IN THE FAIR WORK COMMISSION

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

IN THE MATTER OF:

APPLICATION TO VARY A MODERN AWARD BY:

THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION

AND

AUSTRALIAN WORKERS UNION

AND

MASTER GROCERS AUSTRALIA LIMITED

FOUR YEARLY REVIEW OF MODERN AWARDS
GENERAL RETAIL INDUSTRY AWARD 2010

REPLY SUBMISSIONS OF THE AUSTRALIAN RETAILERS ASSOCIATION

1. These submissions are in response to the some of the submissions filed by various parties on 31 May 2021 in response to the Statement[1] and Draft Determination of the Full Bench of the Fair Work Commission (**Commission**) in the above matter which would have the effect of varying the *General Retail Industry Award 2020* (**GRIA**).

Clause 10.5

2. The submission of the Shop, Distributive and Allied Employees' Association (**SDA**) contends that clause 10.5 is ambiguous or uncertain on the basis that it does not contain the word "particular" after the word "each" in subclauses 10.5(a) and (b). It is not clear from the SDA's submission how the proposed clause is capable of more than one meaning, or how anyone reading the clauses could be unsure of the entitlements and obligations. Further, it is not clear how the addition of the word "particular" eliminates any ambiguity or uncertainty. Given this, the SDA's proposed amendment should be rejected.

3. The National Retail Association proposes a variation to clause 21.2(b) to ensure consistent reference to guaranteed hours. The ARA does not oppose this variation.

4. The Newsagents Association of NSW and ACT (**NANA**) proposes a variation to the notes to clause 10.5 which would insert the word "including" in those notes to ensure it is clear that agreements can be recorded in other forms (than electronically). The ARA does not oppose this variation.

Clause 10.6

5. The SDA contends the example in clause 10.6 is either ambiguous or uncertain, purportedly because it does not identify a requirement that the employer tell the employee that the

[1] [2021] FWCFB 2820

additional hours to be worked are to be worked at ordinary rates. The ARA submits the SDA concern is baseless and no amendment to the example is warranted.

6. The SDA further submits that clause 10.6 should be amended to make clear that agreed additional hours remain subject to overtime where they are outside other working hours restrictions in the GRIA which apply to part time employees. The ARA agrees that if an employee works additional hours that are, for example, outside the commencing or ceasing times for ordinary hours, then they attract overtime. On an orthodox construction of the GRIA on its current terms (incorporating the Draft Determination) this is not controversial. On that basis the ARA does not believe the amendments proposed by the SDA are necessary.

7. The NRA proposes a variation to clause 10.6 of the Draft Determination with effect that an employer and a part-time employee could agree to varying the guaranteed hours after a shift has ceased but before the employee has left work for the day. The reasoning provided for this variation is sound and the ARA supports the proposed variation.

Clause 10.10

1. A number of parties propose changes, or raise concerns, with clause 10.10 of the Draft Determination. Much of the conjecture arises from paragraph 48 of the Statement, the definition of guaranteed hours and the extent to which hours can be varied under clause 10.10(a).

2. Clause 10.5(a) in the Draft Determination defines guaranteed hours as the number of hours an employee works on each day of the week. This encompasses both the days that the employee works and the number of hours to be worked on each day. The SDA appears, at paragraph 3(E), to contend that this definition is uncertain and needs to be supplemented in the note to the subclause.

3. The ARA has, throughout these proceedings, rejected the proposition that clause 10.10(a) (as it reads currently in the GRIA) should be read down in any way from its clear terms. The roster of a part time employee under the GRIA has, since 2010, been subject to variation with required notification, including variation to the days on which the hours are worked and the times those hours are worked on those days. Clause 10.10(a) refers to the "number of hours" agreed under clause 10.5 as being protected from changes to hours through rostering provisions. It says nothing that renders immutable (save for agreement in writing) the days on which hours are to be worked or the number of hours to be worked on each of those days.

4. That this is both the intention of the close and also appropriate is be clear having regard to the fundamental definition of a part time employee in the GRIA and the protections that already exist within the GRIA which support that definition. A part time employee under the GRIA is entitled to reasonably predictable hours of work. That is how a part time employee is defined, and that definition clearly contemplates that there will be some level of unpredictability in a part time employee's hours of work. Clause 10.10 in its current form promotes, and is consistent with, that definition by prohibiting changes to rosters on a week to week or fortnight to fortnight basis. Clause 35 provides for a process of consultation where changes are proposed to regular hours. These provisions, considered together, represent a minimum safety net for the retail industry which is fair in the context of balancing the needs of employers and employees in the industry and is also relevant having regard to the nature of the industry.

5. The general retail industry is an industry which is subject to fluctuations in trading patterns and consumer demand. That is reflected in the current terms and operation of clauses 10.5 and 10.10. What is proposed in the Draft Determination, and what the SDA is seeking to have repetitively enshrined through the amendments it proposes, is a shift in the regulation of part time hours in a manner which has no apparent regard to the nature of the industry and those fluctuating trading patterns. Further, it renders clause 35 essentially nugatory, as there is next to nothing for the employer to consult with a part-time employee about. If the Draft Determination is made in its current form then it will result in something that is far from reasonably predictable hours of work in the context of the retail industry, but rather entirely predictable hours of work.

6. The catalyst for the consideration of part time employment was the correspondence from the Minister to the Commission, the relevant content of which is extracted at paragraph 1 of the Full Bench's decision in this matter.[2] That correspondence asked the Commission to undertake a process that would, if the Commission considered it appropriate, *"maintain a focus on key changes that could potentially support Australia's economic recovery"*. It is not apparent to the ARA how a variation to the GRIA which proposes to eliminate flexibility in the rostering of part time employee hours does anything to support economic recovery.

Clause 10.11

7. Australian Business Industrial and the New South Wales Business Chamber (**ABI**), at paragraphs 17 to 22 of its 31 May submission, question the merit of a review of guaranteed hours in the absence of any additional flexibility for employers and employees in relation to working additional hours. The ARA agrees with the ABI submission. The Joint Employer Application included the review provisions as a protection for employees in the event that the proposed model of standing consent was to be implemented. The protection was important to the ARA as it prevented misuse of the standing consent provisions. The rejection by the Full Bench of those standing consent arrangement proposed in the Joint Employer Application means the need for this protective measure has fallen away.

Clause 35

8. It is noted that the SDA suggests that clause 15.9 should include a note referring the reader to clause 35. While it is not clear where in clause 15.9 such a note is proposed to appear, the ARA is not opposed to its inclusion but does question the need for the note.

Other matters

9. The ARA also supports the submission of ABI, at paragraphs 23 through 26 of their 31 May submission, in relation to the ongoing merit of a standing consent part time arrangement.

Australian Retailers Association
7 June 2021

[2] [2021] FWCFB 1608