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**Sent:** Monday, 14 October 2019 4:31 PM  
**To:** Chambers - Ross J <[Chambers.Ross.j@fwc.gov.au](mailto:Chambers.Ross.j@fwc.gov.au)>  
**Cc:** [Julian.Arndt@ablawyers.com.au](mailto:Julian.Arndt@ablawyers.com.au); Nick Tindley <[nrt@fcbgroup.com.au](mailto:nrt@fcbgroup.com.au)>  
**Subject:** AM 2017/60

Dear Associate

In the hearing on the 8<sup>th</sup> October 2019, the Commission requested the SDA provide its application made in 2009 in respect to junior rates. Attached is the application to vary that was filed (AM2009/77).

The application seeks a number of variations, the first variation is the relevant one.

The application at Annexure A stated:

1. Vary clause 18, so that the words before the table read as follows:  
“Junior employees, employed as a Retail Employee Level 1, 2 or 3, will be paid the following percentage of the appropriate wage rate in clause 17:”

In the General Retail Industry Award (GRIA) the Retail Employee Level 4 is where the trades classification sits.

Kind Regards

Sue-Anne Burnley  
National Industrial Officer



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**THE UNION FOR WORKERS IN RETAIL . FAST FOOD. WAREHOUSING.**

# Form R59

Rule 5 of the *Australian Industrial Relations Commission Rules*

*Workplace Relations Act 1996*

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

## APPLICATION TO VARY A MODERN AWARD

(Section 576H of the Act)

### Applicant

Name:	Shop Distributive and Allied Employee's Association			
Address	6 <sup>th</sup> Floor 53 Queen St, Melbourne, 3000			
Contact Person:	John Ryan			
	<i>[also include the name of any firm of solicitors or agent acting for the applicant]</i>			
Phone No:	03 86117000			
Facsimile No:	03 86117099	Mobile No:	0410524589	
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### Provision under which application is made:

Section 576H of the Act (as preserved under Part 2, Schedule 5 of the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009)

### Relevant industrial instrument(s) (if any):

General Retail Industry Award 20210

### Order or relief sought:

That the General Retail Industry Award 2010 be varied in the terms as set out in Annexure A.

### Grounds upon which the applicants rely:

The proposed variation is consistent with the Consolidated Award Modernisation Request issued by the Minister that governs the making and variation of modern awards.

### Variation 1 - Clause 18 Junior Rates

Junior percentages should not apply to tradespersons and above rates. A person who is a tradesperson should not be paid less than the full trade rate. As the clause currently stands, tradespeople and higher qualified persons could be paid a lower rate if they are aged 20 or under. The variation seeks to limit the payment of junior rates to persons employed at below the tradesperson level.

The justification for junior rates is that they constitute an age based discounted rate on the skill based rate to take account of the lack of work experience, skill and maturity of junior workers. Employees employed at the level of tradesperson or higher are working at such levels of skill and responsibility that age based discounted wage rates are no longer appropriate.

### **Variation 2 - Clause 20.3 Excess Travelling Costs**

The limitation in the current clause of 3 weeks will create problems when a temporary transfer is longer e.g. 4 weeks to cover annual leave. The phrase “*for a period not exceeding three weeks*” should be deleted. This will allow employees, who are directed to work for an extended period on a temporary basis, to receive payment of the allowance.

### **Variation 3 – 20.8 Cold Work Disability**

The provision, as applied currently, is cumulative, that is, the allowance in 20.8(b) is paid if the allowance in 20.8(a) is paid.

In the past, with similar wording in transitional award based instruments, there has on occasions been confusion over the cumulative effect of the allowances. In order to avoid any confusion about the proper operation of the allowances 20.8(b) should be reworded to read:

*“An employee required to work in a cold chamber where the temperature is below 0°C will in addition to the allowance in 20.8(a) also be paid an additional allowance per hour, while so employed, of 2% of the standard rate.”*

### **Variations 4 and 5 - Clause 27**

Currently clause 27 covers both the 38 week for full-time employees and rostering provisions for all employees but has a heading which is limited. The 38 hour week provisions spanning sub-clauses 27.1 to 27.8 only apply to full time employees and as a discrete group should comprise a stand alone clause with a heading which identifies this. The rest of the clause provides rostering provisions for all employees and these provisions should be found in a separate clause.

Variation 4 seeks to rename clause 27.

Variation 5 seeks to split the existing clause 27 into 2 new clauses, appropriately name the new clause 28 and to renumber all subsequent clauses.

The effect of the variations is that they will ensure that employers and employees can easily find the rostering provisions. By splitting clause 27 and renaming both clause 27 and the new clause 28 it will be clear from the Table of Contents at the

commencement of the award that there is a Rostering Principles clause. This clarity is absent from the present structure of the award.

#### **Variation 6 - Clause 28.4(d)**

The current wording of clause 28.4 lists three ways of receiving the benefit for working on a public holiday.

For a casual employee only the payment of the public holiday penalty is appropriate as they are not given annual leave, nor are they guaranteed further work due to the fact they are casual.

For permanent employees, the possibility of three different forms of compensation is a major departure from existing entitlements. Most existing instruments only provide a single entitlement and that is to be paid double time and a half for working on the day.

The SDA would prefer that 28.4(d)(ii) and (iii) be deleted, leaving only 28.4(d)(i) as the only method of compensation for work on a public holiday. The method of compensation provided in clause 28.4(d)(i) is the simplest method of compensation for all employees; i.e. everyone who works on a public holiday gets paid the public holiday rate. Payment for work on a public holiday at the public holiday penalty rate is also the preferred method of compensation for employees as well as being the easiest method for employers to administer.

#### **Variation 7 - Clause 30 Breaks**

Clause 30.1(f) allows the Individual Flexibility clause to be used in relation to all aspects of the entitlement to rest and meal breaks. The capacity to make an Individual Flexibility Agreement should be limited as the length of rest pauses should not be shortened nor should meal breaks be less than 30 minutes, nor should rest breaks be unpaid.

Unbridled use of Individual Flexibility Agreements in relation to the length of rest and meal breaks would see employees agreeing to work for long hours without any break. Such an outcome would undermine the essential safety net entitlement of the clause and would also have adverse implications for the employer, other employees and members of the public in relation to such issues as OHS, discriminatory rostering, etc.

Individual Flexibility is more appropriate in relation to the timing of the taking of rest and meal breaks.

The variations proposed clarify the limits on the use of Individual Flexibility Agreements.

#### **Variation 8 - Clause 31.3(i)**

The current structure of the provision in relation to annual leave loading for non shift workers provides either the 17.5% loading or the payment of weekend penalties, whichever is the higher. However in the retail industry the key loadings and penalties for ordinary hours of work include both weekend penalties and loadings and evening penalties and loadings. The absence of any mention of evening penalties and loadings in clause 31.3(i) means that persons who work most of their hours in the evenings

would receive an annual leave loading which would be lower than the loading on their ordinary hours of work. Reference to “weekend” penalties and loadings needs to be replaced with a reference to any penalty or loading which applies to ordinary hours of work. This broader reference then clearly includes both weekend penalties and loadings and evening penalties and loadings. As currently structured the clause has the effect of providing a lower rate of pay on periods of annual leave for workers who work predominantly on evenings. The inclusion of evening penalties is consistent with the approach that weekend or shiftwork penalties and loadings are to be considered when applying the annual leave loading provision.

#### **Variation 9 - Clause 31.5(b)**

Clause 31.5(b) will operate so that if an employee has accrued an entitlement to more than 8 weeks annual leave then the employee can be required by the employer to take all of their annual leave simply by the employer giving the employee 4 weeks notice. The provision is unreasonable as it permits the employee to accrue 8 weeks of annual leave without constraint but as soon as the employee’s entitlement exceeds 8 weeks then the employer can force the employee to take all of their accrued annual leave at the one time.

Management of annual leave is desirable, but, as the NES explicitly recognises, the forced taking of annual leave must be reasonable in the particular circumstances where an employer is being given the right to force employees to take annual leave.

The current provision in clause 31.5(b) is unreasonable where the only circumstance which triggers the right of the employer to force the employee to use all of their annual leave is that the employee has accrued more than 8 weeks annual leave.

The real difficulty with the current provision is that as annual leave is accrued progressively from month to month then this provision can be invoked by the employer one month after the employee has accrued 8 weeks annual leave.

The removal of existing clause 31.5(b) remedies an obvious injustice within the annual leave clause.

#### **Variation 10 – Clause 32 Compassionate Leave**

The current clause 32 refers to the NES but provides no additional entitlements. Other Modern Awards have reflected the fact that existing award based instruments provide better than the NES entitlement to 2 days paid leave on the death of a family member or member of the employees household. Key retail awards provide for a 3 day entitlement.

The variation seeks to ensure that the entitlement to 3 days paid leave on the death of a member of the employees immediate family or household is retained.

#### **Variation 11 - Clause 33 Public Holidays**

Transitional award based instruments in the retail industry provide for work on public holidays to be voluntary.

Whilst this has not been explicitly stated in the language used in the transitional award based instruments the structure and wording of the Public holidays clause has always been accepted as meaning that work on public holidays was voluntary.

The traditional wording of the public holiday clauses did not need to explicitly state that work on a public holiday was voluntary as the very right created by the public holiday clause was that an employee had the right not to attend work on a public holiday and that the employee would be paid for the day.

The lack of any specific wording that work on a public holiday was voluntary also reflects the fact that the level of casualisation is high in retail, and work for casuals on a Public Holiday can only ever be voluntary as a direct consequence of the nature of casual employment..

The only time that that there was any consideration that work on public holiday would be other than voluntary was with the introduction of Work Choices which created a limited statutory entitlement to public holidays and which created a statutory right for employers to request employees work on a public holiday and that employees who had received such a request could only refuse the request in circumstances where their refusal was reasonable. The statutory provisions of Work Choices did not provide an exclusive regime for dealing with public holidays as both awards and agreements under the Work Choices legislation could also provide public holiday rights and entitlements for employees.

Whilst the Fair Work Act has provided a minimum statutory entitlement to public holidays which is similar to that in Work Choices the minimum statutory entitlement can be improved upon in awards and agreements.

Whilst both Work Choices and the Fair Work Act have provided a minimum statutory entitlement to public holidays which is less than the minimum safety net entitlements determined by the Commission the minimum statutory entitlements were never intended to be an exclusive code and were never intended to operate to reduce existing award entitlements.

The variation seeks to put beyond doubt the long standing right of permanent retail workers to voluntary work on public holidays. The right of permanent employees to voluntary work on public holidays has never impacted on employers ability to open and operate on public holidays as the rate of pay for public holiday work ensures that there are always some employees who will volunteer to work the highly unsociable hours of a public holiday.

### **Variation 12 – Clause 33 Public holidays**

The variations sought restore two important protections for retail workers in relation to public holidays.

Firstly, existing retail awards provide an additional payment for work performed on Christmas Day the 25<sup>th</sup> December even where the public holiday has been substituted to the following Monday. The effect of substitution of Christmas Day by statutory provisions is that it renders Christmas Day an ordinary working day. The purpose of substitution of Christmas Day is to ensure that the standard Monday to Friday workers

get a real public holiday benefit for Christmas Day when it falls on a weekend. However unless State or Territory legislation prevents retailers from opening on the actual Christmas Day it will be an ordinary trading day. Full Benches of the Commission have previously recognised the need for a special provision for retail workers who may be rostered to work on the actual Christmas Day when the public holiday for Christmas Day has been statutorily substituted to the following Monday.

The second issue is the non-working day provision that was a standard in the Federal Retail Awards and in most State NAPSAS. These provisions have now appeared in other modern awards and should be placed back into the retail award. Many employees do not work a standard Monday-Friday roster with common rosters of Tuesday to Saturday occurring.

The standard in the Victorian Shops Award and ACT Retail Award reflected outcomes from the Public Holiday Test Case. These have been beneficial to the industry in providing fairness and equity in applying Public Holidays. The majority of employees in retail will not be defined as shift workers, even though they do work 7 days a week, so are not entitled to a 5<sup>th</sup> week of annual leave. They should not be denied their public holiday benefit. The variation seeks to insert a new clause 33.5 to redress this issue.

#### **Variation 13 – Clause 34 Jury Service**

Award protection for retail employees who undertake jury service has been a feature of retail awards. Other Modern Awards have included a provision providing for the payment of jury service.

The variation seeks to include an existing retail award entitlement into the Modern Award. For the sake of consistency the variation reflects the language used by the Full Bench in clause 43.2 of the Manufacturing Modern Award.

#### **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.

The Minister amended the Award Modernisation Request on 26 August 2009 to include the following new 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.”

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.

Dated 5 November 2009 .

A handwritten signature in black ink, appearing to read 'I Blandthorn', with a stylized, cursive script.

Ian Blandthorn

National Assistant Secretary

## Annexure A

### Variations to the General Retail Industry Award 2010

1. Vary clause 18, so that the words before the table read as follows:  
“Junior employees, employed as a Retail Employee Level 1, 2 or 3, will be paid the following percentage of the appropriate wage rate in clause 17:”
2. Vary clause 20.3 by deleting the words “for a period not exceeding three weeks”.
3. Vary clause 20.8(b) to read as follows:  
“An employee required to work in a cold chamber where the temperature is below 0°C will also be paid an additional allowance per hour, while so employed, of 2% of the standard rate.”
4. Vary the heading of clause 27 to read as, “Method of Working 38 Hour Week for Full Time Employees”
5. Vary clause 27 by deleting clauses 27.9 to 27.14, inclusive and renumbering them as Clause 28.1 to 28.6 inclusive, and by inserting a heading for new clause 28 as follows: “Rostering Principles”, and by renumbering all subsequent clauses.
6. Vary existing clause 28.4(d) to read as follows:  
“Work on a public holiday must be paid for at the rate of 250% of the ordinary time rate of pay.”
7. Vary clause 30.1(f) by adding the following words:  
“Provided that an individual flexibility agreement may not reduce the minimum length of either a rest or meal break, nor remove or reduce the payment for rest breaks.”
8. Vary clause 31.3(b)(i) by deleting the word “weekend” and inserting in lieu thereof the words “ordinary time”.
9. Vary clause 31.5 to read as follows:  
“An employer may require an employee to take annual leave by giving at least four weeks’ notice as part of a close-down of its operations.”
10. Vary clause 32 by adding a new sub clause 32.4 as follows:  
“32.4. A full-time or part-time employee is entitled, in addition to the provisions of the NES, to an additional day of paid compassionate leave for each occasion that a member of the employee’s immediate family or a member of the employees household dies.”
11. Vary clause 33 by adding a new clause 33.3 as follows:  
“33.3. Work on a public holiday is voluntary.”
12. Vary clause 33 by adding the following new sub clauses:

#### **33.4. Work on Christmas Day**

In the case of Christmas Day where substitution occurs, work on 25 December will attract an additional loading of half a normal day's wage for a full day's work in addition to the Saturday/Sunday rate and the employee will also be entitled to the benefit of the substitute public holiday.

### **33.5. Holiday on a Rostered Day Off**

If a public holiday falls on an employee's rostered day off a full time employee, or a part time employee who works 5 days per week (or 6 days if they have so elected), shall be entitled to receive by mutual agreement:

- Another day off in lieu; or
- An equivalent day's pay; or
- One extra day added to his/her annual leave.

The days on which the employee is not rostered to work shall be deemed to be rostered days off.

13. Vary clause 34 by renumbering the existing sentence as 34.1 and inserting a new clause 34.2 as follows:

#### **“34.2. Reimbursement for jury service**

(a) A full-time employee required to attend for jury service during their ordinary hours of work must be reimbursed by the employer an amount equal to the difference between the amount paid to the employee in respect of the employee's attendance for such jury service and the wages the employee would have received in respect of the ordinary hours the employee would have worked had the employee not been on jury service.

(b) Where a part-time employee is required to attend for jury service and such attendance coincides with a day on which the employee would normally be required to work, payment must be made to the employee in accordance with clause 30.”

14. Vary clause 12 to read as follows:

## **12. Part-time employees**

12.1. A part-time employee is an employee who:

- (a) works less than 38 hours per week; and
- (b) has reasonably predictable hours of work.

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. 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 full-timers 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.

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 1/38<sup>th</sup> 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.*

#### 12.9. Rosters

- (c) A part-time employee's roster, but not the agreed number of hours, may be altered by the giving of notice in writing of seven days or in the case of an emergency, 48 hours, by the employer to the employee.
- (d) The rostered hours of part-time employees may be altered at any time by mutual agreement between the employer and the employee.
- (e) Rosters will not be changed except as provided in clause 1.1(c) from week to week, or fortnight to fortnight, nor will they be changed to avoid any award entitlements.
- (f) Rosters may in accordance with clause 12.4 be used for the purposes of clauses 12.2 and 12.3 to record an agreed variation to work additional hours to a part-time employees agreed hours

#### 12.10. Award entitlements

A part-time employee will be entitled to payments in respect of annual leave, public holidays, sick leave and bereavement leave arising under the NES or this award on a proportionate basis. Subject to the provisions contained in this clause all other provisions of the award relevant to full-time employees will apply to part-time employees.

#### 12.11. Conversion of existing employees

No full-time or casual employee will be transferred by an employer to part-time employment without the written consent of the employee. Provided that where such transfer occurs all leave entitlements accrued will be deemed to be continuous. A full-time employee who requests part-time work and is given such work may revert to full-time employment on a specified future date by agreement with the employer and recorded in writing.

**12.12. Additional Hours as Casual hours**

*Nothing in this clause prevents a part-time employee who has worked their agreed hours from working any additional hours, which are not reasonably predictable, as a casual employee, subject to the provisions of this award.*

*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 afternoons cannot come into work that day. Mary advises Sue that instead of calling in one of the usual casuals Mary would like to offer Sue a casual shift from 1.30pm to 5.00pm, with 1.00pm to 1.30pm being a meal break, to cover Bill's absence. Sue accepts the offer of a casual shift for the afternoon and is paid the 25% casual loading for that afternoon work.*

(The words underlined and italicised and the Notes to the clause have been added)