BEFORE THE FAIR WORK COMMISSION

MATTER NO. AM2021/7

S157 –VARIATION OF MODERN AWARDS TO ACHIEVE THE MODERN AWARDS OBJECTIVE – Schedule I – Additional flexibility measures – Part time employees

ACTU SUBMISSION

INTRODUCTION

1. This submission is made by the Australian Council of Trade Unions ('ACTU') in support of the Applicants' - being the Shop, Distributive and Allied Employees' Association (**SDA**), the Australian Workers' Union (**AWU**) and Master Grocers Australia Limited (**MGA**) – application to vary *the General Retail Industry Award 2020* (**GRIA**), as made on 26 February 2021 and amended on 15 March 2021 (**Application**).

2. The Applicants by the Application seek to vary the GRIA by inserting Schedule I, which is titled "Additional flexibility measures – Part time employees"("Schedule")

3. The ACTU submits that the following are pertinent to the disposition of the Application:

   (a) The Applicants consist of worker and employer representatives;

   (b) The Application is supported by the ACTU and the Council of Small Business Organisations Australia (**COSBOA**).

   (c) MGA and COSBOA represent small to medium-sized enterprises, which are more likely to engage employees pursuant to the GRIA.

   (d) The variation the subject of the Application:

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i. Is temporary in nature, being scheduled to sunset after a period of 18 months;

ii. May be adopted by employers and employees on an entirely voluntary basis;

iii. Is straightforward and easy to understand;

iv. Provides certainty for employers and workers;

v. Contains a range of safeguards which are described in the submission of the ACTU filed in this matter on 2 March 2021 (**First ACTU Submission**) at paragraph 18 and elsewhere, as well as the submissions of the SDA filed on 2 March 2021 and 16 March 2021

(e) In response to the Application, the ABI, supported by various employer representatives, seek an alternate variation of the GRIA (**ABI Proposal**);

(f) The ABI proposal:

i. is not supported by any other employer or employee representatives, and is opposed, by the Applicants;

ii. provides for a more complicated mechanism, with less certainty, than the variation proposed in the Application;

iii. does not contain provisions protections to workers;

iv. goes beyond the immediate need to address the effects of the pandemic by seeking to impose permanent radical changes;

4. The ACTU supports the submissions of the Applicants and submits that the GRIA should be varied in the terms applied for. The ACTU further submits that the GRIA should not be varied in the terms the subject of the ABI Proposal. These submissions are supported as follows.

THE PROPOSED CHANGES

Overview

5. 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.

6. 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 pandemic. These changes are supported by a relevant mix of worker and small business advocates.

7. 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.

8. What is essentially the ongoing wholesale casualisation of part-time employment is neither warranted nor justified by the current economic situation or outlook.

9. 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.

10. 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.

11. 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.

12. 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.

The Proponents

13. The Application is made by the SDA, the AWU and the MGA. It is supported by the ACTU and COSBOA. The Applicants and the supporters of the Application consist of:

    a) The representatives of employees working in the retail sector;

    b) The peak council for trade unions;

    c) The representatives of small to medium sized enterprises operating in the retail sector.

14. The alternative proposal is advanced by ABI and is supported by the NRA and ARA. No worker or their union has indicated their support of the ABI proposal.

15. A FWC information note published in this matter states:[1]

> Retail trade is a highly award-reliant industry, with around 3 in 10 non-managerial employees paid exactly the award rate and only 4 industries had a higher proportion of award reliance among non-managerial employees. Over half of employees in small businesses are award reliant. Relatively few enterprise agreements are made in this industry.

16. On this basis, not only is the Applicant's proposal preferable to the ABI proposal because of the support it has from employee representatives, it is further preferable when the nature of those employer representatives is considered. Whereas the Applicant's proposal is brought and supported by representatives of small business – who are more likely to be award reliant – the ABI proposal is not.

17. That the Application is brought by consent between the representatives of workers as well as representatives of small business employers supports the granting of the Application. This factor does not support adoption of the ABI proposal.

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[1] FWC, 10 December 2020, 'Retail Trade' <https://www.fwc.gov.au/documents/sites/award-flexibility-hospitality-retail/background/am2020-103-information-note-retail-trade-2020-12-10.pdf> p2

Type of Change

18. The Application, if granted, will vary the GRIA to insert a schedule (Schedule I) into the Award which will be set to operate for a period of 18 months. Adoption of the temporary provisions of that schedule will be on an entirely voluntary basis – it will remain open to employers and employees to continue to structure their working arrangements according to the terms of the main body of the GRIA.

19. The ABI proposal, if acceded to, will make permanent changes to the GRIA.

Why there is no basis for a permanent and/or radical change

20. The direct and associated effects of the COVID-19 pandemic on workers and businesses have been significant. However, notwithstanding that predictions as to the continuing duration of those effects may vary, there is recognition that the Australian economy will recover.

21. This recognition is consistent with the approach that has been taken by the FWC during the COVID-19 pandemic, which has been to recognise the temporary nature of the COVID-19 pandemic and make temporary changes accordingly.[2]

22. The COVID-19 pandemic – particularly as we head to a phase of economic recovery – does not provide the reasonable basis for a radical overhaul of the industrial relations system, or the framework as it applies to retail workers, much less for a permanent overhaul.

23. The lack of justification for permanent changes to employees' working conditions in the retail sector is supported by the overall employment data, as well as the employment data for the retail sector.

[2] [2020] FWCFB 1690 at [41]; [2020] FWCFB 1741 at [19] – [24]

24. 57.5% of retail employees are engaged on part-time hours.[3] 3 in 5 of these workers are casual employees, which is higher than the average across all industries.[4]

25. The ACTU submits that the correct course should instead involve an examination of measured changes which are sufficient to balance the interests of employers and the protection of workers as the retail sector transitions to full health.

Formation Safeguards

26. Under both proposals, agreement to work additional hours cannot be made a condition of employment and cannot be signed concurrently with an employment agreement. An agreement to work additional hours may only be made once an employment relationship has been established. The ACTU submits that these are important safeguards to protect the interests of workers.

27. The Applicant's proposal contains a further and, it is submitted equally necessary, safeguard which the ABI proposal does not. Under the Applicant's proposal, an agreement cannot be made under coercion or duress. This safeguard is necessary to ensure that agreement to work additional hours is not reached only through the threat of withholding work opportunities or other rights and conditions. The ACTU submits that explicit mention of this protection is both of utility in terms of its substantive effect, as well as on the basis that such inclusion serves as a valuable signal to employers and workers as to the circumstances in which agreement to work additional hours may be reached.

28. This further safeguard is of particular significance where, under the ABI proposal, an employee may be offered an initial contract on the minimum 3 hours with all additional hours which may have been promised to the

[3] FWC, 10 December 2020, 'Retail Trade' <https://www.fwc.gov.au/documents/sites/award-flexibility-hospitality-retail/background/am2020-103-information-note-retail-trade-2020-12-10.pdf> Appendix B

[4] FWC, 10 December 2020, 'Retail Trade' <https://www.fwc.gov.au/documents/sites/award-flexibility-hospitality-retail/background/am2020-103-information-note-retail-trade-2020-12-10.pdf> p5

employee, being the subject of an additional hours agreement. The scope of unscrupulous practices in such a scenario is obvious.

Nature of Mechanism

Certainty versus Standing

29. The fundamental difference between the proposals that are advanced in this matter relates to the nature of the mechanisms being put forward.

30. During the Award modernization process, the AIRC Full Bench identified

> "…the essential characteristics of part-time employment of some degree of regularity and certainty of employment." And, identifying the importance of "predictability", further observed that "the essential integrity of part-time employment which should be akin to full time employment in all respects except that the average weekly ordinary hours are fewer than 38."[5]

31. Under the Applicant's proposal, an agreement to work additional hours may be one of:

    a) An agreement to work a particular shift; or

    b) An agreement to work additional hours over a finite and agreed period of time;

32. In the case of a particular shift, the agreement by its very nature provides certainty as to the duration, hours and starting and finishing times of the additional hours that are agreed to be worked.

33. In the case of an agreement to work additional hours over a specified period, such certainty is also achieved by way of the mechanism's interaction with the GRIA cl 10.5. A note in the schedule provides clarity that the GRIA cl 10.5 (which already applies to base ordinary hours) also applies to any additional hours that are agreed pursuant to the mechanism. Clause 10.5 requires agreement as to:

    a) The number of hours to be worked each day; and

    b) the days of the week on which the employee will work; and

[5] [2009] AIRCFB 826 at [144]

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.

34. The effect of this is that under the Applicant's proposal, both the worker and the employer will have certainty as to how many hours will be worked, and when those hours will be worked at the point at which the agreement is made. No further or subsequent agreement is necessary.

35. The ACTU submits that the Applicant's proposal reflects the "essential characteristics" of part-time employment which are cited above, whereas the ABI proposal seeks to radically transform the very essence of part-time work by attacking the element of certainty which distinguished it from casual work. The socio-economic consequences of such a change for the low paid workforce in particular, are self-evident.

36. The change being sought by the ABI proposal amounts to no less than the casualisation of part-time work. The ABI proposal seeks to convert a permanent form of work – part-time employment – into an insecure and on demand type of work with no job certainty, no regularity of hours, and no guarantee of work or fixed income.

37. This transformation of part-time work that the ABI proposal seeks to bring about in the retail industry serves only the interests of employers – and predominantly large employers at that – with no accompanying protection or sufficient benefit for workers.

38. The further effect of the ABI proposal is on full-time employment. By conferring an ability to engage part-time workers for up to 38 hours per week but with no security or guarantee of those hours, it would be open to employers to offer jobs that might have otherwise been full-time on a part-time basis. There is no barrier, under the ABI Proposal, to an employer doing so, and there would in fact be perceived incentives created by the ABI proposal – such as the ability to unilaterally not offer or even withdraw working hours – at the whim of the employer.

39. The effect of achieving certainty with respect to part-time working hours (which the Applicant's proposal does) is not merely economic but social also.

While the benefits of regular (and under this proposal increased) working hours are clear in terms of economic benefit, the predictability of those hours is a key consideration in terms of part-time workers who may have other responsibility – which may range from secondary employment to "make ends meet" to family and caring responsibilities.

40. The ability to identify working and non-working days up-front is a key factor in workers with caring and other non-working responsibilities (such as study or secondary employment) seeking permanent part-time work over the precariousness and unpredictability that attaches to casual and other forms of insecure work.

41. The mechanism to be provided for under the ABI proposal does not give rise to such certainty. On the contrary, the mechanism provided for under the ABI proposal may give rise to erratic shifts in working hours from one week to the next. Under the ABI proposal, the lived experience between a casual worker and a part-time worker will be minimal if not non-existent. The casualisation of part-time work created by the ABI proposal – if it is accepted – would be deleterious for any worker who needs or otherwise seeks work/life balance.

42. The mechanism provided for under the ABI Proposal could be implemented in such a way that: a general standing agreement to work additional hours could be made; following which, it would subsequently be open to the employer to offer no additional working hours to the worker for a period of weeks (or longer); and then, offer a single, or small number of additional shifts, or a much larger number of shifts to a worker in a particular week. A part-time worker confronted with this situation may find themselves in circumstances where despite the inconvenience of the working times offered, they have no option but to accept the additional hours due to economic considerations.

43. The insecurity for workers that attaches to the ABI proposal does not end with the fact that a worker has no guarantee of additional hours being offered. The insecurity further attaches to additional hours of work even after they are offered and accepted. For example, if a worker and an

employer made a standing agreement for the worker to work additional hours (pursuant to the ABI Proposal) and then subsequent to that:

a) the employer verbally offered the worker a shift;

b) the employee verbally accepted that shift;

c) the employer then verbally cancelled that shift.

In this scenario, the ABI proposal is entirely silent as to whether the worker would be entitled to be paid for the additional shift that they been offered, accepted, and then seen unilaterally withdrawn from them at the last minute – even if they had rearranged other obligations like study or caring, or even declined secondary employment opportunities. The consequence of this is that at no point would a part-time worker, who has made a standing agreement under the ABI proposal, enjoy any level of job security whatsoever.

44. Further, there would be no explicit protection against the application of coercion or duress affecting the acceptance of the work. Under the ABI Proposal part-time employees could simply be driven to accept shifts that are unfavourable to them or incompatible with their other obligations (such as caring, or secondary employment); either by the hardship caused by insufficient working hours over an extended period and/or not knowing when the next opportunity may come; or by other forms of pressure which could be brought to bear due to the lack of explicit safeguards.

45. Where employers hire a number of part-time workers it would be open to them, under the ABI proposal, to employ sophisticated strategies to minimize the guaranteed working hours of their entire workforce and create the economic compulsion necessary to guarantee an on-demand part-time workforce for whom no overtime is payable.

46. The ABI proposal will allow employer to treat their entire part-time workers as if they were casual employees. Employers would be under no obligation to provide certainty, regularity or predictability of working hours but would nevertheless reap all of the benefits of being able to draw down as needed on an on-demand workforce that is economically compelled to accept any work that is offered.

47. The ACTU submits that the way in which the ABI proposal casualises part-time employment should not be awarded for any period of time, much less on an ongoing basis. It constitutes what would be a permanent paradigm shift in the current balance of power between employers and part-time workers, and should not be countenanced under cover of seeking to address the emergence from the pandemic.

Simplicity versus stages

48. There is a clear difference between the competing proposals in term of the steps that are necessary, under each respective conception, to give effect to the working of additional hours.

49. Under the Applicant's proposal, only one agreement is necessary to guarantee the working of additional hours for both parties.

50. That the mechanism proposed by the Applicant's would achieve certainty of agreement with a single step, making it simpler and less complex than the ABI proposal – which requires multiple steps between the making of the agreement and the actual performance of additional hours.

51. Under the ABI Proposal, multiple (at least two) steps are necessary. The first, for the making of the overall standing agreement to work additional hours, and the second for the fixing of the actual working hours to be performed as they arise. This gives rise to a level of administrative complexity which is not present in the Applicant's proposal.

52. The difference is even more noticeable where a single additional shift is contemplated. Under the Applicant's proposal, a single exchange of text messages, emails or other written communication could settle the agreement to work an additional shift. Under the ABI Proposal, this same transaction would require for there to be an overarching written agreement to generally work additional hours, before a discussion could then take place about the offer and acceptance of the actual shift of work.

53. It is the submission of the ACTU that the Applicant's proposal is preferable to the ABI Proposal, on the basis that it allows for a single agreement to be made to cover the working of additional hours, rather than requiring multiple stages of agreement.

Minimum Hours Requirement

54. Under the Applicant's proposal, additional hours may be agreed between the worker and their employer in circumstances where a part-time worker is already engaged to work 9 or more hours per week, pursuant to the GRIA cl 10.5.

55. The ABI Proposal specifies no minimum number of hours for which a part-time employee must work before their proposed mechanism for additional hours becomes available.

56. The direct effect of this difference is that whereas the Applicant's proposal will apply to part-time workers for whom there is already a reasonable commitment to minimum working hours, this is not a feature of the ABI proposal.

57. The further effect of this feature of the ABI proposal arises in conjunction with the nature of the additional hours mechanism proposed by the ABI (as discussed above). Under the ABI proposal, it would be open to employers to engage a new part-time worker without any guarantee of ordinary hours (save and except for the minimum required to comply with the GRIA clause 10.5 and the minimum engagement period) and then subsequently offer all further working hours on an entirely *ad hoc* basis.

58. Moreover, if the ABI proposal is adopted, it would be open to employers to only make additional hours available to part-time workers where they agreed to vary their agreed ongoing hours downwards to the minimum and make a standing agreement to work additional ordinary hours.

59. The position that this leads to is one which makes permanent work insecure, and effectively casualized. Under the ABI proposal, an employer would have access to an on-demand workforce that they can draw on, without the payment of overtime, for any number of hours between the bare legal minimum and 38 – all with no obligation to provide any hours whatsoever beyond the bare minimum. This is effectively the engagement of casual employees without the payment of a casual loading.

Guarantee of Hours

60. The situation which is described immediately above could not arise under the Applicant's proposal.

61. The Applicant's proposal contains a provision that once agreed, the additional hours the subject of the agreement must be provided and paid for (even if not provided). This prohibits the unilateral withdrawal of working hours which have previously been promised.

62. This feature of the Applicant's proposal is not unduly restrictive, particularly in light of the provisions relating to the termination of an additional hours agreement which are balanced.

63. The ABI proposal on the other hand, by its very nature (which is discussed above) provides no guarantee of a quantum of additional weekly working hours,

64. Under the ABI proposal, the initial agreement reached between worker and employer would be essentially conceptual in nature – there would be no obligation for an employer to actually provide working hours under the agreement. All that the initial agreement would provide is a general understanding that additional hours *may* be worked, and that if they are, overtime will not be payable.

65. Dispensation of the requirement to pay overtime rates for no promise of actual working hours is an empty bargain. The worker receives little other than the mere possibility, not the promise, of additional hours as consideration for the waiving of their rights to be paid overtime and the effective casualisation of their employment that this brings about.

Written Requirement

66. The Applicant's proposal requires an agreement to work additional hours be in writing. A note to cl I.6 clarifies that this may occur through an exchange of text messages or email.

67. The ABI proposal requires the employer and the worker to make "a standing written agreement that the employee may work additional ordinary hours". However, there is no requirement to capture that actual additional hours to be worked in writing.

68. This means that there is no protection for the worker, or for the employer, once the hours are accepted to ensure that their actual performance eventuates. If the hours were to be unilaterally withdrawn, it would leave the other party in the unenviable position of being unable to prove that they were ever agreed to in the first place. In these circumstance, a simple denial could thwart any attempt to seek redress. In cases of genuine misunderstanding, there would be no way to ascertain whether or not the actual performance of additional hours was genuinely agreed by both parties.

69. In the example - of a worker who makes a standing agreement, is offered and accepted a shift, rearranged their other commitments and then sees that shift unilaterally withdrawn at the last minute by their employer - given above, even if the ABI proposal purported to protect the worker in that situation (which it does not), the reality the worker would face due to the entire lack of written evidence attaching to the offer and acceptance of actual additional hours, is they would never be able to evidence the agreement to work specific hours necessary to ground an underpayment claim.The Applicant's proposal, through its establishment of certainty upon the making of the agreement, does not suffer from this same criticism.

Increase of standard hours

70. Both proposals, on their face, provide for an ability for the worker to request that additional hours that have been worked be reflected on an ongoing basis through an increase to their guaranteed hours agreed under the GRIA cl 10.5.

71. However, the differences between the two mechanisms which provide for this increase are such that the Applicant's proposal is substantially superior. This superiority is confirmed when the actual capacity for increasing ongoing hours is assessed in light of the nature of the two overall mechanisms.

72. The Applicant's proposal is simple and straightforward. When a worker has regularly performed additional hours over a period of 6 months, they may request that the employer agree to vary their working hours on an ongoing basis, to reflect (i.e. incorporate) those additional hours worked. An employer agree to the request and the variation may be made. An employer

may also refuse the request on reasonable business grounds, provided that they discuss the matter with the worker and provide their reasons in writing.

73. On their faces, the major difference between the Applicant's proposal and the ABI Proposal is that under the latter additional hours must be worked for 12 months before the worker may make a request for an ongoing variation. There is no solid basis for a worker to be required to establish a working pattern over 12 months, when 6 months is a sufficient indicator of regularity.

74. The Applicant's proposed qualifying period should be preferred.

Arbitration

75. The FWC Full Bench has previously recognised the importance of access to arbitration as a relevant safeguard when considering variable hours arrangements for part-time workers.[6]

76. The Applicant's proposal provides the parties to an additional hours agreement with guaranteed access to arbitration to resolve disputes that arise in relation to the application of the new provisions.

77. This access to arbitration, conferred through the granting of consent upon becoming a party to an additional hours agreement, ensures that parties are able to access the independent umpire to resolve disputes, including by making a binding determination. All other requirements of dispute resolution, and powers of the FWC – such as any requirement to raise a dispute at a workplace level, engage in conciliation etc. – remain unaltered.

78. The ABI proposal includes the ability for parties to have disputes arbitrated by the FWC but carves out a significant section of the provision from the scope of the FWC's arbitral power. Under the ABI proposal, neither party could seek the arbitration of a dispute about whether or not there were in fact reasonable business grounds to reject an employee's request to vary their ongoing working hours.

79. The non-inclusion of this facet of the mechanism within the scope of arbitral power is significant, and fundamentally weakens the effectiveness of the

[6] [2020] FWCFB 2316 at [135]

ongoing conversion scheme. There is no sound basis for not allowing the FWC to arbitrate all disputes about the operation of an additional hours agreement.

80. The ABI proposal is a false safe-haven for employers in dispute over "reasonable business grounds". The dispute is forced in court proceedings for civil penalties and compensation for breach of the award, to be decided by a judge with potentially no industrial background or experience. It is a process which is formal, technical, protracted and expensive. The arbitration option on the other hand is to be dealt with a by specialist tribunal, the Commission, in processes which are flexible, non-technical, more expeditious and therefore less expensive. The arbitration wil be dealt with by a Commission member who comes to the task with industrial background and experience and potentially, knowledge of the relevant industry. The arbitration process of the "reasonable business grounds" is far more efficacious and efficient to resolve such disputes and should be included in whichever variation the Commission decides to make.

SCHEDULE I

81. The ACTU submits that the proposed Schedule I strikes an appropriate balance between the Post-COVID-19 recovery needs of employers and the interests of workers.

82. The Application, if granted, will deliver an ability for employers to reach agreement with their part-time workers on the working of additional ordinary hours. These agreements are of limited duration and at any rate are entirely voluntary for both parties. If adopted, additional hours agreements will provide certainty of increased working hours for both parties over their specified duration.

83. Schedule I contains important safeguards for workers which are submitted as necessary in circumstances on the basis that they are reasonable and proportionate to the adoption of the mechanism. These include:

    a) The entirely voluntary nature (for both employer and worker) of adoption.

b) A requirement that an agreement be formed in writing by both parties;

c) A requirement that an agreement cannot be made a condition of employment;

d) A requirement that once voluntarily agreed between the parties, the employer must provide (or pay for) the additional hours of work;

e) A requirement for an agreement to be either for a particular shift or a specified duration;

f) The application of existing rostering provisions;

g) An ability for a worker to seek a permanent variation of their ordinary working hours to reflect additional hours that have been worked for over a 6 month period;

h) The right for workers and employers to seek arbitration of any disputes arising, through such consent to arbitrate being provided upon the making of an additional hours agreement;

84. Accordingly, and for the reasons that follow, the ACTU submits that Schedule I is necessary to achieve the modern awards objective.

THE MODERN AWARDS OBJECTIVE

85. *The Fair Work Act 2009 (Cth)* (**FW Act**) s 134(2) provides that the modern awards objective (as defined in s 134(1)) applies to the performance or exercise of the FWC's modern award powers (which includes its powers under s 157).

86. The FW Act s 157 provides that the FWC may make a determination varying a modern award on application on satisfaction that doing so is necessary to achieve the modern awards objective.

87. In *Hospitality Industry (General) Award* 2010 ([2020] FWCFB 1574) the Fair Work Commission said:

> ***[44]*** *The modern awards objective is to* '*ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions*', *taking into*

account the particular considerations identified in ss.134(1)(a)–(h) (the s.134 considerations).

[45] The modern awards objective is very broadly expressed. It is a composite expression which requires that modern awards, together with the NES, provide 'a fair and relevant minimum safety net of terms and conditions', taking into account the matters in ss.134(1)(a)–(h). Fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question.

[46] The obligation to take into account the s.134 considerations means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision-making process. No particular primacy is attached to any of the s.134 considerations and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.

[47] 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. 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 characterized as broad social objectives. 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.

[48] Section 138 of the Act emphasizes 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.'

[49] *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.*

A Fair and Relevant Minimum Safety Net

88. The specific considerations contained in s134 are considered below. It is important to bear in mind the well-established principle that the section 134 considerations serve an overall objective.[7] Here, the broad concerns of fairness and relevance are critical.

89. In 4 yearly review of modern awards – *Penalty Rates Decision,*[8] the Full Bench observed:

> **"...** the word 'relevant' is defined in the Macquarie Dictionary (6th Edition) to mean 'bearing upon or connected with the matter in hand; to the purpose; pertinent'. In the context of s.134(1) we think the word 'relevant' is intended to convey that a modern award should be suited to contemporary circumstances. As stated in the Explanatory Memorandum to what is now s.138:
>
> '527 ... the scope and effect of permitted and mandatory terms of a modern award must be directed at achieving the modern awards objective of a fair and relevant safety net *that accords with community standards and expectations*.' (emphasis added)"

Section 134(1) considerations

Consideration 134(1)(a)- relative living standards and the needs of the low paid.

90. In 2013, the Minimum Wage Full Bench observed:

> *The minimum wages objective and the modern awards objective both require us to take into account two particular matters, relative living standards and the needs of the low paid. These are different,*

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7 Annual Wage Review 2016-17 [2017] FWCFB 3500 at [128]

8 [2017] FWCFB 1001 at [120]. See also [2016] FWCFB 8025, [2009] AIRCFB 800 at [4]

but related, concepts. The former, relative living standards, requires a comparison of the living standards of award-reliant workers with those of other groups that are deemed to be relevant. The latter, the needs of the low paid, requires an examination of the extent to which low-paid workers are able to purchase the essentials for a "decent standard of living" and to engage in community life. The assessment of what constitutes a decent standard of living is in turn influenced by contemporary norms.[9]

91. A 2011 report by the Productivity Commission found that retail workers earn less on average than employees in most other industries, attributing this in part to the high proportion of part-time work:[10]

> Employees in the retail industry earn less on average than employees in most other industries, reflecting the low average skill level of retail employees. In February 2011, average weekly earnings (AWE) for all retail employees ($614.00 per week) were 61 per cent of the average across all industries. This outcome is strongly influenced by the high proportion of retail employees who are paid junior rates of pay and/or work part time. However, even among full time adult employees, average weekly ordinary-time earnings in retail are only about three-quarters of the average across all industries (with this ratio slightly lower for male employees and slightly higher for female employees) (ABS 2011b).

92. In the 2012 review of *the General Retail Industry 2010*, the FWC acknowledged that many retail workers "can be described as low-paid".[11]

93. A FWC information note published in this matter states:[12]

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[9] [2013] FWCFB 4000 at [361]; See also [2019] FWCFB 3500 at [47]

[10] Productivity Commission, 4 November 2011, *'Economic Structure and Performance of the Australian Retail Industry'* <https://www.pc.gov.au/inquiries/completed/retail-industry/report/retail-industry.pdf>

[11] [2013] FWC 6056 (Modern Awards Review 2012—General Retail Industry Award 2010) at [26] <https://www.fwc.gov.au/documents/decisionssigned/html/2013fwc6056.htm>

[12] FWC, 10 December 2020, 'Retail Trade' <https://www.fwc.gov.au/documents/sites/award-flexibility-hospitality-retail/background/am2020-103-information-note-retail-trade-2020-12-10.pdf> p2

> Retail trade is a highly award-reliant industry, with around 3 in 10 non-managerial employees paid exactly the award rate and only 4 industries had a higher proportion of award reliance among non-managerial employees. Over half of employees in small businesses are award reliant. Relatively few enterprise agreements are made in this industry.

94. It is broadly accepted that retail workers are low-paid. That this stems in part from high levels of award reliance and a high proportion of part-time work weighs in favour of amending the GRIA to enable greater working hours and certainty for part-time workers in a way that also contains sufficient safeguards against the misuse of those provisions to the detriment of those workers.

95. The ACTU submits that the Application, if granted, would achieve this. Further, Schedule I would allow for the improvement of part-time retail workers' living standards relative to full-time retail employees and workers in other sectors; once again through the provision of additional work opportunities in a fair and reasonable manner that is subject to safeguards.

96. In particular, the ACTU submits that the provisions of Schedule I which allow a part-time employee who has regularly worked additional agreed hours for at least 6 month to request a variation to their underlying agreed hours (pursuant to GRIA cl 10.5) will increase relative living standards and the needs of low paid workers by providing a mechanism for workers to seek permanent increases to their working hours and income resulting from that.

<u>Consideration 134(1)(b) – the need to encourage collective bargaining</u>

97. As a short to medium term measure, the Applicants' claim would neither encourage nor discourage collective bargaining.

<u>Consideration 134(1)(c)- promotion of social inclusion through increased workforce participation</u>

98. The Application, if granted, will allow for employers and workers to reach agreement on additional working hours which is certain and predictable. It is submitted that this will lead to increased workforce participation, particularly in relation to under-participation.

Consideration 134(1)(d) – flexible modern work practices and the efficient and productive performance of work

99. Schedule I allows for greater flexibility in the workplace, without sacrificing employee interests and rights.

100. Further, by allowing for greater working hours to be performed by permanent staff, instead of casual employees, it allows for work to be performed by employees who may be more familiar with the operation of the business and therefore able to perform work more efficiently and productively.

Consideration 134(1)(da)

101. Schedule I would not disturb any existing or arising obligations in respect of additional remuneration for working shifts, unsociable hours, or on weekends or public holidays. Penalty rates would continue to apply as per the current provisions of the GRIA.

102. Schedule I would permit a worker to agree to work hours additional to those already agreed under the GRIA cl 10.5 at ordinary rates of pay for a particular shift or specified duration.

103. A worker will further have the right to request an ongoing variation of their working hours to reflect their actual hours of work over a 6 month period. This request could only be rejected on reasonable business grounds. This feature of Schedule I will enable employees to obtain regular increased working hours on an ongoing basis.

Consideration 134(1)(e)- equal remuneration for work of equal or comparable value.

104. This consideration is not directly relevant, however it should be noted that workers in the retail industry are predominantly female, and that part-time employment is more prevalent than full-time employment.[13] Accordingly, this proposal which allows part-time workers to voluntarily work additional hours within a protective framework of safeguards, and also to subsequently

[13] FWC, 10 December 2020, 'Retail Trade' <https://www.fwc.gov.au/documents/sites/award-flexibility-hospitality-retail/background/am2020-103-information-note-retail-trade-2020-12-10.pdf> Appendix B—Characteristics of retail employees

seek ongoing increases to their working hours will have a positive gendered effect insofar as it addresses underemployment.

Consideration 134(1)(f) –impact on business, productivity, employment costs and regulatory burden.

105. The Application, if granted, will have a positive effect on business productivity for the reasons above. The Application will also reduce employment costs and regulatory burden, without reducing employees' rights.

106. The Application, if granted, will provide a cost-effective mechanism for employers to engage part-time workers for additional hours by agreement.

107. Contrary to any alarmist claims which may be made, the regulation that attaches to Schedule I is straightforward, necessary and easy to navigate. The safeguards simply require agreements to be clear and in writing, which is already a feature of good practice. Arbitration is available (where standing consent is given by virtue of making an additional hours agreement) to provide both parties with an efficient means to resolve any issue which may arise without recourse to complex and costly litigation.

108. Compliance with the safeguards is no more onerous than any existing award provision that presently applies, and strongly justified by the protections they offer to workers. At any rate, the adoption of Schedule I is entirely voluntary, with each employer who chooses to use the provisions of that schedule essentially calculating that it is in their interests to do so and that any associated regulation is justified.

Consideration 134(1)(g) – a simple, easy to understand, stable and sustainable modern award system that avoids unnecessary overlap.

109. The ACTU submits that the proposed Schedule I is straightforward, easy to understand and complements existing provisions of the GRIA.

110. The way in which additional hours interact with existing ordinary hours avoids any unnecessary overlap.

Consideration 134(1)(h) – employment growth, inflation and sustainability, performance and competitiveness of the national economy.

111. The Application, if granted, could only have a positive effect on employment growth. Where employers choose not to, it is open to them to not adopt the provisions of Schedule I.

112. Where, on the other hand, retail employers are experiencing higher volumes as a result of the post-COVID019 economic recovery, they may choose to use Schedule I to allocate more working hours to their existing permanent workforce.

113. Where jobs are created, it is likely that while Schedule I is in operation, these jobs will be permanent rather than casual.

CONCLUSION

114. Prior to this application there have been a number of significant variations to modern awards made and granted in response to the COVID-19 pandemic.

115. This application now arises at a time when Australia is optimistic about its economic recovery following the pandemic. However it is still a time where employers claim the need for measures to assist in that economic recovery and it remains as important as ever to ensure that working conditions and income levels receive support and are safeguarded.

116. As demand returns to the retail sector it is important to ensure that employment growth is a growth in permanent, secure jobs, not a growth in insecure ones.

117. For the reasons above, the ACTU submits that the Commission should be satisfied that granting the Application would be consistent with the modern awards objective.

118. Accordingly, the ACTU submits that the FWC should grant the Application.

AUSTRALIAN COUNCIL OF TRADE UNIONS

16 March 2021