the prefatory words 'subject to clause 15' are unnecessary as the proposed schedule does not vary clause 15 of the Retail Award and so it will continue to operate according to its terms. Indeed this was one of the areas of common ground between the Joint Applicants' revised determination and the ABI proposal – clause 15 applies to an agreement to work additional hours.[65] That said, there would be some utility to the insertion of a 'Note' directing attention to the applicable parts of clause 15.

[126] The second observation about clause I.2 relates to the Note which appears under the clause I.2. The intent is clear – an additional hours agreement reached under clause I.2 must be in writing and address the matters in clause 10.5. But it may be argued that a 'Note' is an

---

[64] *4 yearly review of modern awards* [2015] FWCFB 4658 at [7].

[65] Transcript, 17 March 2021 at PN176.

explanatory tool which does not give rise to an independent legal obligation or right. This issue is partially addressed by clause I.5(b) and (c) which effectively require that an additional hours agreement be recorded in writing. Further, as Ai Group submits, clause 10.5 is directed at an agreement reached 'on engagement' and is not apt to describe a subsequent agreement to work additional hours.[66] This matter requires clarification.

[127] The final point about the Joint Applicants' revised draft determination concerns clause I.4, which states:

> 'The parties to an additional hours agreement may, by mutual agreement, terminate the agreement with 24 hours' notice. Such agreement will not be unreasonably withheld.
>
> NOTE: Terminating an additional hours agreement will be an agreement to mutually change a roster to exclude the increased rostered hours.'

[128] Our *preliminary* view is that clause I.4 is unnecessary. The parties can agree to change a roster to exclude agreed additional hours. The work to be done by clause I.4 as presently drafted is unclear. We see no evident utility in the requirement for 24 hours' notice.

[129] We now turn to the ABI proposal. The essence of the regime proposed by ABI is set out in its proposed clause 10.11:

> '**10.11 Voluntary Additional Hours**
>
> (a) Despite anything in clause 10.10, an employer and part-time employee may make a standing written agreement that the employee may work additional ordinary hours to those agreed pursuant to clauses 10.5 and 10.6, provided that the total ordinary hours do not exceed 38 hours per week. The standing written agreement must be kept as an employee record for 7 years.
>
> Note: A standing written agreement may be made in electronic form.
>
> (b) A standing written agreement under this clause must specify the following matters:
>
> i. the employer can request the employee to work additional hours and the employee has the right to accept or refuse those additional hours;
>
> ii. if the employee accepts an offer of additional hours, those hours constitute ordinary hours; and
>
> iii. the employee may terminate the agreement at any time, with that termination taking effect from the commencement of the next roster period after the employee notifies the employer of the termination.
>
> (c) An employer is not required to offer the additional hours referred to in the standing agreement in any particular week or weeks.
>
> (d) If an employee is requested to work any additional ordinary hours pursuant to the standing written agreement, the employee has a right to refuse such a request.

[66] Transcript, 17 March 2021 at PN329.

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

(f) The standing written agreement under this clause 10.11 cannot be made a condition of offering employment and cannot be signed concurrently with an offer employment.'

[130] ABI explains how the 'standing written agreement' operates in practice at [103] – [108] of its submissions:

'Once the written standing agreement is in place, the parties can informally arrange between themselves when additional hours are offered and accepted.

This maximises the flexibility through which (and when) additional hours can be offered.

This allocation of work pursuant to the standing agreement might ultimately take place verbally, by way of emails or text messages or through a rostering communication.

Regardless of the method of communication used to offer and accept the additional hours of work, the employee's interests have been protected because:

(a) firstly, ordinary time rates will only apply to those hours for which the employee has indicated that they are prepared to work additional hours at ordinary rates; and

(b) secondly, the employee retains a clear right to refuse any additional shifts offered (a right which is identified both in the standing written agreement and the Award itself).

On the other hand, the Union Application does not refer to any ability for employees to reach any standing arrangement pursuant to which they would be willing to work additional shifts.

As a result, under the Union Application, 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 repetitive paperwork on businesses which is not necessary.'

[131] In essence the ABI proposal envisages what may be characterised as a two stage process:

Stage 1: An employer and a part-time employee make what is described as a 'standing written agreement' which specifies:

(i) the employer can request the employee to work additional hours and the employee has the right to accept or refuse those additional hours;

(ii) if the employee accepts an offer of additional hours, those hours constitute ordinary hours; and

(iii) the employee may terminate the agreement at any time, with that termination taking effect from the commencement of the

next roster period after the employee notifies the employer of the termination.

Stage 2: An employer offers a part-time employee 'additional hours' – the employee may accept or reject that offer. If accepted, the 'additional hours' become ordinary hours.

[132] There are a number of difficulties with the proposal.

[133] Conceptually an 'agreement' involves an offer and an acceptance of the terms of that offer. In a contractual context consideration is also an element of the agreement. The 'standing written agreement' envisaged in clause 10.11(a) has none of these features. In particular:

- The employer is not required to offer the additional hours referred to in the standing agreement in any particular week or weeks.
- The 'standing written agreement' commits the part-time employee to nothing at all. If an employee is requested to work any additional ordinary hours pursuant to the standing written agreement, the employee can accept or refuse such a request.
- An employee may also unilaterally vary or revoke their standing written agreement at any time.

[134] On its face the 'standing written agreement' is little more than a statement that the employer can request the employee to work additional hours and the employee may accept or refuse those additional hours.

[135] During the course of oral argument ABI said:

> 'we envisage… that the starting point is that the parties will make a written standing agreement… and that the employee will outline the types of additional hours they may be willing to work at ordinary time rates'.[67]

[136] But, on its own terms, clause 10.11 does not even do that. An indication by the part-time employee of the types of additional hours they may be willing to work is *not* one of the matters which must be specified in a standing written agreement (see clause 10.11(b)(i), (ii) and (iii)).

[137] If the construction of clause 10.6 advanced by ABI is correct then one may well ask – what does clause 10.11 add? What work does clause 10.11 do that cannot be done now?

[138] The only discernible difference appears to be that if a 'standing written agreement' is in place and the employee subsequently accepts an offer of additional hours, those hours constitute ordinary hours. In other words the existence of a 'standing written agreement' obviates the need to record in writing an agreement to work specified additional hours.

[67] Transcript, 17 March 2021 at PN162.

[139] During the course of oral argument Mr Izzo for ABI elaborated on how the proponents of the ABI proposal envisaged it operating in practice:

> 'MR IZZO: That's correct, and what I am proposing, your Honour, I don't propose to go through the safeguards, because I think they're well understood and have been well ventilated, so there is no need to go through them, but it's really this standing agreement mechanism and then how you actually work the hours. So what we envisage is that the starting point is that the parties will make a written standing agreement so it is in writing, and that the employee will outline the types of additional hours they may be willing to work at ordinary time rates.
> …
>
> The next step that the standing written agreement contemplates is that it is made very clear to everyone in the agreement that the employee has a right to accept or refuse the additional hours. It's quite important we put this in the written agreement itself so that an employee doesn't have to have regard to the award, they're actually told about their right in the written document itself, but they are also told once they accept an offer of additional hours they become ordinary hours, and that really feeds into the point of clarification I made earlier, your Honour. Once that offer of work is accepted neither party can really rescind unless there is a legitimate form of leave on the part of the employee, or on the part of an employer if the work is not required they could pay for the shift in any event, which sometimes might happen.
> …
>
> JUSTICE ROSS: So, Mr Izzo, to be clear there's the broad availability standing availability agreement which has the features you have suggested, and then that agreement does not commit the employer to offer any shifts.
>
> MR IZZO: No, it does not.
>
> JUSTICE ROSS: No. So that might be seen as the first stage, and in each and every case there's a second stage, and you describe that at paragraph 106 as the offer and acceptance; the offer by the employer of the additional hours, which presumably will be within the employee's stated availability, and the acceptance of that offer by the employee, and as you have indicated there is the protection that on each occasion the employee can refuse that offer, even though it's within their availability.
>
> MR IZZO: That's right, and the distinction here, much noise is made about first and second steps, and I will come to that in due course, <u>but the distinction with this second step, if we can call it that, is because a standing written agreement has already been made the employer has the advantage of knowing when the employee is generally available, that they're generally open to working these hours, and what is contemplated is that in some form the employer will request, but we're trying to ensure that this actually is sufficiently flexible so the employer will use it</u>. So we are not trying to restrict how they request. They may verbally speak to the employee if it arises on the day. They may text the employee, they may email, they may use electronic rostering software. They might use any means, but what they need to do is indicate, as a matter of practical reality they need to indicate a request for the employee to work.
>
> The employee needs to do the same thing back, the employee indicate whether they're prepared to work or not, and again that could be a thumbs up in the store on the day, or that could be a text or some other form. But what we are trying to do is ensure that that ad hoc offer and acceptance of extra work that is allowed to take place without a regime of stringent written requirements being imposed on it, and why we say we can do that is because we have the standing written agreement in advance, as well as an express right of refusal that has been communicated to the employee both through the award and the standing written agreement. So that's how we see the second step working, your Honour.

> JUSTICE ROSS: Just exploring that for a moment, you have got an obligation under the regulations to identify which overtime hours are worked and the rate of pay and what have you. In the circumstances you have outlined where there might be a level of informality about the offer and the acceptance, how do you deal with a subsequent dispute that might arise about whether or not the employee agreed to work those hours as additional hours as opposed to overtime hours?
>
> MR IZZO: Your Honour, we would say the employees have already provided that agreement in writing. That's the purpose of the standing written agreement. We think the more important question at that point in time is did the employee agree to work the hours at all. So we say there is a standing written agreement to perform them as ordinary hours. That has already been given. The next question is when the actual need arises to work the shift does the employee actually agree to come to that shift, are they available, and at that point what's being sought from the employees is not agreement to work at ordinary time rates or not to be overtime, that was already given.
>
> What's being sought is just agreement to work that shift, and you would look for the types of objective evidence that one would normally look for if there was a dispute, what was said by the parties, if there was something in writing what was it, what was witnessed, what was heard. The fact that the employee turned up might also be an indication of the fact that they accepted the offer, and what we are conscious of is that the employer nevertheless does have an obligation to at least record hours of work for the purposes of making payments, and so there will be a record of that nature, but there won't be an overtime record as such because it doesn't constitute overtime. But we say the employer won't be put to proof on that point because of the standing written agreement.'[68] (emphasis added)

[140] It appears from this extract that the purpose of the standing written agreement is to constitute some form of standing consent whereby the employee 'agrees' to work additional hours offered by their employer, subject only to a right to refuse a particular offer on a case by case basis. To the extent that this is the intent of the provision it appears to be inconsistent with the general way in which part-time work is regulated in modern awards.

[141] In the *Casual and Part-time Employment decision*[69] the Full Bench reviewed the cases dealing with part-time employment and concluded:

> '…the Full Bench in *Appeal by Leading Age Services Australia NSW - ACT* … pointed to the requirement in the award for part-time employees to have "reasonably predictable hours of work" and said:
>
> > "[19] ... This requirement for reasonable predictability in hours of work stems, we consider, from the originating concept of part-time employment as being suitable for and attractive to persons who have other significant and reasonably predictable family, employment and/or educational commitments and therefore require some certainty as to the days upon which they work and the times they start and finish work. It follows that the other provisions of the Award applying to part-time employees must so far as the language permits be read as giving content to the definitional requirement of reasonable predictability in hours of work."

[68] Transcript, 17 March 2021 at PN162, PN164, PN166-173.

[69] [2017] FWCFB 3541.

> Thus the typically distinctive features of the award regulation of part-time work – the requirement for written agreement specifying the number of hours to be worked and the days and times in the week when these hours are to be worked, alterable by written agreement only – reflect the original rationale for part-time employment to which we have earlier referred.'[70] (footnotes omitted) (emphasis added)

[142] The issue of 'flexible part-time work' which appears to be a feature of the ABI proposal was the subject of a recent Full Bench decision in relation to the Fast Food Industry Award 2010.[71]

[143] In the Fast Food proceedings Ai Group sought to delete the part-time employment provisions in the Award (clause 12) and insert a new 'flexible part-time clause'. Clause 12 of the current Award provided:

> '**12. Part-time employees**
>
> 12.1 A part-time employee is an employee who:
>
> (a) works less than 38 hours per week; and
>
> (b) has reasonably predictable hours of work.
>
> 12.2 At the time of first being employed, the employer and the part-time employee will agree, in writing, on a regular pattern of work, specifying at least:
>
> - the number of hours worked each day;
> - which days of the week the employee will work;
> - the actual starting and finishing times of each day;
> - that any variation will be in writing;
> - that the minimum daily engagement is three hours; and
> - the times of taking and the duration of meal breaks.
>
> 12.3 Any agreement to vary the regular pattern of work will be made in writing before the variation occurs.
>
> 12.4 The agreement and any variation to it will be retained by the employer and a copy given by the employer to the employee.
>
> 12.5 An employer is required to roster a part-time employee for a minimum of three consecutive hours on any shift.
>
> 12.6 An employee who does not meet the definition of a part-time employee and who is not a full-time employee will be paid as a casual employee in accordance with clause 13—Casual employment.

---

[70] [2017] FWCFB 3541 at [96] – [97].

[71] *4 yearly review of modern awards – Fast Food Industry Award 2010* [2019] FWCFB 272.

12.7 A part-time employee employed under the provisions of this clause will be paid for ordinary hours worked at the rate of 1/38th of the weekly rate prescribed for the class of work performed. All time worked in excess of the hours as agreed under clause 12.2 or varied under clause 12.3 will be overtime and paid for at the rates prescribed in clause 26—Overtime.'

[144] Ai Group sought to replace the current award provision with the following:

'**12. Part-Time Employment**

12.1 A part time employee is an employee who:

(a) Works at least 8 but less than 38 hours per week;

(b) Has reasonably predictable hours of work; and

(c) Receives on a pro-rata basis, equivalent pay and conditions to those of full- time employees.

12.2 At the time of engagement, the employer and the part-time employee will agree in writing upon:

(a) the number of hours of work which are guaranteed to be provided and paid to the employee each week or, where the employer operates a roster, the number of hours of work which are guaranteed to be provided and paid to the employee over the roster cycle (**the guaranteed minimum hours**); and

(b) the days of the week, and the periods in each of those days, when the employee will be available to work the guaranteed minimum hours (**the employee's agreed availability**).

12.3 The employee may not be rostered to work less than 3 consecutive hours in any shift.

12.4 The guaranteed minimum hours shall not be less than 8 hours per week.

12.5 Any change to the guaranteed minimum hours may only occur with written consent of the part-time employee.

12.6 Where there has been a genuine and ongoing change in the employee's personal circumstances, the employee may alter the days and hours of the employee's agreed availability on 14 days' written notice to the employer. If the alteration to the employee's agreed availability cannot reasonably be accommodated by the employer within the guaranteed minimum hours then, despite clause 12.2, those guaranteed minimum hours will no longer apply and the employer and the employee will need to reach a new agreement in writing concerning guaranteed minimum hours in accordance with clause 12.2.

12.7 An employee may be offered ordinary hours in addition to the guaranteed minimum hours (**additional hours**) within the employee's agreed availability. The employee may agree to work those additional hours provided that:

(a) The additional hours are offered in accordance with clause 25 – Hours of Work and clause 26 - Rostering;

(b) The employee may not be rostered for work outside of the employee's availability;

(c) Agreed additional hours are paid at ordinary rates (including any applicable penalties payable for working ordinary hours at the relevant times) and accrue entitlements such as annual leave and personal/carer's leave; 24

(d) The agreement to work additional hours may be withdrawn by a part-time employee with 14 days written notice;

(e) Additional hours worked in accordance with this clause are not overtime; and

(f) Where there is a requirement to work overtime in accordance with clause 26, overtime rates will apply.

12.8 A part-time employee who immediately prior to (**operative date of variation**) has a written agreement with their employer for a regular pattern of hours is entitled to continue to be rostered in accordance with that agreement, unless that agreement is replaced by a new written agreement made in accordance with clause 12.2.

12.9 Where a part-time employee has over a period of at least 12 months regularly worked a number of ordinary hours that is in excess of the guaranteed minimum hours, the employee may request in writing that the employer agree to increase the guaranteed minimum hours. If the employer agrees to the request, the new agreement concerning guaranteed minimum hours will be recorded in writing. The employer may refuse the request only upon reasonable business grounds, and such refusal must be provided to the employee in writing and specify the grounds for refusal.

12.10 An employee who does not meet the definition of a part-time employee and who is not a full-time employee will be paid as a casual employee in accordance with clause 13 – Casual Employment.

12.11 A part-time employee employed under the provisions of this clause must be paid for ordinary hours worked at the rate of 1/38th of the minimum weekly rate prescribed for the class of work performed.'

[145] There were six main points of difference between the current award provision and Ai Group's proposed clause:

(i) Ai Group's proposed clause would introduce a minimum engagement of 8 hours per week for part-time employees ('guaranteed minimum hours') and those guaranteed minimum hours may only be varied by the employee's written agreement.

(ii) The proposed clause does not require regular pattern of work (hours worked per day, on which day/s of the week, starting and finishing times) to be agreed at the commencement of employment, as is required by the current award. Instead, the proposed clause requires parties to agree in writing on the days of the week, and times on those days, that the employee is available to work the guaranteed minimum hours ('employee's agreed availability').

(iii) Ai Group's proposed clause would remove the requirement for all time worked by a part-time employee in excess of their agreed weekly hours ('additional hours') to be paid at overtime rates. Instead, subject to the limitations in proposed clause 12.7, the additional hours would be paid at ordinary rates.

(iv) Clause 12.3 of the current award requires any variation to an employee's regular pattern of work to be agreed in writing before the variation occurs. Ai Group's proposed clause alters this requirement in two ways:

- An employee may change their agreed availability by giving 14 days' written notice to the employer, if there has been a 'genuine and ongoing change' to the employee's personal circumstances. If the employer cannot accommodate the amended availability, the parties must come to a new guaranteed minimum hours agreement.

- Secondly, the proposed clause provides that additional hours may be worked by agreement but makes no provision for the form of that agreement and any record keeping;

(v) The proposed clause includes a 'savings provision' (in clause 12.8) which preserves part-time agreements in operation prior to the insertion of the proposed clause in the award.

(vi) The proposed clause inserts an additional provision that allows an employee, where they have regularly worked hours in excess of their guaranteed minimum hours, to make a written request that an employer increase the guaranteed minimum hours.

[146] The Full Bench concluded that Ai Group's proposed variation lacked merit.[72] In essence, the Full Bench rejected Ai Group's 'flexible part-time clause' because it did not provide the regularity and certainty which is a feature of part-time employment. The proposal may have facilitated working arrangements more akin to casual employment, absent the requirement to pay a casual loading.

[147] As mentioned earlier, as it has been explained to us it appears that the intent of the ABI proposal is to create a form of standing consent whereby the employee 'agrees' to work additional hours offered by their employer, subject to a right to refuse a particular offer on a case by case basis. The ABI proposal is different to that rejected in the Fast Food case; but both have the common effect of permitting an employer to roster part-time employees within the range of their agreed availability without the need to record any agreement to work a particular shift.

[148] We acknowledge that, unlike Ai Group's Fast Food proposal, the ABI proposal allows an employee to vary or revoke the standing agreement at any time and further, to refuse a particular offer of additional hours. But the ABI proposal plainly proceeds on the expectation that a part-time employee will accept an offer to work additional hours within their stated availability. If such a claim is to be pursued it will amount to a substantiated variation to the existing part-time work arrangements.

[149] The final observation we wish to make concerns the right to request a variation in regular agreed hours based on the additional hours worked over a specified period.

---

[72] *4 yearly review of modern awards – Fast Food Industry Award 2010* [2019] FWCFB 272 at [137] – [148].

[150] Both the Joint Application and the ABI proposal 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. There appears to be a general consensus about the utility of such a term.

[151] The Joint Application and the ABI proposal contain a number of common elements – as detailed at [32] – [33] above and there are only two points of distinction:

- the duration of the specified period;
- and access to arbitration in respect of a dispute pertaining to whether there were reasonable business grounds for refusing an employee's request.

[152] The variation of the Retail Award to insert such a provision may address concerns expressed during the proceedings that facilitating the working of additional hours may create, in essence, a 'structural incentive' to provide part-time employees with fewer guaranteed hours. The proposition being that if employers can 'flex up' there is no incentive to offer guaranteed hours above the minimum engagement of three hours. There is a certain logic to this proposition, but whether it is realised may depend on the extent to which work demands fluctuate and the risk aversion of each employer.

[153] We also note that such a term is a feature of about half of the enterprise agreements to which ABI referred in the course of its submissions.

[154] We are, of course, conscious of the need for caution when referring to the terms of enterprise agreements in the context of a review of modern awards. The legislative context is quite different. Enterprise agreements are negotiated by the parties and approved by the Commission against various statutory criteria. The terms of any enterprise agreement also need to be considered having regard to all of its provisions.

[155] However, given the level of consensus that has emerged during the proceedings 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.

Next Steps

[156] As mentioned earlier, 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.

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.

[157] The next step in progressing these issues will be for Commissioner Hampton to convene a further conference to discuss the meaning and intent of clause 10 of the Retail Award and our *provisional* view regarding the variation of the Retail Award (at [155] above).

[158] In particular, 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 patten 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 patten 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 as 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?

[159] To inform the discussion at the conference, we draw the parties' attention to the Information Note we published today regarding the history of the part-time provisions in the Retail Award.

[160] We intend 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.

[161] We propose to act on our own initiative under s.160(2)(a) to address these issues.

[162] The conference process set out above will conclude by no later than Friday 9 April. We expect that a Report will then be provided by Commissioner Hampton. We will publish a *provisional* draft variation in the week commencing Monday 12 April 2021. Parties will be given an opportunity to file submissions in respect of any such proposal.

[163] 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.

[164] 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.[73]

PRESIDENT

Appearances:
A Durbin for the Attorney-General's Department.
A Millman for the National Retail Association.
B Ferguson for Australian Industry Group.
H Borenstein of Counsel for the Australian Council of Trade Unions.
I Booth for the Newsagents Association of NSW & ACT Limited.
J Cullinan for the Retail and Fast Food Workers Union.
L Izzo and *R Kingston* for Australian Business Industrial and the NSW Business Chamber Ltd.
M Brown and *J de Bruin* for the Master Grocers Australia Limited.
M McKenzie and *P Strong* for Council of Small Business Organisations Australia.
N Tindley for the Australian Retailers Association.
S Crawford for the Australian Workers Union.
T Lawrence for Australian Chamber of Commerce and Industry.
W Friend of Counsel for the Shop, Distributive and Allied Employees' Association.

Hearing details:

2021.
Melbourne, Adelaide and Brisbane (by video):
17 March.

Printed by authority of the Commonwealth Government Printer

<PR728061>

[73] *4 yearly review of modern awards* [2015] FWCFB 4658 at [7].

Attachment A – Joint Applicant Revised Draft Determination

MA000004 PRXXXXXX

FAIR WORK COMMISSION

DRAFT DETERMINATION

Fair Work Act 2009
S157 - 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
DEPUTY PRESIDENT ASBURY
COMMISSIONER HAMPTON Melbourne, DD MM 2021

S157 Determination varying a Modern Award

A. Further to the Decision and Reasons for Decision <<Decision Ref>> in AM2020/103, it is determined pursuant to section 157 of the Fair Work Act 2009, that the General Retail Industry Award 2020 be varied by including new Schedule I to the Award in the following terms:

"Schedule I – Additional flexibility measures – Part time employees

I.1 Schedule I operates from [insert commencement date] until [insert date 18months later]. The period of operation can be extended on application.

Additional hours agreements

I.2 Subject to clause 15, an employer and a part-time employee who is engaged to work more than 9 hours per week in accordance with clause 10.5, may make an agreement (an additional hours agreement) for the employee to work more ordinary hours than the number of hours agreed under clause 10.5 (the additional agreed hours), to a maximum total of 38 ordinary hours per week.

Note: For the avoidance of doubt clause 10.5 applies to the Additional Hours Agreement at the time the agreement is made. Making an additional hours agreement will be an agreement to mutually change a roster to include the increased hours into the roster.

I.3 If an employer and part-time employee make an additional hours agreement, the employee must be paid for the additional agreed hours at their ordinary rate of pay, even if they are not required to work those hours.

I.4 The parties to an additional hours agreement may, by mutual agreement, terminate the agreement with 24 hours' notice. Such agreement will not be unreasonably withheld.

NOTE: Terminating an additional hours agreement will be an agreement to mutually change a roster to exclude the increased rostered hours.

I.5 The employee must be paid overtime for any additional agreed hours worked unless the following conditions are met:

(a) the additional hours agreement is genuinely made by the employer and the individual employee without coercion or duress; and

(b) if the additional hours agreement is for a particular rostered shift, it must be recorded in writing at or by the end of the affected shift, or as soon as is reasonably practicable; and

(c) if the additional hours agreement is for a specified period of time other than a particular rostered shift, it must be recorded in writing before the start of the first period of additional agreed hours; and

(d) the employer must keep a copy of the additional hours agreement.

I.6 The additional hours agreement cannot be made a condition of securing employment and cannot be signed concurrently with an offer of employment.

Note: The agreement could be recorded in writing through an exchange of text messages or emails.

Review of number of hours

I.7 Where a part-time employee has regularly worked additional agreed hours for at least six months, the employee may request in writing that the employer vary the agreement under clause 10.5 to reflect the ordinary hours regularly being worked.

I.8 The employer must respond in writing to the employee's request within 21 days.

I.9 The employer may refuse the request only on reasonable business grounds.

EXAMPLE: Reasonable business grounds to refuse the request may include that the reason that the employee has regularly worked additional agreed hours is temporary—for example where this is the direct result of another employee being absent on annual leave, long service leave or worker's compensation.

I.10 Before refusing a request made under clause I.7, the employer must discuss the request with the employee and genuinely try to reach agreement on an increase to the number of hours agreed under clause 10.5 that will give the employee more predictable hours of work and reasonably accommodate the employee's circumstances.

I.11 If the employer and employee agree to vary the agreement under clause 10.5, the employer's written response must record the agreed variation. If the employer and employee do not reach agreement, the employer's written response must set out the grounds on which the employer has refused the employee's request.

Other Provisions

I.12 The employer and employee parties to an additional hours agreement consent to any dispute in relation to Schedule I being settled by the Fair Work Commission through arbitration in accordance with clause 36 – Dispute resolution and section 739(4) of the Act.

NOTE: A dispute about the employer's handling of a request under clauses I.8- I10 can be dealt with under clause I.12. This could include a dispute about whether the employer's refusal of a request was reasonable, whether the employer discussed the request with the employee as required under clause I.10, or whether the employer responded in writing to the request as required under clauses I.8 , I.9 and I.11."

I.13 An Additional hours agreement may, when made, have an end date up to six months beyond the life of this schedule. The provisions of this Schedule continue to apply to it during such extended period.

B. This determination comes into force on and from DD MM 2021.

PRESIDING MEMBER

Attachment B – ABI Draft Determination

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
DEPUTY PRESIDENT ASBURY
COMMISSIONER HAMPTON 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 new clauses 10.11 to 10.12 to the following effect:

10.11 Voluntary Additional Hours

(a) Despite anything in clause 10.10, an employer and part-time employee may make a standing written agreement that the employee may work additional ordinary hours to those agreed pursuant to clauses 10.5 and 10.6, provided that the total ordinary hours do not exceed 38 hours per week. The standing written agreement must be kept as an employee record for 7 years.

Note: A standing written agreement may be made in electronic form.

(b) A standing written agreement under this clause must specify the following matters:

i. the employer can request the employee to work additional hours and the employee has the right to accept or refuse those additional hours;

ii. if the employee accepts an offer of additional hours, those hours constitute ordinary hours; and

iii. the employee may terminate the agreement at any time, with that termination taking effect from the commencement of the next roster period after the employee notifies the employer of the termination.

(c) An employer is not required to offer the additional hours referred to in the standing agreement in any particular week or weeks.

(d) If an employee is requested to work any additional ordinary hours pursuant to the standing written agreement, the employee has a right to refuse such a request.

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

(f) The standing written agreement under this clause 10.11 cannot be made a condition of offering employment and cannot be signed concurrently with an offer employment.

10.12 Increasing guaranteed hours to match regular work pattern

(a) If a part-time employee has regularly worked additional ordinary hours in excess of their pattern of work agreed under clauses 10.5 and 10.6 for at least 12 months, the employee may request in writing that the employer vary the agreement under clause 10.5 to reflect the ordinary hours regularly being worked.

(b) The employer must respond in writing to the employee's request within 21 days.

(c) If the employer agrees to a request under clause 10.12(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.

(d) The employer may refuse the request under clause 10.12(a) only on reasonable business grounds. The employer must notify the part-time employee in writing of a refusal and the grounds for it.

(e) Before refusing a request under clause 10.12(a), the employer must discuss the request with the employee and explore whether they can reach agreement on an increase to the number of hours agreed under clause 10.5 that will give the employee more predictable hours of work and reasonably accommodate the employee's circumstances.

10.13 The employer and employee parties to a standing written agreement consent to any dispute regarding clauses 10.12 and 10.13 being settled by the Commission through arbitration in accordance with clause 36 – Dispute resolution, except for any dispute pertaining to whether there were reasonable business grounds for refusing a request under clause 10.12(a).

10.14 Clauses 10.11, 10.12 and 10.13 will be subject to review to determine whether they will continue to operate beyond 15 September 2022.

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

> Overtime rates will not apply to additional hours worked under clause 10.11
>
> Note: additional hours worked under clause 10.11 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 at the end of clause 15.9(h):

> This subclause does not apply to the working of additional hours by part time employees under clause 10.11

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

> This subclause does not apply to the working of additional hours by part time employees under clause 10.11

5. By amending clause 10.6 in the following manner (additions underlined, deletions identified):

> **10.6** The employer and the employee may agree to vary the ~~regular pattern~~ <u>times, days and hours</u> of work agreed under clause 10.5 with effect from a future date or time. Any such agreement must be in writing.

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