In the matter of:

Fair Work Act 2009
S157 – FWC may vary etc. modern awards if necessary to achieve modern awards objective

Award Flexibility – General Retail Industry Award 2020

(AM2021/7)

SUBMISSIONS ON BEHALF OF THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES ASSOCIATION (SDAEA)

1. In a Statement issued by the Full Bench of the Fair Work Commission issued 18 May 2021, the Full Bench has expressed provisional views and annexed a draft Determination.

2. The Full Bench has afforded an opportunity to interested parties to address the matters canvassed in its Statement with a stated intention to then finalise the applications on the papers.

3. The SDA makes the following observations and suggestions in relation to the draft Determination as published by the Full Bench.

   (A) In clause 10.5(a) as proposed, an employee and employer are required to agree on "the number of hours to be worked on each day of a week", defined relevantly as the "guaranteed hours". It is submitted that the clause as proposed is ambiguous or uncertain. It is not clear, for example, whether the clause invites a conclusion, or proceeds upon an assumption, that the same hours must be worked on each day. While this is clearly unintended, any potential for uncertainty may be readily resolved by inserting the word "particular" after the word "each" in the sub-paragraph. It is noted that paragraph [49] of the Full Bench's Statement itself articulates its understanding of Clause 10.5 in these terms.

   (B) The example given in relation to "Sonya" under clause 10.6 raises the possibility for potential ambiguity as well, or at least a lack of certainty in a particular employee's understanding of how clause 10.6 is intended to operate. It posits the case where an employer contacts an employee, Sonya, and asks her to vary her guaranteed hours on that day to work for two extra hours. What would appear to be intended is that those two additional hours would be at ordinary time rates. However it is not suggested in the example as given that the employer actually says to Sonya that she is being asked to agree to work at ordinary time rates. It is submitted that the example should make this clear. The employer should have to specify to the employee at the time of the request that the additional hours are to be at ordinary time rates. That is the clear intent of clause 10.6 and the changes there proposed. The SDAEA considers that to ensure that there is informed consent to such a proposal, the example should include the stipulation, say, by including the words "at ordinary time rates" after "2 extra hours" in line 3 of the example. Without these additional words it could be argued at a later time that the agreement was to work at overtime rates.

(C) Further the offer of additional hours should be clarified to ensure that it is only hours that comply with all the conditions of ordinary hours. It should not be a situation where additional hours are rightly overtime eg outside the span of hours, shifts longer than 9 or 11 hours etc. It should be clarified and specifically included that all the conditions of Clause 15 apply to additional hours, except for subclauses 15.6 and 15.9 (d), (e), (g) and (h).

(D) The roster change referred to in clause 10.10(a) should require 14 days' notice if there is disagreement. The SDAEA notes that this is the period that applies now under clause 15.9(e).

(E) Note 2 to clause 10.10 dealing with guaranteed hours should reference the particular days agreed in clause 10.5. To omit to do so may have the consequence that some employers may interpret the guarantee as applying only to the hours and not to the days on which they are agreed to be worked. Thus, for example:
"Note 2: An employee's guaranteed hours <u>including the days on which those guaranteed hours are agreed to be worked</u> can only be changed by agreement."

(F) Clause 15.9 as proposed should include a separate note that clause 35 provides for consultation about roster changes eg. NOTE 2: See clause 35 – Consultation in relation to roster changes."

(G) For clarity the notes which are in Clause 10.10 should be in one group at the end of Clause 10.10.

4. The suggested amendments above seek to anticipate aspects of the amendments proposed by the draft Determination which might, if and when operative, lead to continued uncertainty and ambiguity in their operation which it is submitted is best addressed now in the context of the Full Bench having identified uncertainty in the current operation of clause 10 of the GRIA which it proposes to address.

5. As to the provisional views expressed by the Full Bench in its Statement made on 18 May 2021 at paragraphs [17], [19]-[20], [27], [35], [39], [49]-[50], and [51] and subject to the observations and proposed amendments earlier made, the SDAEA formally submits as follows.

   (A) As to [17], the SDAEA supports the Full Bench's provisional view.
   (B) As to [19]-[20], the SDAEA supports the Full Bench's provisional view.
   (C) As to [27], the SDAEA does not support the Full Bench's provisional view. It is true that cl.10 already contains the type of inconsistency which existed in the Aged Care award and the TWU Qantas agreement. But the distinction relied upon by the Full Bench is a distinction without a difference. Part time employment is subject to agreement of days and hours at commencement. Changes are also subject to agreement. To say that notwithstanding those specific provisions change can be required without agreement preserves fundamental inconsistency. That inconsistency should be resolved in favour of preserving a part time employees right not to agree to a proposed change.
   (D) As to [35], the SDAEA supports the Full Bench's provisional view.

(E) As to [39], the SDAEA supports the Full Bench's provisional view.
(F) As to [49]-[50], the SDAEA supports the Full Bench's provisional view (subject to the further clarification proposed above in relation to Clause 10.5);;
(G) As to [51], the SDAEA accepts that, conditional upon it having satisfied itself on proper grounds that making a determination varying a modern award is necessary to achieve the modern awards objective and/or having identified ambiguity or uncertainty in the terms of a modern award, the Full Bench may act of its own motion (and independently of, and/or in conjunction with, separate applications by parties covered by the modern award) to make a determination varying the Award to ensure that it meets the modern awards objective and/or is not ambiguous or uncertain in its operation, as the case requires. Whether the provisional views reached by the Full Bench on all issues identified by the Full Bench in its Statement afford a proper jurisdictional foundation for the proposed exercise of such a power is a matter in respect of which the SDAEA reserves its rights.

6. The Full Bench has directed that the matter will be dealt with on the papers. In order to assist all parties, the SDA suggests that the Commission identify to the parties the further amendments proposed by interested parties which it provisionally considers ought be made and provide a further draft to the parties of the proposed clause incorporating those proposed suggestions in relation to which interested parties can be afforded an opportunity for final reply submissions. For the assistance of the Commission, the SDA has amended the Commission's Draft Determination to include the amendments addressed above which it contends should be incorporated into any Determination as made.

DATED: 31 May 2021

A J MACKEN & CO.
Solicitors for the SDAEA

ATTACHMENT A

DRAFT DETERMINATION

Fair Work Act 2009
s.157 – Variation of a modern award to meet the modern awards objective

Award flexibility–General Retail Industry Award 2020
(AM2021/7)

GENERAL RETAIL INDUSTRY AWARD 2020
[MA000004]

Retail industry

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT ASBURY
COMMISSIONER HAMPTON

MELBOURNE, XX DATE 2021

Industrial relations reform working groups – letter from Minister – award flexibility – joint application – part-time additional hours – General Retail Industry Award 2020.

A. Further to decision [[2021] FWCFB XXXX] issued by the Full Bench on XX DATE 2021, the above award is varied as follows:

1. By deleting clause 10 and inserting the following:

10. Part-time employees

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.

10.2 An employer may employ part-time employees in any classification defined in Schedule A—Classification Definitions.

10.3 This award applies to a part-time employee in the same way that it applies to a full-time employee except as otherwise expressly provided by this award.

10.4 A part-time employee is entitled to payments in respect of annual leave and personal/carer's leave on a proportionate basis.

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 on each particular day of the week (the **guaranteed hours**); and

(b) the times at which the employee will start and finish work each particular day; and

(c) when meal breaks may be taken and their duration.

NOTE: An agreement under clause 10.5 could be recorded in writing through an exchange of emails, text messages or by other electronic means.

10.6 Changes to regular pattern of work by agreement

(a) The employer and the employee may agree to vary the regular pattern of work agreed under clause 10.5 on a temporary or ongoing basis, with effect from a future date or time. Any such agreement must be recorded in writing:

(i) if the agreement is to vary the employee's regular pattern of work for a single rostered shift – before the end of the affected shift; and

(ii) otherwise – before the variation takes effect.

NOTE 1: An agreement under clause 10.6 could be recorded in writing through an exchange of emails, text messages or by other electronic means.

NOTE 2: An agreement under clause 10.6 cannot result in the employee working 38 or more ordinary hours per week.

EXAMPLE: Sonya's guaranteed hours include 5 hours work on Mondays. During a busy Monday shift, Sonya's employer sends Sonya a text message asking her to vary her guaranteed hours that day to work 2 extra hours at ordinary hours rate (including any penalty rates) . Sonya is happy to agree and replies by text message confirming that she agrees. The variation is agreed before Sonya works the extra 2 hours. Sonya's regular pattern of work has been temporarily varied under clause 10.6. She is not entitled to overtime rates for the additional 2 hours.

(b) Any change to the regular pattern of work and/or additional hours offered agreed under 10.6 must comply with Clause 15 except for subclauses 15.6 and 15.9 (d), (e), (g) and (h).

10.7 The employer must keep a copy of any agreement under clause 10.5, and any variation of it under clause 10.6, and, if requested by the employee, give another copy to the employee.

10.8 For any time worked in excess of their guaranteed hours, the part-time employee must be paid at the overtime rate specified in **Table 10—Overtime rates**.

10.9 The minimum daily engagement for a part-time employee is 3 consecutive hours.

10.10 Changes to regular pattern of work by employer

(i) An employee's regular pattern of work agreed under clause 10.5 or 10.6, other than the employee's guaranteed hours, may be changed by the employer giving the employee 7 days, or in an emergency 48 hours, written notice of the change.

(ii) . If the employee disagrees with the change proposed with 7 days notice, , the period of written notice of the change required to be given is extended to at least 14 days in total

(iii) The employer and employee may seek to resolve a dispute about a roster change in accordance with clause 36–Dispute resolution.

(iv) Clause 10.10(e) applies to a part-time employee whose roster is changed in a particular week for a one-off event that does not constitute an emergency and then reverts to the previous roster in the following week.

(v) The employer must pay the employee at the overtime rate specified in **Table 10– Overtime rates** for any extra time worked by the employee because of the roster change in clause 10.10(d).

Commented [FWC1]: This change is to make clear that an employee's guaranteed hours encompass the number of hours to be worked on each particular week day e.g 5 hours on a Monday, 6 hours on a Wednesday.

Commented [FWC2]: Inserted to make clear that agreements can be recorded electronically.

Commented [FWC3]: This could include variations to the employee's guaranteed hours and variations to the regular pattern of work which do not alter the employee's guaranteed hours. Variations which do not alter the employee's guaranteed hours could also currently be made under clause 10.10(b). For clarity on the circumstances in which a part-time employee's regular pattern of work can be changed, clause 10.10(b) has been deleted.

Commented [FWC4]: It is intended that the variation mut be agreed to before it takes effect, which could include an agreement made immediately before the variation takes effect.

If an employee is asked to agree to a variation after they have worked additional hours, the agreement would be of no effect and the employee would be entitled to be paid overtime for the additional hours worked.

Commented [FWC5]: Recognising that changes made under clause 10.6 may only be for a single shift, this change would reduce regulatory burden on employers. The obligation to keep a copy of the agreement would be retained.

Commented [FWC6]: This is linked to the discussion at para [41] of the statement and whether we are contemplating (unilateral) roster changes to the days of the week with the hours still being ordinary hours – provided they do not exceed the guaranteed hours (or 38).

Commented [FWC7R6]: The proposed change to 10.5 makes this clear.

Commented [FWC8]: This clause is intended to comprehensively deal with the circumstances in which an employer can unilaterally vary a part-time employee's regular pattern of work. Accordingly, we have deleted existing clause 10.10(b), which provides for mutually agreed changes to an employee's roster. Such changes could be agreed under clause 10.6.
For consistency, we have referred to the employee's 'regular pattern of work' rather than their 'roster'.

Commented [FWC13]: The intent is that clause 10 comprehensively deals with when changes to a part-time employee's roster may be made.

~~NOTE: Clause 15.7 contains additional rostering provisions. Clause 35 contains requirements to consult with employees about roster changes.~~

~~(i)~~(vi) However, the regular pattern of work of a part-time employee must not be changed from week to week or fortnight to fortnight or to avoid any award entitlements.

NOTE 1: See clause 27—Rostering restrictions for the rosters of shiftworkers.

NOTE 2: An employee's guaranteed hours can only be changed by agreement. See clause 10.6.

Commented [FWC9]: This note is intended to make clear the circumstances in which an employee's guaranteed hours can be changed, but it may not be needed as clause 10.8(a) already says 'other than the employee's guaranteed hours'.

NOTE 3: Clause 15.7 contains additional rostering provisions. Clause 35 contains requirements to consult with employees about roster changes.

10.11 Review of guaranteed hours

(i) If an employees' guaranteed hours are less than the ordinary hours that the employee has regularly worked in the previous 12 months, the employee may request in writing that the employer increase their guaranteed hours on an ongoing basis to reflect the hours regularly being worked.

(ii) An employee may only make a request under clause 10.11(a) once every 12 months.

(iii) The employer must respond in writing to the employee's request within 21 days.

(iv) The employer may refuse the request only on reasonable grounds.

EXAMPLE: Reasonable grounds to refuse the request may include the reason that the employee has regularly worked more ordinary hours than their guaranteed 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.

(v) Before refusing a request under clause 10.11(c), the employer must discuss the request with the employee and genuinely try to reach agreement on an increase to the employee's guaranteed hours that will give the employee more predictable hours of work and reasonably accommodate the employee's circumstances.

(vi) If the employer and employee agree on an increase to the employee's guaranteed hours, the employer's written response must record the agreed increase.

(vii) If the employer and employee do not reach agreement, the employer's written response must include details of the reasons for the refusal, including the ground or grounds for refusal and how the ground or grounds apply.

Commented [FWC10]: The wording of this clause draws on the wording of clause 6.3(b).

NOTE: If the employer and employee agree in writing to increase the employee's guaranteed hours, this will vary the agreement under clause 10.5.

(viii) The employer and employee may seek to resolve a dispute about a request under clause 10.11(a) in accordance with clause 36—Dispute resolution.

NOTE: 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 10.11(e), or whether the employer responded in writing to the request as required under clauses 10.11(c), (f) or (g).

2. By deleting clause 15.9 and inserting the following:

15.9 Notification of rosters

(a) The employer must ensure that the work roster is available to all employees, either exhibited on a notice board which is conveniently located at or near the workplace or through accessible electronic means.

(b) The roster must show for each employee:

(i) the number of ordinary hours to be worked by them each week; and

(ii) the days of the week on which they will work; and

(iii) the times at which they start and finish work.

(c) The employer must retain a copy of each completed work roster for at least 12 months and produce it, on request, for inspection to an authorised person.

(d) Due to unexpected operational requirements, the roster of an employee other than a part-time employee may be changed by mutual agreement by the employer and the employee at any time before the employee arrives for work.

NOTE: Clause 10.6 deals with when the roster of a part-time employee may be changed by mutual agreement.

(e) For employees other than part-time employees, the employer may make permanent roster changes at any time by giving the employee at least 7 days' written notice of the change. If the employee disagrees with the change, the period of written notice of the change required to be given is extended to at least 14 days in total.

NOTE: Clause 10.10 deals with when the roster of a part-time employee may be changed by their employer.

(f) The employer and employee may seek to resolve a dispute about a roster change in accordance with clause 36–Dispute resolution.

(g) Clause 15.9(h) applies to an employee other than a part-time employee whose roster is changed in a particular week for a one-off event that does not constitute an emergency and then reverts to the previous roster in the following week.

(h) The employer must pay the employee at the overtime rate specified in **Table 10–Overtime rates** for any extra time worked by the employee because of the roster change in clause 15.9(g).

(i) An employer must not change the roster of an employee with the intention of avoiding payment of shiftwork or penalty rates, loadings or other applicable benefits. If the employer does so, the employee must be paid any shiftwork or penalty rates, loadings or benefits as if the roster had not been changed.

NOTE: See clause 27 – Rostering restrictions for the rosters of shiftworkers.

Commented [FWC11]: The intent is that clause 10 comprehensively deals with when changes to a part-time employee's roster may be made.

Commented [FWC12]: The intent is that clause 10 comprehensively deals with when changes to a part-time employee's roster may be made.

Commented [FWC13]: The intent is that clause 10 comprehensively deals with when changes to a part-time employee's roster may be made.

B. This determination comes into effect on XX DATE 2021. In accordance with s.165(3) of the *Fair Work Act 2009* (Cth) this determination does not take effect in relation to a particular employee until the start of the employee's first full pay period that starts on or after XX DATE 2021.

PRESIDENT

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