Australian Industry Group

Application to vary the General Retail Industry Award 2020

Further Submission

(AM2021/7)

16 March 2021

AM2021/7 APPLICATION TO VARY THE GENERAL RETAIL INDUSTRY AWARD 2020

FURTHER SUBMISSION

INTRODUCTION

1. The Australian Industry Group (**Ai Group**) files this further submission in relation to:

   (a) An application (**Application**) made by the Shop, Distributive and Allied Employees' Association (**SDA**), the Australian Workers' Union (**AWU**) and Master Grocers Australia Ltd (**MGA**) (collectively, **Applicants**), seeking variations to the *General Retail Industry Award 2020* (**Retail Award** or **Award**) in relation to part-time employment. All references in this submission to the Application relate to the amended draft determination filed by the Applicants on 15 March 2021.

   (b) Variations to the part-time provisions of the Retail Award (**Employer Proposal**) that have been proposed by Australian Business Industrial and the NSW Business Chamber, the National Retailers Association (**NRA**) and the Australian Retailers Association (**the Joint Employers**).

2. Ai Group opposes the variations proposed by the Applicants and submits that the Fair Work Commission (**Commission**) cannot be satisfied that the proposed variations are *necessary* to achieve the modern awards objective.

3. In our submission of 4 March 2021, Ai Group identified various problematic elements of the proposed provisions advanced by the Applicants (paragraphs 32 – 55). Ai Group continues to rely on those submissions and contends that for the reasons there articulated and the additional reasons set out in these submissions, the claim advanced by the Applicants:

   (a) Is not fair to employers, as contemplated by s.134(1) of the *Fair Work Act 2009* (**Act**);

(b) Is potentially inconsistent with, or at the very least does not sufficiently promote flexible modern work practices and the efficient and productive performance of work, as contemplated by s.134(1)(d) of the Act;

(c) May have an adverse impact on business in relation to employment costs, as contemplated by s.134(1)(f) of the Act; and

(d) Is not simple and easy to understand, as contemplated by s.134(1)(g) of the Act.

4. In addition, we submit that:

(a) The extant provisions of the Retail Award already potentially deliver the flexibility that the Application purports to introduce in the Award, thereby rendering the variations proposed unnecessary. We address this matter below.

(b) Consideration is being given by Parliament to the *Fair Work Amendment (Supporting Australia's Job and Economic Recovery) Bill 2020* (**Bill**) this week (i.e. during the week commencing 15 March 2021). This of itself tells against the grant of the Application, for the reasons outlined in our submission of 4 March 2021.

(c) Though there appears to be a level of agreement amongst various interested parties involved in these proceedings that the Retail Award should be varied to facilitate part-time employees working additional hours in certain circumstances without a requirement to pay overtime rates, there remains disagreement as to how this should be achieved. The model advanced by the Applicants does not reflect a fair or appropriate means of achieving the outcome described above and therefore should not be adopted by the Commission.

5. We broadly support the intent of the Employer Proposal, as set out in the draft determination filed in the Commission on 15 March 2021; subject to certain problems with the drafting of the proposed provisions that we address in these

submissions and the content of the proposed clause 10.13 (which deals with resolution of disputes), which we also address later in this submission.

THE APPLICATION: EXTANT PROVISIONS AND HISTORICAL CONSIDERATIONS

6. Clauses 10.5 – 10.8 of the Award are in the following terms: (emphasis added)

> **10.5** At the time of engaging a part-time employee, the employer must agree in writing with the employee on a regular pattern of work that must include all of the following:
>
> **(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 work each day; and
>
> **(d)** when meal breaks may be taken and their duration.
>
> **10.6** The employer and the employee may agree to vary the regular pattern of work agreed under clause 10.5 with effect from a future date or time. Any such agreement must be in writing.
>
> **10.7** The employer must keep a copy of any agreement under clause 10.5, and any variation of it under clause 10.6, and give another copy to the employee.
>
> **10.8** 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 10—Overtime rates.

7. Clause 10.6 of the Award arguably permits the kind of flexibility contemplated by the proposal advanced by the Applicants. That is, it potentially permits an employer and employee to agree to changes to the hours agreed upon at engagement, including by agreeing that the employee will work hours *in addition to* those agreed upon engagement. By virtue of clause 10.8 of the Award, in such circumstances, a part-time employee is entitled to overtime rates where they work outside their agreed hours, *as varied*.

8. We are fortified in this view having considered the following prior consideration given to the relevant issues.

9. When the terms of the Award were finalised by the Australian Industrial Relations Commission (**AIRC**), the relevant provisions were in the following terms:

12.2 At the time of first being employed, the employer and the part-time employee will agree, in writing, on a regular pattern of work, specifying at least:

- the hours worked each day;
- which days of the week the employee will work;
- the actual starting and finishing times of each day;
- that any variation will be in writing;
- minimum daily engagement is three hours; and
- the times of taking and the duration of meal breaks.

12.3 Any agreement to vary the regular pattern of work will be made in writing before the variation occurs.

12.4 The agreement and variation to it will be retained by the employer and a copy given by the employer to the employee.

…

12.7 A part-time employee employed under the provisions of this clause will be paid for ordinary hours worked at the rate of 1/38th of the weekly rate prescribed for the class of work performed. Overtime is payable for all hours worked in excess of the agreed number of hours.

…

26.3 Maximum ordinary hours on a day

…

(b) A part-time employee may not be rostered to work at ordinary time more than their agreed number of hours on any day.[1]

[1] http://www.airc.gov.au/awardmod/databases/retail/Modern/general_retail.pdf

10. Shortly afterward, on 26 August 2009, the Minister's Award Modernisation Request was varied, to include the following additional paragraph:

Overtime penalty rates – part-time work

53. The Commission should ensure that the hours of work and associated overtime penalty arrangements in the retail, pharmacy and any similar industries the Commission views as relevant do not operate to discourage employers from:

- offering additional hours of work to part-time employees; and
- employing part-time employees rather than casual employees.

11. In light of the above development, the AIRC subsequently issued a statement on 10 September 2009, in which it said as follows:

Part-time employment

[11] The 26 August variation inserted the following after paragraph 52 of the consolidated request:

"**Overtime penalty rates – part-time work**

53. The Commission should ensure that the hours of work and associated overtime penalty arrangements in the retail, pharmacy and any similar industries the Commission views as relevant do not operate to discourage employers from:

- offering additional hours of work to part-time employees; and
- employing part-time employees rather than casual employees."

[12] In its decision of 19 December 2008 the Commission made the *General Retail Industry Award 2010* and the *Pharmacy Industry Award 2010*. Any interested party which is of the view that either of those awards, or any other award, should be varied to give effect to the 26 August variation should make an appropriate application. We will endeavour to deal with any such application before the end of 2009.[2]

12. On 29 September 2009, the NRA filed an application, seeking variations to the Award. In particular, it proposed the following:

Clause 12.7 - Part Time Provisions

Delete the following sentence from clause 12.7 – *"Overtime is payable for all hours worked in excess of the agreed number of hours."*

[2] *Award Modernisation* [2009] AIRCFB 835 at [11] – [12].

13. The NRA's application referred to the aforementioned amendment to the Minister's request and then went on to submit as follows: (our emphasis)

> 14. The part time provisions of the Award discourage employers from offering additional hours of work to part time employees. Employers offering additional hours to part time employees would, in most cases, be required to pay overtime rates for those hours. The quantum of the overtime penalties under the Award means that these additional hours would be more expensive if offered to part time employees when compared to casual employees. This clearly will discourage employers from employing part time employees, and instead casual employees will be preferred. The proposed amendment to the Award will remedy this issue.

14. On 5 November 2009, the SDA made an application[3], seeking variations to the Award. In particular, the SDA proposed variations to the part-time provisions of the Award, as follows:

> 12.3. Any agreement to vary the regular pattern of work will be made in writing before the variation occurs. *An agreement made under this provision may be either a permanent agreed variation to the pattern of work or may be temporary., e.g. a single roster period.*
>
> *12.4. For the purposes of clauses 12.2 and 12.3 the requirement to have a written variation to the agreed part-time hours will be satisfied where the employee agrees to work additional hours to their agreed hours and where the employer and employee sign or initial a roster which records the additional hours that are agreed to be worked. Such agreed additional hours will be paid for at the rate applicable to such hours and not at the overtime rate.*
>
> > *NOTE: Sue is employed as a part-time employee to work Monday, Tuesday and Wednesday 9.00am to 1.00pm. On Tuesday Mary the store manager, approaches Sue at 10.00am and advises her that Bill, the part-time employee who normally works 2.00pm to 6.00pm Monday, Tuesday and Wednesday will be taking 4 weeks annual leave commencing next week. Mary offers Sue extra part-time hours by covering Bill's hours whilst he is on leave. Mary is quite happy to work the extra hours for the next 4 weeks. As the roster for the fulltimers and part-timers at the store is issued each 3 months, Mary and Sue cross out Bills name for the period he will be on leave and writes in Sue's name and both Sue and Mary initial each change on the roster. Mary photocopies the signed roster and gives one copy to Sue and places the second copy on the notice board and gives the signed roster to Payroll to be kept as a pay record.*
>
> 12.5 The agreement and variation to it will be retained by the employer and a copy given by the employer to the employee. *Where the written variation is constituted by a signed or initialled roster a copy of the signed or initialled roster must be retained by the employer and a copy given to the employee.*
>
> 12.6. An employer is required to roster a part-time employee for a minimum of three consecutive hours on any shift.

[3] http://www.airc.gov.au/awardmod/fullbench/variations/AM200977.pdf

12.7. An employee who does not meet the definition of a part-time employee and who is not a full-time employee will be paid as a casual employee in accordance with clause 13.

12.8. A part-time employee employed under the provisions of this clause will be paid for ordinary hours worked at the rate of 1/38th of the weekly rate prescribed for the class of work performed. Overtime is payable for all hours worked in excess of the agreed number of hours, *except where the employer and employee have agreed to a variation to the agreed hours in accordance with clause 12.3 in which case overtime is payable for all hours worked in excess of the agreed varied hours.*

> *NOTE: Sue is employed as a part-time employee to work Monday, Tuesday and Wednesday 9.00am to 1.00pm. On Tuesday Mary the store manager, approaches Sue at 10.00am and advises her that Bill, the part-time employee who normally works 2.00pm to 6.00pm Monday, Tuesday and Wednesday cannot come into work that day. Mary advises Sue that no one else is available to cover Bill's shift. Mary asks Sue if she will agree to vary her hours and work the additional hours that afternoon. Sue, who would prefer to have the afternoon off, declines the offer to work additional hours. Mary then offers Sue casual hours for that afternoon. Whilst Sue knows that she would be paid the casual rate for the afternoon she would prefer to have the time off work. Again Sue declines the offer to work. Mary then tells Sue that Sue is required to work the afternoon shift to cover Bill's absence. Sue would prefer not to work, but Sue knows that the requirement to work the afternoon shift is not unreasonable. Sue works the afternoon shift and is paid overtime for the hours worked.*

15. It articulated the following grounds and reasons in support of the variations proposed:

Variation 14 – Clause 12 Part-time Employees

The SDA proposes a number of variations to clause 12 in response to the Ministers amended Award Modernisation Request in relation to part time employees.

…

Whilst the structure of the existing clause permits part-time employees to work additional hours without the need for overtime to be paid this has not been acknowledged by employers who have in most cases sought to construct an artificial argument over the operation of this clause.

There has been much hysteria shown by employers in relation to this issue. The Minister's response in amending the Award Modernisation Request has been measured and appropriate. The SDA's proposed variations address the specific issues raised by the Minister.

In the period since the several retail industry awards of the Commission were simplified in the late 1990's part-time employment clauses identical to that which is in the current Modern Award have operated without any of the adverse consequences occurring which the employers now fear.

Simply because the existing part-time employment clauses have operated without causing employers to have to pay overtime for any additional hours worked by a part-

time employee show that it is relatively simple to make the already obvious even more so.

The variations sought by the SDA in relation to part-time employment maintain all existing protections for part-time employees whilst at the same time presenting a clear and unambiguous means for employers to approach part-time employees to work additional hours either at ordinary rates of pay or at casual rates.

The structure of the variations sought by the SDA give effect to the following clear principles:

- A part-time employee cannot be required to work hours additional to the agreed hours for ordinary hourly rates of pay.

- A part-time employee can freely agree to work hours additional to their agreed hours at the ordinary hourly rate of pay, in which case the additional hours will count for the purpose of calculating leave entitlements.

- A part-time employee can freely agree to work hours additional to their agreed hours at the casual rate of pay, in which case the additional hours will not count for the purpose of calculating leave entitlements.

- A part-time employee can, in circumstances where they prefer not to work, be required to work reasonable additional hours to their agreed hours in which case they will be paid the overtime rate.

- An employer can offer additional hours to a part-time employee at either the ordinary hourly rate or at the casual rate, but the employer cannot require the part-time employee to work the additional hours.

- An employer can require a part-time employee to work additional hours to their agreed hours where the request to work such additional hours is reasonable and where the part-time employee does not have a reasonable reason for refusing such a request. In such cases the additional hours required to be worked are paid at the overtime rate of pay.

- Any occasion on which a part-time employee works additional hours to their agreed hours must be recorded in writing as part of the requirement on the employer to keep accurate payroll records.

These principles have always been present in the operation of the part-time employment clause and are clearly present within the structure of the existing provisions of the Modern Award. The variations sought by the SDA simply and explicitly state these principles. The inclusion of Notes to the part-time employment clause gives practical examples of how and when a part-time employee will be paid ordinary rates, casual rates or overtime rates for additional hours.

16. It is evident from the above that the SDA's view was that the Award, as drafted at the time, enabled an employer and part-time employee to agree that the employee would work ordinary hours in addition to those initially agreed, on an ad hoc or ongoing basis, and that such hours would not attract overtime rates.

The union's application was purportedly directed towards making the terms of the Award clearer in this regard.

17. The Chamber of Commerce & Industry of Western Australia and the Retail Traders Association of Western Australia also made a joint application to vary the Award in light of the Minister's amended request.[4]

18. In its decision of 29 January 2010, the AIRC dealt with each of the aforementioned applications, as follows: (emphasis added)

> **[8]** The Chamber of Commerce and Industry of Western Australia (CCIWA), Retail Traders Association of Western Australia (RTAWA) and the NRA seek changes to the part-time employment provisions. They rely on the terms of cl.53 of the Minister for Employment and Workplace Relations' award modernisation request (the consolidated request).
>
> **[9]** Clause 53 of the request contains a requirement to ensure that the hours of work and associated overtime and penalty arrangements in the retail, pharmacy and any similar industries do not discourage employers from offering additional hours of work to part-time employees or from employing part-time employees rather than casual employees. Clause 53 was included in the consolidated request by an amendment made on 26 August 2009, after the modern retail award was made.
>
> **[10]** We have generally agreed to amend part-time provisions regarding overtime, in the light of the change to the consolidated request, to make it clear that when variations to part-time hours are agreed in writing overtime is not payable for such agreed additional hours unless the total hours exceed 38 per week or the other limits on ordinary hours. Such changes assist in making additional hours available to part-time employees subject to their genuine agreement. We will vary the modern award to replace the second sentence of cl.2.7 to read as follows: "All time worked in excess of the hours as agreed under clause 12.2 or varied under clause 12.3 will be overtime and paid for at the rates prescribed in clause 28.2— Overtime (excluding shiftwork)"
>
> **[11]** To avoid any confusion we will also delete cl.26.3(b).
>
> **[12]** The SDA also seeks a very detailed alternative part-time employment provision. We do not believe that the level of prescription sought is warranted.[5]

19. Whilst the drafting of the Award, when made, required the payment of overtime rates for any work performed outside the hours agreed with a part-time employee on engagement, as a result of the above decision, the Award was varied to require that overtime rates would be payable for work performed in excess of the agreed hours, *as subsequently varied*. Evidently, the AIRC intended that the

[4] http://www.airc.gov.au/awardmod/fullbench/variations/AM200931.pdf

[5] *Re General Retail Industry Award 2010* [2010] FWCFB 305 at [8] – [12].

variations to the Award would make clear that an employer and employee could then reach agreement that the employee would work additional hours and that the employee would not be entitled to overtime rates for such work.

20. Neither the amended Award Modernisation Request, the applications made to vary the Award, the AIRC's decision or the variations made to the Award contemplated that that flexibility was to be limited only to ongoing changes to the hours to be worked by part-time employees. Put another way, none of the abovementioned sources suggest that the terms of the Award are intended to preclude a part-time employee and employer from reaching agreement on an ad hoc basis that the employee will work additional hours at ordinary rates. This could include additional hours immediately before or after a period of work that the employee agreed to work on engagement as well as additional 'standalone' periods of work.

21. Read in this context, we consider that the extant provisions of the Award can lawfully be applied in the manner described above and that as a result, the 'flexibility' that the Application purports to deliver is already available. Indeed when considered in this way, it becomes apparent that making the variations proposed by the Applicants would amount to a retrograde step. They will result in the introduction of various unnecessary limitations and requirements that will in fact inhibit the flexibility that is currently available to employers and employees under the Award.

22. We acknowledge that the relevant extant provisions of the Award are potentially not sufficiently clear and would, to that end, benefit from variations that are directed towards putting beyond doubt that they permit an employer and part-time employee to reach agreement that the part-time employee will work hours in addition to those agreed upon engagement on an ongoing or ad hoc basis, and that overtime rates are not payable in respect of such work. We submit that this could be achieved through the following simple variations:

> **10.6** The employer and the employee may agree to vary the ~~regular pattern~~ hours of work agreed under clause 10.5 with effect from a future date or time. The agreement may be ongoing or for a specified period of time. Any such agreement must be in writing.

THE APPLICATION AND THE EMPLOYER PROPOSAL: MISALIGNMENT BETWEEN THE CATALYST FOR THE RIGHT TO REQUEST AND CLAUSE 10.5

23. The two proposals before the Commission contemplate differing mechanisms for employees to work additional ordinary hours to those agreed under clause 10.5. Both the Application and the Employer Proposal seek the inclusion of a regime enabling employees to request that such hours be offered permanently and a limited capacity for employers to refuse such requests.

24. We contend that both proposals fail to appropriately align such new obligations with the requirements of clause 10.5. This issue is explained below.

25. The flexibility that is proposed to be delivered by the Application is encapsulated in clause 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.

26. The clause enables an employer and part-time employee to make an agreement for the employee to work more ordinary number of hours agreed under clause 10.5. It does not require that agreement be reached in relation to the following matters, as required under clause 10.5:

> **(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 work each day; and
>
> **(d)** when meal breaks may be taken and their duration.

27. The proposed approach enables parties to reach agreement on a quantum of additional hours but not the precise days or times at which they are worked. This means that an arrangement agreed under clause I.2 may be wholly incapable of being accommodated in an agreement under clause 10.5. For example, the parties may agree to work 5 extra ordinary hours but such hours may be worked at different times of the day or on different days over different weeks.

28. The difficulty with the proposed approach flows from its interaction with proposed clauses I.7 to I.11, which fall under the heading 'Review of hours'. These provisions potentially impose burdens on employers that appear to be potentially triggered by an employee regularly working additional hours, even if they are worked on a variable range of times or days.

29. The problem we identify above arises in part from the wording of clause I.7:

> I.7 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.

30. This wording appears to require that an employee has regularly worked additional agreed hours for at least six months. It is not clear that they must have worked the same agreed hours for at least six months.

31. It may be that the Applicants intend for this matter to be addressed through the inclusion of the following note below clause I.2:

> **Note:** For the avoidance of doubt clause 10.5 applies to the Additional Hours Agreement at the time the agreement is made. Making an additional hours agreement will be an agreement to mutually change a roster to include the increased hours into the roster.

32. It is not however clear what assistance the note provides.

33. It is also not clear whether the note is intended to be an operative term or just a guide to the operation of other elements of the Award. Further, clause 10.5 applies upon engagement, not at the time an Additional Hours Agreement is potentially made. Accordingly, the note appears to be inaccurate.

34. The note is also arguably inconsistent with proposed clause I.6, which require that (emphasis added):

> The additional hours agreement cannot be made a condition of securing employment and cannot be signed concurrently with an offer of employment.

35. We are also unclear as to the reason why the note specifies that "making an additional hours agreement will be an agreement to mutually change a roster to include the increased hours into the roster".

36. Similar observations regarding the lack of alignment between the circumstances or pattern of hours that enables an employee to seek a permanent increase to their hours and the requirements of clause 10.5 can be made regarding the Employer Proposal, which provides at clause 10.5 as follows:

> If a part-time employee has regularly worked additional ordinary hours in excess of their pattern of work agreed under clauses 10.5 and 10.6 for at least 12 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.

37. If the Award is to be amended to include a right for employees to request that additional hours worked pursuant to either proposal be adopted on a permanent basis, the prerequisite for this should be that such hours conform to a pattern of hours that is compatible with an agreement that can be reached under clause 10.5.

38. We do not propose any particular amendment that should be made to the Applicants' Application to rectify the issue we here identify as we contend that their claim ought not be adopted for various reasons.

39. The issue could however be addressed in the context of the Employer Proposal by replacing clause 10.12(a) with the following provision:

> **10.12 Increasing guaranteed hours to match regular work pattern**
>
> **(a)** If a part-time employee has regularly worked additional ordinary hours in excess of their pattern of work agreed under clauses 10.5 and 10.6 for at least 12 months, and those hours have been worked in such a consistent and predictable pattern each week that they are capable of being subject to an agreement under clause 10.5, then they may request in writing that the employer agree to increase their regular pattern of work.

40. We here also observe that the adoption of a 12 month period of working additional hours as the catalyst for when a right to request additional working hours should arise also reflects a more reasonable accommodation of the reality that there are a range of seasonal considerations that can impact staffing requirements of employers in the retail industry than the 6 month period adopted by the Applicants. Absent comprehensive evidence dealing with such matters, it would be appropriate for the Full Bench to adopt the cautious approach of adopting a 12 month period as the precondition for any right to request or be given additional hours.

THE EMPLOYER PROPOSAL: OTHER MATTERS

41. The Employer Proposal is intended to provide a form of standing consent, in writing, to be reached between an employer and part-time employee to enable the employee to work additional hours beyond their regular agreed hours. It cannot result in the employee working more than 38 ordinary hours or working outside of the limits for working ordinary hours applicable to employees generally under the Award.

42. The proposal still requires that the employee has a right to refuse the working of any additional hours that are actually offered, and an employee is not required to make themselves available to work if offered.

43. We also observe that the proposal is not intended to enable part-time employment under the Award to operate in a manner that is akin to casual employment. An employee would still be afforded a commitment to certain hours in accordance with clause 10.5 and any additional ordinary hours worked would be relevant to the accrual and crediting of NES entitlements.

44. The kind of flexibility proposed is similar to that adopted under enterprise agreements in the retail sector applicable vast numbers of employees. This supports a contention that it is a form of flexibility that is relevant to the needs of the sector.

45. We are broadly supportive of the Employer Proposal. The proposal largely delivers the kind of flexibility that Ai Group has identified as being necessary in previous submissions and incorporates a range of safeguards to ensure that it is not abused. The particularly relevant extracts from our previous submissions are set out below for convenience:

> 33. In our view, there would be merit in the inclusion of a term that enables an employer and employer to reach a form of standing agreement that hours beyond those agreed in accordance with clause 10.5 could be worked as ordinary hours if and when those hours are made available to the employee, without the employer needing to commit to the provision of such hours of work.
>
> 34. Ideally, such a term would then enable those additional hours to be offered and worked in accordance with such an agreement without the employer needing to implement burdensome administrative processes each time that such

additional hours may become available. Processes that require an employer to obtain agreement for the hours to be treated as ordinary hours on each occasion, and to have to make and keep record of the agreement in writing on each occasion will, in practice, operate as a barrier to employers offering additional work to part-time employees rather than casual employees and to employers electing to more readily offer part-time jobs.

35. We accept that there may be a need for appropriate safeguards around the implementation of such an approach and as such we have been engaging in active discussions with other major parties in order to reach agreement on such matters or at least narrow our differences as to what would be a workable model for delivering greater flexibility.

46. We also note that we have been heavily involved in productive discussions, both before the Commission and outside of its auspices, leading to the crafting of the clause. Nonetheless, we are unable to support the Employer Proposal its entirety for the following key reasons:

(a) We have proposed an alternate variation to clause 10.6, as set out above.

(b) We have proposed amendments to proposed clause 10.12(a), as set out above.

(c) We contend that there would be merit in refining the drafting of elements of the proposed clause in other minor ways in order to ensure that the provision operates effectively in practice.

(d) We oppose the requirement that access to the kind of flexibility proposed be conditional upon the parties consenting to Commission arbitrating disputes about its operation, as proposed.

47. We nonetheless submit that these issues warrant the Commission adopting a slightly modified form of the Employer Proposal. They do not warrant its rejection.

48. We also note that we have some reservations about whether *all* of the safeguards included in the proposal are necessary. The safeguards contained in the proposal require that employees entering into the arrangement do so in an informed way; that an individual cannot be pressured into entering into the arrangement at the commencement of employment; that the arrangement is properly recorded and that the arrangement can be terminated by either party.

49. We nonetheless acknowledge that the cumulative effect of the safeguards described above is to provide a scheme that could not be reasonably construed as being susceptible to unfair abuse by employers. Moreover, we acknowledge that it has been proposed that a review of the provisions be undertaken by a date in September next year. This would enable a consideration of whether the enduring inclusion of such provisions in the Award is warranted after a period of their operation. In such circumstances we do not seek to press objections to the inclusion of these various safeguards in the Award.

Identification of Ordinary Hours & difficulties with an unfettered right to refuse additional hours

50. We understand that the intention underpinning the proposed provision is that if an employee agrees to a request to work additional ordinary hours, such hours become ordinary hours, for the purposes of both determining Award and NES derived entitlements. There may however be a practical problem because the clause does not expressly provide for this. As a consequence, the precise point at which the hours become the employee's ordinary hours is potentially not certain. This should be addressed.

51. The clause should also reflect the proposition than an employee must undertake any additional hours that they have agreed to undertake, unless they are otherwise entitled to take leave. As framed, the provision would appear to enable an employee to refuse work hours at any point. It would be very unfair to an employer for an employee who has agreed to work additional hours to be able to change their mind and refuse to work them at very short notice. This would likely be particularly problematic for many small employers.

52. In light of concerns identified above, it would be appropriate to amend the clause to ensure that it expressly provides:

    - That additional hours worked in accordance with a standing agreement are ordinary hours if an employee agrees to work them; and

- That the right to refuse additional hours only extends until such time as the employee has agreed to the working of additional hours

Consent Arbitration

53. The Application appears intended to require that parties who utilise the proposed provisions consent to the Commission arbitrating any dispute regarding the newly proposed provisions. We understand, based on our involvement in the conferences before Commissioner Hampton, that the proposal advanced in the Application may be the subject of significant amendment, although at the time of preparing these submissions, that has not eventuated.

54. The Employer Proposal provides, in effect, that if an employer and employee agree to a standing written agreement pursuant to clause 10.11, they consent to any dispute regarding clauses 10.12 and 10.13 (we assume that there is a typo and this is intended to be a reference to 10.11 and 10.12) being settled through arbitration. This is subject to the significant caveat that the clause does not operate to provide that the parties consent to arbitration of any dispute pertaining to whether there were reasonable grounds for refusing a request under clause 10.12(a).

55. Ai Group contends that is not necessary to include either of the proposed dispute resolution clauses.

56. The Award already contains an adequate dispute resolution mechanism. It is not necessary, in the sense contemplated by s.138, to include a clause setting out a special arrangement that applies only in the context of the proposed new provisions.

57. Ai Group is particularly opposed to the approach adopted by the Applicants. For the reasons already stated, the flexibility that we understand is proposed to be delivered is already arguably available under the Award, or at least it appears that it was intended to be available. There is no basis established in the material advanced by the Joint Applicants for now requiring that such flexibility should

only be available on the condition of an employer agreeing to consent arbitration of any dispute associated with it.

58. We are also concerned that either clause increases the likelihood of an employee, or their representative, pursuing meritless claims that an employer has unreasonably refused a request to offer an employee additional hours permanently. This potentially exposes businesses to expensive and distracting litigation. This would be a particularly negative outcome for small and medium sized businesses that lack the skills or experience to deal with such matters absent a paid representative.

59. The Award should, as far as possible, encourage the determination of decisions about what hours of work will be offered to an employee to be determined by the workplace participants. The Commission can play an important a role in facilitating conciliation about such matters, but the Award should not create a system under which it may be too readily called upon to be the arbitrator of whether the additional hours should be offered.

60. We also observe that the current dispute resolution clause already enables the Commission to deal with disputes by arbitration where this is genuinely consented to by the parties. If parties see some convenience or other utility in the Commission arbitrating a matter, this is available.

61. The current dispute resolution clause contained in the Award would provide an appropriate level of oversight of the operation of either of the proposed new clauses. This can include a ventilation of the risks for a party that proceeds to act in non-conformity with the Award. Further, although we are not ourselves convinced of the necessity for this, any new clause could include a reference to the dispute resolution provisions, in a manner similar to that contained in the standard award clause dealing with family friendly working arrangements. This would draw a reader's attention to this facility. Such a clause could state:

> **X.X** Any dispute about the operation of this clause can be dealt with in accordance with clause 36. Dispute Resolution.

62. If a party is concerned that there is non-compliance with the Award and a dispute about this is not appropriately resolved through conciliation or mediation before the Commission, it may nonetheless be appropriately dealt with through the standard enforcement regime. Alternatively, the matter can be appropriately raised with the Fair Work Ombudsman. The Commission should not adopt an approach which instead effectively renders itself as the body responsible determining whether there has been compliance with award terms in favour of the approach that has been contemplated by the legislature.

63. In raising these concerns, we are not seeking to impugn the constructive role that the Commission can and does routinely play in the resolution of disputes. However, consent arbitration results in the Commission exercising a private arbitration power. We are concerned that in such a context, a party would have limited appeal rights. Several Federal Court decisions have considered the limits of the availability of judicial review where an employer and its employees (and/or a union) have agreed to consent arbitration by the Commission.[6]

64. Acceptance of any of the proposed clauses dealing with consent arbitration would require the Commission to find that it is the more appropriate body to determine a dispute over whether there has been compliance with an award provision than a relevant court. This position should not be accepted. A case for such a conclusion has not been established and, in our view, should not be adopted in the context of urgent proceedings where parties have been afforded extremely limited opportunities to advance material relating to such matters.

65. We also contend that the Commission should not lightly be satisfied that it is appropriate to implement a permanent scheme in the Award that operates to force an employer into indirectly consent in advance of a dispute arising to the Commission arbitrating a dispute should it materialise. Such an approach is unduly complicated and somewhat artificial. We doubt that, in practice, many employers or employees, would appreciate the technical ramifications that would

[6] See Endeavour Energy v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia [2016] FCAFC 82; and Linfox Australia v Transport Workers Union of Australia [2013] FCA 659.

be triggered by their agreement to simply enter an arrangement that permits an employee to work addition ordinary hours.

66. The proposed approaches are so out of step with the approach generally determined to be appropriate in the award system that they ought not be adopted. Adoption of the proposed approach would not be consistent with the maintenance of system that is simple and easy to understand, as contemplated by s.134(1).

67. In raising these concerns, we acknowledge that the Commission has included 'consent arbitration' as a safeguard in the context of certain temporary 'Covid schedules' that have been inserted into some awards. However, in these instances, there has been a significant degree of consensus amongst major industrial parties, and at times support from the Minister for Industrial Relations, as to the acceptability of consent arbitration. In such instances the inclusion of mechanisms providing for consent arbitration has largely been part of a broader balance struck between the parties and endorsed by the Commission as to acceptable safeguards in the context of an urgent response to the crises flowing from the pandemic. It has been part of a pragmatic and cooperative approach between the parties. A comparable level of consensus does not exist in these proceedings.

68. In identifying the absence of agreement in this regard we point not only to Ai Group's objection to the proposal, but also to the fact that the availability of consent arbitration in Employer Proposal is advanced in the context of a very different claim to that which has ultimately been advanced by the Applicants and have also proposed that the scope of matters that can be the subject of arbitration is materially different. There is no consensus on the merit of consent arbitration.

69. If, contrary to these submissions, the Commission forms the view that it is necessary for the Commission to include consent arbitration under a variation to the Award, the scope of the clause should reflect that which has been adopted in the Employer Proposal.

THE APPLICATION AND EMPLOYER PROPOSAL: TIME LIMIT

70. The proposed provisions advanced by the Applicants are proposed to operate for a period of 18 months. It is not clear why this time limit is warranted.

71. We understand the Employer Proposal is not intended to only apply for a limited duration, but that it is proposed that it should be the subject of review by the Commission by 15 September 2022.

72. The availability of the kind of flexibility proposed under either proposal for only a limited period would undermine its utility to employers and, as a result, the extent to which it is likely to result in increased employment for part-time employees through employers either.

73. Put simply, if any 'new' flexibility is only temporary, instead of permanent, it is foreseeable that it will be less likely to result in employers being either more willing to hire permanent part-time employees in preference to casual employees or to offer additional hours to already engaged part-time employees in preference to casuals employees or to simply not offer the hours. The reasons for this are twofold:

    - Firstly, it is axiomatic that a temporary flexibility will be less appealing to employers who do not have confidence in the long-term viability of engaging employees on a part-time basis that requires the setting of specific hours of work; especially if this is combined with a real or perceived requirement to pay overtime penalties if they need to temporarily call on such employees to perform extra work. This is logically a particularly relevant consideration for employers grappling with variable trading patterns in the context of the pandemic. A temporary flexibility is accordingly less likely to give employers the confidence to hire additional part-time staff than a permanent change.

    - Secondly, there are changes to payroll processes and programs that need to be made to capitalise on the new flexibility. The extent to which

employers will be willing to invest in making such changes in the context of a temporary variation cannot be verified based on the material before the Commission, but we foresee that it will be a barrier to some employers utilising the new flexibility if it is only available temporarily.

74. A consideration of the need to ensure a stable award system, as necessitated by s.134(1) also weighs in favour of making a permanent rather than temporary change to the Award.