Australian Industry Group

Application to vary the General Retail Industry Award 2020

Submission
(AM2021/66)

3 September 2021

AM2021/66 APPLICATION TO VARY THE GENERAL RETAIL INDUSTRY AWARD 2020

1. INTRODUCTION

1. An application has been made by the Australian Payroll Association (**Applicant**) in the Fair Work Commission (**Commission**) in relation to the *General Retail Industry Award 2020* (**Award**). Specifically, the Applicant appears to seek a variation to clause 11.4 of the Award, in order to address the following issue:

> I am writing in relation to clause 11.4 of the GRI Award in relation to paying casuals a minimum of 3 hours work. The change in the wording to the clause states that an employer must pay a casual a minimum of 3 hours work, which implies even if the employee goes home sick and works less than 3 hours then the employer must pay them 3 hours. I gather this was not the intention as an employee can then come in and after an hour say they are sick and they get paid 3 hours, so employers may be overpaying employees as a result of the change of the wording for this clause.
>
> Can you please investigate and ideally make it clearer again the Award?
>
> (**Application**)

2. The Application is made pursuant to s.160 of the *Fair Work Act 2009* (**Act**).

3. The Australian Industry Group (**Ai Group**) files this submission in accordance with paragraph [3](1) of the statement and directions issued by the Commission on 10 August 2021 (**Statement**). In particular, this submission responds to the issues identified by the Commission at paragraph [2] of its Statement and other associated matters relating to the Application.

2. STANDING

4. Paragraph [2](iv) of the Statement identifies the following issue with respect to the Applicant's standing to make an application pursuant to s.160 of the Act:

> **[2]** A number is issues arose at and from that mention:
>
> …
>
> **(iv)** Does the Australian Payroll Association have standing, in accordance with s.160(2) of the FW Act to make an application under s.160 of the FW Act. If not, should the Commission vary the GRI Award on its own motion?

5. Section 160(1) of the Act provides that the Commission *'may make a determination varying a modern award to remove an ambiguity or uncertainty or to correct an error'*.

6. Section 160(2) of the Act sets out the bases upon which the Commission may exercise its power under s.160(1). Relevantly, s.160(2) provides that:

> **(2)** The FWC may make the determination:
>
> **(a)** on its own initiative; or
>
> **(b)** on application by an employer, employee, organisation or outworker entity that is covered by the modern award; or
>
> **(c)** on application by an organisation that is entitled to represent the industrial interests of one or more employers or employees that are covered by the modern award; or
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> **(d)** if the modern award includes outworker terms—on application by an organisation that is entitled to represent the industrial interests of one or more outworkers to whom the outworker terms relate.

7. Based on the information contained in the Application, it would appear that the Applicant is not:

   (a) an employer, employee, organisation or outworker entity that is covered by the Award for the purposes of s.160(2)(b) of the Act; or

   (b) an organisation that is entitled to represent the industrial interests of one or more employers or employees that are covered by the modern award for the purposes of s.160(2)(c) of the Act. We note that the Applicant is not a

registered organisation for the purposes of the *Fair Work (Registered Organisations) Act 2009* (Cth).

8. We further note that the Award does not include any '*outworker terms*' and as such, s.160(2)(d) of the Act would not appear to confer standing to the Applicant on that basis.

9. Accordingly, the Applicant does not appear to have standing under either ss.160(2)(b), (c) or (d) of the Act to make the Application.

10. Notwithstanding the Applicant's lack of standing, the Commission may exercise its power *'on its own initiative*' under s.160(2)(a) to make a determination to vary the Award to remove an '*ambiguity, uncertainty or error*'.

11. For the reasons which follow, we submit that the Commission should act on its own initiative and exercise its power to remove an error in the Award as identified in section 5.2 of these submissions.

3. THE RELEVANT AWARD PROVISIONS

12. Clause 11 of the Award relevantly states: (emphasis added)

> **11. Casual employees**
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> …
>
> **11.4** An employer must pay a casual employee for a minimum of 3 hours' work, or 1.5 hours' work in the circumstances set out in clause 11.5, on each occasion on which the casual employee is rostered to attend work even if the employee works for a shorter time.
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> **11.5** The circumstances are:
>
> **(a)** the employee is a full-time secondary school student; and
>
> **(b)** the employee is engaged to work between 3:00 pm and 6:30 pm on a day on which the employee is required to attend school; and
>
> **(c)** the employee, with the approval of the employee's parent or guardian, agrees to work for fewer than 3 hours; and
>
> **(d)** employment for a longer period than the agreed period is not possible either because of the operational requirements of the employer or the unavailability of the employee.
>
> …

13. The Award as it currently applies reflects the outcome of the plain language redrafting process (**PLR process**) that was recently undertaken by the Commission. For the purposes of this submission, we refer to the Award as it applied immediately prior to the completion of that process as the **2010 Award**.

14. Clause 13.4 of the 2010 Award stated as follows: (emphasis added)

> **13. Casual employees**
>
> …
>
> **13.4** The minimum daily engagement of a casual is three hours, provided that the minimum engagement period for an employee will be one hour and 30 minutes if all of the following circumstances apply:
>
> **(a)** the employee is a full-time secondary school student; and
>
> **(b)** the employee is engaged to work between the hours of 3.00 pm and 6.30 pm on a day which they are required to attend school; and

(c) the employee agrees to work, and a parent or guardian of the employee agrees to allow the employee to work, a shorter period than three hours; and

(d) employment for a longer period than the period of the engagement is not possible either because of the operational requirements of the employer or the unavailability of the employee.

15. Clause 13.4 in the 2010 Award provided for a *'minimum daily engagement'* of 3 hours (or 1.5 hours in the circumstances outlined by clause 11.5) (**2010 Clause**), whereas the extant clause 11.4 in the Award provides casual employees with an entitlement to a minimum payment for *'3 hours' work*' (or 1.5 hours in the circumstances described by clauses 13.4(a) – 13.4(d)), '*even if the employee works for a shorter time*' (**2020 Clause**).

16. The effect of the 2020 Clause is therefore substantively different to the effect of the 2010 Clause.

17. That is, an employer was required under the 2010 Clause to provide a casual employee with a '*minimum daily engagement*' of either 3 hours' or 1.5 hours' work, depending on the circumstances. Whether or not the employee was entitled to payment equivalent to 3 hours' or 1.5 hours' of work would depend on whether the employee had in fact performed work for the entirety of that period. The minimum engagement period prescribed by the 2010 Clause did not of itself guarantee a payment equivalent to that period.

18. By contrast, the 2020 Clause provides an entitlement to a minimum payment period and goes on to require such payment '*even if the employee works for a shorter time'*. These words expressly provide a casual employee with a minimum payment equivalent to 3 hours' work (or 1.5 hours in certain circumstances), even if they do not perform a period of work commensurate to the minimum payment amount. For example, as identified by the Applicant, an employer would still be required to make a minimum payment of 3 hours' or 1.5 hours' pay (as applicable), even if the '*employee works for a shorter time*'.

19. Accordingly, and as explained in further detail in the following section of our submission, it appears that the PLR process has resulted in a substantive change to the nature of the entitlement that was previously contemplated by the 2010 Clause.

4. THE PLAIN LANGUAGE RE-DRAFTING PROCESS

20. In this section of our submission, we deal with the PLR process and the manner in which the change to the 2010 Clause appears to have arisen.

21. In summary, it is our submission that:

    (a) For the reasons articulated above, the 2020 Clause is substantively different to the 2010 Clause.

    (b) This change is a product of the PLR process.

    (c) The change appears to have been unintended.

22. The PLR process was not intended to give rise to substantive changes to terms and conditions prescribed by the relevant awards. For instance, in a statement published by the Commission in relation to the PLR process pilot, the Commission said as follows:

> **[14]** Importantly, as part of this Pilot: … The plain language draft is not intended to change the substantive legal effect of any award term.[1]

23. Subsequently, the Commission published guidelines by reference to which the remainder of the PLR process was to be conducted. The guidelines said as follows:

> 1.4 The aim of plain language drafting is to make the document as simple and easy to understand as possible without taking away from precision or omitting necessary information or changing the legal effect of the document.[2]

[1] *4 yearly review of modern awards* [2015] FWC 6555 at [14].

[2] Moran, Eamonn; *Guidelines for plain language redrafting of modern awards* (October 2016).

24. The PLR process in relation to the Award commenced with the publication of a plain language exposure draft (**PLED**) on 5 July 2017. The covering page including the following paragraph: (emphasis added)

> This plain language exposure draft has been prepared by staff of the Fair Work Commission based on the ***General Retail Industry Award 2010*** as at 5 July 2017. This exposure draft does not seek to amend any entitlements under the ***General Retail Industry Award 2010***. It has been prepared to address some of the structural issues identified in modern awards and to apply plain language drafting principles and techniques to award-specific provisions.[3]

25. It is clear from each of the sources cited above that the PLR process was not intended to result in substantive changes. We have not identified any statement or decision of the Commission, or any other indication, that the Commission decided to deviate from that general proposition during the course of the PLR process in relation to the 2010 Award. We recognise that in some instances, the Commission may have expressly decided to do so in light of a controversy about the meaning or merit of certain terms; however, it remained the case that the redrafting of the awards by the Commission's staff was not of itself intended to give rise to such an outcome.

26. The PLED of 5 July 2017 contained a proposed clause 11.3 regarding minimum payments for casual employees. That clause was ultimately adopted as clause 11.4 in the Award, without any amendment.

27. None of the parties who made submissions in response to the aforementioned PLED, or any subsequent iteration of it, identified that the relevant clause was substantively different to the 2010 Clause in the way that has been described by Ai Group earlier in this submission or the Application. That is, the nature of the change we have described was not identified by any of the parties in their respective submissions during the PLR process.

28. The only submission to have been made about the provision was by the Shop Distributive and Allied Employees' Association (**SDA**). At the outset of the PLR process, in its written submissions of 4 August 2017, the union identified that in relation to the proposed clause 11.3, '*the reference to a minimum daily*

[3] PLED dated 5 July 2017.

engagement of 3 hours for casual employees has been removed. As stated at paragraph 47 in relation to part-time employment, this is a substantive change.'[4] The removal of the minimum daily engagement period in the proposed draft clause 11.3 became one of the issues relating to casual employment that was identified as 'item 34' in the summary of submissions produced by the Commission on 5 September 2017.[5]

29. It appears that the reference by the SDA to paragraph 47 was in error and that the union was in fact referring to paragraph 48 of its submission, which said as follows regarding the part-time employment provisions contained in the PLED:

> The phrase 'minimum daily engagement is three hours' has been removed from the exposure draft. This is a substantive change which removes the 'minimum daily engagement' from part-time employment which has the effect of allowing part-time employees to be engaged on more than one occasion per day. The GRIA does not permit this.[6]

30. It appears that the SDA sought to raise a different matter to the one that has been identified by the Application. The union had a concern that the removal of the minimum engagement period from the part-time and casual employment provisions would have the effect of allowing an employer to engage them to work on more than one occasion per day. The union had a view that the 2010 Award did not permit such an arrangement.

31. Separately, the SDA also raised in its written submissions of 4 August 2017 an issue relating to the proposed clause 11.5 of the PLED, which stated as follows:

> **11.5** An employer must pay a casual employee at the end of each engagement unless the employer and the employee have agreed that the pay period of the employee is either weekly or fortnightly.

32. The SDA submitted that in accordance with the 2010 Award, '*casual pay arrangements are to be in accordance with pay arrangements for fulltime and part-time employees*'.[7] In particular, the SDA submitted that the proposed draft clause 11.5 would introduce '*pay arrangements by individual agreement*

[4] SDA submission dated 4 August 2017 at [78].

[5] Summary of submissions dated 5 September 2017.

[6] SDA submission dated 4 August 2017 at [48].

[7] SDA submission dated 4 August 2017 at [72].

between a casual employee and the employer, which is not contemplated by the GRIA which prescribes default pay arrangements.'[8] On this basis, the SDA proposed the following draft clause 11.5, which was ultimately adopted in the Award:

> **11.5** An employer must pay a casual employee at the end of each engagement or weekly or fortnightly in accordance with pay arrangements for full-time and part-time employees.

33. The issue regarding pay arrangements for casual employees arising from the proposed clause 11.5 became 'item 35' in the summary of submissions produced by the Commission on 5 September 2017.[9]

34. On 20 September 2017, the SDA submitted that in respect of item 34, '*[t]he issue in relation to minimum daily engagement has been resolved under item 35'.*[10] No explanation was provided as to the basis on which item 35 had purportedly resolved the issue of minimum daily engagements for casual employees at item 34.

35. On 18 October 2017, an updated summary of submissions was published by the Commission, which contained a comment from the drafter of the PLED responding to the issue identified by the SDA in relation to clause 11.3; that '*[c]lause 11.3 covers the 3 hours minimum daily engagement.*'[11] It appears that the drafter held the view that clause 11.3 of the PLED had the same substantive effect as the 2010 Clause and that the union's concern did not warrant any drafting changes.

[8] SDA submission dated 4 August 2017 at [72].

[9] Summary of submissions dated 5 September 2017.

[10] SDA outline of position dated 20 September 2017.

[11] Summary of submissions dated 18 October 2017, page 20.

36. On 26 October 2017, a conference took place before Justice Ross. A short exchange regarding item 34 between his Honour and the SDA ensued, as follows:

> JUSTICE ROSS: … Let's go to item 34. You see the drafter's note. I think the SDA's point was that - or one of the points was, that 11.3 and 11.4 what's included is if they could be read together. The drafter makes the comment that 11.3 clearly refers to the circumstances set out in 11.4.
>
> MS PATENA: Look, at this point, your Honour, we'll accept those comments and will review. Yes, that's fine.
>
> JUSTICE ROSS: Yes, so you provisionally accept and if you've got a different view, you'll let me know by 4.00 pm next Thursday. Yes?
>
> MS PATENA: Yes, thank you, your Honour.
>
> JUSTICE ROSS: Is there anything else in item 34? No.[12]

37. Subsequently, the SDA did not advise that its submissions summarised at item 34 remained a matter of concern or that there was any outstanding issue in relation to item 34.

38. On 2 February 2018, the Commission issued a statement which confirmed that the issues in respect of the proposed clauses 11.3 and 11.4 as part of item 34 appeared to have been resolved:

> **[27]** Item 34 relates to clauses 11.3 and 11.4 of the revised plain language exposure draft. The SDA did not make any further submissions in relation to proposed clauses 11.3 and 11.4. This aspect of item 34 appears to be resolved.[13]

39. On 19 June 2018, an updated agenda of outstanding items for discussion at a conference listed on 21 June 2018 was issued by the Commission. Item 34 as it related to the '*[d]rafting of minimum engagement period clause'*, featured on the agenda.

[12] Transcript of proceedings on 26 October 2017 at PN144 – PN148.

[13] *4 yearly review of modern awards – Plain language re-drafting – General Retail Industry Award 2010* [2018] FWC 702 at [27].

40. On 21 June 2018, Justice Ross convened a conference during which the following exchange occurred between His Honour and the SDA, confirming that item 34 was resolved: (emphasis added)

> JUSTICE ROSS: Anyone have any problem with that? No, all right. The second issue under casuals seems to be this proposition that the hourly rate of pay for a fulltime employee is not the same as the minimum hourly rate, and there's some issue about that. Is that right? It was mentioned in an earlier submission and it's not dealt with in later submissions, and the PLED's been updated. I just wasn't sure if anything further remains in respect of that issue, and nor am I sure - I'm not sure whether item 34 from the summary, whether there is anything remaining in that given the drafter's comments, et cetera.
>
> MS PATENA: I think the SDA's - - -
>
> JUSTICE ROSS: You withdrew that, I think, or part of it.
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> MS PATENA: Yes, concerns have been addressed, your Honour.
>
> JUSTICE ROSS: All right. So that deals with casual employment.
>
> MS PATENA: Yes, your Honour, thank you, for the SDA.[14]

41. On 23 July 2018, a statement was issued by the Commission which stated as follows in respect of item 34:

> **[17]** At the June 2018 conference, the SDA confirmed that they have withdrawn the issue at item 34.[15]

42. No further submissions regarding the issue of minimum engagements for casual employees were raised or discussed following the conference on 21 June 2018, and the proposed draft clause 11.3 of the PLED was adopted as clause 11.4 in the Award.

43. In summary, as demonstrated by the material cited above, during the course of the PLR process:

    (a) The 2010 Clause was substantively redrafted in the PLED issued on 5 July 2017; namely, it removed the minimum daily engagement and replaced this with a minimum payment period.

[14] Transcript of proceedings on 21 June 2018 at PN152 – PN157.

[15] *4 yearly review of modern awards – Plain language re-drafting – General Retail Industry Award 2010* [2018] FWC 4046 at [17].

(b) No party identified during the PLR process that the proposed clause 11.3 was substantively different to the operation of the comparable clause in the 2010 Award in the sense contemplated by the Application and Ai Group's earlier submissions.

(c) The PLR process was at all times conducted on the basis that it was not intended to change the legal effect of terms and conditions.

(d) The Commission did not at any stage expressly determine that it intended to change the substantive meaning of the relevant term.

(e) Therefore, it appears that the substantive change to the 2010 Clause was unintended.

5. SECTION 160 - ERROR

44. Ai Group submits that clause 11.4 of the Award contains an error in the sense contemplated by s.160 of the Act, resulting from the PLR process (as outlined in section 4 of these submissions). The bases for our contention is set out below.

5.1 Prior Consideration of the Meaning of *'Error'*

45. In the context of the 4 yearly review of the *Vehicle Manufacturing, Repair, Services and Retail Award 2010*, the SDA proposed a variation to the award pursuant to s.160 of the Act on the basis that it contained an *'error'* as to the manner in which certain rates had been calculated. In its decision, a Full Bench of the Commission dealt with the relevant aspect of the union's submissions as follows: (emphasis added)

> **[73]** With respect to the SDA, this is not demonstrative of any error. It only demonstrates that a methodology was used which the SDA, with the benefit of hindsight, would prefer not to have been used. Nothing was placed before us to suggest that the AIRC did not intend to use that methodology, or that some mathematical error was made in calculating the rates in accordance with that methodology. We do not accept that disagreement - even a well-founded disagreement - with a previous decision concerning an award is sufficient to establish an error for the purpose of s.160. What is necessary is to show that some sort of mistake occurred, in that a provision of the award was made in a form which did not reflect the tribunal's intention. There is nothing to suggest that this occurred here. Accordingly the SDA's application under s.160 must be dismissed.[16]

46. We respectfully adopt the concept of an *'error'* as described by the Commission in the passage above.

5.2 Does clause 11.4 of the Award Contain an 'Error'?

47. As set out earlier in these submissions:

    (a) The legal effect of the 2020 Clause is different to the 2010 Clause.

    (b) The change is a product of the PLR process.

[16] *4 yearly review of modern awards – Vehicle Manufacturing, Repair Services and Retail Award 2010* [2016] FWCFB 4418 at [73].

(c) The Commission did not intend for the legal effect of the 2010 Clause to be varied during the PLR process. Rather, it intended for the legal effect to remain the same.

48. Accordingly, we submit that a '*mistake'* occurred during the PLR process; in that clause 11.4 was drafted in a form that did not reflect the Commission's intention to retain the substantive effect of the 2010 Clause.[17]

49. On this basis, the Commission can in our submission be satisfied of the existence of the requisite jurisdictional fact that enlivens the Commission's discretion to exercise its power to vary the Award pursuant to s.160 of the Act.

5.3 How Should the Commission Remedy the Error Identified in Clause 11.4 of the Award?

50. As identified throughout this submission, the central issue with respect to the extant clause 11.4 of the Award is that it provides employees with a minimum payment of either 3 hours' or 1.5 hours' work each time they are rostered to attend work, even if they do not perform a commensurate period of work.

51. Accordingly, in order to address the relevant error, the extant clause 11.4 of the Award should be amended to reflect the 2010 Clause, as follows:

> **11.4** ~~An employer must pay a casual employee for a minimum of 3 hours' work,~~ The minimum daily engagement of a casual employee is 3 hours, or 1.5 hours' ~~work~~ in the circumstances set out in clause 11.5~~, on each occasion on which the casual employee is rostered to attend work even if the employee works for a shorter time~~.

[17] *4 yearly review of modern awards – Vehicle Manufacturing, Repair Services and Retail Award 2010* [2016] FWCFB 4418 at [73].

6. SHOULD THE COMMISSION EXERCISE ITS DISCRETION TO VARY THE AWARD?

52. For the reasons that follow, Ai Group submits that:

    (a) The Commission should exercise its direction to vary the Award as proposed by Ai Group, pursuant to s.160 of the Act.

    (b) In the alternate, even if the Commission is not satisfied that the Award contains as error in the relevant sense, the Commission should vary the Award as proposed by Ai Group pursuant to s.157(1)(a) of the Act.

Section 138 and the Modern Awards Objective

53. The proposed variation is, in our submission, necessary to ensure that the Award achieves the modern awards objective, as required by s.138 of the Act.

54. Central to our contention is the proposition that there is simply no basis or justification for the requirement imposed on employers by clause 11.4 of the Award to provide for a minimum payment equivalent to either 3 hours' or 1.5 hours' of work, in circumstances where an employee does not in fact perform a commensurate period of work.

55. For example, where a casual employee is ill or where an employee arbitrarily decides not to perform part of a shift, it would be illogical and unfair for the employee to receive the windfall gain afforded to them by the 2020 Clause.

56. In this section of our submission, we deal with each of the mandatory considerations identified at s.134(1) of the Act. In so doing we note that consistent with the Commission's prior consideration of those provisions:

    (a) no particular primacy is attached to any of the considerations[18];

    (b) not all of the considerations will necessarily be relevant[19]; and

[18] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [115].

[19] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [115].

(c) there is a degree of tension between some of the considerations. The Commission's task is, respectfully, to balance the various considerations.[20]

A Fair Safety Net

57. Fairness is to be assessed from the perspective of employers and employees.[21]

58. The variation proposed by Ai Group is fair because:

(a) It would rectify the error in the Award, flowing from the PLR process.

(b) It would ensure that the windfall gain afforded by the 2020 Clause to employees (as described above) is removed from the Award.

(c) It would confer the original protections afforded to casual employees under the 2010 Award. As a result, employers would be required to engage casual employees for at least three hours on each occasion.

(d) Employers would not be required to pay casual employees for work not performed during the minimum engagement period, as was the case under the 2010 Clause.

(e) It would be consistent with the general principle that a casual employee is paid for the time they spend working and not for the time they do not work.

Section 134(1)(a): The Relative Living Standards and Needs of the Low Paid

59. In our submission, the proposed variation sought would not have a substantial impact on the relative living standards or needs of the low paid. The 2020 Clause affords an employee payment for work not performed where they perform less than three hours' work. Thus, the amount payable, which would no longer be payable under the proposed provision, would be less than three hours in each instance.

60. In our submission, s.134(1)(a) of the Act is a neutral consideration in this matter.

[20] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [163].

[21] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [117].

61. In any event, s.134(1)(a) of the Act reflects but one of many competing considerations that must be taken into account. Consistent with the approach adopted by the Commission in the *Penalty Rates Decision*, even if the Commission were to form the view that the proposed variation is inconsistent with s.134(1)(a), this is not determinative.

Section 134(1)(b): The Need to Encourage Collective Bargaining

62. In our submission, s.134(1)(b) of the Act is a neutral consideration. We do not anticipate that the variation proposed would of itself encourage or discourage enterprise bargaining.

Section 134(1)(c): The Need to Promote Social Inclusion through Increased Workforce Participation

63. Section 134(1)(c) of the Act is concerned with persons *obtaining* employment.[22]

64. The proposed variation is self-evidently not *inconsistent* with promoting social inclusion through increased workforce participation. There is no logical basis for concluding that the variations sought would have an adverse effect on workforce participation.

65. Section 134(1)(c) of the Act is a neutral consideration in this matter.

Section 134(1)(d): The Need to Promote Flexible Modern Work Practices and the Efficient and Productive Performance of Work

66. The practical effect of clause 11.4 of the Award is that a minimum amount would be payable to casual employees even if they do not perform the relevant period of work. This quite obviously does not promote flexible modern work practices, nor the efficient and productive performance of work. It enables casual employees to absent themselves from work, for any reason and potentially with little if any notice being provided to the employer; whilst the employer would nonetheless be liable to pay wages to the employee in accordance with the 2020

[22] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [179].

Clause. To this end, the practical effect of clause 11.4 is clearly inconsistent with s.134(1)(d) of the Act.

67. The proposed variation sought would remedy this issue; in part by removing the existing incentive in the Award to not perform the relevant period of work. Accordingly, s.134(1)(d) of the Act lends support to the proposed variation.

Section 134(1)(da): The Need to Provide Additional Remuneration for Employees working Overtime; Unsocial, Irregular or Unpredictable Hours; Weekends or Public Holidays or Shifts

68. Section 134(1)(da) of the Act is not directly relevant to the extant clause or the proposed variation. This is in our submission a neutral consideration.

Section 134(1)(e): The Principle of Equal Remuneration for Work of Equal or Comparable Value

69. At paragraphs [204] – [207] of the *Penalty Rates Decision*, the following was stated:

> **[204]** Section 134(1)(e) requires that we take into account 'the principle of equal remuneration for work of equal or comparable value'.
>
> **[205]** The 'Dictionary' in s.12 of the FW Act states, relevantly:
>
> > 'In this Act:
> >
> > ***equal remuneration for work of equal of comparable value:*** see subsection 302(2).'
>
> **[206]** The expression 'equal remuneration for work of equal or comparable value' is defined in s.302(2) to mean 'equal remuneration for men and women workers for work of equal or comparable value'.
>
> **[207]** The appropriate approach to the construction of s.134(1)(e) is to read the words of the definition into the substantive provision such that in giving effect to the modern awards objective the Commission must take into account the principle of 'equal remuneration for men and women workers for work of equal or comparable value'.

70. In our submission, s.134(1)(e) of the Act is a neutral consideration in this matter, as the proposed variation would not affect or undermine the principle of equal remuneration for work of equal or comparable value.

Section 134(1)(f): The Likely Impact of Any Exercise of Modern Award Powers on Business including on Productivity, Employment Costs and the Regulatory Burden

71. It is axiomatic that the grant of the proposed variation would have a positive impact on business. In particular, the proposed variation would avoid a situation where an employer is unfairly disadvantaged by a clause which provides a casual employee with an entitlement to a monetary payment for work that they have not performed.

72. Employers who engage employees in accordance with what appears to have been the intended purpose of clause 11.4 of the Award (namely, providing a casual employee with a shift that is at least 3 hours or 1.5 hours in length) are significantly disadvantaged in circumstances where the employee does not in fact perform a commensurate period of work, where they are required to do so by their employer. An employer in such circumstances would be required under the Award to make a minimum payment. This has the consequence of increasing employment costs and undermining productivity. These consequences would be compounded where an employer is also left to endeavour to offer work to another casual employee to replace the absent casual employee.

73. Accordingly, section 134(1)(f) of the Act lends support to the proposed variation sought.

Section 134(1)(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

74. The proposed variation is clearly supported by s.134(1)(g) of the Act. For the reasons set out in this submission, the proposed variation would rectify an anomaly identified in clause 11.4 of the Award and addresses the potentially confusing nature of the provision.

75. The proposed variation would make it expressly clear that an employer is only required to provide a minimum daily engagement. This would be in keeping with the need to ensure a stable and sustainable modern award system, by restoring the position that applied for many years prior to the PLR process.

76. Section 134(1)(g) of the Act supports the grant of the claim.

Section 134(1)(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

77. Though the precise impact is difficult to assess, the proposed variation is unlikely to have a negative impact on employment growth, inflation and the national economy.

78. In our submission, s.134(1)(h) of the Act is a neutral consideration in this matter.

7. CONCLUSION

79. Having regard to the matters set out in this submission, we submit that the Commission should exercise its discretion to vary the Award on its own motion pursuant to s.160 or s.157 of the Act, as proposed in section 5.3 of these submissions. The proposed variation would rectify the error that was made during the PLR process.

80. Furthermore, as set out in this section 6 of these submissions, the proposed variation is necessary in the sense contemplated by s.138 of the Act. In particular, we submit that:

    (a) There is no justification for requiring a minimum payment in circumstances where an employee does not perform work up to 3 hours or 1.5 hours, depending on the circumstance. Such an outcome is unfair and cannot be said to form a *necessary* part of the minimum safety net.

    (b) The proposed variation is fair. The extant term is unfair.

    (c) If the error is remedied in the terms proposed, the Award will be simple and easy to understand.

    (d) The grant of the proposed variation will have an overall positive impact on business.