

03 September 2021



Attention: Commissioner Bissett

By email to: chambers.bissett.c@fwc.gov.au

Subject: Application by Australian Payroll Association  
(AM2021/66)

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The following submission is made by The Newsagents Association of NSW and ACT Ltd on behalf of its members and members of the Australian Newsagents Federation Ltd (T/as Australian Lotteries and Newsagents Association) which are respondents to the General Retail Industry Award 2020.

In the Statement and Directions issued on 10 August 2020 Commissioner Bissett posed the following questions at [2]:

*[2] A number of issues arose at and from that mention:*

- (i) Does clause 11 (and cl 11.4 in particular) of the GRI Award contain any ambiguity or uncertainty or an error which may be resolved by a variation of the GRI Award pursuant to s.160 of the Fair Work Act 2009 (FW Act)?*
- (ii) If clause 11 has changed from the provisions of the 2010 Award, how did the variation arise and was it intended?*
- (iii) If the answer to (i) is yes, what is the ambiguity, uncertainty or error, how does it arise and how should the clause be varied to resolve the issue?*
- (iv) Does the Australian Payroll Association have standing, in accordance with s.160(2) of the FW Act to make an application under s.160 of the FW Act. If not, should the Commission vary the GRI Award on its own motion?*

The relevant sections of the minimum engagement requirements of the General Retail Industry Awards 2010 and 2020 are:

2010 Award

13.4 The minimum daily engagement of a casual is three hours, .....

### 2020 Award

- 11.4 An employer must pay a casual employee for a minimum of 3 hours' work, ....., on each occasion on which the casual employee is rostered to attend work even if the employee works for a shorter time.

Section 160 of the Fair Work Act provides:

### **FAIR WORK ACT 2009 - SECT 160**

#### **Variation of modern award to remove ambiguity or uncertainty or correct error**

- (1) The FWC may make a determination varying a modern award to remove an ambiguity or uncertainty or to correct an error.
- (2) The FWC may make the determination:
  - (a) on its own initiative; or
  - (b) on application by an employer, employee, organisation or outworker entity that is covered by the modern award; or
  - (c) on application by an organisation that is entitled to represent the industrial interests of one or more employers or employees that are covered by the modern award; or
  - (d) if the modern award includes outworker terms - on application by an organisation that is entitled to represent the industrial interests of one or more outworkers to whom the outworker terms relate.

### Responses to Questions Posed by Commissioner Bissett

#### Question [2] (i)

Clause 11.4 of the 2020 Award is not ambiguous; however, uncertainty surrounds the entitlements of casual employees who through their own choice absent themselves from work before the conclusion of the minimum 3 hours' work.

We submit the Commission is free to make a determination on its own motion under Section 160 (1) of the Fair Work Act 2009 to remove the uncertainty which we submit is attached the Clause 11.4 of the 2020 Award.

Question [2] (ii)

We understand the 2020 version of the Award was the result of substantial rewording and formatting of the 2010 Award arising from the plain language conversion process. We do not believe the plain language conversion process was designed to create new Award entitlements.

Whilst the plain language changes which resulted in the wording of Clause 11.4 of the 2020 Award should have been identified by and resolved by the parties prior to finalisation of the plain language version of the Award, that did not occur. We submit that more than likely this outcome is a non-intended consequence of the proceedings in the plain language conversion matter.

Question [2] (iii)

As to the reasons why an uncertainty may have arisen, see our submission in response to Question [2] (ii) above.

Proposed variation to Clause 11.4 of the General Retail Industry Award 2020

- 11.4 An employer must pay a casual employee for a minimum of 3 hours' work, or 1.5 hours' work in the circumstances set out in clause 11.5, on each occasion on which the casual employee is rostered to attend work **and works**, even if the employee, **other than through absencing themselves from work, is required by the employer to work** for a shorter time.

Question [2] (iv)

The Australian Payroll Association may not have standing, in accordance with s.160(2) of the FW Act to make an application under s.160 of the FW Act.

We submit that the Commission should vary the General Retail Industry Award 2020 on its own motion in accordance with s. 160(1) and (2) (a) of the FW Act.

Please contact the undersigned should further information be required.

We are available to participate in further conferences convened by the Commission to resolve these matters.



Ian Booth FSAE  
Chief Executive Officer