

From: Dominic Macken <djmacken@macken.com.au>
Sent: Friday, 26 February 2021 5:06 PM
To: AMOD <AMOD@fwc.gov.au>
Cc: Sue-Anne Burnley <sue-anne@sda.org.au>; Gerard Dwyer <gerard@sda.org.au>;
steve.baker@awu.org.au; marie.brown@mga.asn.au; jos.debruin@mga.asn.au
Subject: Award Flexibility - Hospitality and Retail Sectors - AM2020/103

Dear AMOD,

We refer to the above matter.

We advise that we act on behalf of the First Applicant, the Shop, Distributive and Allied Employees' Association but we also note that the Australian Workers' Union and Masters Grocers Australia Limited are separately Applicants to this proceeding.

We enclose an Application to vary a modern Award (the General Retail Industry Award 2020) which is a joint application brought on behalf of all the Applicants.

The Application flows from an earlier indication from his Honour, the President (responding to correspondence from the Minister for industrial Relations) that stakeholders interested in a proposal by the Commission to move to vary identified Awards of its own motion pursuant to s157(3)(a) of the Act should act collaboratively, where possible, to reach consensus on changes that the parties consider ought appropriately be the subject of such variation determinations.

The enclosed Application, brought jointly on behalf of the identified Applicants responds to his Honour's invitation. For the convenience of the Commission, the Applicants have additionally attached a draft Determination reflecting the terms of the variation sought.

Yours faithfully,

A J MACKEN & CO.

Form F46 – Application to vary a modern award

Fair Work Act 2009, ss.157–160

This is an application to the Fair Work Commission to make a modern award or make a determination varying or revoking a modern award, in accordance with Part 2-3 of the Fair Work Act 2009.

The First Applicant



These are the details of the person who is making the application.

Title	<input type="checkbox"/> Mr <input type="checkbox"/> Mrs <input type="checkbox"/> Ms <input checked="" type="checkbox"/> Other please specify: Registered Organisation		
First name(s)	Shop, Distributive and Allied Employees' Association		
Surname			
Postal address	6 th Floor, 53 Queen Street		
Suburb	Melbourne		
State or territory	Vic	Postcode	3000
Phone number	(03) 8611 7000	Fax number	
Email address	Gerard@sda.org.au ; sue-anne@sda.org.au		

If the First Applicant is a company or organisation please also provide the following details

Legal name of business	Shop, Distributive and Allied Employees' Association
Trading name of business	SDA
ABN/ACN	99 789 302 470
Contact person	Gerard Dwyer; Sue-Anne Burnley

The Second Applicant



These are the details of the person who is making the application.

Title	<input type="checkbox"/> Mr <input type="checkbox"/> Mrs <input type="checkbox"/> Ms <input checked="" type="checkbox"/> Other please specify: Registered Organisation		
First name(s)	Australian Workers' Union		
Surname			
Postal address	Level 1, 16-20 Good Street		
Suburb	Granville		
State or territory	NSW	Postcode	2142
Phone number	1300 040 482	Fax number	
Email address	Stephen.crawford@nat.awu.net.au ; Steve.baker@awu.org.au		

If the Second Applicant is a company or organisation please also provide the following details

Legal name of business	Australian Workers' Union
Trading name of business	AWU
ABN/ACN	28 853 022 982
Contact person	Stephen Baker

The Third Applicant



These are the details of the person who is making the application.

Title	<input type="checkbox"/> Mr <input type="checkbox"/> Mrs <input type="checkbox"/> Ms <input checked="" type="checkbox"/> Other please specify: Registered Organisation		
First name(s)	Master Grocers Australia Limited		
Surname			
Postal address	Suite 5, 1 Milton Parade		
Suburb	Malvern		
State or territory	Vic	Postcode	3144
Phone number	(03) 9824 4111	Fax number	
Email address	Jos.deBruin@mga.asn.au ; Marie.brown@mga.asn.au		

If the Third Applicant is a company or organisation please also provide the following details

Legal name of business	Master Grocers Australia Limited
Trading name of business	MGA
ABN/ACN	44 004 063 263
Contact person	Marie Brown

Do the Applicants need an interpreter?



If the Applicants require an interpreter (other than a friend or family member) in order to participate in conciliation, a conference or hearing, the Fair Work Commission will provide an interpreter at no cost.

Yes – Specify language

No

Do the Applicants require any special assistance at the hearing or conference (eg a hearing loop)?

Yes – Please specify the assistance required

No

Do the Applicants have a representative?



A representative is a person or organisation who is representing the applicant. This might be a lawyer or paid agent, a union or employer organisation, or a family member or friend. There is no requirement to have a representative.

Yes, as to the First Applicant – Provide representative's details below

No

First Applicant's representative



These are the details of the person or organisation who is representing the Applicant (if any).

Name of person	Dominic Macken		
Firm, organisation or company	A J Macken & Co.		
Postal address	11 th Floor, 53 Queen Street		
Suburb	Melbourne		
State or territory	Vic	Postcode	3000
Phone number	(03) 9614 4899	Fax number	
Email address	Djmacken@macken.com.au		

Is the First Applicant's representative a lawyer or paid agent?

Yes

No

1. Coverage

1.1 What is the name of the modern award to which the application relates?



Include the Award ID/Code No. of the modern award

General Retail Industry Award 2020 – MA00004

1.2 What industry is the employer in?

Retail Industry

2. Application

2.1 What are you seeking?

Specify which of the following you would like the Commission to make:

- a determination varying a modern award
- a modern award
- a determination revoking a modern award

2.2 What are the details of your application?

The Applicants jointly seek a determination varying the General Retail Industry Award 2020 in the following terms:

“That the General Retail Industry Award 2020 (the Award) be varied by including new Schedule I to the Award in the following terms:

“Schedule I – Additional flexibility measures – Part time employees

I.1 Schedule I operates from [insert commencement date] until [insert date 18 months later]. The period of operation can be extended on application.

Additional hours agreements

I.2 Subject to clause 15, an employer and a part-time employee who is engaged to work more than 9 hours per week in accordance with clause 10.5, may make an agreement (an additional hours agreement) for the employee to work more ordinary hours than the number of hours agreed under clause 10.5 (the additional agreed hours), to a maximum total of 38 ordinary hours per week.

I.3 If an employer and part-time employee make an additional hours agreement, the employee must be paid for the additional agreed hours at their ordinary rate of pay, even if they are not required to work those hours.

I.4 The employee must be paid overtime for any additional agreed hours worked unless the following conditions are met:

- (a) the additional hours agreement is genuinely made by the employer and the individual employee without coercion or duress; and
- (b) if the additional hours agreement is for a particular rostered shift, it must be recorded in writing at or by the end of the affected shift, or as soon as is reasonably practicable; and
- (c) if the additional hours agreement is for a specified period of time other than a particular rostered shift, it must be recorded in writing before the start of the first period of additional agreed hours; and
- (d) the employer must keep a copy of the additional hours agreement.
- (e) the additional hours agreement cannot be made a condition of securing employment and cannot be signed concurrently with an offer of employment.

Note: The agreement could be recorded in writing through an exchange of text messages or emails.

I.5 The parties to an additional hours agreement may, by mutual agreement, terminate the agreement with 24 hours notice.

Review of number of hours

I.6 Where a part-time employee has regularly worked additional agreed hours for at least six months, the employee may request in writing that the employer vary the agreement under clause 10.5 to reflect the ordinary hours regularly being worked.

I.7 The employer must respond in writing to the employee's request within 21 days.

I.8 The employer may refuse the request only on reasonable business grounds.

EXAMPLE: Reasonable business grounds to refuse the request may include that the reason that the employee has regularly worked additional agreed hours is temporary—for example where this is the direct result of another employee being absent on annual leave, long service leave or worker's compensation.

I.9 Before refusing a request made under clause I.5, the employer must discuss the request with the employee and genuinely try to reach agreement on an increase to the number of hours agreed under clause 10.5 that will give the employee more predictable hours of work and reasonably accommodate the employee's circumstances.

I.10 If the employer and employee agree to vary the agreement under clause 10.5, the employer's written response must record the agreed variation. If the employer and employee do not reach agreement, the

employer's written response must set out the grounds on which the employer has refused the employee's request.

I.11 The employer and employee parties to an additional hours agreement consent to any dispute in relation to Schedule I being settled by the Fair Work Commission through arbitration in accordance with clause 36 – Dispute resolution and section 739(4) of the Act.

NOTE: A dispute about the employer's handling of a request under clause I.5 can be dealt with under clause I.11. This could include a dispute about whether the employer's refusal of a request was reasonable, whether the employer discussed the request with the employee as required under clause I.9, or whether the employer responded in writing to the request as required under clauses I.7 and I.10."

A copy of a draft Determination in the terms of the variation the subject of this application is separately annexed.

Attach additional pages, if necessary.

2.3 What are the grounds being relied on?

Using numbered paragraphs, specify the grounds on which you are seeking the proposed variations.



You must outline how the proposed variation etc is necessary in order to achieve the modern awards objective as well as any additional requirements set out in the FW Act.

1. Pursuant to s157 of the (Cth) Fair Work Act 2009, the Fair Work Commission may, inter alia, make a determination varying a modern Award if the Commission is satisfied that making the determination is necessary to achieve the modern awards objective.
2. The Commission may make a determination pursuant to s157 on its own initiative: s157(3)(a)
3. By letter dated 9 December 2020 from the Minister of Industrial Relations, the President of the Fair Work Commission was advised that it was the position of the Federal Government that the Commission should undertake a process underpinned by the exercise of its powers under s.157(3)(a) to move of its own motion to vary modern awards in identified industry sectors in relation to "key changes that could potentially support Australia's economic recovery".
4. The General Retail Industry Award 2020 is one of the industry sectors in relation to which the Government has requested the Commission to act of its own motion in the above regard.
5. The Commission has instituted proceedings in response (AM2020/103 – Award Flexibility and Retail Sectors) to commence a process to underpin the Commission's power to make determinations of its own motion to effect variations. In particular, the Commission has invited interested parties to make applications (including jointly, where possible) for variations considered by such interested parties to fall within the framework of the Government's letter of request to the President.
6. The Applicants jointly propose and support variation to the General Retail Industry Award 2020 in the terms here applied for. It is submitted the Commission can be satisfied that a determination to vary in the terms proposed is necessary to meet the modern awards objective (which is a necessary pre-condition to approval by the Commission pursuant to s157(3)(a) of the Act in any event).

7. The amendments effected by the proposed inclusion in the Award of Schedule I are temporary (18 months) subject to a right to apply for an extension. They address additional flexibility measures for part-time employees by prescribing a mechanism for additional hours agreements between employer and employees subject to appropriate safeguards.
8. In particular, the variation as proposed is submitted to assist small to medium sized enterprises in meeting the unique circumstances presented by the recovery from the COVID-19 pandemic and associated Government responses, in a way that is balanced and equitable, taking into account the interests of their workforces and with appropriate safeguards.
9. The variation as proposed is submitted to fall within the Federal Government’s descriptor of a “key change” affording a measure of necessary workplace flexibility that “could prove critically important for providing businesses in the most distressed part of the economy with the confidence to increase hiring during the recovery”. To that extent, given current economic circumstances, the variation is submitted to be necessary to achieve the modern awards objective in providing a fair and relevant minimum safety net of terms and conditions.

Signature



If you are completing this form electronically and you do not have an electronic signature you can attach, it is sufficient to type your name in the signature field. You must still complete all the fields below.

Signature	/s Gerard Dwyer (for and on behalf of the First Applicant)
Name	GERARD DWYER
Date	26 February 2020
Capacity/Position	National Secretary/Treasurer of the First Applicant

Signature	/s Daniel Walton (for and on behalf of the Second Applicant)
Name	DANIEL WALTON
Date	26 February 2020
Capacity/Position	National Secretary of the Second Applicant

Signature	/s Jos de Bruin (for and on behalf of the Third Applicant)
Name	JOS DE BRUIN
Date	26 February 2020
Capacity/Position	Chief Executive Officer of the Third Applicant



Where this form is not being completed and signed by the Applicant, include the name of the person who is completing the form on their behalf in the **Capacity/Position** section.

PLEASE RETAIN A COPY OF THIS FORM FOR YOUR OWN RECORDS

MA000004 PRXXXXXX

FAIR WORK COMMISSION

DRAFT DETERMINATION

Fair Work Act 2009

S157 - FWC may vary. Etc. modern awards if necessary to achieve modern awards objective

Award flexibility – Hospitality and Retail Sectors (AM2020/103)

GENERAL RETAIL INDUSTRY AWARD 2020

MA000004

Retail Industry

Presiding Member

Melbourne, DD MM 2021

S157(3)(a) Determination varying a Modern Award

- A. Further to the Decision and Reasons for Decision <<Decision Ref>> in AM2020/103, it is determined pursuant to section 157(3)(a) of the Fair Work Act 2009, that the General Retail Industry Award 2020 be varied by including new Schedule I to the Award in the following terms:

“Schedule I – Additional flexibility measures – Part time employees

I.1 Schedule I operates from [insert commencement date] until [insert date 18months later]. The period of operation can be extended on application.

Additional hours agreements

I.2 Subject to clause 15, an employer and a part-time employee who is engaged to work more than 9 hours per week in accordance with clause 10.5, may make an agreement (an additional hours agreement) for the employee to work more ordinary hours than the number of hours agreed under clause 10.5 (the additional agreed hours), to a maximum total of 38 ordinary hours per week.

I.3 If an employer and part-time employee make an additional hours agreement, the employee must be paid for the additional agreed hours at their ordinary rate of pay, even if they are not required to work those hours.

I.4 The employee must be paid overtime for any additional agreed hours worked unless the following conditions are met:

- (a) the additional hours agreement is genuinely made by the employer and the individual employee without coercion or duress; and
- (b) if the additional hours agreement is for a particular rostered shift, it must be recorded in writing at or by the end of the affected shift, or as soon as is reasonably practicable; and
- (c) if the additional hours agreement is for a specified period of time other than a particular rostered shift, it must be recorded in writing before the start of the first period of additional agreed hours; and

(d) the employer must keep a copy of the additional hours agreement.

(e) the additional hours agreement cannot be made a condition of securing employment and cannot be signed concurrently with an offer of employment.

Note: The agreement could be recorded in writing through an exchange of text messages or emails.

I.5 The parties to an additional hours agreement may, by mutual agreement, terminate the agreement with 24 hours notice.

Review of number of hours

I.6 Where a part-time employee has regularly worked additional agreed hours for at least six months, the employee may request in writing that the employer vary the agreement under clause 10.5 to reflect the ordinary hours regularly being worked.

I.7 The employer must respond in writing to the employee's request within 21 days.

I.8 The employer may refuse the request only on reasonable business grounds.

EXAMPLE: Reasonable business grounds to refuse the request may include that the reason that the employee has regularly worked additional agreed hours is temporary—for example where this is the direct result of another employee being absent on annual leave, long service leave or worker's compensation.

I.9 Before refusing a request made under clause I.5, the employer must discuss the request with the employee and genuinely try to reach agreement on an increase to the number of hours agreed under clause 10.5 that will give the employee more predictable hours of work and reasonably accommodate the employee's circumstances.

I.10 If the employer and employee agree to vary the agreement under clause 10.5, the employer's written response must record the agreed variation. If the employer and employee do not reach agreement, the employer's written response must set out the grounds on which the employer has refused the employee's request.

I.11 The employer and employee parties to an additional hours agreement consent to any dispute in relation to Schedule I being settled by the Fair Work Commission through arbitration in accordance with clause 36 – Dispute resolution and section 739(4) of the Act.

NOTE: A dispute about the employer's handling of a request under clause I.5 can be dealt with under clause I.11. This could include a dispute about whether the employer's refusal of a request was reasonable, whether the employer discussed the request with the employee as required under clause I.9, or whether the employer responded in writing to the request as required under clauses I.7 and I.10."

B. This determination comes into force on and from DD MM 2021.

PRESIDING MEMBER