Australian Industry Group

Application to vary the *General Retail Industry Award 2020*

Reply Submission

(AM2024/26 & AM2024/40)

21 February 2025

AM2024/26 & AM2024/40

APPLICATIONS TO VARY THE *GENERAL RETAIL INDUSTRY AWARD 2020*

1. INTRODUCTION

1. This submission of Australian Industry Group (**Ai Group**) is filed pursuant to direction [6] of the Further Amended Directions issued by the Fair Work Commission (**Commission**) on 19 September 2024 and is made in reply to:

   (a) Material filed by the Shop Distributive and Allied Employees' Association (**SDA**) in support of its application in AM2024/40, which seeks determinations varying clause A.6.2 and clause A.7.2 at Schedule A – Classification Definitions (**Schedule A**) of the *General Retail Industry Award 2020* (**GRIA**); and

   (b) Material filed by Mr. Anthony Hicks in support his application in AM2024/26, which seeks a determination varying clause A.8.3 of Schedule A of the GRIA.

2. Ai Group opposes each application. For the reasons advanced in this submission, the Commission should dismiss them both. While the determinations proposed in both applications affect Schedule A, the proposals are different and are addressed separately in this submission.

3. In this submission, references to the Act are references to the *Fair Work Act 2009* (Cth) unless stated otherwise.

2. REPLY TO THE APPLICATION IN AM2024/40

Background

4. The SDA commenced proceedings AM2024/40 by filing a *Form F46 – Application to make vary or revoke a modern award* dated 5 September 2024 (**SDA/F46**).

5. The changes sought by this application are set out at paragraph 2.4 (p.5/6) of SDA/F46. As to the substantive proposals, the applicant asks the Commission to vary Schedule A by:

   (a) Deleting clause A.6.2(c) which currently reads:

   'assistant or deputy or second in charge to a shop manager of a shop with departments or sections'

   (b) Relocating the existing content of A.6.2(c) to a new clause A.7.2(b) to read:

   'assistant or deputy or second in charge to a shop manager of a shop with departments or sections'

   (c) Inserting a new clause A.7.2.(c) to read:

   '*duty manager of a shop with departments or sections'*

6. The specific grounds relied upon to support these proposed changes are set out in eleven numbered sub-paragraphs at paragraph 2.5 (p.5/6) of SDA/F46. From the position conveyed by those grounds, the applicant relies principally upon s.157(1)(a), with s.160 relied upon for *'additional support'*.[1]

7. In addition to SDA/F46, the applicant has filed:

   (a) Written submissions dated 1 November 2024;

   (b) A witness statement of Adam Garraway dated 1 October 2024;

[1] See SDA/F46 at sub-para 11 at p.6/6 where the final sentence reads: '*To that extent, the variation sought in paragraph 2.4(2) above can be additionally supported pursuant to the FWC's powers under s160 of the Act, namely to remove (in this context, resolve) an ambiguity or uncertainty surrounding the appropriate Award classification of duty managers.'*

(c) A witness statement of Brigitt De Laine dated 1 November 2024;

(d) A witness statement of Tanya Smith dated 31 October 2024; and

(e) A witness statement of Blythe Ormesher dated 1 October 2024.

Relevant Provisions of the Act

Section 157(1)(a)

8. Section 157(1)(a) relevantly provides: (emphasis added)

> (1) The FWC may:
>
> (a) make a determination varying a modern award, otherwise than to vary modern award minimum wages or to vary a default fund term of the award; or
>
> …
>
> if the FWC is satisfied that making the determination or modern award is necessary to achieve the modern awards objective.

9. The Commission's power at s.157(1)(a) is discretionary and is qualified by the requirement that the Commission be satisfied that making the proposed variation is '*necessary*' to achieve the modern awards objective.

10. The applicant bears the onus for satisfying the Commission that its proposed variations are more than just desirable; and are '*necessary'* to achieve the modern awards objective.[2]

Section 160(1)

11. Section 160(1) provides: (emphasis added)

> The FWC may make a determination varying a modern award to remove an ambiguity or uncertainty or to correct an error.

[2] *National Retailers Association Ltd & Ors* [2010] FWA 5068 at [34].

12. Section 160(1) provides the Commission with a discretionary power to '*remove'* an ambiguity or uncertainty. Similar powers were available under previous legislation.[3] The following principles and considerations inform the approach to a claim under section 160(1):

    (a) The existence of an ambiguity or uncertainty is *'a necessary statutory prerequisite to any variation being made'*;[4]

    (b) The Commission must first ascertain whether ambiguity or uncertainty exist in the term(s) under consideration; if so, the Commission must then consider whether to remove the ambiguity or uncertainty;[5]

    (c) The identification of an ambiguity or uncertainty involves an objective assessment of the words used;[6]

    (d) The terms *'ambiguity'* and *'uncertainty'* are not synonymous, they are distinct terms;[7] and

    (e) Ambiguity exists where the term is capable of more than one meaning.[8]

[3] *Workplace Relations Act 1996* at section 554(1) provided: '*The Commission may, if it considers that an award or term of an award is ambiguous or uncertain, make an order varying the award so as to remove the ambiguity or uncertainty.'*

[4] *CoInvest Ltd v Visionstream Pty Ltd* (2004) 134 IR 43 at [46] cited in *Bianco Walling Pty Ltd v Construction Forestry Maritime Mining and Energy Union & Ors* [2020] FCAFC 50; 275 FCR 385 at [49].

[5] See *Bianco Walling Pty Ltd v Construction Forestry Maritime Mining and Energy Union & Ors* [2020] FCAFC 50; 275 FCR 385 at [49]; *CoInvest Ltd v Visionstream Pty Ltd* (2004) 134 IR 43 at [42] and [44]; *Re Australian and International Pilots Association* [2007] AIRC 303; 162 IR 121 at [16] - [17].

[6] *Beltana No.1 Salaried Staff Certified Agreement 2002-2004* [2002] AIRC 531 at [49] cited in *Bianco Walling Pty Ltd v Construction Forestry Maritime Mining and Energy Union & Ors* [2020] FCAFC 50; 275 FCR 385 at [70].

[7] *Bianco Walling Pty Ltd v Construction Forestry Maritime Mining and Energy Union & Ors* [2020] FCAFC 50; 275 FCR 385 at [73] - [75].

[8] *Bianco Walling Pty Ltd v Construction Forestry Maritime Mining and Energy Union & Ors* [2020] FCAFC 50; 275 FCR 385 at [67] citing *Printing and Kindred Industries Union v Davies Bros Ltd* (1986) 18 IR 444 at 449.

Relevant Terms of the GRIA

Clause 14 – Classifications

13. Clause 14 is the key operative provision of the GRIA with respect to classifications. Clause 14 is essential to any proper consideration of the classification scheme under the GRIA, as it sets out the required method for classifying employees.

14. Clause 14 provides:

> **14. Classifications**
>
> **14.1** An employer must classify an employee covered by this award in accordance with Schedule A —Classification Definitions.
>
> **14.2** The classification by the employer must be based on the skill level as determined by the employer that the employee is required to exercise in order to carry out the principal functions of the employment.
>
> **14.3** Employers must notify employees in writing of their classification and of any change to it.

15. Having regard to the clear terms of clause 14, Ai Group submits that each of the following conclusions is undoubtedly correct.

16. *First,* it is the employer who is responsible for classifying employees, because:

    (a) Clause 14.1 states that the employer '*must classify*' an employee;

    (b) Clause 14.2 is concerned with *'[t]he classification by the employer';* and

    (c) Clause 14.3 states that the employer '*must notify employees in writing of their classification'.*

17. *Second,* the act of classifying an employee is a decision by the employer informed by both the level of skill which the employer determines is required to carry out the employee's principal functions and by Schedule A. This is correct because:

(a) Clause 14.1 directs the employer to classify an employee '*in accordance with Schedule A - Classification Definitions';* and

(b) Clause 14.2 directs that classification by the employer *'must be based on the skill level as determined by the employer that the employee is required to exercise to carry out the principal functions of the employment.*'

18. *Third**,*** the employer's decision on a classification must be compatible with Schedule A. This is correct because clause 14.1 connects clause 14 with Schedule A through the requirement that the employer classify an employee '*in accordance with'* Schedule A.

19. *Fourth,* to determine the appropriate classification, the employer must have regard to the skills required for the employee to perform the employee's principal functions. This is correct because clause 14.2 requires that the employer determine the classification level based on '*the skill level*' which the employee is '*required to exercise*' to carry out the '*principal functions of the employment*'.

20. *Fifth,* there is no particular significance attributed to an employee's job title. This is correct because there is no mention of job titles at clause 14.

21. The result of the methodology described at clause 14 is that actual skills are to be taken into account by the employer in the classification task. Clause 14 does not require that regard be had to the employee's job title.

22. As noted above, clause 14 connects with Schedule A through clause 14.1, which requires that the employer classify an employee '*in accordance with'* Schedule A. Accordingly, Schedule A has a significant role within the classification scheme. This is demonstrated in the following analyses of the two classification levels which are directly affected by this application: Retail Employee Level 6, and Retail Employee Level 7.

<u>Clause A.6 – Retail Employee Level 6</u>

23. It is abundantly clear from the text (particularly the verb '*means*'), that A.6.1 is the definition of Retail Employee Level 6. The critical defining element is that the

work is done '*at a higher level than'* Retail Employee Level 5. While A.6.1 does not expand further on this defining element, such expansion is unnecessary because, under clause 14.2, the employer must take into account *'the skill level'* required from the employee to carry out the principal functions of the employee's employment, and this informs the employer's determination as to whether the work is done *'at a higher level than'* the preceding Level 5.

24. A.6.1 does not refer to any job titles. This demonstrates that one's job title is not a defining element of this classification level.

25. Regarding the role of clause A.6.2; this provision is a guiding observation about indicative job titles that are *'usually'* within '*the definition'* (logically, a reference to the preceding definition at clause A.6.1). As '*usually*' is not synonymous with '*always*', clause A.6.2 does not convey a decisive or determinative position.

26. It is notable that '*include'* immediately precedes the list of indicative job titles at clause A.6.2(a) - (d). This shows that the list is inclusive, not exhaustive. It follows that clause A.6.2 does not represent a complete list of all indicative job titles that usually fall within the classification; nor is it definitive or prescriptive about the extent to which the classification level embraces jobs with these indicative job titles. Accordingly, while clause A.6.2 could assist in the task of classifying an employee, clause A.6.2 does not determine classification and does not compel the employer to classify an employee at Level 6 by reason of the employee's job title.

27. In summary:

    (a) Clause A.6.1 defines Retail Employee Level 6 and is significant in the classification scheme by reason of this definitional function;

    (b) Clause A.6.2 does not define Retail Employee Level 6; and

    (c) Clause A.6.2 does not determine classification at Retail Employee Level 6.

28. The upshot is that a retail employee will be entitled to classification at Retail Employee Level 6 where the employer determines that the level of skill required to be exercised to carry out the principal functions of the employee's employment is '*at a higher level than'* the preceding Level 5. An employee's job title does not establish the entitlement to classification at Level 6.

Clause A.7 – Retail Employee Level 7

29. It is abundantly clear from this text (particularly the verb '*means'*) that clause A.7.1 is the definition of Retail Employee Level 7*.* The critical defining element is that the work is done *'at a higher level than'* Retail Employee Level 6*.* Clause A.7.1 does not expand on this defining element; but such expansion is unnecessary because under clause 14.2, the employer must take into account '*the skill level*' required from the employee to carry out the principal functions of the employee's employment and that consideration then informs the employer's determination as to whether the work is done *'at a higher level than'* the preceding Level 6. Clause A.7.1 does not refer to any job title(s). This demonstrates that one's job title is not a defining element of this classification.

30. Regarding the role of clause A.7.2; this provision is a guiding observation about indicative job titles that are '*usually*' within '*the definition'* (logically, a reference to the preceding definition at A.7.1). As '*usually*' is not synonymous with *'always*', A.7.2 does not convey a determinative or decisive position.

31. It is notable that '*include'* immediately precedes the list of indicative job titles at clauses A.7.2(a) - (b). This shows that the list is inclusive, not exhaustive. Thus, clause A.7.2 is not a complete list of all indicative job titles that usually fall within the classification; nor is it definitive about the extent to which the classification embraces jobs with such job titles. Therefore, while clause A.7.2 could assist in the task of classifying an employee, clause A.7.2 does not determine classification and it does not compel the employer to classify an employee at Level 7 by reason of the employee's job title.

32. In summary:

    (a) Clause A.7.1 defines Retail Employee Level 7, and is significant to the classification scheme by reason of this definitional function;

    (b) Clause A.7.2 does not define Retail Employee Level 7; and

    (c) Clause A.7.2 does not determine classification at Retail Employee Level 7.

33. The upshot is that a retail employee will qualify for classification at Retail Employee Level 7 where, in the judgement of the employer, the level of skill required to be exercised to carry out the principal functions of the employment is '*at a higher level than'* the preceding Level 6. An employee's job title does not establish the entitlement to classification at Level 7.

Conclusion

34. The above analysis shows that when proper account is taken of all relevant provisions (i.e. clause 14 and Schedule A), the GRIA provides a skill-based classification structure. The key operative provision is clause 14 and Schedule A plays a significant auxiliary part; it does not operate independently of clause 14.

35. In these proceedings, the applicant asks the Commission to make changes to Schedule A, which the applicant claims are necessary to meet the modern awards objective. In these circumstances, the applicant could be expected to demonstrate an understanding of the key operative provision (clause 14) and its connection with Schedule A. Yet, despite the obvious significance of clause 14 to classifying employees under the GRIA, there is no reference to clause 14 in the applicant's material filed to date, nor any content that demonstrates awareness of this key provision. As the following submissions show, this is one of several unsatisfactory and unpersuasive aspects of the applicant's case.

The Alleged Necessity to Achieve the Modern Awards Objective

36. In the grounds specified at paragraph 2.5 of SDA/F46, this passage appears at sub-paragraph 10 (p.6/6): (emphasis added)

> In particular, and to the extent that the specified statutory criteria set out in s134 of the Act are relevant to this application, the Applicant submits that classifying employment roles in the Award correctly by reference to aligned indicative job titles provides critical foundation and support for the modern awards objectives and its specified criteria.

37. The applicant's submission that employment roles are classified '*by reference to aligned indicative job titles*' is incorrect. The submission misapprehends the GRIA's classification scheme. Contrary to the applicant's submission, employment roles are not classified by reference to *'aligned indicative job titles'*. The correct method for classifying employees under the GRIA is by reference to the '*skill level*' required to carry out the principal functions of the employee's employment. The correct method directs attention to actual skills needed to carry out the employment, not job titles. And this has been the method of classifying employees since the GRIA was first made by the Australian Industrial Relations Commission in 2008.[9]

38. In the grounds specified at paragraph 2.5 of SDA/F46, the following passage appears at sub-paragraph 11 (p.6/6) in support of the proposed variation to include '*duty manager of a shop with departments or sections'* at new clause A.7.2(d):

> Arguably, the inclusion of an indicative job title in respect of Level 7 employees relevant to duty managers involves no impact at all. The Applicant would contend that these employees should already be classified as Level 7 employees. The variation merely makes explicit in terms of the indicative job title what the Applicant contends is necessarily already implicit.

39. This passage reveals a fundamental misunderstanding about the classification scheme in the GRIA and the misdirected aims of this application. This is so for the following reasons.

[9] PR985114.

40. *First,* if, as the applicant asserts, *'these employees'* are already entitled to be classified at Level 7, then the real issue is about recognition by the employer of an entitlement that has already arisen under the GRIA. Axiomatically, if an entitlement already arises, then there is no necessity to vary the GRIA.

41. *Second,* if any of *'these employees'* consider that they are not correctly classified, then that is a matter that should be pursued with their employer through the dispute procedure at clause 36 of the GRIA. A dispute about the classification level assigned to the employee by the employer is a matter that can be dealt with pursuant to the dispute procedure.

42. In any event, the existence of such a dispute would not of itself establish a proper basis for changing the GRIA under s.157(1)(a).

43. *Third,* if an employee is a '*duty manager of a shop with departments or sections'*, that employee will be entitled to classification at Level 7 if, in the employer's determination, the level of skill required to be exercised by the employee to carry out the principal functions of their employment is '*at a higher level than'* preceding Level 6. This follows from clause 14.2, which directs attention to the facts of an employee's employment. The GRIA's skill-based classification structure does not operate by speculation about what might be implied by a job title. The proposition that classification is determined by indicative job title (or job title) is contrary to clause 14.2, which is manifestly clear that classification is determined by '*the skill level as determined by the employer that the employee is required to exercise in order to carry out the principal functions of the employment.'*

The Alleged Ambiguity or Uncertainty

44. In the grounds specified at paragraph 2.5 of SDA/F46, the following passage appears at sub-paragraph 6 in support of the proposed variation to include '*duty manager of a shop with departments or sections'* at new A.7.2(d):

> The is no specific reference to such position in the Award and the inclusion will remove an uncertainty or ambiguity in the proper classification of such roles.

45. It is incumbent on the applicant to identify and demonstrate the alleged ambiguity or uncertainty as their existence is *'a necessary statutory prerequisite to any variation being made*'.[10] Relevantly, to establish ambiguity it is necessary to show that the impugned term is capable of more than one meaning.[11] However, the applicant's case does not identify any ambiguity (i.e. it does not present any plausible competing meanings for consideration). Consequently, the applicant has not established ambiguity as a necessary prerequisite for variation pursuant to s.160(1).

46. Ambiguity and uncertainty are not synonymous terms;[12] however, the applicant does not treat the terms as distinct. Instead, the applicant conflates ambiguity and uncertainty with the consequence that neither is sufficiently identified. This conflation is illustrated by the following passages at [40] and [41] of the applicant's written submissions: (emphasis added)

> Furthermore, ambiguity and uncertainty are present by virtue of the fact that an ASM is classified at the same level as employees subordinate to them.[13]
>
> A duty manager of a shop with departments or sections is an indicative job title that does not appear presently anywhere in the GRIA. What follows is that ambiguity and uncertainty exist around what a duty manager of a shop with departments or sections is to be paid.[14]

47. It is the case that the term *'duty manager of a shop with departments or sections'* does not appear in the indicative job titles at clause A.7.2(a) - (b). However, the absence an express reference to such a title does not of itself establish ambiguity or uncertainty. As addressed in this reply submission, the indicative job titles listed at clauses A.6.2(a) - (d) and A.7.2(a) - (b) are indicative not exhaustive,

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[10] *CoInvest Ltd v Visionstream Pty Ltd* (2004) 134 IR 43 at [46] cited in *Bianco Walling Pty Ltd v Construction Forestry Maritime Mining and Energy Union & Ors* [2020] FCAFC 50 (24 March 2020); 275 FCR 385 at [49].

[11] *Bianco Walling Pty Ltd v Construction Forestry Maritime Mining and Energy Union & Ors* [2020] FCAFC 50 (24 March 2020); 275 FCR 385 at [67] citing *Printing and Kindred Industries Union v Davies Bros Ltd* (1986) 18 IR 444 at 449.

[12] *Bianco Walling Pty Ltd v Construction Forestry Maritime Mining and Energy Union & Ors* [2020] FCAFC 50 (24 March 2020); 275 FCR 385 at [73]-[75].

[13] SDA submission dated 1 November 2024 at [40].

[14] SDA submission dated 1 November 2024 at [41].

and therefore neither provision is definitive about the extent to which the classification embraces jobs with these indicative job titles.

48. The proposed removal of clause A.6.2(c) and relocation to clause A.7.2(b) is unnecessary because an employee can be classified at the relevant level even if the employee's actual job title is not expressed in the same terms as the listed indicative job titles at clauses A.6.2 or A.7.2.

49. Further, the applicant does not demonstrate that the term is an existing indicative job title. Notably, none of the employees who have made a statement filed in this matter holds a position with the job title '*duty manager of a shop with departments or sections*.' In this regard:

    (a) Adam Garraway's job title is *'Assistant Store Manager'*;[15]

    (b) Brigitt De Laine's job title is *'Duty Manager'*;[16]

    (c) Tanya Smith's job title is *'Night-fill Department Manager*'.[17]

50. The introduction of an *'indicative'* job title that us not in fact reflective of the job titles used in practice in the sector is apt to cause confusion and, indeed, render the instrument ambiguous or unclear.

Other Matters

51. At [17] and [22] of the applicant's written submissions, it is contended that unsocial hours of work, work on weekends and public holidays should be taken into account when determining the appropriateness of classifying an Assistant Store Manager and a Duty Manager pursuant section 134(1)(da)(ii) and (iii). That submission misapprehends the GRIA. This is so because classification is not based on the times at which work is performed.

[15] Statement of Adam Garraway dated 1 November at para. 1.

[16] Statement of Brigitt De Laine dated 1 November 2024 at para. 1.

[17] Statement of Tanya Smith dated 31 October 2024 at para. 1.

52. Insofar as the SDA attributes significance to s.134(1)(da)(ii) and (iii) in this matter, the applicant's submission is misconceived. There are adequate conditions in the GRIA which provide additional remuneration for employees working unsocial, irregular or unpredictable hours; notably:

    (a) Clause 22 Penalty rates (including additional pay loadings for work on Saturdays, Sundays and public holidays at clause 22.1);

    (b) Clause 25 Rate of pay for shiftwork (including public holiday shift rates at clause 25.3); and

    (c) Clause 33 Public holiday (including payment for work on a public holiday or substitute day at cl. 33.3).

53. Further, taking into account:

    (a) The intended effect of the variations sought by the applicant with respect to employees within the indicative job title at A.6.2(c) (i.e. to move that cohort from classification level 6 to classification level 7, with a consequential increase in the minimum rate of pay from the rate applicable to level 6 to the rate applicable to level 7); and

    (b) The intended effect of the variation sought by the applicant to include new indicative job title '*duty manager of a shop with departments or sections'* at A.7.2(d), with the consequence that the minimum wage for level 7 would apply to that indicative job title,

    it appears that the applicant's substantive claim gives rise to work value considerations. The applicant has not, however, made out a case that the resulting rates of pay are warranted on work value grounds.

54. Further, the applicant has not addressed the effect of the variations upon relativities amongst pay rates for the various classification levels and has not addressed the extent to which existing relativities would (or would not) be preserved. In this regard, the applicant's case does not include any comparison between the duties and responsibilities of the particular roles affected by the

variation, and the duties and responsibilities of employees employed in other classifications under the GRIA.

The Applicant's Evidence

Statement of Adam Garraway

55. Mr Garraway is an Assistant Store Manager at Woolworths Arkaba, South Australia.[18] Of the three employees who have made statements filed in this matter, Mr Garraway is the only employee with the job title *'Assistant Store Manager'*.

56. Mr Garraway gives an account of the work that he does at that store and his statement is a personal account of his own work circumstances. Mr Garraway does not purport to give an account of the work circumstances of any other person with the job title *'Assistant Store Manager'*. Insofar as the applicant may claim that Mr Garraway's statement is representative of the work circumstances of employees with the same title, there is no sound demonstrated basis to support such claim.

57. At [10] of his statement, Mr Garraway informs that he is employed pursuant to the GRIA as a Retail Employee Level 6. This information is stated decisively – this does not support the proposition that the classification structure is ambiguous or uncertain. Mr Garraway does not express any dissatisfaction with his classification at Retail Employee Level 6 or with anything arising from the application of the GRIA to his employment.

58. At [21] of this statement, Mr Garraway provides an account of what his duties as *'Assistant Store Manager'* include, and he informs about times that he acts as *'Duty Manager'* and *'Store Manager'* during the week. Mr Garraway distinguishes his role as *'Assistant Store Manager'* from *'Duty Manager'* and from *'Store Manager'*.

[18] Statement of Adam Garraway at para. 1.

59. Thus, it is apparent that the duties that Mr Garraway performs occasionally are different from his job as 'Assistant Store Manager'. In the context of retail employment covered by the GRIA, it is not remarkable that Mr Garraway is required to act in higher classifications from time to time, as clause 17.5 Higher duties provides additional pay for such higher duties work.

Statement of Brigitt De Laine

60. Brigitt De Laine is a Duty Manager at Drakes in Yankalilia.[19] Of the three employees who have made statements, Ms De Laine is the only employee with the job title *'Duty Manager'*.

61. Ms De Laine gives an account of the work that she does at that store and therefore her statement represents a personal account of her own work circumstances; Ms De Laine does not purport to give an account of the work circumstances of any other person with the job title Duty Manager. Insofar as the applicant may claim that Ms De Laine's statement is representative of the work circumstances of employees with the job title Duty Manager, there is no sound demonstrated basis to support such claim.

62. At [8], Ms De Laine states that when working as a Duty Manager, she is '*paid as a level 6 employee pursuant to the GRIA*'. Ms De Laine conveys this information in decisive terms. The statement does not support the proposition that the GRIA is uncertain.

63. Ms De Laine does not express any dissatisfaction with her classification as a Retail Employee Level 6 or with anything arising from the application of the GRIA to her employment.

Statement of Tanya Smith

64. Tanya Smith is employed by Woolworths as a full-time salaried Night-fill Department Manager. Of the three employees who have made statements filed

[19] Statement of Brigitt De Laine at para. 1.

in these proceedings, Ms Smith is the only employee with the job title *'Night-fill Department Manager'*.

65. Ms Smith provides an account of her work in this role most notably at [22] of her statement, where she describes the tasks involved in a typical shift. As with the other employees, Ms Smith's statement concerns her own experiences at work and does not purport to be representative of the work done by anyone else holding a position with the same or similar job title. Insofar as the applicant may claim that this statement is representative of the work circumstances of employees with the same job title as Ms Smith, there is no sound demonstrated basis to support such claim.

66. According to paragraph 6.1 of the letter annexed to Ms Smith's statement (annexure TS-01), Ms Smith is classified at Retail Employee Level 6 of the GRIA. Ms Smith does not express any dissatisfaction with her classification as a Retail Employee Level 6 or with anything arising from the application of the GRIA to her employment.

3. REPLY TO MR HICKS' APPLICATION IN AM2024/26

67. AM2024/26 was commenced by the Form F46 application filed by the applicant Mr Hicks on 17 June 2024 (**Hicks/F46**). In addition to Hicks/F46, the following material has been filed in support of the application:

    (a) An outline of submissions, undated; and

    (b) A statement of Anthony Hicks, dated 15 November 2024.

68. Details of the application appear at paragraph 2.4 (p.4/5) of Hicks/F46. From those details, the application seeks a single variation at clause A.8.3 of Schedule A, to insert '*duty manager*' at A.8.3(a).

69. The grounds relied upon to support the application appear in eight numbered subparagraphs at paragraph 2.5 of Hicks/F46.

70. According to the details recorded at paragraph 2.4 (p.4/5) of Hicks/F46, the proposed variation is sought pursuant to s.160(1).

71. The principles and considerations which inform the approach to claims under s.160 are summarised earlier in this submission. Ai Group adopts those principles and considerations for the purposes of this reply to AM2024/26. Ai Group also adopts its submissions in reply to AM2024/40 regarding the skill-based classification structure in the GRIA, including clause 14 Classifications, the key operative provision.

72. As none of the grounds at paragraph 2.5 of Hicks/F46 identifies any alleged ambiguity, the application is confined to an alleged uncertainty. This is apparent from subparagraph 7 (p.5/5) in which the applicant states: (emphasis added)

> The existing text with the GRIA strongly indicates that the appropriate classification for a duty manager in a shop with departments is in fact Retail Employee Level 8. However, <u>as this is not definite, there is uncertainty that the Commission should remove by making the proposed amendment</u>.

73. The existence of ambiguity, uncertainty or error is a necessary statutory prerequisite to any variation being made under s.160.[20] Accordingly, the applicant must demonstrate an existing uncertainty at clause A.8.3(a), otherwise the application must fail for want of necessary statutory prerequisite. For the reasons which follow in this submission, A.8.3(a) does not exhibit uncertainty as alleged by the applicant. Furthermore, the applicant's case is advanced on the incorrect premise that clause A.8.3 determines classification at Retail Employee Level 8. In view of this, these reply submissions include analysis of Retail Employee Level 8 to explain its constituent parts that are relevant to this matter and its significance within the GRIA classification structure.

Clause A.8 – Retail Employee Level 8

74. It is abundantly clear that A.8.1 (not A.8.3) defines Retail Employee Level 8*.* Consistent with the approach at clauses A.6.1 and A.7.1, the critical defining element at A.8.1 is that the work is done '*at a higher level than'* the preceding level 7*.* Clause A.8.1 does not expand on this defining element, but such expansion is unnecessary because under clause 14.2 the employer must take into account '*the skill level*' required from the employee to carry out the principal functions of the employee's employment and that consideration then informs the employer's determination as to whether the work is done *'at a higher level than'* the preceding Level 7.

75. Clause A.8.1 does not refer to indicative job titles, or any job title. This demonstrates that job title is not a defining element of this classification level. As addressed earlier in this submission, clause 17.1 also demonstrates that indicative job titles do not define the classification levels in the GRIA.

[20] *CoInvest Ltd v Visionstream Pty Ltd* (2004) 134 IR 43 at [46] cited in *Bianco Walling Pty Ltd v Construction Forestry Maritime Mining and Energy Union & Ors* [2020] FCAFC 50 (24 March 2020); 275 FCR 385 at [49].

76. The applicant's principal claim is that clause A.8.3(a) is uncertain. If so, uncertainty should be discernible from an objective assessment[21] of the words used in the short passage at A.8.3(a). However, the passage is uncomplicated and straightforward. Objectively assessed, the words used at A.8.3(a) do not convey uncertainty. Further, the absence of the proposed job title does not of itself establish uncertainty.

77. The effect of clause A.8.3 is comparable to clauses A.6.2 and A.7.2 in that it is a guiding observation about indicative job titles that are '*usually*' within '*the definition'* at clause A.8.1. As '*usually*' is not synonymous with *'always*', A.8.3 does not convey any decisive position. Further, it is notable that '*include'* immediately precedes the list of indicative job titles at clauses A.8.3(a) - (b). This is significant in that it shows that that list is inclusive, not exhaustive. Accordingly, clauses A.8.3(a) - (b) are not a complete list of all indicative job titles that usually fall within the classification; nor are they a definitive or prescriptive statement about the extent to which the classification embraces jobs with such job titles.

78. Therefore, while clause A.8.3 could assist in the task of classifying an employee, it does not determine classification and does not compel an employer to classify an employee at Level 8 by reason of the employee's job title. Classification is not determined by job title. The correct position is that classification is based on the level of skill that the employer determines is required in order for the employee to carry out the principal functions of the employment. This correct approach is clearly and unambiguously expressed at clause 14 Classifications.

79. In summary:

    (a) Clause A.8.1 defines Retail Employee Level 8, and is significant to the classification scheme by reason of this definitional function;

    (b) Clause A.8.3 does not define Retail Employee Level 8; and

[21] *Beltana No.1 Salaried Staff Certified Agreement 2002-2004* [2002] AIRC 531 at [49] cited in *Bianco Walling Pty Ltd v Construction Forestry Maritime Mining and Energy Union & Ors* [2020] FCAFC 50 (24 March 2020); 275 FCR 385 at [70].

(c) Clause A.8.3 does not determine classification at Retail Employee Level 8.

80. The upshot is that a retail employee will be entitled to classification at Retail Employee Level 8 where, in the determination of the employer, the level of skill required to be exercised to carry out the principal functions of the employee's employment is '*at a higher level than'* the preceding Level 7. An employee's job title does not establish the entitlement to classification at Level 8. Insofar as the applicant asserts otherwise, the applicant misapprehends the classification scheme under the GRIA.

81. The applicant's proposed change will be ineffectual in achieving the result intended by the applicant. This is so because the change to A.8.3(a) (as proposed by the applicant) will not change the classification definition at A.8.1 and will not give rise to an obligation to classify an employee at Level 8 based only upon the employee's job title, whether indicative or otherwise.

Additional matters

82. The applicant presents no evidence that a *'duty manager in a shop with departments or sections'* is an existing job title or indicative job title. For instance, the applicant has not presented any evidence from any person with such a job title. The statement of Anthony Hicks dated 15 November 2024 is the only statement filed by the applicant in support of this application and that statement does not provide any reliable factual support for that proposition.

83. Although the application is brought under s.160, the applicant's submission expresses reasons which do not have any apparent relevance to s.160; but rather, appear to resonate more closely with work value reasons. This is illustrated by two propositions put in those submissions:

(a) That it is appropriate to list *'shop manager'* and *'duty manager'* under the same level;[22] and

[22] Submissions of Anthony Hicks at para [12].

(b) That duty manager is closer to shop manager then it is to any other job title.[23]

84. Finally, for the reasons explained above, the application does not adequately engage with work value reasons.

[23] Submissions of Anthony Hicks at para [21].