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Subject: AM2021/7 - Award Flexibility - General Retail Industry Award 2010

Dear Sir/Madam

Please find **attached** submissions for ABI and NSWBC in relation to the above proceedings (both in word and pdf format).

Annexures A to **I** to the submissions will be sent through by way of separate email.

Yours faithfully

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Links to Annexures

Annexures
Annexure A
Annexure B
Annexure C
Annexure D
Annexure E
Annexure F
Annexure G
Annexure H
Annexure I

IN THE FAIR WORK COMMISSION

SUBMISSION

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

FILED ON BEHALF OF:

- AUSTRALIAN BUSINESS INDUSTRIAL
- THE NSW BUSINESS CHAMBER LTD

16 MARCH 2021

BACKGROUND

1. This submission is made on behalf of Australian Business Industrial (**ABI**) and the New South Wales Business Chamber Ltd (**NSWBC**).

2. This submission is filed in response to Amended Directions[1] issued by the Commission on 12 March 2021, directing interested parties to file submissions in relation to a revised application filed on 28 February 2021 (**Union Application**) to vary the General Retail Industry Award 2020 (**Award**).

3. The Application was filed on behalf of the Shop, Distributive and Allied Employee's Association (**SDA**), the Australian Workers' Union (**AWU**) and Master Grocers Australia Limited (**MGA**), (collectively, **the Applicants**) and is supported by the Australian Council of Trades Unions (**ACTU**) and the Council of Small Business Organisations Australia (**COSBOA**).

4. In response, ABI, NSWBC, the Australian Retailers Association (**ARA**) and the National Retailers Association (**NRA**) have filed a joint determination (**the Joint Employer Determination**) which addresses the same part time employment provisions that are the subject of the Union Application.

5. For the reasons advanced below, ABI and NSWBC oppose the granting of the Union Application as it does not provide any new flexibility or mechanism by which additional hours can be offered to part-time employees. Instead, the Union Application simply imposes new burdens on employers for offering additional hours to part time employees, which do not presently exist.

6. ABI and NSWBC urge the Fair Work Commission to make the Joint Employer Determination in lieu of the Union Application.

SUMMARY OF ABI AND NSWBC POSITION

7. ABI and NSWBC oppose the granting of the Union Application, and support the making of the Joint Employer Determination, on the following grounds:

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

   Contention 2 The only additional benefit that would be gained by the Union 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

[1] [2021] FWC 1088

must be recorded prior to the hours being worked. This is of marginal benefit. It is insubstantial.

Contention 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.

Contention 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.

Contention 5 The scheme proposed by the 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.

Contention 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.

Contention 7 The evidence filed by ABI and NSWBC 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.

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

Contention 9 The flexibilities contained in the Joint Employer Solution 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.

CONTENTION 1: EXISTING FLEXIBILITY UNDER THE AWARD

8. Clause 10.5 of the 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.

9. This agreement must be made at the time the employee is engaged and must be recorded in writing.

10. The regular pattern of work can be departed from in two ways:

    (a) changes to the days, times and breaks that are to be worked can be made unilaterally by the employer, or by agreement with the employee, in accordance with clause 10.10 - however, these changes cannot increase the total number of hours worked; or

    (b) an employer and employee can agree to change the regular pattern of work under clause 10.6 of the Award.

11. 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.

12. Unlike a roster change made under clause 10.10, an agreement to vary the regular pattern of work made under clause 10.6 can increase the number of ordinary hours that are to be worked by a part-time employee. This proposition is not controversial.

13. Furthermore, ABI and NSWBC maintain that the provisions in clause 10.6 enable an employer to make ad-hoc variations to hours of work on a case by case basis. That is, an employer can agree with an 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.

14. ABI and NSWBC maintain this position because:

    (a) 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.

    (b) 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).

    (c) 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).[2] This is particularly the case where the terms

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[2] 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

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).[3]

15. ABI and NSWBC's position regarding the proper application of clause 10.6 is reinforced by the history of the making of the Award.

16. For the sake of completeness, ABI and NSWBC note that it is uncontroversial that the historical circumstances in which award provisions were first created may assist in their interpretation, as identified in the seminal case of *Short v Hercus Pty Ltd* [1993] FCA 51 at 517:

> *…the circumstances of the origin and use of the clause are plainly relevant to an understanding of what is likely to have been intended by its use"*[4]

The making of the Award and previous consideration of its operation

17. The Award was first made by the AIRC on 19 December 2008.[5]

18. On 28 August 2009, the Minister for Employment and Workplace Relations varied the Award Modernisation Request to insert the following:

> *The Commission should ensure that the hours of work and associated overtime penalty arrangements in the retail, pharmacy and any similar industries the Commission views as relevant do not operate to discourage employers from:*
>
> - *offering additional hours of work to part-time employees; and*
> - *employing part-time employees rather than casual employees.*

19. Following this variation, the Chamber of Commerce and Industry of Western Australia (**CCIWA**), Retail Traders Association of Western Australia (**RTAWA**)[6] and the NRA[7] sought to vary the part-time employment provisions of the Award in Commission proceedings AM2009/24.

20. In its Decision dealing with these applications[8], the Full Bench stated as follows:

> *[8] The Chamber of Commerce and Industry of Western Australia (CCIWA), Retail Traders Association of Western Australia (RTAWA) and the NRA seek changes to the part-time employment provisions. They rely on the terms of cl.53 of the Minister for Employment and Workplace Relations' award modernisation request (the consolidated request).*

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[3] Ibid
[4] Ibid
[5] PR985114
[6] CCIWA and RTAWA Application in Matter AM2009/31
[7] NRA Application in Matter AM2009/24
[8] [2010] FWAFB 305

[9] Clause 53 of the request contains a requirement to ensure that the hours of work and associated overtime and penalty arrangements in the retail, pharmacy and any similar industries do not discourage employers from offering additional hours of work to part-time employees or from employing part-time employees rather than casual employees. Clause 53 was included in the consolidated request by an amendment made on 26 August 2009, after the modern retail award was made.

*[10] We have generally agreed to amend part-time provisions regarding overtime, in the light of the change to the consolidated request**, to make it clear that when variations to part-time hours are agreed in writing overtime is not payable for such agreed additional hours unless the total hours exceed 38 per week or the other limits on ordinary hours. Such changes assist in making additional hours available to part-time employees subject to their genuine agreement.** We will vary the modern award to replace the second sentence of cl.2.7 to read as follows:*

"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 28.2—Overtime (excluding shiftwork)" (emphasis added)

21. Notably, in their submissions in the award modernisation proceedings[9] the SDA acknowledged the Award's ability to allow part timers to work additional hours at single time rates:

"38. The NRA supports their proposed variations by referencing back to the amended Ministerial Request in relation to part time employment. However, the written submissions of the NRA at paragraphs 57-59, which support their application to vary part time employment provisions of the award, simply ignore the practical operation of the part time employment provisions.

39. There is no recognition by the NRA that the part time employment provisions permit additional hours to be worked by a part time employee without the need for the payment of overtime. This can be achieved through the processes included within the part time employment clause which allows for agreed variations to the agreed pattern of work of a part time employee.

40. Where a part time employee agrees to vary their agreed hours of work, then additional hours are not paid at the overtime rate or even at the casual rate, but are merely paid at the ordinary hourly rate." (emphasis added)

Subsequent consideration

22. The position of the SDA has been repeated in subsequent proceedings.

[9]Submission of the Shop Distributive & Allied Employees' Association in Matter No. AM2009/24

23. By way of example, in *Coles Supermarket Enterprise Agreement 2017* [2018] FWCA 2283, the appropriateness of a 'standing consent arrangement' being inserted into a Coles enterprise agreement was the subject of contest. The Retail and Fast Food Workers Union (**RAFFWU**) contended that this type of arrangement was less beneficial than the Award provisions. The SDA disagreed.

24. In reply, the SDA stated as follows (footnotes omitted):

> *[14] The SDA contends that the assertion by RAFFWU that the Agreement fails the BOOT because of clause 4.1.4(d) is "faint". It contends that the Award provides, inter alia, that a part-time employee and his or her employer must agree in writing on a regular pattern of work specifying the hours that are to be worked each day, the days to be worked and the commencing and finishing times on each of those days.* ***Additionally, the Award provides that the regular pattern of work can be varied in writing and that a part-time employee is paid at ordinary time rates for hours worked that are agreed. The Award then provides that any time that is worked in excess of the hours that have been agreed to on commencement of employment or as varied, must be paid at overtime rates****. In support of its contention, the SDA also refer to the Full Bench decision that determined to vary the part-time overtime provisions in 2010 to ensure that part-time employees do not miss out on the opportunity to work additional hours because the Award required them to be paid at overtime rates.*
>
> ***[15]*** *The SDA says that under clause 4.1.4(d), part-time employees are not required to work additional hours at ordinary time rates. They say that the effect of the clause is that if a part time employee wishes to work additional hours at the appropriate ordinary time rate, then by virtue of clause 4.1.4(d), they can do so and that* ***such a position is the same as the Award. The SDA contend that the only difference between the operation of the Agreement clause and the Award clause is administrative and allows Coles to implement a practical and logistically sound method of allowing part-time employees to work additional hours****."*[10]
>
> (emphasis added)

25. In determining the matter, Deputy President Gostencnick ultimately agreed that the Award already contained a mechanism allowing employers and employees to vary working hours on an ad-hoc basis by way of written agreements. The Deputy President held as follows:

> *[20] The provision in the Agreement is different to the Award provision but I do not consider it to be detrimental. I accept that the provision results in an easing of an administrative burden on Coles in* ***achieving a flexibility for which provision is already made in the Award. An employee and Coles are able to agree on a variation***

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[10] *Coles Supermarket Enterprise Agreement 2017* [2018] FWCA 2283

contemplated by the Award but through a scheme involving <u>less frequently executed written variation agreements.</u>

(emphasis added)

26. The final phrase in the Deputy President's comments above (referencing a series of frequently executed written variation agreements) specifically contemplate the notion that several written agreements might be made by employees and an employer from time to time on an ad-hoc basis to afford extra hours of work.

Conclusion regarding existing Award provisions

27. Having regard to the above, 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.

28. 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.

CONTENTION 2: THE UNION APPLICATION PROVIDES A MARGINAL AND INSUBSTANTIAL ADDITION TO EXISTING FLEXIBILITIES

29. The variations sought by the Applicants would allow employers and part-time employees to enter into 'additional hours agreements' which permit the working of additional hours, in excess of a part-time employee's regular pattern of work, at the ordinary hourly rate of pay.

30. Proposed clause I.4 explains that an additional hours agreement may be for either:

(a) a particular rostered shift; or

(b) a specified period of time other than a particular rostered shift.

31. Amongst the requirements to enter into an additional hours agreement;

(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:

i) if the additional hours agreement is for a particular rostered shift – at or by the end of the affected shift, or as soon as is reasonably practicable; or

ii) if the additional hours agreement is for a specified period of time other than a particular rostered shift – before the start of the first period of additional agreed hours.

32. Aside from the ability to defer the written agreement to work additional hours on a particular rostered shift to the end of the shift, there is nothing contained in the Union Application that is not already conferred by the existing Award clause 10.6. Specifically:

(a) both allow an agreement to work additional hours at a single time rate;

(b) both allow for such agreement to be made for a particular shift or for a period of time; and

(c) both require the agreement to be recorded in writing.

33. The very minor adjustment the Union Application confers (the ability to defer the written agreement to some later date - likely the end of the shift) has some benefit.

34. However, it is a very minor and consequential amendment to an existing flexibility regime.

35. It is not apparent why such significant drafting detail is required in the Union Application's proposed Schedule I when the award flexibility mechanism already exists and is not being added to at all.

36. If the Union wishes to pursue this small incremental adjustment to the existing flexibility in clause 10.6 in the Award, such an adjustment could be achieved by a short one line amendment to clause 10.6, as opposed to introducing an entire Schedule with a vast array of new burdens being imposed on employers (this is addressed in further detail below).

37. The Union Application is accordingly inconsistent with section 134(1)(g) of the FW Act. The obsolete nature of the Schedule I means that the proposed inclusion is both:

(a) inconsistent with the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia; and

(b) is not necessary to achieve the modern awards objective.

CONTENTION 3: LIMITATIONS ON INCREASED FLEXIBILITY UNDER THE APPLICATION

38. The existing Award provisions allow <u>any</u> part-time employee to enter into an agreement to work additional ordinary hours. The variations sought in the application impose limits on which part-time employees can enter into additional hours agreements.

39. Proposed clause I.2 limits the ability to enter into additional hours agreements to part-time employees who are engaged to work more than 9 hours per week.

40. Such a limitation seems somewhat illogical. One would ordinarily reason that the part-time employees who work the fewest hours are perhaps the most likely to have the availability to work additional hours.

41. In this regard, the limitation proposed by the Union Application is inconsistent with section 134(1)(a) and s134(1)(c) of the FW Act as the limitation:

    (a) is inimical to the relative living standards needs of the low paid (which would likely be desirous of the option to perform more work voluntarily); and

    (b) does not promote social inclusion through increased workforce participation for those who are working the least number of hours in the industry.

CONTENTION 4: INCREASED BURDENS UNDER THE APPLICATION

42. In exchange for the insubstantial and limited 'benefit' considered above, the proposed variations seek to introduce a significant number of new onerous constraints on offering part time employees additional hours, including:

    (a) a prohibition on signing an additional hours agreement concurrently with an offer of employment;

    (b) a 'conversion' clause, requiring employers to increase a part-time employee's regular pattern of work where they work additional hours for a course of 6 months or more; and

    (c) the requirement to agree to any dispute being settled by the Commission through arbitration. That is, arbitration can compulsorily be imposed on an employer in a manner not presently available under the existing part time provisions.

43. Each of these burdens is unreasonable and cannot be considered an appropriate inclusion based on the limited benefit gained from the proposed variation in the Union Application.

44. It is the presence of these additional burdens that makes the MGA and COSBOA support for the Union Application startling. It appears MGA and COSBOA have agreed to support a proposal that does not provide any flexibility for employers under the Award that does not already exist, whilst simultaneously imposing multiple new burdens on employers.

45. MGA and COSBOA are urged to reconsider their support for the Union Application, having regard to the above submissions regarding how the existing Award provisions currently work.

Restriction on signing an additional hours agreement with an offer of employment

46. Proposed clause I.4(e) would prohibit an additional hours agreement being made a condition of employment or being signed concurrently with an offer of employment.

47. This clause seems entirely obsolete and counterintuitive when read in conjunction with proposed clauses I.3 and I.5. It is presumed that clause I.4(e) is intended to prevent unscrupulous employers from engaging part-time employees with a low number of regular hours and requiring an additional hours agreement to allow them to work additional hours.

48. Such conduct would, however, offer no benefit as clause I.3 would require the employer to pay the part-time employee for all of the hours in the additional hours agreement, even if the part-time employee was not required to work them. Further, clause I.5 would not allow the employer to terminate the additional hours agreement without the part-time employee's consent.

49. In these circumstances, it is not apparent why an employer would seek to artificially engage an employee on less hours of work on commencement of employment, only to 'lock in' these additional hours by way of an onerous additional hours agreement pursuant to the Union Application.

50. The safeguard proposed by way of this provision assumes employers will act irrationally and against the interests of their business in order to extract some small award-benefit or tactical advantage over employees.

51. This is detached from practical realities.

52. In practice, if employers have a demand for a consistent pattern of work, then the most likely response to such a demand is to seek to fill that demand securely, by way of agreeing on commencement of an engagement to have an employee perform such work. It suits both employers and employees to have certainty over which hours of work will be regularly performed.

53. The Union Application also ignores that there are legitimate reasons why an employer and part-time employee may wish to enter into an additional hours agreement at the time of engagement. By way of example only:

    (a) an employee who is engaged is to work one or two shifts per week on an ongoing basis may agree to work additional hours during their first week to enable them to undertake training; and/or

    (b) an employee who also undertakes study might be willing to increase their hours during particular holiday periods when classes are not being held.

Conversion clause

54. ABI and NSWBC are not entirely opposed to a clause that allows a part-time employee to request an increase to their Regular Hours if they have regularly and systematically worked additional ordinary hours and if a substantive amendment is being made to the award to facilitate the working of additional hours by consent.

55. Indeed, the Joint Employer Determination includes a similar clause as a safeguard against employees being regularly rostered for hours that are additional to their contractual engagement.

56. However, ABI and NSWBC do oppose the conversion clause that has been included in the Union Application.

57. This is because the Union Application, as a whole, does no more in substance than to replicate the existing mechanisms in clause 10.6 of the Award.[11] With this in mind, no cogent basis has been advanced, nor any evidence to date, to identify why an additional safeguard is required to address the types of variations already permitted by clause 10.6.

58. Is it the Union case that the current regime of variations are being implemented improperly by employers? Or that part time employees are largely being engaged on lower patterns of work under clause 10.5 and then having their hours increased pursuant to separate written agreements? What is taking placed in the industry now that the Unions contend warrants the imposition of such a substantial change to the existing part time employment framework?

59. In the absence of any material changes to how part time employees can be offered additional hours, no merit case exists for introducing the conversion safeguard proposed by the Applicants.

Timeframe for conversion

60. ABI and NSW also oppose the 6 month period proposed in the Application for assessing conversion requests. One reason that an employer may wish to offer additional hours to a part-time employee is a seasonal increase in business (e.g. a retail store in a tourist area).

61. Seasonal variations in hours may not be accurately taken into account if a review of hours worked is limited to a 6 month period, for the purposes of granting a right to convert to greater hours of work.

[11] See discussion at the paragraphs relating to ‘Contention 1’ above

62. Using a 12 month period to review an employee's pattern of additional hours allows all seasonal fluctuations to be considered before any decision to convert to a higher number of hours is assessed and confirmed.

Agreement to arbitration by the Fair Work Commission

63. The requirement for employers to agree to arbitration of disputes by the Fair Work Commission is a significant departure from the existing award-regime.

64. Again, in circumstances where the Union Application, as a whole, does no more in substance than to replicate the existing mechanisms in clause 10.6 of the Award,[12] no cogent basis has been advanced, nor any evidence to date, to identify why this additional safeguard is required to address the types of variations already permitted by clause 10.

65. The Award already contains a dispute resolution procedure allowing parties to seek the Commission's assistance in resolving disputes

66. This existing procedure already applies to any disputes relating to:

(a) the variation of a part-time employee's hours in accordance with clause 10.6; and

(b) the conversion of a casual employee to permanency (arguably a more significant entitlement and conversion mechanism than that proposed amendments).

67. ABI and NSW are not aware of any issues arising out of the existing provisions. No evidence or submissions have been advanced to date by the Applicants regarding any deficiencies with or abuse of the existing provisions such that the additional safeguard of compulsory arbitration is required.

Joint Employer Determination proposal re: arbitration

68. Given that the Joint Employer Determination does promote a new substantive flexibility, ABI and NSW agree that there is merit in providing easier access to arbitration with respect to some matters <u>on a trial basis</u>. The benefit of including greater access to arbitration initially is that the Commission will be available to intervene (by compulsion if necessary) to deal with any teething issues with respect to the new provisions or to deal with misunderstandings regarding how the provisions operate.

69. Importantly, however, the Joint Employer Determination does not give the Commission the power to arbitrate whether there are reasonable business grounds for an employee to not be converted to greater hours under clause 10.5.

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[12] See discussion at the paragraphs relating to 'Contention 1' above

70. There are compelling reasons as to why the Commission's power of arbitration should not extend to assessing an employer's reasonable business grounds for refusing a conversion request, even on a trial basis.

71. ***Firstly,*** the FW Act draws a significant distinction between most employment disputes and disputes regarding whether reasonable business grounds exist to reject a particular employee application. This is evident from the unique standing given to these types of disputes in:

    (a) section 65 of the FW Act (with respect to refusing requests for flexible working arrangements on reasonable business grounds); and

    (b) section 76 of the FW Act (with respect to refusing requests for extended unpaid parental leave on reasonable business grounds).

72. The Act does not provide for disputes about either of the above matters to be arbitrated by the Commission, without agreement of the parties.

73. ***Secondly,*** the Commission has long recognised that the Commission should be hesitant to arbitrate disputes pertaining to the exercise of an employer's managerial prerogative - that is, the employer's prerogative to run its business as the employer deems most efficient and beneficial. The seminal case that identifies the role of the Commission in arbitrating disputes where an employer's exercise of managerial prerogative arises is *the Australian Federated Union of Locomotive Enginemen v State Rail Authority of New South Wales* (1984) 295 CAR 188 (**XPT Case**). In the *XPT Case* it was held as follows:

    > *"It seems to us that the proper test to be applied and which has been applied for many years by the Commission is for the Commission to examine all the facts and not to interfere with the right of an employer to manage his own business unless he is seeking from the employees something which is unjust or unreasonable."*

74. The approach in the *XPT Case* is reflected in a later decision of *CEPU v Telstra Corporation Ltd* (PR958009), where Commissioner Smith held that:

    > "*It is settled that this Commission, and its predecessors, did not intervene in the prerogative of management to run and organise a business in the way in which it considers the most efficient manner. This prerogative was subject to it not being exercised in a manner which could be regarded as harsh, unjust or unreasonable…*"[13]

75. The above reasoning continues to be adopted by the Fair Work Commission with respect to disputes under Fair Work Instruments.[14]

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[13] At [9]

[14] See *Maritime Workers Union of Australia v Patrick Stevedores Holdings Pty Ltd* [2014] FWC 3615 at [80], *Pulle v Commonwealth of Australia acting though the Secretary of the Department of Parliamentary Services* [2011] FWA 7462,

76. The Commission has, however, developed these decisions over time, noting that:

(a) for a case to be made out in relation to the failure of management to exercise its responsibilities properly, it is necessary to go beyond demonstrating a viable and/or credible alternative to that decided upon by the employer;[15]

(b) in the absence of a finding of unjust or unreasonable conduct, the preferred option of a third party such as the Commission is "*irrelevant*" to the case that the parties have to prove. It is not the function of the Commission to substitute its view for that of the employer as to the most efficient way of managing the enterprise;[16] and

(c) ultimately, there needs to be "*strong evidence*" before the Commission would take the significant measure of stepping into the shoes of a Company regarding decision about operational matters.[17]

77. All of these principles warrant considerable caution being taken before determining that the Commission should intrude upon disputes regarding how an employer chooses to organise its business.

78. Having regard to these matters, it is submitted that providing a general right of arbitration over whether an employer has reasonable business grounds to increase a part-time employee's hours is not appropriate and is inconsistent with aspects of the modern awards objective, including:

(a) section 134(1)(f) of the FW Act, which requires the impact of modern award powers on business, productivity, employment costs and the regulatory burden to be considered; and

(b) section 134(1)(g) of the FW Act, which focuses on the need to ensure a simple, easy to understand, stable and sustainable modern award system.

CONTENTION 5: PARALLEL OPERATION OF SCHEDULE I AND CLAUSE 10.6

79. The Application seeks to vary the Award by adding a new Schedule I. Accordingly, the existing flexibilities afforded by clause 10.6 are not disturbed and would continue to apply.

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and *Construction, Forestry, Mining and Energy Union v HWE Mining Pty Limited* [2011] FWA 8288

[15] *ACT Minister for Health v Australian Nursing Federation* (L2261). Cited with approval in *CPSU v Australian Broadcasting Corporation* PR915827 at [59] and *The Australian Workers' Union v Alcoa World Alumina Australia Limimted* [2012] FWA 9222

[16] Ibid

[17] *Maritime Workers Union of Australia v Patrick Stevedores Holdings Pty Ltd* [2014] FWC 3615 at [82]

80. The almost identical provisions introduced by the proposed variations would operate in parallel to clause 10.6. Both provide a means by which employers and employees can vary the hours of work for part time employees by way of separate written agreements.

81. This will lead to extremely confusing outcomes, particularly given that the arrangements in clause 10.6 are not constrained in the same way as the proposed flexibilities outlined in Schedule I.

82. A variety of questions will likely arise. By way of example:

    (a) If an employer and employee agree in writing to a variation of hours, how does one determine whether the arrangement is being made under clause 10.6 or Schedule I?

    (b) If some of the safeguards in Schedule I are applied, can an employer elect to instead apply the more flexible provisions currently contained in clause 10.6 to vary the hours of work?

83. This type of outcome is plainly inconsistent with section 134(1)(g) of the FW Act, which focuses on the need to ensure a simple, easy to understand, stable and sustainable modern award system.

CONTENTION 6: THE AWARD SHOULD BETTER PROMOTE WORKING OF ADDITIONAL HOURS BY PART TIME EMPLOYEES

84. While the Union Application lacks merit for the reasons advanced, ABI and NSWBC do agree that the existing Award provisions in relation to part-time hours are both unclear and suffer from a level of inflexibility that is not justifiable.

85. A number of key industrial parties (ABI, NSWBC, ARA, NRA, Ai Group, SDA, ACTU, MGA and COSBOA) all support the notion that part-time employees should be able to work additional <u>ordinary</u> hours, without attracting overtime payments, where such hours are voluntarily worked.

86. As stated by ABI and NSWBC's representative in the conference on 5 March 2021, the present proceedings represent a moment of extraordinary consensus between the parties. Major employer and union groups are unified in seeking the same outcome - namely, the facilitation of greater part time hours of work.

87. Based on the SDA and ACTU submissions filed on 2 March 2021, it also appears to be common ground that the introduction of provisions allowing additional ordinary hours to be worked by part time employees on a voluntary basis will:

(a) encourage employers to offer additional hours;[18]

(b) increase hours of employment amongst part time employees, thereby promoting social inclusion through increased workforce participation;[19]

(c) have a positive impact on business and productivity;[20]

(d) have a positive impact on employees because "*an entitlement on the part of a part-time employee to overtime under the GRIA is illusory if the employer will not consider the employee for overtime in preference to engaging casual employees*"[21]; and

(e) support employment growth, and the performance of the economy as a whole.[22]

88. It appears that ABI and NSWBC are aligned with the SDA, AWU and MGA about the general merit of allowing part time employees to work additional hours voluntarily at ordinary rates, up to 38 hours per week.

89. Whilst the mechanism for delivering this increased level of flexibility is contested, common acknowledgment that the part time provisions of the Award should change is largely uncontested (excluding perhaps the position of RAFFWU).

CONTENTION 7: EVIDENCE FILED BY ABI AND NSWBC DEMONSTRATES THAT THE EXISTING PART TIME PROVISIONS OF THE AWARD ARE DISINCENTIVISING THE OFFERING OF WORK TO PART TIME EMPLOYEES

90. ABI and NSWBC commissioned the University of Wollongong to prepare a report examining the use of casual engagements in the retail industry.

91. The Report, '*Employers and the Use of Casuals in the Australian Retail Sector*', was prepared by Senior Professor Paul J Gollan (PhD), Associate Professor Martin J. O'Brien (PhD) and Honorary Professor Jonathan M. Hamberger (PSM, PhD) in March 2021 (**Research Report**) and has been filed in these proceedings.

92. The authors of the Research Report were asked to consider 5 themes, predominately focused on casual employment patterns:

(a) Why employers have traditionally engaged casual employees in the retail industry?

(b) Whether employers consider it desirable or necessary to continue to engage employees on a casual basis. If so, why?

[18] 2 March 2021 SDA Submissions at [17]
[19] 2 March 2021 SDA Submissions at [19], 2 March 2021 ACTU Submission at [33]
[20] 2 March 2021 SDA Submissions at [20], 2 March 2021 ACTU Submission at [35], [40]
[21] 2 March 2021 SDA Submissions at [21], 2 March 2021 ACTU Submission at [38]
[22] 2 March 2021 SDA Submissions at [24], 2 March 2021 ACTU Submissions at [46]

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

(d) Whether employers require an ability to change rosters for staff, even those who have been engaged for some time?

(e) Do these organisations engage employees part-time? If not, why not?

93. In order to assess these questions, the authors of the Research Report conducted:

(a) in-depth focus groups with 10 retail businesses; and

(b) a survey of 79 businesses operating in the General Retail industry. 77 of these businesses engaged employees under the terms of the Award, whilst 2 employed employees exclusively under the terms of enterprise agreements.

94. At the outset, it is acknowledged that the research conducted is not a precise statistically representative survey which can automatically be extrapolated as representative of the industry as a whole. However, from a qualitative perspective, what the research identifies is:

(a) the views of approximately 80 employers in the industry regarding the motivations behind engaging casual employees and the challenges associated with employing part time employees; and

(b) common themes that are likely to arise in broader research activities. Clear trends emerged from this small sample of employers that indicate that certain barriers are operating in the industry with respect to part time employment.

95. The Research Report unsurprisingly demonstrates that casual employment is high throughout the industry.[23] This is a matter that was previously well known in any event and which is confirmed by the Commission's own research[24] and that of the Attorney General's Department.[25]

96. However, the Report went on to identify some matters that have not previously been the subject of extensive consideration.

97. ***Firstly,*** the Research Report identifies that the prevalence of casual engagements in the industry is largely driven by the fact that employers need labour that is able to respond to fluctuating demand and that casual engagements respond better to such fluctuations in

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[23] 75/79 General Retail businesses employed casual employees, casual employment comprised an average of 55% of total employment

[24] https://www.fwc.gov.au/documents/sites/award-flexibility-hospitality-retail/background/am2020-103-information-note-retail-trade-2020-12-10.pdf

[25] https://www.fwc.gov.au/documents/sites/award-flexibility-hospitality-retail/background/am2020103-working-time-fed-gov-280121.pdf page 10

demand than part time employment. This was borne out by the survey research, which identified that by the far the most significant motivating factor that drove the employment of casuals was the ability to vary weekly work hours in response to customer demand.[26] This ranked first in importance in responses with a mean score of 7.9/10.

98. ***Secondly,*** Award rules pertaining to the employment of part-timers are viewed by employers as restrictive and disincentivise employing more employees on a non-casual basis. This was specifically identified in the focus group discussions,[27] where a number of respondents complained about the requirement to agree to every change to an employee's hours to be in writing. These responses were then reinforced by the survey. In particular, in the survey:

(a) The 4th highest reason for employing casuals was because it was "easier" than employing people on a part time or full time basis (with a mean score of 5.7/10).[28]

(b) 73% of respondents indicated that they would or might engage more part-time or full time employees if particular Award conditions changed.

(c) Tellingly, when asked what types of changes would be required in order to reduce barriers to part time or full time engagements:

i. 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 of 7.4/10.[29]

ii. 'Complexities' in changing fixed rosters of days/hours ranked second, with a mean score of 7.3/10.[30]

99. The survey does not provide all the answers.

100. Rather, it merely highlights a dissatisfaction on the part of employers with respect to part-time employment provisions - in particular regarding when overtime applies to additional hours and to perceived 'complexities' associated with rostering and changing hours of work.

101. The Joint Employer Determination addresses these very types of issues.

[26] Research Report at page 11
[27] Research Report at page 5
[28] Research Report at page 11
[29] Research Report at page 13
[30] Research Report at page 13

CONTENTION 8: THE JOINT EMPLOYER DETERMINATION IS MORE APPROPRIATE THAN THE UNION APPLICATION AND BETTER ALIGNS WITH THE MODERN AWARDS OBJECTIVE

Standing agreement

102. The primary distinction between the Joint Employer Determination and the Union Application is that the Joint Employer Determination contemplates an employer and employee being able to reach a written 'standing agreement' regarding when an employee may be available to work additional hours (without overtime applying).

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

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

105. 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.

106. 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).

107. 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.

108. 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.

109. It also imposes the very process which the Research Report has indicated disincentivises the offering of additional hours to part time employees.[31] The very 'complexity' concerns employers cited when explaining why they favoured casual employment in the Research Report are being re-imposed through the Union Application.[32]

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[31] See, by way of example, Research Report page 5, page 12, page 13
[32] See, by way of example, Research Report page 11

110. In the absence of any standing arrangement under which an employee's availability is communicated, the Union Application lacks any mechanism enabling employers to be notified in advance of an employee's general availability to work additional hours. This places on employers the obligation to directly enquire about employee availability every time additional work might arise.

111. For these reasons, ABI and NSWBC contend that the Joint Employer Determination is:

(a) more likely to increase part time/permanent employment and thereby serve the needs of the low paid (see section 134(1)(a) of the FW Act);

(b) more likely to facilitate the offering of additional hours and thereby social inclusion through workforce participation (see section 134(1)(c) of the FW Act);

(c) more likely to promote modern and flexible work practices and the efficient and productive performance of work (see section 134(1)(d) of the FW Act);

(d) better suited to addressing the impact of the modern award on business, including on productivity, employment costs and the regulatory burden (see section 134(1)(f) of the FW Act); and

(e) simpler and easier to understand and apply, resulting in a more stable modern awards system (see section 134(1)(g) of the FW Act),

when compared to the Union Application.

Compulsion to pay

112. 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.

113. 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.

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.

115. Having regard to this matter, ABI and NSWBC contend that the Joint Employer Determination is:

(a) more likely to increase part time/permanent employment and thereby serve the needs of the low paid (see section 134(1)(a) of the FW Act);

(b) more likely to facilitate the offering of additional hours and thereby social inclusion through workforce participation (see section 134(1)(c) of the FW Act); and

(c) better suited to addressing the impact of the modern award on business, including on productivity, employment costs and the regulatory burden (see section 134(1)(f) of the FW Act).

Inability to terminate agreement unilaterally

116. Surprisingly, the Union Application provides no mechanism for an employee to terminate the agreement to work additional hours unilaterally.

117. This approach deviates from the Joint Employer Determination, which confers on employees the express right to vary or revoke any standing written agreement at any time.[33]

118. The inability for employees to terminate their agreement to work additional hours unilaterally imposes unnecessary burdens on employees in a manner inconsistent with:

(a) section 134(1)(a) - which requires the needs of the low paid to be taken into account; and

(b) section 134(1)(d) - which focuses on the need to promote flexible modern work practices.

CONTENTION 9: JOINT EMPLOYER DETERMINATION REFLECTS EXISTING FLEXIBILITIES ALREADY CONTAINED WITHIN ENTERPRISE AGREEMENTS, SUPPORTED BY SDA

119. The standing agreement mechanism proposed in the Joint Employer Determination for working ordinary hours is not novel. It has already been extensively applied within the industry.

120. Notable examples of this approach include the use of “standing consent” provisions in the:

(a) *Coles Supermarkets Enterprise Agreement 2017* (**Coles EA**);

(b) *Woolworths Supermarkets Agreement 2018* (**Woolworths EA**);

(c) *Prouds Retail Employees Enterprise Agreement 2019* (**Prouds EA**);

(d) *Kmart Australia Ltd Agreement 2018*;

(e) *Freedom Retail Enterprise Agreement 2020*;

(f) *Betts Group Agreement 2019*;

[33] Clause 10.11(e) of the Joint Employer Determination

(g) *Fantastic Furniture Enterprise Agreement 2019* (**Fantastic Furniture EA**)

(h) *Dan Murphy's Agreement 2019*; and

(i) *Champions IGA Supermarket Enterprise Agreement 2019*.

121. The above list of examples is indicative, as opposed to exhaustive. Copies of each of these enterprise agreements (together with the decision approving them) have been filed with these submissions for ease of reference.

122. The position taken by the SDA with respect to a number of these agreements is illuminative.

123. In relation to the Coles EA, the decision by Deputy President Gostencnick approving the EA notes the SDA's strong support for a standing consent arrangement to offer part time employees additional hours of work (in contrast to the position of RAFFWU):

> *[15] The SDA says that under clause 4.1.4(d), part-time employees are not required to work additional hours at ordinary time rates. They say that the effect of the clause is that if a part-time employee wishes to work additional hours at the appropriate ordinary time rate, then by virtue of clause 4.1.4(d), they can do so and that such a position is the same as the Award.* ***The SDA contend that the only difference between the operation of the Agreement clause and the Award clause is administrative and allows Coles to implement a practical and logistically sound method of allowing part-time employees to work additional hours****.*
>
> ***[16] The SDA contend that the standing consent provisions in the Agreement are a benefit to employees and provide a clear protection in that a formal record of an employee's wish to work additional hours must be maintained and that a part-time employee can refuse to work additional hours on any occasion. Furthermore, the SDA submit that clause 4.1.4(d) does not operate to circumvent the payment of overtime penalties, but affords a part-time employee the opportunity to agree to working additional hours in advance and to verbally withdraw such an agreement at any point in time.***
>
> *[17] Overall, the SDA say that the submission of RAFFWU is "a theoretical one divorced from any real understanding of the working conditions and wishes of employees who will be covered by the Agreement" and that their position does not appear "to [not] reflect the wishes of the relevant employees given them overwhelming majority of those employees who chose to vote, who voted in favour of the Agreement and who voted in favour despite the recommendation of RAF Inc. that they vote against the Agreement".* (emphasis added)

124. In the case of the Woolworths EA, the SDA lodged a statutory declaration in support of the EA being approved by the Commission.

125. In the case of both the Prouds EA and Fantastic Furniture EAs, the SDA opposed the approval of both EAs but did not appear to take any issue with the standing consent arrangements for part-time employees in either EA.

126. 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.

CONSEQUENTIAL AMENDMENTS

127. The Joint Employer Determination also proposes certain consequential amendments to facilitate the making of standing agreements.

128. Specifically:

(a) Items 2, 3 and 4 of the Joint Employer Determination varies overtime clauses to make it clear that additional hours worked voluntarily pursuant to a standing written agreement do not attach overtime.

(b) Item 5 of the Joint Employer Determination makes minor amendments to clause 10.6 of the Award to make it clearer that employers and employees can already vary hours of work in accordance with clause 10.6 of the Award.

The variation proposed in Item 5 of the Joint Employer Determination achieves two outcomes:

i. It gives effect to the stated intentions of the Full Bench of Fair Work Australia with respect to allowing part time employees and employers to vary hours of work by written agreement[34].

ii. It addresses any confusion that may exist within the industry or amongst industrial parties as to the availability of written agreements to vary existing part time hours. Whilst, ABI and NSWBC maintain that clause 10.6 clearly allows employers and employees to change hours of work from time to time by way of written agreement, the Union Application's repetition of this same flexibility suggests that perhaps not all industrial parties hold the same view. There is accordingly benefit in making the variation proposed in Item 5 of the Joint Employer Determination.

[34] See discussion at [17] to [28] above

129. The primary basis upon which the consequential amendments are grounded is that they will assist in simplifying and better explaining the provisions of the Award, thereby supporting the creation of a simple, easy to understand, stable and sustainable modern award system (see s134(1)(g) of the FW Act).

Filed on behalf of ABI and NSWBC by

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