IN THE FAIR WORK COMMISSION ("FWC")

IN THE MATTER OF:

An application pursuant to s 157 of the Fair Work Act 2009 (Cth) – FWC may vary etc. modern awards if necessary, to achieve modern awards objective

Award Flexibility – Retail Sector
(AM2021/7)

GENERAL RETAIL INDUSTRY AWARD 2020
[MA000004]

BY:

The Shop, Distributive and Allied Employees' Association ("**SDA**"), Australian Workers' Union, and Master Grocers Australia Limited ("**MGA**")

(collectively, "**the Applicants**")

MGA'S OUTLINE OF SUBMISSIONS

Date of Document:	15 March 2021	Solicitors Code:	–
Filed on behalf of:	the Applicants	DX:	–
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The Proceedings

1. These submissions are made on behalf of the Applicants in the matter of AM2021/7, which is currently before the FWC.

Introduction

2. MGA a national employer industry association representing independent grocery, liquor, and other retail outlets including timber and hardware, in all States and Territories of Australia. These businesses range in size from small, to medium and large, and make a significant contribution to the retail industry, accounting for approximately $16 billion in retail sales.

3. There are 2,700 branded independent grocery stores, approximately 1,300 independent supermarkets trading under their own local brand names. In addition, there are numerous independent liquor stores operating throughout Australia. These stores collectively employ more than 120,000 staff.

4. COSBOA represents thousands of small businesses across Australia with a significant number of stores in the retail industry. Most of these employers are working in businesses of between three and 15 employees

and they have suffered considerable losses during the pandemic. They are now in a recovery phase and they are seeking opportunities to provide additional hours of employment. Obtaining regular work is an attractive prospect for many employees and the ability to offer additional hours is welcomed by employers but they need that opportunity to be simple and easy for them.

5. MGA submits that the General Retail Industry Award 2020 ("**the GRIA**") which provides the instrument that is relied on by both employers and employees to determine how their working relationship in the retail industry operates, lacks clarity in respect of offering additional hours of work which has led to errors being made by both employers and employees.

6. In the current economic environment, any improvements to the GRIA are welcomed in the interests of providing more hours work to employees, particularly permanent hours of work. In the Working Groups established by the Federal Government in 2020, the issue of part time flexibility was raised by small businesses as one that needed assistance to grow retail employment. The objective being to increase hours of work that small businesses could offer employees. It was pointed out that the GRIA is not always easy to manage and that wherever it was possible a provision should be made for flexible working arrangements.

7. Despite the considerable time and effort that was made with award redrafting over several years there are some areas of the GRIA that remain difficult, especially for those who lack the availability of human resources or have difficulty with Award interpretation. These factors are particularly indicative of problems that are often faced by small family businesses particularly those that lack access to the assistance which is often necessary in interpreting Award clauses. The result of a misunderstanding of an Award clause is not necessarily attributable to the inability of the employer, but lies in the way in which the Award is written. The result is that an employee may be underpaid an entitlement and an employer is required to make back payment of wages. Consequently, it is not uncommon for an employer to avoid providing additional hours because they believe they may have to pay overtime rates for any extra hours of work provided to an employee.

8. The part-time clauses and the requirements associated with the performance and payment of additional hours of work to employees, who wish to work such hours has been misunderstood on many occasions. This has resulted in back payments being made by the employer and then a refusal by the employer to offer any additional hours in the future for fear of making an error.

9. MGA does not resile in acknowledging that the GIRA provides for the ability to offer additional hours of work to a part time employee. It is well understood that there are provisions in the GIRA to enable payment of ordinary rates for additional hours of work. What remains as a problem is that some employers do not realise that such additional hours must be agreed in writing before the work is performed, otherwise the work must be paid at the overtime rates.

Section 157

10. This Application continues to be made pursuant to s 157 of *Fair Work Act 2009* (Cth)[1] ("**the Act**") seeking to vary the GRIA if necessary, to achieve the modern awards objective in line with s 134 of the Act.[2]

11. The suggested Schedule I ("**Proposed Variation**") to be inserted into the GRIA by the Applicants was recently amended and filed by the SDA with the FWC on 15 March 2021.[3]

12. The Applicants submit that the Proposed Variation achieves the elements of section 134(1) of the Act.[4]

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[1] *2009* (Cth).
[2] Ibid.
[3] <https://www.fwc.gov.au/documents/sites/award-flexibility-hospitality-retail/submissions/am20217-corr-draftdet-sdaandors-150321.pdf>.
[4] *2009* (Cth).

Section 134(1)

13. Section 134(1) of the Act[5] spells out the objective of the Modern Awards as follows:

> *(a) relative living standards and the needs of the low paid; and*
>
> *(b) the need to encourage collective bargaining; and*
>
> *(c) the need to promote social inclusion through increased workforce participation; and*
>
> *(d) the need to promote flexible modern work practices and the efficient and productive performance of work; and*
>
> *(da) the need to provide additional remuneration for:*
>
> *(i) employees working overtime; or*
> *(ii) employees working unsocial, irregular or unpredictable hours;*
> *(iii) employees working on weekends or public holidays; or*
> *(iv) employees working shifts; and*
>
> *(e) the principle of equal remuneration for work of equal or comparable value; and*
>
> *(f) the likely impact of any exercise of modern award powers on business including on productivity, employment costs and the regulatory burden; and*
>
> *(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and*
>
> *(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.*

<u>*Living standards and needs of the low paid*</u>

14. The Applicants submit that the Proposed Variation captures the fundamental principles set out by the tripartite united agency, the International Labour Organisation, being those relating to "social justice and decent work", that is:

> *productive work in which rights are protected, which generates an adequate income, with adequate social protection … all [employees] should have access to income-earning opportunities … employment, income and social protection can be achieved without compromising workers' rights and social standards.*[6]

15. The Proposed Variation has stepped beyond the GRIA in an aim to allow the parties to collaborate in an industry where employees are low paid, to generate further opportunities of work.

16. The retail industry is seasonal in nature and hours of work fluctuate, particularly in small to medium sized enterprises. Through these further opportunities of work, which generally would not have been presented to permanent part-time employees due to the complexity of the GRIA and burdensome overtime penalty, they will allow the employees to have access to additional income earning chances.

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[5] Ibid.
[6] ILO: C087 – Decent Work, 1999 (No 87).

17. Accordingly, the Applicants strongly contend that the Proposed Variation will result in accelerating employment, social protection, social dialogue, and rights at work.

18. Regarding the principles of living standards and the needs of the low paid, these concepts were explored in *Ex parte HV McKay*[7] ("**the Harvester Case**").

19. Although the Harvester Case related to the *Excise Tariff 1906*[8], the presiding President considered principles that are relevant to these proceedings at hand. Most importantly, the needs of the average unskilled employees living in their community, which is essentially the first modern objective of section 134(1) of the Act.[9]

20. The President opinioned in the Harvester Case that ensuring what is fair and reasonable remuneration for work "is obviously designed for the benefit of the employees in the industry; and it must be meant to secure to them something which they cannot get by the ordinary system of individual bargaining with employers."[10]

21. The Applicants submit that the Proposed Variation will allow the employees of the retail sector who are low paid, to gain access to additional work to allow them meet the relative living standards of today's economy, which includes "obtaining commodities … clothing, and a condition of frugal comfort estimated by current human standards."[11]

Bargaining, workforce participation, flexible modern work practices, additional remuneration, and efficient/productive performance

22. Fair dealings in the workplace have always been an underpinning principle of the industrial relations sphere.

23. The ability for the employer and the employee to balance interests in an aim to achieve a mutual goal is crucial to any harmonious working relationship.

24. By allowing the parties to self-regulate through bargaining at a workplace level, fair treatment can then be achieved. In turn, this ensures an exchange of remuneration for work in a manner that best suits the employer and the employee.

25. The Proposed Variation in its current form will allow businesses to adopt changes that promote social inclusion through increased workforce participation. The ability of businesses to alter what is a heavily casualised industry into one that relies on permanent employment, will dramatically alter its structure for the better benefit of its permanent employees. As a result, casual employees will not be placed in a position of competitive advantage vis-à-vis permanent part time employees.

26. It is a particular focus for MGA and COSBOA that there be a move away from the use of casual labour and place a greater focus on permanent employment. There has been a significant misunderstanding amongst casual employees that because the rate of payment is higher therefore, to be employed on a casual basis is more lucrative. This should be dispelled as unacceptable because the long-term benefits of providing permanent employment have advantages for employees.

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[7] (1907) 2 CAR.
[8] (No. 16 of 1906)
[9] *2009* (Cth).
[10] (1907) 2 CAR, 3.
[11] Ibid, 4.

27. Business will be more readily open towards offering their permanent part-time employees additional hours instead of their casuals. In turn, that will foster a more inclusive environment for a status of employment, that more often than not, is rarely utilised due to its associated complexities.

28. The Proposed Variation will offer both ad-hoc and ongoing agreements to additional hours of work, without the ambiguities of the GRIA. Parties will be allowed to easily agree on additional hours by informal means, which is of great value to small to medium enterprises who lack administrative support, human resource teams, payroll, etc.

29. The Applicants further submit that the Proposed Variation will easily promote flexible modern work practices as it will allow employers to approach their part-time employees and offer additional hours, and should they be accepted, the by-product would be efficient and productive performance of work, and in return, additional pay to the employees.

30. As a result, this will emulate one of the important functions of the FWC, being "promoting cooperative and productive workplace relations and preventing disputes".[12]

Equal remuneration for work of comparable value

31. The Proposed Variation will compensate part-time employees at their ordinary rates for the additional hours. Nonetheless, such arrangement will uphold the principle of equal remuneration for work of comparable value.

32. The GRIA as it currently operates, unfairly distinguishes between the rate of pay for additional hours worked by a part-timer in excess of the agreed hours, against that of a casual employee.

33. The Proposed Variation will apply to ensure that all employees, regardless of status, are paid the same for work that is comparably of the same value.

Impact of any exercise of modern award powers on business

34. The Applicants submit that the Proposed Variation will improve productivity, performance, and employment growth as more part-time employees can be easily engaged. This will enhance workplace relations at a micro level, for example team uniformity and comradery, and at a macro level.

35. Additionally, it will aim to reduce employment costs by mitigating the overtime penalty that would ordinarily apply, along with the regulatory burden of compliance.

A simple, easy to understand, stable and sustainable modern award system

36. The Proposed Variation has been simply drafted, without added complexity in an aim to benefit enterprises that lack the resources, time, effort and money to invest in Award compliance.

37. The provisions are simple enough to be interpreted by business owners, employees and average individuals who do not have a legal background.

[12] *Fair Work Act 2009* (Cth), s 576(2)(aa).

The Proposed Variation vs the GRIA and Case Studies

38. The GRIA at Clause 10 "Part-time employees" specifies the basis of the part-time working arrangements between the employer and the part-time employee and determines terms and conditions under which a part-time employee may be employed. At Clause 10.5, the GRIA specifies the following:[13]

    (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; and
    (d) when meal breaks may be taken and their duration.

39. Further at Clause 10.6, the GRIA states that "The employer and the employee may vary the regular pattern of work agreed under Clause 10.5 with effect from a future date and any such time must be in writing."[14]

40. At Clause 10.8, the GRIA notes that "For any time worked in excess of the number of hours agreed under Clauses 10.5 or 10.6, the part-time employee must be paid at the overtime rate specified in Table 9."[15] This is reiterated again at clause 21.2(b) of the GRIA.

41. Albeit clause 10.6 of the GRIA allows for variation of a part-time employee's regular pattern of work, what is crucial and is viewed as an onerous hurdle, is that there must be a written agreement ***before*** the additional work is undertaken for a single or ongoing change. Further, the Applicants submit that clause 10.6 remains unclear as to whether a variation can be for a temporary or permanent period.

42. In contrast, the Proposed Variation is unequivocal about its ability to allow businesses the flexibility to agree to vary hours for a single shift, and on an ongoing short- or long-term basis. Should the agreed variation be for a single shift, an employer and its employee could agree in writing, after the shift has taken place, provided it is as soon as reasonably practicable.

43. The added flexibility of the Proposed Variation will allow employers and their employees to agree informally, by means of text messages and emails, which will alleviate red tape and administrative costs.

44. Also, peppered throughout the Proposed Variation are safeguards in comparison to the GRIA, that the Applicants view as comprehensive enough to provide employers and their employees adequate protection and clarity so as to avoid disputes, most importantly maintaining the requirements of clause 10.5 of the GRIA for the additional hours, and not just the initial agreement. These safeguards are further explored below.

45. It is submitted that the GRIA clauses are not always capable of clear interpretation by a retailer who operates a small to medium business. MGA submits that the Proposed Variation for part-time employees is indicative of the distressed nature of the GRIA as emphasised by the Attorney General, the Honorable Mr Christian Porter.[16] Further, it is acknowledged that an employer cannot afford to be reliant on a mistaken interpretation of the GRIA. However, if the GRIA was presented in a simple manner that enables both parties to have a clear understanding of their respective obligations, future errors could be avoided.

46. MGA Members are provided with information about the contents of the GRIA and the need to be conversant with its requirements. Information is available through seminars, information sheets and booklets. A regular newsletter is available on current issues to keep members informed. However, not all small businesses are

[13] 'General Retail Industry Award 2020' <http://awardviewer.fwo.gov.au/award/show/MA000004#P316_20997>.
[14] Ibid.
[15] Ibid.
[16] <https://www.fwc.gov.au/documents/sites/award-flexibility-hospitality-retail/correspondence/am2020-103-correspondence-ag-to-justice-ross-2020-12-09.pdf>.

members of an employer association and the need to ensure that materials that are required to maintain a basic understanding of the GRIA will therefore largely be dependent on the GRIA itself. Hence the need for clarity and confidence in the instrument that provides for day-to-day guidance of how the law operates in their businesses is crucial.

Case Study No. One

47. A recent case study that was brought to the attention of MGA was that of a retailer who has been operating his business for 15 years consisting of between 60 – 85 employees. He engaged approximately 50% of staff as part-time employees. The permanent employees worked their hours to a regular pattern but did not work overtime. Six part-time employees requested that they work the additional hours and stated that they were happy to be paid at the ordinary rate, in fact they insisted they were happy to receive the ordinary hourly rate. The employer accepted verbally that their arrangement was acceptable to both parties and saw no reason to have an agreement. Their arrangement continued over a period of approximately five years. The employees left the business and claimed for underpayment of wages, which was subsequently paid. The employer had thought that mutual consent was sufficient and wrongly believed it unnecessary to have a written agreement with the employees.

48. The above example is one that is not uncommon amongst retailers where the employer is well intentioned in assisting employees and the employee equally accepts the additional employment at the time simply because it was available in that form. On learning subsequently of their rights, the employees then took what was a lawful course of action.

49. This raises the question of why the employer made the error. Was it just ignorance or was it a reliance on the goodwill of the parties at the time, or whether the employer should have known better and insisted on an additional hours agreement?

Case Study No. Two

50. A further case study involving an employer in a small sized retail store of approximately 25 employees engaged all permanent staff.

51. Prior to Boxing Day, the employer rostered all available permanent staff. However, just at the start of the shift, the employer was advised that one of his permanent full-time staff will be unavailable for the Boxing Day sale due to an emergency, whereby the employee was required to take an unplanned trip for that day.

52. The employer, caught up in the busy trading day, immediately offered the hours to be worked by the missing employee to another employee as additional hours, who was a part-time employee.

53. The employer offered such hours at the ordinary rate of pay, which the employee was currently receiving, and they were accepted. There was no written agreement reached as the appointment was spontaneous and due to the busy sale day, so it was simply a verbal arrangement.

54. The employee then claimed overtime rates from the employer for the additional time worked.

The Proposed Variation vs the Respondents' Proposal[17]

55. The overarching principle that both the Proposed Variation and the Respondents' Proposal dated 15 March 2021 (combined, "**the Proposals**") are trying to achieve is offering businesses and their employees additional

[17] <https://www.fwc.gov.au/documents/sites/award-flexibility-hospitality-retail/submissions/am20217-corr-draftdet-abla-150321.pdf>.

flexibility for part time employees. There is a clear overarching and common ground by the Proposals, however, the means of achieving such flexibility and the safeguards are quite departed between the Proposals.

Structure of the Provision

56. The Respondents' Proposal contemplates varying the GRIA itself, suggesting inclusions under clause 10 and amendments to subsequent subclauses, inter alia.

57. The stated life of the Respondents' Proposal is limited, with a sunset on 15 September 2022, subject to review.

58. The Applicants submit that a variation to the GRIA's core regarding part-timers at this time may be detrimental to the workings of the GRIA. Given that the Respondents' Proposal is yet to be tested in practice by businesses, its effect and what stems from it is unknown.

59. On the other hand, even though the Proposed Variation is offered for a period of 18 months and subject to review, it is inserted as a schedule to the GRIA. The use of a schedule does not affect the general application of the GRIA and allows businesses and their employees to voluntarily elect to utilise the schedule or not.

Nature of the Agreement

60. This issue appears to be the most significantly different concept between the Proposals.

61. As alluded to previously, the Proposed Variation provides for single or short- or long-term agreements to provide a part time employee with additional hours. This creates an obligation on both the employer to provide the additional hours and pay and on the employee to be available for such hours.

62. In contrast, the Respondents' Proposal contemplates a standing agreement clause, meaning that an employer and employee agree to later be offered additional hours, at the needs of the business. This position unfortunately provides neither the employer, nor the employee with guaranteed hours, times and days of work. It also demoralizes the whole notion of permanent employment and the security associated with such status.

63. When viewed holistically, the Respondents' Proposals adds complexity to what is already a convoluted issue and unnecessary steps, requiring an employer to have two agreements for the variations, atop of the initial one required by clause 10.5.

Eligibility/Pre-Conditions

64. The Respondents' Proposal fails to limit the minimum number of part-time hours to enable access to the additional hours, whilst the Proposed Variation provides a minimum requirement of nine hours per week.

65. The Applicants contend that the inclusion of a minimum will provide a safeguard to the employees, so as to avoid "casualising" them, whilst ensuring businesses are completely aware of which permanent employees would be able to gain access to the additional hours. Moreover, MGA members would generally engage casuals to undertake work that is less than nine hours per week and therefore, the limitation is not prohibitive on small to medium enterprises.

Increasing Additional Hours

66. The Proposals are not significantly apart from each other regarding when to permanently increase the additional hours worked.

67. The Applicants submit that a period of six months is reasonable for both the employer and the employee.

68. The Applicants are of the view that the Respondents' Proposal of 12 months could result in additional burdens of compliance, record keeping, and the like, which in turn cause further disputes between the parties.

69. As for the access to arbitration, the Applicants submit that the clause still permits for the disputing parties to deal with the matter in accordance with clause 36 of the GRIA, which allows for negotiation at a workplace level, followed by the FWC's involvement by way of conference, prior to arbitration.

Rostering and Overtime Provisions of the GRIA

70. The Proposed Variation is clear as to class the additional hours as "ordinary", which would be defined pursuant to clause 15 of the GRIA, thus not attracting overtime rates. This is further iterated at clause I.5 stating that "the employee must be paid *overtime* … unless the … conditions are met".

71. As for the rostering provisions of the GRIA, the Applicants submit that the Proposed Variation now contemplates that any agreement to make or terminate additional hours between an employer and employee is taken to be a roster change for the purposes of clause 15 of the GRIA.

72. The Applicants contend that clause 35 of the GRIA relating to consultation about changes to hours of work is only relevant in circumstances where there is a unilateral change to the roster of an employee. The Proposed Variation is underpinned by the notion of mutual agreement and therefore the application of clause 35 is an irrelevant consideration.

73. We thank the FWC for the opportunity for making these submissions in support of the Application.

Master Grocers Australia Limited
16 March 2021