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Subject: Re: AM2021/7 - Award Flexibility - General Retail Industry Award 2010 - Report to the Full Bench - Commissioner Hampton

Award Flexibility – General Retail Industry Award 2020 – AM2021/7) – Application to vary the GRIA re Part-time employment

Dear Associate,

We refer to the above matter and to the Further Report prepared by Commissioner Hampton and recently distributed to interested parties

Commissioner Hampton's Report summarises the position of parties in relation to questions posed by the Full Bench, including relevantly in relation to the extent to which clause 15 of the GRIA which deals with arrangements as between employers and employees in relation to rosters interacts with clause 10.6 of the GRIA which permits variations to contract hours for part-time employees.

The position of the SDA in relation to the question posed by the Full Bench is summarised in paragraph [22] of Commissioner Hampton's report.

Since the receipt of that Report, the SDA has become aware of consideration by the Commission in relation to how similar roster provisions interact with similar variation provisions in another Modern Award.

The relevant decision is **Re Leading Age Services Australia NSW – ACT –** [2014] FWCFB 129, Hatcher VP, Sams DP and Roberts C.

The consideration by the Commission in relation to how clause 10.3(c) of the Aged Care Award 2010 (ACA) (the equivalent to clause 10.6 of the GRIA) was intended to interact with clause 22.6(c) of the ACA (the equivalent to clause 15.9 (and, to some extent, clause 10.10) of the GRIA) is contained within paragraphs [18]-[30] of that decision. Those paragraphs reference in support of conclusions reached earlier Full Bench authority in TWU -v- Qantas Airways Limited [2008] AIRCFB 1198.

The conclusion there reached by the Commission (at [18])is that the clause 15.9 GRIA counterpart in the ACA does not permit, and was not intended to permit, the employer to make unilateral changes

in respect of any changes otherwise permitted by the counterpart provision to clause 10.6 GRIA for part-time employees by use of any right to change a roster on the provision of the requisite notice.

The SDA has already identified in its submissions to the Full Bench unquestionable tension between clause 10.6 and 10.10 (a). An overarching issue for the Full Bench in the present proceeding is whether a unilateral roster change on its face sanctioned by reference to either clause 10.10(a) or clause 15 of the GRIA should be permitted to undermine operative protections in relation to clause 10.6 variations which are required to be underpinned by agreement. These authorities would suggest that there was no such intention in terms of similar rights formulated in respect of other Modern Awards.

Obviously, the industry sectors are materially different but the Commission may be nonetheless assisted, ahead of any resumed hearings, to have its attention and the attention of the interested parties drawn to earlier consideration by a Full Bench of similar concerns raised in relation to how two similar provisions are and were intended to interact with each other.

For convenience, pdf copies of the referenced Full Bench decisions are included with this email communication.

Yours sincerely,

A J MACKEN & CO.