Australian Industry Group

Application to vary the General Retail Industry Award 2020

Submission
(AM2021/7)

4 March 2021

APPLICATION TO VARY THE GENERAL RETAIL INDUSTRY AWARD (AM2021/7)

1. INTRODUCTION

1. This submission is made by the Australian Industry Group (**Ai Group**) in response to the statement ([2021] FWC 1088) issued by the Fair Work Commission (**Commission**) on 1 March 2021 concerning AM2021/7 – an application made by the Shop, Distributive and Allied Employees' Association (**SDA**), the Australian Workers' Union (**AWU**) and Master Grocers Australia (**MGA**) to vary the *General Retail Industry Award 2020* (**Retail Award** or **Award**).

2. As identified in the Commission's statement, the application is linked to the Award Flexibility case for the hospitality and retail sectors (AM2020/103) that is before the Commission.

3. In short, Ai Group contends that the Commission should not grant the application for the following overarching reasons:

    - The *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* (**Bill**) will potentially result in the imminent inclusion of a different scheme for a similar form of flexibility in the Award. The passage of the Bill, should it occur, would have a material bearing on the merits of including the alternate scheme proposed in the application.

    - The possibility that the Bill's content may be varied, and the current political context associated with its consideration by Parliament, also creates difficulties for the conduct of these proceedings, at this time. This includes risks that the approach taken to the matter by either the Commission or parties will be used for political purposes and this may impact upon the proper conduct of proceedings associated with the matter.

- The material advanced in support of the application does not establish that the proposed scheme is necessary to ensure that the Retail Award meets the modern awards objective. Indeed, there are significant reasons why the Commission should form the view that the proposed clause, when considered in its totality, is not *necessary* to achieve the modern awards objective.

- The short timeframe afforded to interested parties for advancing material in response to the claim has not enabled interested parties a fair opportunity to properly consider the claim or advance material in reply to it. Aspects of the specific proposal are readily contestable and are being contested by major industrial parties representing the interests of employers covered by the Award.

- There are multiple claims before the Commission dealing with what may be charactered as the need for flexible part-time employment provisions. Moreover, with the encouragement of the Commission, major industrial parties representing the interests of employers in this industry (including Ai Group) have been engaged in constructive discussions directed at reaching a joint position, or at least a greater level of consensus, on variations that should be sought. As a result, other proposals for variations will be advanced as a product of these discussions. To consider and potentially grant one proposal prior to considering such alternate proposals would be unfair to the parties pursuing different variations. It would also risk the Retail Award being varied multiple times in short succession as the various claims are considered. Such an outcome is wholly inconsistent with the maintenance of a stable award system.[1]

[1] A matter that must be taken into account in accordance with s.134(1).

4. We ultimately submit that the Commission should decline to grant the application and it should list further proceedings, commencing with a conference shortly after the potential window in March for the passage of the Bill, to deal in a co-ordinated way with the issue of whether any variation to the Retail Award to make the part-time provisions more flexible is necessary and the specific claims advanced.

5. In advancing the above course of action we observe that there is an apparent level of consensus regarding the existence of a deficiency in the current regulation of part-time employment under the Retail Award and the need for reform, but there is a divergence of views as to the appropriate means of remedying this. The Commission should adopt an approach that allows all such proposals to be properly ventilated and considered.

2. CONSIDERATIONS ASSOCIATED WITH THE BILL

6. The Bill is currently before Parliament. It has been passed by the House of Representatives and is expected to be voted upon in the Senate in the week commencing 15 March 2021, following the tabling in Parliament of the report of a Senate Committee inquiry into the provisions of the Bill on 12 March 2021.

7. After the week commencing 15 March 2021, the Senate does not sit again for the purposes of debating and voting on legislation until the budget session in May, and usually Parliament's time in that session is devoted to budget bills.

8. The provisions of the Bill are directly relevant to the application here before the Commission because Schedule 2 – Awards, of the Bill:

   - Applies to employers and employees covered by the Retail Award;
   - Would enable an employee to work additional hours with the agreement of their employer without the payment of overtime penalties, subject to specified limits and safeguards;
   - Deals with the same subject matter as that which is dealt with in the application; and

- Would have the effect of inserting part-time employment provisions into the Retail Award that would differ from those proposed in the application.

9. We submit that it would not be appropriate for the Commission to determine the application ahead of the Bill being voted upon in Parliament because:

    - The Bill is expected to be voted upon in the next two weeks.

    - Schedule 2 – Awards, of the Bill operates from the day after the Act receives Royal Assent.

    - Many amendments to Schedule 2 have been proposed by various parties in their submissions to the Senate Committee Inquiry into the Bill and at this stage it is not clear what, if any, amendments will be made to the Schedule.

    - It would be important for the Commission to consider the interaction between any relevant provisions in the *Fair Work Act 2009* (as amended by the Bill) and the part-time employment provisions in the Retail Award.

    - If the Commission made a decision on the application just before the Bill is voted upon in Parliament, there is the risk of the decision being used for political purposes by political parties.

10. Justice Ross identified the importance of the last of the above points in the following comments made in an exchange with Australian Business Industrial (**ABI**) at a conference on 5 February 2021 in respect of a proposal by ABI to pursue a flexible part-time employment provision in the Retail Award:

> I will be similarly blunt, Mr Izzo, and the difficulty that I apprehend is not about the merits or anything like that, but it may affect the timing of the hearing of this aspect of the matters in the retail industry. If, for example - and I'm not suggesting this is a timetable - this matter was to go on and be the subject of proceedings at the same time as the bill is being debated in parliament, then it seems to me there is a real risk that even any questions from the Commission about aspects of the claim may be translated into the political arena and be used by one group or another in relation to the debate on the bill.

> Even your comments that you don't think the bill - look, I understand the full context in which you put your remarks. I understand that you're not opposing the bill or anything like that, but that won't be how it's reported. There is a risk as you run the parallel proceedings that people - we have already seen this in the debates around the legislation.
>
> I, for myself, am pretty reluctant to sort of jump into a political process and nor do I want to be in a position where the questions that I might put to you or provisional views, or however you frame it, then get used as a club to beat someone on some side to death with. It sort of drags us into that process. Look, I just wanted to raise that. I mean, we'll see how this develops, but I didn't want you to at least, you know, not be aware of that concern.

11. The concerns raised by His Honour have significant force.

12. The Bill will deliver a modest improvement to the current situation under the Award by enabling an employer and employee to agree to temporarily work additional ordinary hours to those that have otherwise been agreed in accordance with the terms of clause 10.5. It will afford similar flexibilities in 11 other awards, beyond the Retail Award.

13. The proposal advanced by the applicants appears to propose a scheme for enabling part-time employees to agree to work additional ordinary hours to those set out under clause 10.5 which is in some respects similar to that proposed under the Bill, but that nonetheless departs significantly and in various ways from the approach proposed by the Government. Relevantly, in contrast to the approach adopted under the Bill, the proposal in the application here before the Commission:

    - Omits various mechanisms and safeguards included in the Bill;
    - Includes a different minimum hours' requirement as a measure for when a part-time employee may be eligible to access the new flexibility;
    - Imposes onerous new obligations on employers to permanently increase the hours that they offer part-time employees in certain circumstances;
    - Imposes additional obligations upon employers to consult employees seeking to increase their ordinary hours of work;

- Imposes a requirement on employers to genuinely try to reach agreement with certain employees who request additional hours as to "an increase to the number of hours agreed under clause 10.5 that will give the employee more predictable hours of work and reasonably the employee's circumstances".

- Imposes additional obligations upon an employer to set out in writing the grounds upon which the employer has refused the request;

- Provides a different framework for settlement of disputes, which includes arbitration; and

- Limits the availability of the flexibility to a period of 18 months (unlike the Bill which provides the flexibility on an ongoing basis).

14. If the application is granted and the Bill is passed, it would give rise to the problematic situation of the Award containing separate provisions dealing with a very similar subject matter, but in a manner that will include a confusing array of differences.

15. We contend that it is appropriate for the Commission to take the possible imminent of the passage of the Bill into consideration when determining whether the proposed variations should be granted at this time. Crucially, we contend that this alone would justify not granting the claim, at this time.

3. THE NEED FOR MORE FLEXIBLE PROVISIONS

16. Ai Group supports the insertion of more flexible part-time provisions being available to employers and employees covered by the Retail Award. This will assist, and indeed encourage, employers to offer part-time employment in favour of casual employment. This is a particularly relevant consideration in the context of variable trading patterns and in light of the raft of uncertainties visited upon industry by the COVID-19 pandemic.

17. We nonetheless contend that the proposed variations represent an overly complicated and otherwise flawed attempt to deliver very modest improvements. Moreover, we contend that greater flexibility should be afforded to employers and employees without imposing the raft of significant and unjustified new regulatory and administrative burdens and obligations upon employers as are proposed by the applicants.

18. Before further addressing the merits of the application, it is appropriate to briefly consider the relevant current Award provisions.

19. Clause 10 of the Retail Award deals with part-time employment. Clause 10.1 defines a part-time employee for the purpose of the instrument:

> **10.1** An employee who is engaged to work for fewer than 38 ordinary hours per week and whose hours of work are reasonably predictable, is a part-time employee.

20. Clause 10.1 does not mandate that the ordinary hours will remain constant, however it does not contemplate significant unforeseeable fluctuations in ordinary hours.

21. Clause 10.5 adopts a highly prescriptive approach to requiring agreement on the hours that an employee will work:

> **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.

22. It is observed that clause 10.5 does not require agreement on the ordinary hours of work. Nonetheless, clause 10.8 requires that any time worked in excess of the number of hours agreed under clause 10.5 or 10.6 must be paid overtime rates:

> **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.

23. Clause 10.6 provides some capacity to agree to vary the *regular pattern* of work agreed clause 10.5.

> **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.

24. Although the wording of clause 10.6 does not make it abundantly clear that the provision enables an employer to agree to vary the number of hours to be worked under clause 10.5, we contend that the reference to the "pattern of work" is properly interpreted as enabling the agreement about this matter.

25. It is nonetheless arguable that the clause does not enable an employer and employee to agree to the employee *temporarily* working additional ordinary hours to those agreed under clause 10.5 or clause 10.6. That is, it appears that the Award only enables the parties to agree to vary an employee's *regular pattern of hours* under clause 10.5 on a permanent basis. If such a variation was made to reflect a temporary or short-term need, a subsequent agreement to vary the regular pattern back to the former pattern would be needed.

26. The Award should be amended to enable an employer to provide a part-time employee with additional hours of work to those agreed under clause 10.5 without the requirement to pay overtime rates. This should be made available through a scheme that is simple and which does not impose an undue regulatory or administrative burden on employers, which would only serve to operate as a disincentive to the employer.

27. For completeness, we note that clause 10.10 enables changes to be made to an employee's roster in certain circumstances but not does not permit changes to the *number* of hours agreed under clause 10.5.

4. THE PROPOSED VARIATIONS

The Proposed Variations are not 'Necessary'

28. The proposed provisions do not, when viewed in their entirety, reflect an appropriate scheme for delivering the type of flexibility that we submit is necessary for inclusion in the Award. The Scheme includes various elements that the Commission could not be satisfied, on the material before it, are necessary in sense contemplated by s.138.

29. We observe that many of the concerns we raise may be a product of the approach to drafting that has been adopted by the parties. In some instances, it may be that this can be rectified without significantly altering the nature of what has been proposed. In other instances, our concerns are more fundamental. The existence of such drafting deficiencies nonetheless necessitates a careful approach to the consideration of the matter; which in our submission is not practicable within the short timeframe that has been made available for the conduct of the matter thus far.

30. We also observe that given the brief period of time that we have been afforded to respond to the claim, we may not have identified all of the problematic deficiencies in the provision. Nor has it afforded a reasonable opportunity to fully consult our membership in relation to the proposal in order to comprehensively identify their views.

31. In these sections that follow we specifically address concerns or deficiencies flowing from particular elements of the proposal.

The Proposed Clause I.2

32. Ai Group's primary concern is that this proposal falls short of the level of flexibility that the Retail Award should provide.

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.

36. The application advanced in these proceedings falls short of the kind of flexibility that we have described above and which we say is necessary to ensure that the Award meets the modern awards objective.

37. We also observe that the application provides for a much more limited form of flexibility than is or has been available under various other awards.[2] We understand that these forms of flexibilities may not be desired by the union parties to these proceedings, but no persuasive reason has been advanced as to why a much more restrictive and burdensome approach is necessary in the Retail Award.

38. It is unclear why it has been proposed that the flexibility is only available to employees who are undertaking 9 hours of work has been selected or, more relevantly, why the inclusion of term providing for this particular quantum is *necessary* for the purposes of section 138.

The Proposed Clause I.3

39. There are potentially problems with the manner in which the rate of pay for additional hours has been identified and the proposed requirement to pay employees for hours that are not required to be worked. We deal with these issues separately below but note that they are somewhat interconnected.

The Rate of Pay

40. The proposed provisions require that additional hours must be paid at the employee's "ordinary rate of pay". The term is utilised but not defined in the Retail Award.

41. In some instances, the Retail Award identifies this rate of pay as including certain amounts. It is accordingly unclear whether this is intended to merely capture the minimum rate of pay for the employee's ordinary hours of work or whether the intent is to require the payment of various allowances, penalties or loadings contemplated by the Award.

[2] See for example the *Telecommunications Services Award 2020*(cl. 10.2(b)); Contract Call Centres Award 2020(cl. 10.4); the Nurses Award 2010 (cl. 28.1(d)) and the Social, Community, Home Care and Disability Services Industry Award 2010 (cl. 28.1(b)(iii)).

42. We also note that certain amounts are only payable in relation to time worked. We do not read the proposal as requiring the payment of such amounts but observe that this is far from clear.

43. We assume that the proposal would not require the payment of over-award amounts, but again, this is far from clear.

44. The proposal is far from simple and easy to understand.

The Obligation to Pay for Time Not Worked

45. The applicants' proposal requires that employees be paid for hours that they are not required to work.

46. As drafted, the proposal does not limit the circumstances in which this requirement would apply. As a consequence, it would appear to require payment in circumstances where an employee is not required to work the additional agreed hours because they are entitled to be absent from work or to take leave due to the operation of various provision of the NES or Award. This is a profoundly unfair outcome.

The Proposed Clause I.4

47. This proposed provision requires that overtime must be paid for any additional agreed hours worked unless certain specified conditions are met. The approach that has been adopted in the structure and drafting of the provision would results in various uncertainties as well as unfair and anomalous outcomes. For example:

    i) It is not clear whether the conditions identified in paragraphs (a), (b) or (c) require the particular activity referred to in those paragraphs to be undertaken by the employer or employee.

    ii) There is no time limit on the record keeping requirement set out in paragraph (d). This accordingly appears to require that the record must be kept indefinitely.

ii) If the employer fails to keep the records indefinitely it appears to have the effect of requiring that additional agreed hours would be paid at overtime rates, even though this may be contrary to the agreement of the parties and many years may have passed.

The Proposed Clauses I.6 - I.11

48. Clauses I.6 to I.10 provide a framework under which an employee will have a right to request a permanent increase to their hours of work as agreed under clause 10.5. If presented with such a request, an employer will be obliged to discuss the request with the employee and try to reach agreement with them on an increase to the number of hours agreed under the clause that will give the employee more predictable hours of work and reasonably accommodate the employee's circumstances. The employer will only be permitted to refuse the request on reasonable business grounds.

49. The proposal potentially imposes a significant adverse impact upon businesses by visiting additional employment costs as well as administrative and regulatory burdens on them.[3]

50. If an employer misjudges whether they have reasonable business grounds for refusing the request, or is perceived by an employee or party with capacity to bring enforcement proceedings against them to have misjudged whether such grounds exist, they face the prospect of being subject to prosecution and civil penalties. These risks are compounded by the proposed capacity under clause I.11 for parties to bring disputes about any matter (including disputes about whether an employer had reasonable grounds for refusing a requests) before the Commission and to have such matters arbitrated. Such legal proceedings and consequences have the potential to visit significant disruption and cost upon employers.

[3] As contemplated by s.134(1)(f).

51. The combined effect of clauses I.6 to I.11 would appear to enable, or indeed require, the Commission (or a relevant court) to determine whether an employer has proper grounds for not agreeing to the additional hours of work and as such to determine whether such hours must be agreed. Ai Group submits that decisions about the hours that they are prepared to employ an individual are best made by the employer. The Award should not lightly be varied, having regard to both matters of both fairness to an employer and the merits of the matter more broadly, to enable a third party external to an employer's organisation to make a determination about whether permanent additional hours of work are to be provided to an employee.

52. It should not lightly be accepted that a fair and relevant safety net of minimum terms conditions, as contemplated by s.134(1), should impose a requirement to offer employment particular hours of employment (as opposed to putting conditions upon hours that can be offered and the terms and conditions attached to employment).

53. Many awards provide a capacity for employees to work additional hours to what may be described as their initially agreed or regular ordinary hours of work without these being required to be treated as overtime or paid at overtime rates.[4] None of these adopt the precise approach now proposed in the application. For example,

54. Ai Group also observes that there is no justifiable reason for setting the trigger for the application of clauses I.6 to I.10 at 6 months. Nor is there evidence to establish that even if employers have regularly been able to offer additional hours over that period that they will be then commonly ably to offer it on a permanent basis.

[4] See for example the *Telecommunications Services Award 2020*(cl. 10.2(b)); Contract Call Centres Award 2020(cl. 10.4); the Nurses Award 2010 (cl. 28.1(d)) and the Social, Community, Home Care and Disability Services Industry Award 2010 (cl. 28.1(b)(iii)).

55. Ai Group contends clauses I.6 to I.11 are potentially particularly problematic and that a case for their inclusion has not been made out. Even if the Commission is minded to include some additional flexibility that is in the nature of that proposed by the applicants in these proceedings, it should not include the provisions contained in clauses I.6 to I.11.

5. ALTERNATE EMPLOYER PROPOSALS

56. In the context of AM2020/103, other proposals directed at making part-time provisions in the Retail Award more flexible have been advanced by other employer associations. It is at this stage unclear what course of action will be adopted by the Commission in its progressing of those claims. The subject matter of the application here before the Commission overlaps significantly with the matters to be dealt with as a consequence of those proceedings.

57. Consistent with encouragement of the Commission, Ai Group has engaged with other major employer groups representing the interests of employers to develop a uniform position that can be advanced before the commission. We understand that in light of those discussions a further proposal will be provided to the Commission today. Ai Group is engaging with its membership in relation to this further proposal and will seek the opportunity to Address the Commission as to its merits in due course.

6. PROPOSED APPROACH TO THE FUTURE CONDUCT OF THE PROCEEDINGS

58. It is evident that employer and union representatives agree that employers and employees to whom the Retail Award applies should have access to more flexible part-time employment provisions.

59. However, there is no agreement at this stage on the specific terms of an award variation to address this issue. There is no doubt disagreement.

60. We submit that the Commission should decline to grant the application at this stage, although we accept that it may be not be necessary to dismiss the claim.

61. We propose that there would be considerable merit in the Commission scheduling a conference in the week commencing 22 March to enable all interested parties to engage in Commission facilitated discussions regarding flexible part-time employment provision for the Retail Award. This should encompass discussion regarding the proposal in the application and any other proposals that are filed ahead of the conference. If a consensus cannot be reached the matter could be programmed at that date.

62. By 22 March, the Bill will have been passed by Parliament or, alternatively, it will be known that the Bill will not be passed for at least a few months.