Fair Work Act 2009

s.157 – FWC may vary etc modern awards if necessary to achieve modern awards objective

Award Flexibility – General Retail Industry Award 2020

(AM2021/7)

In the matter of:

Application to vary a modern award

Shop, Distributive and Allied Employees' Association (SDA)

Australian Workers' Union (AWU)

Master Grocers Australia Limited (MGA)

(collectively the **Applicants)**

FURTHER SUBMISSIONS OF THE SHOP DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION

1. This matter comes before the Commission originally by way of an application by the SDA, the AWU and the MGA to vary the General Retail Industry Award 2020 (**GRIA**) on a temporary basis by the inclusion of a new Schedule I. It is supported by both the ACTU and the Council of Small Business of Australia.

2. The consent position between those parties was brought to the Commission on an urgent basis in order to obtain some temporary changes to arrangements for part-time employees to assist retail sector businesses to deal with the effects of, and to facilitate their recovery from, the COVID-19 pandemic. The provisions of the proposed Schedule I to the GRIA were designed to ensure not only that small business, and other businesses, were assisted, but that the rights of employees were safeguarded at the same time.

3. A number of other employer associations have, to differing extents, either criticised the Schedule I proposal or put forward, in the case of ABI and NSWBC, a substantial new proposal. That proposal has been refined and a draft described as a "joint employers' proposal" has been circulated on 15 March 2021.

4. The ABI/NSWBC proposal is for the introduction of permanent changes to the GRIA (albeit subject to review in 2022) which are not, it would seem, driven by the effects of the pandemic, since those can be expected to recede over time, but rather by a desire to achieve a wholesale and permanent change to the nature of part-time employment under the GRIA.

5. There are a number of similarities between the changes proposed by the joint applicants and ABI/NSWBC but there are also very substantial differences, the most significant of which is of course the application for permanent rather than temporary arrangements.

6. Additionally, the ABI/NSWBC proposal lacks not only safeguards but mechanisms and guidance to ensure compliance. These matters are particularly important in an industry such as retail where so many employers are small businesses. It is particularly noteworthy in this context that MGA and COSBOA with their small business focus endorse and support the clear provisions in the joint proposal which make it easy for an employer without an HR department to offer additional hours in an award compliant way.

7. The SDA has not had a proper opportunity to consider the application for permanent change. It has also received a draft expert report on 15 March 2021. It has not had sufficient time to consider this properly, nor has it had a proper opportunity to obtain its own evidence in respect of the proposed permanent changes. Some preliminary comments on the report are made below.

8. In those circumstances, while the SDA understands the Commission's view that all proposals for change should be considered together, it presses its submission that if the Commission is minded to introduce permanent changes to the GRIA, the SDA and any other interested stakeholders should be given a further opportunity to adduce its or their own evidence, including expert evidence in respect of any opposing position. It is accepted that the necessity for speed with the temporary changes proposed means that the process of hearing needs to be truncated. In fact, that was part of the reasoning behind the Applicants' application to the

Commission. However, permanent change to a modern award should, when there is opposition, only be made after a full opportunity to be heard is given to all interested parties. There is not a like for like comparison to be made between the two Applications. The SDA has not been afforded a proper opportunity to address the joint employers' claims if these are to be contemplated on anything other than a temporary basis. If that is to occur, it seeks such an opportunity.

The proposed Schedule I

9. Arising from the hearing on 5 March 2021 there was conciliation between the parties with the assistance of Commissioner Hampton. Those discussions brought into focus some of the issues raised by the employers in their opposition to the joint proposal. A slightly amended version of the draft Determination proposed by the SDA and the other joint applicants (attached) has now been filed. The changes will be described below.

10. The submissions which the SDA filed on 2 March 2021 have already dealt with the basic principles in relation to variation of modern awards. They have also dealt with how it is submitted this proposed variation is necessary to meet the modern awards objective.

11. The submissions in support of the present application by the ACTU helpfully also set out material in relation to the nature of the industry covered by the GRIA. In particular, it is noted that the retail industry is highly award reliant, that many retail workers are low income, that a high proportion of employees work on a part-time basis and that small business accounts for almost a third of all employment in the sector.

12. The MGA also makes some submissions about the nature of the industry covered by the GRIA. In paragraph 8, the MGA set out a number of significant factors which support the making of the proposed variation. Those matters, it is submitted, taken in context, should be given heavy weight by the Commission in considering this application.

13. Additionally, the Attorney-General's Department prepared on 28 January 2021 a paper entitled "Employment Size and Working Patterns in Particular Sectors of the Hospitality and Retail Industries" in response to a request from Justice Ross of 10 December 2020. That discloses that the employment in the retail sector has shrunk from 782,200 in August 2019 to 733,600 in August 2020. Further, there is a

high percentage of female employees in the sector: 56.1% in August 2020. Moreover, 96.3% of retail businesses either employ no-one or between 1 and 19 employees. More than half of retail businesses (50.5%) employ between 1 and 19 employees. Finally, the retail industry sector has a very high proportion of part-time employees: 57.5% as opposed to 31% of employees across all industry sectors.

14. On the one hand, the number of small businesses and the decrease in employment in retail during the pandemic suggest that some flexibility to promote recovery is justified. On the other hand, the nature of the workforce and the significant proportion of part-time employees suggest that strong safeguards must be implemented to protect employees as well. The joint applicants recognise these things and propose Schedule I as an appropriately temporary adjustment.

15. It is also not insignificant, as noted above, that there is broad support for a number of aspects of the proposed Schedule I from the employer organisations who do not support it *in toto*.

16. The Australian Retailers Association (ARA) agrees there is merit in providing more simplified arrangements for part-time employees (paragraph 15). It agrees that a flexible part-time arrangement will encourage employers to offer opportunity to work additional hours to part-time employees (paragraph 16). It agrees that more flexible part-time provisions will allow greater flexibility in employment, greater productivity and will reduce the regulatory burden (paragraph 17). It agrees that the implementation of flexible part-time provisions with appropriate employee protections will allow for opportunities for additional hours which did not previously exist (paragraph 18). It submits that the more flexible part-time provisions will assist in maintaining employment and the long term viability of retail businesses which "will directly contribute to some degree to the sustainability of the performance of a national economy" (paragraph 19).

17. The Ai Group (AiG) supports the inclusion of more flexible part-time provisions in the GRIA as it 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" (paragraph 16).

18. ABI and the NSWBC support varying the existing part-time provisions of the GRIA to enable part-time employees to work additional ordinary hours without attracting overtime rates of pay where such hours are voluntarily worked (paragraph 34).

19. While there is common ground to that extent, there is also opposition. Much of that set out in the written submissions filed in opposition to the joint applicants' application was focused on the timing of the hearing of the application which was fixed for Friday 5 March 2021. Those concerns were addressed by the adjournment of that hearing until Tuesday 16 March 2021.

20. However, there remain points of opposition to the joint application. These might be appropriately divided into substantive and technical objections.

Substantive Objections

21. The AiG submits that proposed Schedule I includes elements that the Commission could not be satisfied are necessary in the sense contemplated by s.138 (paragraph 28).

22. For the reasons already articulated, the SDA submits that this is not so. The position of the retail industry post COVID – especially the small business retail industry sector which predominates- is demonstrably in need of assistance. The short term flexibility which will result from the inclusion of Schedule I promotes the modern awards objective as explained in the SDA's earlier submissions.

23. The AiG also submit that the joint applicants' application does not provide sufficient flexibility. The AiG submits that an appropriate term would enable additional hours to be offered and worked on the basis of a standing agreement rather than a separate agreement on each occasion (paragraphs 33 and 34).

24. This is also a central feature of the ABI NSWBC proposal. It is opposed for the reasons set out below.

25. The AiG also opposes the application on the basis that it requires employees to be paid for additional hours they are not required to work, for example, if they take leave due to the operation of the NES or the GRIA. The AiG submits that this is a profoundly unfair outcome (paragraph 46).

26. It is not clear how it is said to be different from any other part-time employee who, in their contracted hours, has an absence due to the operation of the NES or the GRIA.

27. The AiG opposes the obligation to pay overtime for additional agreed hours unless specified conditions are met (paragraph 47).

28. This submission by the AiG is submitted, with respect, to misunderstand how Schedule I will work. The clause complained of simply makes it clear that the ordinary Award position applies unless the matters set out have been complied with. It is a convenient checklist that enables employers and employees to ensure that any additional hours agreement is valid.

29. The AiG also opposes the right of an employee to request a permanent increase of his or her hours of work (paragraphs 48-55). The basis of this opposition, set out in paragraph 50, is that it is unfair to subject an employer to enforcement proceedings if it wrongly considers that it has reasonable business grounds for refusing the request. The AiG also opposes the six month trigger for the additional hours conversion. It is noted that the joint employers' proposal now includes a right to request a permanent increase, but after twelve months, not six.

30. It is submitted that neither objection is well made. The six month time frame is fair. Additional hours agreements are supposed to be temporary. Employees should be entitled to certainty of a more permanent alteration in their employment position after a reasonable period of time.

31. Using reasonable business grounds as a standard for determining whether an employee's hours should be made contractually permanent is neither unfair nor unusual. The expression is used in a similar context in ss.65(5) and 76(4) of the *Fair Work Act.* Moreover, the fear of prosecution for a contravention is misplaced. Any dispute would almost certainly be resolved through arbitration by the Commission rather than by a costly and lengthy court proceeding.

32. The RAFFWU Inc in a submission dated 4 March 2021 opposed any introduction or flexibility to the Award even in the circumstances of the COVID-19 pandemic.

33. Obviously the weight of submissions from all the major participants in the retail industry (both employer and employee representatives) is against this failure by RAFFWU Inc to recognise (or perhaps understand) the real challenges currently

facing the retail industry which impact upon both employer and employee alike. The SDA recognises that some temporary flexibility is needed to deal with the COVID 19 challenges.

34. The ABI and NSWBC oppose the changes because they submit they add substantial complexity to the GRIA and will be deleterious to business, in particular by disincentivising the granting of additional hours (paragraph 38).

35. It is submitted that neither of those contentions is well made. Schedule I facilitates the granting of additional hours. The ABI and NSWBC complaint is that the protections introduced for employees are complex. They are not. They are consistent with numerous other provisions in modern awards ensuring that agreements are genuinely made and recorded (e.g. cl. 15.8 and 28.9 of the GRIA).

Drafting and technical objections

36. These may be summarised as follows. Each of the NRA, the ARA and ABI/NSWBC have raised a concern about the interaction between Schedule I and the existing provisions of the GRIA. This has now been clarified by the introduction of a note to cl.I.2 stating that the provisions of cl.10.5 apply to additional hours agreements.

37. The NRA and RAFFWU Inc raise a concern about any agreement for additional hours only being terminable by mutual agreement.

38. This balances the parties' interests providing certainty on both sides. On the assumption (which underpins the proposed inclusion of Schedule I) that the employee willingly agrees to work additional hours, providing for a right to terminate the arrangement by mutual agreement and not unilaterally at the election of the employer offers advantage to the employee seeking to maintain the agreed arrangement.

39. A new addition to cl.I.4 makes it clear that any agreement to terminate must not be unreasonably withheld. This strikes a fair balance between the parties' needs for certainty and flexibility in the present circumstances.

40. The NRA raises an issue that the additional hours agreement can only be of its nature a temporary arrangement given the overarching temporary operation of Schedule I itself (paragraph 2.8). This is said to sit uncomfortably with the fact that an employee may request that the hours be made permanent after six months.

41. This is a tendentious point. Of course, all additional hours agreements are temporary since the Schedule's proposed operation is limited. However, during its operation, for the reasons set out above, an employee ought to be able to secure a permanent change to contracted hours if there is no good business reason why he or she should not.

42. ARA also raise the question of whether an agreement for additional hours is temporary or permanent (paragraph 21). In this context it suggests that it is unclear whether an employee will return to his or her originally agreed contracted hours at the end of the operation of the Schedule.

43. The short response is that all agreements will have an end date coinciding with the end of the operation of the Schedule (or earlier if agreed). Thus, unless the hours have become permanent or the employer and employee agree to make them so, an employee will revert to his or her cl.10.5 agreed hours at the expiry of the Schedule. A new cl.I.13 makes this clear by providing that an additional hours agreement cannot have an end date more than six months beyond the life of Schedule I.

44. The AI Group suggests that the proposed Schedule fails to clarify whether the entitlement to payment for additional hours at the employee's ordinary rate of pay requires payment of various allowances, penalties or loadings contemplated by the GRIA for working the additional hours at particular times (paragraphs 40-44).

45. The short reply is that, on its terms, Schedule I only operates to relieve employers of the obligation to pay overtime. All other award entitlements and obligations continue to operate and apply.

The ABI/NSWBC alternative proposal

46. As noted above, there are significant differences between the ABI/NSWBC alternative and the joint proposal by the applicants. These are:

- The ABI/NSWBC alternative involves a permanent and enduring change to the nature of part-time employment under the GRIA. It is not temporary, it is not contended to be related to the COVID-19 pandemic. It is a permanent change in relation to how part-time employees' terms and conditions of employment are to be governed and regulated. As such it would effect a wholesale change to the nature of part-time work under the GRIA.

- The wide-ranging effects of that change are magnified by the lack of any requirement that an employee have a minimum number of set hours before an availability agreement can be made. The joint applicants' proposal requires that a part-time employee have nine rostered hours before an additional hours agreement can be made.

- The ABI/NSWBC proposal also seeks to introduce the contentious and problematic concept of a standing written agreement by which an employee can provisionally be asked to accept future days of the week and hours of those days during which they will be available to work additional hours. It is proposed that such a standing agreement could be recorded in writing, through an exchange of text messages, emails or via other electronic means.

- A standing written agreement will entitle the employer to roster any voluntary additional hours to the employee (proposed clause 10.11(b). Where an employee has agreed to work additional hours he or she cannot withdraw from that agreement until the next roster period (c.10.11(e)). Otherwise there is a right to refuse additional hours, but the draft clause is silent on how this is done.

- An employee is entitled to request an increase to the regular pattern of work after 12 months, as opposed to the six month period proposed by the joint application and an employer can only refuse such a request on reasonable business grounds.

- There is now provision for arbitration of any disputes between the employer and the employee excluding the question of whether an employer has reasonable business grounds for refusing to make an employee's additional hours permanent.

- Finally, the joint employers' draft Determination proposes to amend cl.10.6 by removing the reference there to the "regular pattern" of part time employment This effects a significant change to what is an important characteristic of such employment.,

47. It is obvious that the ABI/NSWBC proposal (now apparently with broader employer support) provides much more limited protection to employees than the joint applicants' proposal.

48. But more significantly, it would bring about a major change to the way part-time employment is structured. Because it is permanent, it creates a situation only one step removed from wholly objectionable zero hours contracts.

49. The employers have now introduced a term (cl.10.11(f)) which would prohibit an employer requiring an employee to make a standing agreement as a condition of offering employment or having such an agreement signed "concurrently" with an offer of employment.

50. This provides little if any protection to prospective employees. It would be a simple matter for an employer to engage an employee for the award minimum of three hours per week but make clear that if the prospective employee offered to enter into a standing agreement, additional hours would likely be offered. What real choice does the suppliant for part-time employment have in those circumstances?

51. The joint application, by contrast, requires that additional hours be specified. It is true that a scenario similar to that outlined above could occur. But the outcome for the employee would be set, predictable additional hours, not the opportunity to be offered such hours if the employer decides to do so.

52. In other words, under the joint employers' proposal, applicants for employment could be placed in a position where, in order to obtain a job, they have to agree to a minimal number of fixed hours, whilst at the same time making themselves available for a large number of additional hours at ordinary time rates. Those hours would not be guaranteed, but the employees would effectively remain on-call. It is easy to provide (as the proposal does) that employees in some way might refuse hours, but in the real world the bargaining positions are such that this will often be difficult. The ABI/NSWBC proposal offers no safeguards against this misuse of negotiating strength between the parties.

53. The proposal by ABI/ NSWBC and those who support it is nothing more than an invitation to increase the insecurity of part-time work and to take the retail industry back to the type of employment which prevailed in the 19th and early 20th centuries. This is not a helpful response to the impact on the sector of the pandemic emergency. It is particularly regrettable that it has arisen and is pressed in proceedings initiated jointly by unions and employers seeking to provide some flexibility to assist with recovery from the pandemic.

54. Turning to the detail of the proposal, a significant defect is the lack of any arbitration in relation to any disputes over conversion of regular additional hours to permanent hours. It is all very well for an employee to be able to request that his or her additional hours be made permanent after twelve months and for an employer only to be able to refuse such a request on reasonable business grounds. But the right is meaningless in the absence of any ability to enforce it. When dealing with the low-paid entry level employee who is typically representative of the employees covered by the GRIA, and particularly part-time employees, it is not realistic to suggest that such an employee will commence proceedings in the Court to compel compliance with an obligation subsequently resisted by the employer. Conciliation under the dispute resolution provisions of the GRIA will not assist in the face of the employer who does not wish to compromise or agree.

55. The standing authorisation is also problematic. It would appear to override the protections afforded to employees in rostering by cl.15. Employees cannot refuse hours once rostered for that roster cycle. However, part-time employees often have other commitments, whether family responsibilities, study commitments or even in relation to other part-time jobs.

56. It can readily be anticipated that an underemployed part-time worker will try to be available for as many hours as possible to increase his or her income. But commitments might arise, which were unknown at the time of the standing authorisation, which prevent working on some days normally available. The ABI/NSWBC (and other employer) proposal creates a situation where an employee can be required to work, at least for one roster cycle despite what may be a temporary change to circumstances.

57. It is also not beyond the realm of possibility that an employee will signify availability to more than one employer for the same hours in the hope of maximising his or her employment. What happens when both employers roster for the same time?

58. The proposal just goes too far one way by giving employers a free hand to roster without any consultation.

59. Both the MGA and the COSBOA see the sense in the protections offered in the joint application. That should weigh heavily in the Commission's thinking as to whether or not to accede to what is in effect a wholesale change to part-time employment involving a de facto imposition of casual employment at ordinary time rates.

60. As to the University of Wollongong Report, it does not advance the joint employers' case. It apparently started off as an enquiry into the use of casual employees in a different industry. An attempt has since been made to use the data obtained to answer questions about the GRIA.

61. The focus groups whose views are discussed in Section 3 are small and hardly representative of anything. Insofar as they express views, they may be summarised as "employers would prefer more flexibility".

62. The number of responses to the survey (79) is vanishingly small. We are not told how many surveys were distributed. Nor are we told what questions were asked. The answers given seem to focus on casual employment (unsurprising given that that was the purpose of the survey in the beginning).

63. The best you can make of all of this is that some employers prefer casuals because of the flexibility. Further, if they could have flexibility without the costs of casual rates, they would prefer that. The conclusions are hardly revelatory.

64. How any of this can support change in view of the modern awards objective is unclear.

65. There has been no attempt by ABI and NSWBC to justify the necessity of the wholesale change that they seek to be made on a permanent basis. it is nothing more than an opportunistic attempt to use the raising of these matters by the Minister in the context of the COVID-19 pandemic to wreak a fundamental realignment of the entitlements of vulnerable part-time employees in this industry.

66. Finally, it should be noted that the FWC undertook an extensive review of Awards commencing in 2014 (AM2014/196). There was a Full bench established to look at issues concerning part-time and casual employees that engaged extensively with this subject matter for several years. No concerns were raised in that process by the employers over the existing part-time clause in GRIA and additional hours. Further, in the specific 2014 review of GRIA, again, no case was put seeking change.

67. For the foregoing reasons the proposal in the joint application should, with necessary modifications, be adopted. ABI/NSWBC's alternative proposal for a permanent change should be rejected.

Dated: 16 March 2021

W L Friend QC

Counsel for the SDA

A J MACKEN & CO.

Solicitors for the SDA

Attachment A

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

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT ASBURY
COMMISSIONER HAMPTON Melbourne, DD MM 2021

S157 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 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.

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.

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 parties to an additional hours agreement may, by mutual agreement, terminate the agreement with 24 hours' notice. Such agreement will not be unreasonably withheld.

NOTE: Terminating an additional hours agreement will be an agreement to mutually change a roster to exclude the increased rostered hours.

I.5 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.

I.6 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.

Review of number of hours

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.

I.8 The employer must respond in writing to the employee's request within 21 days.

I.9 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.10 Before refusing a request made under clause I.7, 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.11 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.

Other Provisions

I.12 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 clauses I.8-I10 can be dealt with under clause I.12. 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.10, or whether the employer responded in writing to the request as required under clauses I.8 , I.9 and I.11."

I.13 An Additional hours agreement may, when made, have an end date up to six months beyond the life of this schedule. The provisions of this Schedule continue to apply to it during such extended period.

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

PRESIDING MEMBER