IN THE FAIR WORK COMMISSION
REGISTRY: MELBOURNE

MATTER No: AM2024/9, AM2024/33, AM2024/26, AM2024/40

Application by The Australian Retailers Association
Variation on the Commission's own motion

THE AUSTRALIAN RETAILERS ASSOCIATION'S OUTLINE OF SUBMISSIONS REGARDING PROPOSED VARIATIONS TO THE GENERAL RETAIL INDUSTRY AWARD 2020

A. INTRODUCTION

1. These submissions are made on behalf of the Australian Retailers Association (**ARA**) pursuant to order 2(a) of the further amended directions of Vice President Gibian dated 19 September 2024 (**Directions**).

2. On 6 February 2024, the ARA made an application to vary the *General Retail Industry Award 2020* (**GRIA 2020**) pursuant to sections 157(1)(a) and 160(1) of the *Fair Work Act 2009* (Cth) (**FW Act**) (**Application**). The Application sought 17 proposed variations to the GRIA 2020, marked A through Q. Between April and July 2024, proposed variations C (in part), E, M and N were determined.[1]

3. On 18 July 2024, a Full Bench of the Fair Work Commission issued the final report on the Modern Awards Review 2023-24 (**Review**).[2] As a result of the final report, the Fair Work Commission (**Commission**) commenced its own proceedings (AM2024/33) to consider proposals advanced in the 'making awards easier to use' stream of the Review to vary the GRIA 2020 which overlapped with the Application, or which otherwise raised a seriously arguable case for change.[3] The Full Bench determined that the remaining proposed variations in the Application (except those concerning part-time employment) are to be heard and determined together with proposed variations sought in the Commission-initiated proceedings.[4]

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[1] Proposal E was determined on 2 April 2024 (*General Retail Industry Award 2020* [2024] FWCFB 197); Proposal C was determined in part on 7 May 2024 (*General Retail Industry Award 2020* [2024] FWCFB 251); Proposals M and N were determined on 5 July 2024 (*General Retail Industry Award 2020* [2024] FWCFB 302).
[2] *Modern Awards Review 2023-24* (Report, 18 July 2024).
[3] *Modern Awards Review 2023-24* (Report, 18 July 2024), [167(3)].
[4] On 15 August 2024, the President, Justice Hatcher, issued a statement giving effect to these conclusions: *Application by the Australian Retailers Association* [2024] FWC 2163, [5].

4. In accordance with the consolidated list of proposals filed on 7 October 2024 pursuant to Order 1 of the Directions, the ARA advances the following proposed variations as part of these proceedings:

   (a) Proposal A – Amendment to make clear that "written records" include digital records;

   (b) Proposal B – Amendment to allow for split shifts with employee agreement;

   (c) Proposal C – Amendment to minimum break between shifts on different days;

   (d) Proposal D – Amendment to improve ability to average hours over longer periods;

   (e) Proposal F – Amendment to remove restriction of 19 starts for full-time employees;

   (f) Proposal G – Amendment to enable 38 ordinary hours to be worked across four days;

   (g) Proposal H – Amendment to remove the requirement for consecutive days off by agreement;

   (h) Proposal I – Amendment to clarify employees regularly working Sundays;

   (i) Proposal J – Amendment to introduce salaries absorption for managerial and higher-level staff;

   (j) Proposal L – Amendment to remove requirements to notify break times in advance for non-part-time employees;

   (k) Proposal O – Amendment to clarify annual leave loading;

   (l) Proposal P – Amendment to provide an ability for employees to waive a meal break and go home early; and

   (m) Proposal Q – Amendment to clarify the application of the first aid allowance.

5. A complete list of the ARA's proposed variations to be heard and determined in this proceeding is set out at Annexure A to these submissions.[5]

[5] The proposed variations in the Application concerning part-time employment, being proposals K and L (item 22), will be heard and determined separately in 2025 as part of the Commission-initiated proceedings concerning part-time employment (*Modern Awards Review 2023-24* (Report, 18 July 2024), [167(6)]; *Application by the Australian Retailers Association* [2024] FWC 2163, [4]-[5]), and therefore are not addressed in these submissions.

6. The ARA relies on the lay witness evidence of:

(a) Statement of Grant Shelton dated 23 October 2024 (**Shelton Statement**);

(b) Statement of Daisy Canning-Casey dated 25 October 2024 (**Canning-Casey Statement**);

(c) Statement of Angus McDonald dated 25 October 2024 (**McDonald Statement**);

(d) Statement of Richard Dunstan dated 29 October 2024 (**Dunstan Statement**);

(e) Statement of Chris Mein dated 31 October 2024 (**Mein Statement**);

(f) Statement of Chris Melton dated 31 October 2024 (**Melton Statement**);

(g) Statement of Charlie De Pasquale dated 31 October 2024 (**De Pasquale Statement**);

(h) Statement of Karen Justice dated 31 October 2024 (**Justice Statement**);

(i) Statement of Elise Tassigiannakis dated 30 October 2024 (**Tassigiannakis Statement**); and

(j) Statement of John Di Tirro dated 1 November 2024 (**Di Tirro Statement)**.

7. The ARA also relies on the expert witness report of David Rumbens, Partner, Deloitte Access Economics Pty Ltd, dated 30 October 2024 (**Rumbens Report**).

B. APPLICABLE PRINCIPLES

8. In performing functions or exercising powers, the Commission must take into account the objects of the FW Act: s 578(a). Section 3 relevantly provides, among other things:

> **3 Object of this Act**
>
> The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:
>
> (a) providing workplace relations laws that are fair to working Australians, **promote job security and gender equality**, are **flexible for businesses**, **promote productivity and economic growth** for Australia's future economic prosperity and take into account Australia's international labour obligations; and

(b) ensuring a guaranteed safety net of **fair, relevant and enforceable** minimum terms and conditions through … modern awards …;"

…

(d) assisting employees to **balance their work and family responsibilities** by providing for **flexible working arrangements**;

…

(Emphasis added.)

Section 157 – Variation if necessary to achieve the modern awards objective

9. Under s 157 of the FW Act, the Commission may, among other things, make a determination varying a modern award if the Commission is satisfied that making the determination is necessary to achieve the modern awards objective.

10. In *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227, Tracey J elaborated on the proper construction of s 157(1) as follows:

> [35] The statutory foundation for the exercise of FWA's power to vary modern awards is to be found in s 157(1) of the Act. **The power is discretionary in nature**. **Its exercise is conditioned upon FWA being satisfied that the variation is "necessary" in order "to achieve the modern awards objective." That objective is very broadly expressed**: FWA must "provide a fair and relevant minimum safety net of terms and conditions" which govern employment in various industries. In determining appropriate terms and conditions regard must be had to matters such as the promotion of social inclusion through increased workforce participation and the need to promote flexible working practices.
>
> [36] The sub-section also introduced a temporal requirement. FWA must be satisfied that it is necessary to vary the award at a time falling between the prescribed periodic reviews.
>
> [37] The question under this ground then becomes whether there was material before the Vice President upon which he could reasonably be satisfied that a variation to the Award was necessary, at the time at which it was made, in order to achieve the statutory objective.
>
> …
>
> [46] In reaching my conclusion on this ground I have not overlooked the SDA's subsidiary contention that **a distinction must be drawn between that which is necessary and that which is desirable. That which is necessary must be done. That which is desirable does not carry the same imperative for action.** Whilst this distinction may be accepted it must also be acknowledged that reasonable minds may differ as to whether particular action is necessary or merely desirable. It was

open to the Vice President to form the opinion that a variation was necessary.'

(Emphasis added.)

11. Section 134(1) defines the modern awards objective as follows:

> **134 The modern awards objective**
>
> *What is the modern awards objective?*
>
> (1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:
>
> (a) relative living standards and the needs of the low paid; and
>
> (aa) the need to improve access to secure work across the economy; and
>
> (ab) the need to achieve gender equality in the workplace by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and providing workplace conditions that facilitate women's full economic participation; and
>
> (b) the need to encourage collective bargaining; and
>
> (c) the need to promote social inclusion through increased workforce participation; and
>
> (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
>
> (da) the need to provide additional remuneration for:
>
> (i) employees working overtime; or
>
> (ii) employees working unsocial, irregular or unpredictable hours; or
>
> (iii) employees working on weekends or public holidays; or
>
> (iv) employees working shifts; and
>
> (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
>
> (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

This is the ***modern awards objective.***

12. Section 138 of the FW Act provides that a "modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective."

13. Fairness in the context of s 134(1) is to be assessed from the perspective of the employees and employers covered by the modern award in question.[6]

14. As to the obligation to take the considerations in s 134(1)(a) to (h) into account, the Full Bench in *Australian Hotels Association and United Workers' Union* [2020] FWCFB 1574, observed that:

> [46] The obligation to take into account the s 134 considerations means that each of these matters, insofar as they are relevant, **must be treated as a matter of significance in the decision-making process**. **No particular primacy is attached to any of the s 134 considerations and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award**.
>
> [47] It is not necessary to make a finding that the award fails to satisfy one or more of the s 134 considerations as a prerequisite to the variation of a modern award. Generally speaking, the s 134 considerations do not set a particular standard against which a modern award can be evaluated; **many of them may be characterised as broad social objectives**. In giving effect to the modern awards objective **the Commission is performing an evaluative function** taking into account the matters in s 134(1)(a)–(h) and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance.
>
> (Emphasis added.)

15. As observed by the Full Federal Court in *Shop, Distributive and Allied Employees' Association v Australian Industry Group* (2017) 253 FCR 368:

> "…many, perhaps all, of the s 134(1)(a)-(h) matters themselves permit, indeed require, consideration of "contemporary circumstances"; the range of "needs" and "impacts" these matters identify necessarily include needs and impacts assessed by reference to contemporary circumstances…
>
> Thus, it is also the case that the "fair and relevant" safety net criteria which dictate the quality of any modern award embrace the concept of "fair and

[6] *Australian Hotels Association and United Workers' Union* [2020] FWCFB 1574, [45].

relevant" having regard to contemporary circumstances, that conception being within the subject matter, scope and purpose of the Fair Work Act."[7]

16. As was recognised by the Full Bench in *Re Horticulture Award 2020* [2021] FWCFB 5554:

> [14] Variations to modern awards **must be justified on their merits**. The extent of the merit argument required will depend on the circumstances. Significant changes where merit is reasonably contestable should be supported by an analysis of the relevant legislative provisions and, where feasible, probative evidence.
>
> …
>
> [18] Reasonable minds may differ as to whether a proposed variation is necessary (within the meaning of s.138) as opposed to merely desirable. **What is 'necessary' to achieve the modern awards objective in a particular case is a value judgment**, **taking into account the s 134 considerations** to the extent that they are relevant having regard to the **context,** including the circumstances of the particular modern award, **the terms of any proposed variation and the submissions and evidence'.**
>
> (Emphasis added.)

17. The relevant workplace culture and the views of the relevant employees are important considerations in the evaluative assessment of whether the modern award provides a fair and relevant minimum safety net.[8]

Section 160(1) – Variation of modern award to remove ambiguity or uncertainty or correct error

18. Section 160(1) of the FW Act allows the Commission to make a determination varying a modern award to remove ambiguity or uncertainty or correct an error. Pursuant to section 160(2)(c), the Commission may make the determination 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.

19. As the Full Bench observed in *General Retail Industry Award 2020* [2024] FWCFB 197, the principles applicable to the proper interpretation and application of section 160 were recently summarised as follows:

> [51] The principles applicable to the interpretation and application of s 160 are well established. It is first necessary to determine if the award provisions under consideration are ambiguous, uncertain or attended by error. To find ambiguity in respect of an award provision, there must usually be rival contentions as to the proper meaning of the provision which are reasonably arguable. The words 'ambiguous' and 'uncertain' are not synonyms, and uncertainty may be

[7] *Shop, Distributive and Allied Employees' Association v Australian Industry Group* (2017) 253 FCR 368, [51], [53].
[8] *Re Telstra Corporation* [2022] FWCFB 46, [95].

established even if the provision at issue has a clear meaning and is not ambiguous, since uncertainty may arise from the application of unambiguous terms to a given set of circumstances or if the provision is doubtful, vague or indistinct in its expression. Error will be demonstrated if some sort of mistake is shown, in that a provision of the award was made in a form which did not reflect the tribunal's intention. It is only if ambiguity, uncertainty or error is found that a variation to remedy this may be considered.[9]

[52] The Commission has a discretion as to the terms of the variation to be made, subject to the variation determined having the purpose and effect of removing the identified ambiguity or uncertainty or correcting the identified error.[10]

Retrospective operation of the variation

20. Section 165 of the FW Act prescribes when variation determinations come into operation. It provides:

> *Determinations come into operation on specified day*
>
> (1) A determination under this Part that varies a modern award (other than a determination that sets, varies or revokes modern award minimum wages) comes into operation on the day specified in the determination.
>
> (2) The specified day must not be earlier than the day on which the determination is made, unless:
>
> (a) the determination is made under section 160 (which deals with variation to remove ambiguities or correct errors); and
>
> (b) the FWC is satisfied that there are exceptional circumstances that justify specifying an earlier day.
>
> *Determinations take effect from first full pay period*
>
> (3) The 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 the day the determination comes into operation.

21. The following principles are relevant to determining whether "*exceptional circumstances*" exist within the meaning of section 165(2) of the FW Act:

(a) What will amount to "*exceptional circumstances*" is intrinsically incapable of exhaustive statement.[11]

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[9] *Re Australian Industry Group* [2021] FWCFB 115 at [20]-[21]; *Journalists Published Media Award 2020* [2022] FWC 839 at [8]; *Bianco Walling Pty Ltd v CFMMEU* [2020] FCAFC 50; 275 FCR 385 at [73]-[78] (in relation to s 217 of the FW Act, which provides for the variation of enterprise agreements to 'remove an ambiguity or uncertainty'); *Vehicle, Manufacturing, Repair Services and Retail Award 2010* [2016] FWCFB 4418 at [73].
[10] *Modern award superannuation clause review* [2023] FWCFB 264 at [51]-[51].
[11] *Toll Transport Pty Ltd T/A Toll Transport* [2022] FWC 3346 at [207] (***Toll Transport***) citing *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 at [30].

(b) Exceptional circumstances are circumstances that are out of the ordinary course, unusual, special or uncommon but the circumstances themselves do not need to be unique nor unprecedented, nor even rare.[12] To be exceptional, a circumstance "*cannot be one that is regularly, or routinely, or normally encountered*."[13]

(c) Exceptional circumstances may include a single exceptional matter, a combination of exceptional factors, or a combination of ordinary factors which, although individually of no particular significance, when taken together can be considered exceptional.[14]

22. The ARA seeks that any determinations made in respect of Proposal H (in relation to the change of the heading to clause 15.7), Proposal I (in relation to the change of the heading to clause 15.8) and Proposal O (in respect of the insertion of "weekend penalty rates") operate with effect from 1 October 2020, being the date that the determination following the plain language re-drafting process came into effect.[15] These proposals are sought under s 160(1) of the FW Act to remedy inadvertent errors arising from the plain language re-drafting process. This gives rise to "exceptional circumstances" within the meaning of s 165(2) of the FW Act as they are "out of the ordinary course" and "unusual" in the sense that such errors would not have ordinarily been expected from a comprehensive process adopted by a Full Bench of the Commission.

23. The ARA otherwise seeks that any determinations in respect of the remaining proposals operate with effect from one week after the date of the determination.

C. THE RETAIL SECTOR

24. As outlined above, in determining the "needs" and "impacts" identified in each of the section 134(a) to (h) considerations, the Commission should have regard to the relevant "contemporary circumstances".

25. The relevant contemporary circumstances for the purposes of the Application include:

(a) the economic performance, productivity and competitiveness of the retail sector, including digital transformation and the prevalence of small businesses;

(b) the demographics of the retail sector workforce; and

[12] *Toll Transport,* at [207] citing *Nulty v Blue Star Group Pty Ltd* [2011] FWAFB 975 at [13].
[13] *Toll Transport,* at [207] citing *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 at [30].
[14] *Toll Transport,* at [207] citing *Nulty v Blue Star Group Pty Ltd* [2011] FWAFB 975 at [13].
[15] PR722492.

(c) the increased need for flexibility to meet employee circumstances and promote greater workforce participation and diversity.

26. The Rumbens Report outlines the current performance of the retail sector and the current levels of productivity and competition in the industry. Key aspects of the report are highlighted below.

Performance of the retail sector

27. Trading conditions for retailers have been particularly challenging in the past two years.[16] Since 2022, the "cost of living crisis" and a significant increase in mortgage payments have limited consumers' real spending capacity.[17] These factors have resulted in a reduction in retail sales over the last two years with retail turnover falling by 2.6%.[18] Retailers continue to face inflationary pressures, with annual retail inflation averaging 3.5% in the two years to June 2024, well above the pre-pandemic five year average of 1.1%.[19]

28. Weak sales conditions have slowed employment growth in the sector with retail employment growing by 0.2% in the year to August 2024, significantly below the wider economy which saw employment growth of 2.7%.[20] Labour costs are particularly important for the retail sector given the labour intensity of the sector.[21] As compared with other sectors, retail employees receive a relatively greater share of industry returns.[22] Underemployment, defined as employed persons with the desire and ability to work more hours sits at 14% of the retail workforce, compared to 7% across the economy, which has been an enduring feature of the sector.[23] The high underemployment in the retail industry while employment is growing strongly indicates that there are inefficiencies in working arrangements in the retail sector.[24]

29. The profit margins are, in general, low.[25] In FY24 the EBITDA margin in the retail trade industry was just 5.8%, the joint lowest EBITDA margin across the 15 industry sectors.[26] Structurally low profit margins means that there is a need for businesses to organise their operations well and efficiently to succeed.[27] This combined with the sector's weak sales

[16] Rumbens Report, [3.7].
[17] Rumbens Report, [3.8], [4.23].
[18] Rumbens Report, [3.7], [4.23].
[19] Rumbens Report, [4.26].
[20] Rumbens Report, [4.28].
[21] Rumbens Report, [4.31].
[22] Rumbens Report, [4.31].
[23] Rumbens Report, [4.12].
[24] Rumbens Report, [4.13].
[25] Rumbens Report, [3.5].
[26] Rumbens Report, [3.5], [4.32]-[4.33].
[27] Rumbens Report, [4.35].

performance explains why in the last 12 months, over 1,000 retail businesses in Australia went into insolvency.[28]

30. Further, there has been a digital transformation in recent years with retail businesses moving towards online sales, which is driving changes in how retailers operate.[29] There has also been considerable capital investment in retail on equipment, plant and machinery with 44% of surveyed Australian retailers investing or planning to invest in AI and automation.[30] The rise in automation has impacted working practices in the retail sector with a range of new tasks and skills required to deal with the increasing automation.[31] In the current trading environment, it is important that retail businesses operate as efficiently as possible.[32]

Competition and productivity

31. Generally, there is a significant degree of competitive pressure in the Australian retail sector.[33] Competition in the sector is being supported by several factors, including economy-wide trends in technology, increased competition from international brands and the expansion of online retail and e-commerce, which has materially altered the competitive landscape within the Australian retail sector.[34] Overseas retailers have had a rapidly growing presence in Australia with large-scale online retailers, such as Amazon and Temu, having been able to significantly expand in Australia, adding considerable competitive pressure on traditional retailers.[35] This heightened competition has driven significant innovation in retail practices and will remain a key driver of competition in Australia.[36]

32. The level of competition present in the retail sector applies pressure on Australian businesses to be efficient and productive to remain viable.[37] In this respect, it is notable that most businesses in the industry are small or medium sized.[38] In 2023, the sector had 74,060 non-employing businesses.[39] Meanwhile, amongst employing businesses 49,664

[28] Rumbens Report, [4.35].
[29] Rumbens Report, [4.17]-[4.20].
[30] Rumbens Report, [4.19].
[31] Rumbens Report, [4.20].
[32] Rumbens Report, [4.66], [4.77].
[33] Rumbens Report, [3.2].
[34] Rumbens Report, [4.39].
[35] Rumbens Report, [4.43]-[4.45]. Amazon's retail arm generated $3.1 billion in revenue in Australia in the 2023 calendar year, after entering the market in late 2017, and Temu generated $1.7 billion of revenue in the 2024 financial year, after launching in March 2023. For the 2024 financial year, it is estimated that Amazon had 7.9 million Australian customers with Temu's Australian customer base estimated at 3.8 million.
[36] Rumbens Report, [4.42].
[37] Rumbens Report, [4.50].
[38] Rumbens Report, [4.48].
[39] Rumbens Report, [4.48].

(60.8%) employed fewer than 5 employees, while only 352 (0.4%) employed more than 200 workers.[40]

33. Productivity growth in the retail sector has been weak with labour productivity in the retail sector declining by 1.4%, since FY21.[41] The decline in productivity has been attributed to a range of factors, including skills shortages.[42] As barriers to entry into the market continue to decrease, Australian businesses must enhance their productivity to remain competitive.[43] Increased productivity allows the more efficient allocation of labour and drives operational improvement that can lead to significant cost savings.[44] Effective staff scheduling and inventory management can lower operational costs.[45] Further, implementing predictable scheduling practices, including allowing employees to have more control over their shifts, led to, in one study, a 5.1% increase in store-level productivity.[46] More flexible work practices should result in greater efficiency in the retail labour market.[47]

Demographics of the retail sector and flexible work practices

34. The Rumbens Report also outlines relevant demographics of the retail workforce and data relevant to flexible work in the retail sector.

35. Flexible work practices are prevalent in the Australian retail sector with 64% of employees working part-time and/or casually, as compared with 42% across the whole economy.[48] Workplace flexibility is a key issue which could be improved with some 66% of employees identifying that flexible work arrangements are important to them but with only 55% being offered flexible working arrangements.[49] This gap of 11 percentage points is the highest out of any industry.[50] The inefficiencies caused by this gap may be one of the factors contributing to poor retention rates in the retail sector.[51]

36. Women, particularly with care giving responsibilities, face barriers to participation in more rigid work structures.[52] There is a higher share of female employees in the retail sector (54%, compared to 48% in the broader economy).[53] The retail sector employs more than

[40] Rumbens Report, [4.48].
[41] Rumbens Report, [3.10], [4.52].
[42] Rumbens Report, [4.53].
[43] Rumbens Report, [4.56].
[44] Rumbens Report, [4.56].
[45] Rumbens Report, [4.57].
[46] Rumbens Report, [4.57].
[47] Rumbens Report, [4.77].
[48] Rumbens Report, [3.14].
[49] Rumbens Report, [3.16], [4.15].
[50] Rumbens Report, [3.16], [4.74].
[51] Rumbens Report, [4.16].
[52] Rumbens Report, [3.15], [4.73].
[53] Rumbens Report, [4.4].

twice (2.6 times) the average number of workers who face barriers to participation (many of whom are women or workers aged below 24), which suggests that the flexible nature of retail work is an enabler for participation by women and younger workers.[54] Flexible forms of work play an important role in ensuring many of those with caring responsibilities have access to paid work.[55]

37. In addition to the Rumbens Report, the evidence filed by the ARA demonstrates that in recent years there has been an increased focus on flexibility and inclusivity in workplaces within the retail sector. Employers in the retail sector have developed and maintain workplace policies that support a diverse workforce and encourage flexible work options to better support the needs and requirements of employees with diverse backgrounds, including to support gender equity.[56]

The need for increased flexibility, efficiency and productivity

38. Broadly, there are three principal objectives sought to be achieved by the variations in the Application: improve flexibility, enhance productivity and reduce administrative burdens, thereby increasing efficiency.

39. The current retail trading environment and workforce demographics outlined above highlight the importance of ensuring the terms of the GRIA 2020 operate in a manner that better facilitates flexibility and increases productivity and efficiency. In particular, the Commission should have regard to the heightened competition in the retail sector, low profit margins, weak productivity growth, skills shortages and low retention rates, the disruption caused by the emergence of the online retail market and the importance of offering flexible work, particularly for women and employees with caregiving responsibilities.

40. For the reasons outlined below, the terms of the GRIA 2020 do not currently provide a fair and relevant minimum safety net of terms and conditions because of the lack of flexibility and the presence of rigid restrictions which are hindering productivity and leading to operational inefficiencies. In the circumstances outlined above, there is a pressing *need*, and not a mere *desire*, to make the variations sought by the ARA in the Application.

[54] Rumbens Report, [4.6].
[55] Rumbens Report, [4.7].
[56] Shelton Statement, [15]-[18]; Melton Statement, [47]; Annexure CM-4; Tassigiannakis Statement, [29]; Annexure ET-1; Di Tirro Statement, [18]-[19].

D. PROPOSED VARIATIONS

D.1 PROPOSAL A - Amendment to make clear that 'written' records include digital records

41. Digital methods of communication (and the corresponding digital storage recording such communications) is the widespread and predominant form of communication across the Australian economy and society. Proposal A seeks, in a common-sense and simple manner, to confirm that the GRIA 2020 permits any agreement, record or notice to be made and kept digitally, which is also consistent with business practice across the industry.

42. The ARA seeks, by proposed variation A, to insert a new clause 2A, which provides:

> 2A. For the purposes of any agreement or notice that is required to be recorded in writing under this award, the agreement or notice may be provided and recorded digitally, including through an exchange of emails, text messages, a record in an electronic system or by other electronic means.

43. The ARA also seeks the deletion of notes that appear at clauses 10.5 and 10.6, which provide:

> NOTE: An agreement under clause 10.5 could be recorded in writing including through an exchange of emails, text messages or by other electronic means.
>
> NOTE 1: An agreement under clause 10.6 could be recorded in writing including through an exchange of emails, text messages or by other electronic means.

44. The ARA's position is that the GRIA 2020 already permits the documentation and recording of agreements and notices in electronic form. However to remove any uncertainty it seeks that the Proposal A variation be made:

(a) under s 160(1) on the basis that the current terms of the GRIA 2020 gives rise to "uncertainty" and the variation removes that uncertainty by explaining expressly that any agreement or notice required to be recorded "in writing" under the GRIA 2020 can be recorded electronically and does not need to be recorded in hard copy; and

(b) further, or alternatively, under s 157(1)(a) on the basis that the variation to explain expressly the availability of electronic means of recording an agreement or notice in writing is necessary to achieve the modern award objective, particularly taking into account the considerations under s 134(d), (f) and (g).

Uncertainty in the current terms of the GRIA 2020

45. The inconsistency in the expression of different GRIA 2020 provisions as to how records of agreements and notices "in writing" may be recorded gives rise to uncertainty.

46. The GRIA 2020 expressly requires a number of agreements and notices to be in writing, including:

(a) individual flexibility arrangements and agreements/notice to terminate them: cll 5.7(a) and 5.11;

(b) consent to convert from full-time to part-time: cl 8.3(a);

(c) agreement to return to full-time from part-time: cl 8.3(c)(ii);

(d) agreed regular pattern of work for part-time employees: cl 10.5;

(e) agreement to vary temporarily a part-time employee's regular pattern of work: cl 10.6;

(f) notice of changes to a part-time employee's regular pattern of work: cl 10.10(a);

(g) request and response to review part-time guaranteed hours: cl 10.11(a) and (c);

(h) advice as to the availability of a Government apprentice assistance scheme in the context of deductions for block release training: cl 12.7(g);

(i) notice of an employee's classification and any changes to it: cl 14.3;

(j) request not to have two consecutive days off: cl 15.7(d)(i);

(k) request not to have three consecutive days off (for employees regularly working Sundays): cl 15.8(b);

(l) notification of rosters: cl 15.9(a);

(m) notice of permanent roster changes: cl 15.9(e);

(n) notice of regular pay day and any changes to it: cl 18.3(b) and (c);

(o) authorisation of voluntary employee superannuation contributions: cl 20.3(a);

(p) notice for adjustment to voluntary employee superannuation contributions: cl 20.3(b);

(q) agreement to take time off instead of payment for overtime: cl 21.3(a);

(r) notice to take annual leave during shutdown: cl 28.4(b) and (c);

(s) direction to take annual leave during shutdown: cl 28.4(e)(i);

(t) agreement to take leave without pay during a temporary shutdown: cl 28.4(g);

(u) direction to take annual leave where excessive leave accrued: cl 28.6(a);

(v) notice to take annual leave where excessive leave accrued: cl 28.7(a);

(w) agreement to take annual leave in advance: cl 28.8(a);

(x) agreement to cash out annual leave: cl 28.9(c);

(y) notice of workplace delegate appointment or election as a workplace delegate: cl 33A.3;

(z) notice of employees ceasing to be a workplace delegate: cl 33A.4; and

(aa) provision of information in consultation about major workplace change: cl 34.2.

47. Clauses 10.5 and 10.6 expressly note that the requirement to record an agreement in writing can be done through electronic means, including through an exchange of emails and texts (as outlined above at paragraph 43). Further, clause 15.9(a) provides that a roster is made available to all employees either exhibited on a notice board or "through accessible electronic means". No other clauses specify how the relevant agreement or notice can be recorded or provided in writing. The absence of any express explanatory note that applies to all of the above clauses creates uncertainty as to whether agreements or notices recorded electronically are permitted in respect of the balance of the agreements and notices outlined above.

48. Although the consensus view among retail employers is that electronic records are sufficient to comply with the obligations created by the GRIA 2020 with respect to agreements and notices,[57] the proposed variation would explain the requirement expressly and put beyond doubt that this interpretation is correct.

49. Having regard to the above, the current terms of the GRIA 2020 give rise to uncertainty as to the application of the requirement to record agreements and notices in writing and whether such requirements encompass electronic means (other than as expressly stipulated for clauses 10.5, 10.6 and 15.9(a)).

The proposed variation removes the existing uncertainty

[57] Shelton Statement, [34]; McDonald Statement [23]; Mein Statement, [26]; Tassigiannakis Statement, [24].

50. To resolve the uncertainty, a variation should be made to explain expressly that any agreement or notice required under the GRIA 2020 can be provided or recorded electronically.

51. The evident purposes of requiring that an agreement is recorded in writing are to ensure an agreement is properly made before certain action is taken by an employer/employee, and to ensure that there is an appropriate record of such an agreement having been made. The requirement safeguards an employee's right to choose whether or not to make such an agreement, and mitigates the risk of a dispute about whether such an agreement was made. Similarly, the requirement that certain notices be made in writing ensures that employees are provided with proper notice, and that there is an appropriate record of such a notice having been given. In an increasingly digital retail environment where a number of businesses are undergoing a digital transformation and the primary method of communicating with employees is through electronic means,[58] each of these purposes can be sufficiently achieved through electronic means. In considering whether a proper agreement has been made or proper notice has been given, there is no material difference between an electronic record or a hard copy record. There is, therefore, no logical basis for an inconsistent method of recording different types of agreements and notices. The inconsistency in the use of explanatory notes is largely a product of the award history outlined below.

52. The Full Bench varied the GRIA 2020 to include the explanatory notes to clauses 10.5 and 10.6 as part of a discrete issue considered as part of the Full Bench's award flexibility review, which was initiated following the Minister for Industrial Relations' request to the Commission to consider priority modern awards, including the GRIA 2020, to support Australia's economic recovery following the COVID-19 pandemic.

53. In that proceeding, all parties who made submissions regarding the variation to clause 10.6 concurred that an agreement under clause 10.6 must be recorded in writing and that this included by electronic means.[59] In making the variation determination, the Full Bench included the notes to clauses 10.5 and 10.6 on the basis that it was necessary to *clarify* the operation of clause 10 and because the variation was necessary to achieve the modern awards objective, in particular s 134(1)(d), (f), (g) and (h) (further addressed below).[60] In that case, the Full Bench did not go on to consider the other requirements under the GRIA 2020 to record agreements or provide notices in writing.

[58] McDonald Statement, [26]; Rumbens Report, [4.17]-[4.20].
[59] *Award flexibility – General Retail Industry Award 2020* [2021] FWCFB 2820, [16].
[60] *Award flexibility – General Retail Industry Award 2020* [2021] FWCFB 3571, [77]-[78].

54. Further, the ARA's position is that it is unnecessarily duplicative and confusing to have multiple 'Notes' in the body of the GRIA 2020 referring to the availability of digital records in respect of distinct clauses. The proposed new clause 2A provides a simple and easy to understand method of remedying the existing uncertainty and puts beyond doubt the availability of electronic means of recording agreements and notices across all relevant obligations under the GRIA 2020.

The variation is necessary to achieve modern award objectives

55. Further or alternatively, the ARA submits that the variation is necessary to achieve the modern awards objective, particularly having regard to the need to promote flexible modern work practices (s 134(1)(d)), the regulatory burden on employers (s 134(1)(f)), and the need to ensure a simple and easy to understand modern award (s 134(1)(g)). In this respect it is noteworthy that the Full Bench included the explanatory notes to clauses 10.5 and 10.6 of the GRIA 2020 on the basis that it was necessary to clarify the operation of clause 10 and because the variation was necessary to achieve the modern awards objective, including in respect of s 134(1)(d), (f) and (g).[61] The ARA addresses each of the relevant considerations below.

Section 134(1)(d) – the need to promote flexible modern work practices

56. In an increasingly digital world, it is appropriate that the terms of the GRIA 2020 reflect the reality of the modern workplace in the retail sector where agreements and notices are provided through various electronic systems. The use of electronic systems and databases for the creation and maintenance of employment records, such as time and attendance records, rosters and payroll, has become more prevalent amongst employers in the retail sector.[62] Electronic communications are often the preferred form of communication for employees in the retail sector.[63] A number of enterprise agreements covering significant employers in the sector (and which were endorsed by the SDA) specify that a requirement for written records includes digital records.[64]

57. The amendment proposed by the ARA is consistent with the need to promote flexible modern work practices that utilise digital systems to promote efficient and productive performance of work. The express explanation that agreements and notices can be made

[61] *Award flexibility – General Retail Industry Award 2020* [2021] FWCFB 3571, [77]-[78].
[62] Shelton Statement, [29], [35]; De Pasquale Statement, [21]; Melton Statement, [24], [29], [31]; Dunstan Statement, [27]-[28]; McDonald Statement, [15]; Mein Statement, [18], [26]; Tassigiannakis Statement, [24]; Justice Statement, [23].
[63] Shelton Statement, [37]; Di Tirro Statement, [40].
[64] *Coles Retail Enterprise Agreement 2024,* cl 1.3.3; *Kmart National Agreement 2024,* Appendix A.27 (subject to the Commission's approval); *Target Australia Retail Agreement 2022*, cl 5.24.

through electronic means is, as has been observed by the Commission, "a logical and contemporary amendment".[65]

58. Further, in *4 yearly review of modern awards – Casual employment and Part-time employment* [2017] FWCFB 3541, the Full Bench determined that, having regard to the need to promote flexible modern work practices under s 134(1)(d) of the FW Act a variation to the *Social, Community, Home Care and Disability Services Industry Award 2010* and *Aged Care Award 2010* should be made to clarify that changes to rosters may be communicated by any electronic means of communication (for example, by text message).[66]

Section 134(1)(d) – likely impact on productivity and the regulatory burden on employers; section 134(1)(h) – likely impact on sustainability and competitiveness of the national economy

59. Given the number of requirements to record certain agreements and notices in writing, it would be overly burdensome and inefficient if employers were to be required to record such agreements and notices in exclusively paper-based forms, particularly where this involves creating a separate record outside of the employer's usual electronic systems and also where managers are responsible for managing the records of a large number of employees.[67] For small businesses working remotely, additional resources may be required to make and keep hard-copy records.[68] These administrative processes can also delay the implementation of changed working arrangements and therefore lead to inefficiencies.[69]

60. Expressly clarifying that the use of electronic means to record agreements and notices is permitted would promote efficiency and productivity as such agreements and notices are more readily created, stored and implemented within centralised electronic systems.[70] It is also consistent with the *Electronic Transactions Act 1999* (Cth), which provides that requirements, under a Commonwealth law, to give information in writing, to require a signature, to produce a document or record or retain information or documents, are taken to have been met through electronic forms.[71] Further, the use of electronic records also facilitates compliance with the GRIA 2020 and record-keeping obligations as electronic

[65] *4 yearly review of modern awards – Hair and Beauty Industry Award 2010* [2018] FWCFB 7874, [57].
[66] *4 yearly review of modern awards – Casual employment and Part-time employment* [2017] FWCFB 3541, [645].
[67] Shelton Statement, [36], [72]; De Pasquale Statement, [15], [23]; Dunstan Statement, [34]; Mein Statement, [27]; Tassigiannakis Statement, [25]; Di Tirro Statement, [38]-[39].
[68] Justice Statement, [24].
[69] Shelton Statement, [72]; Dunstan Statement, [35]-[36].
[70] Melton Statement, [37]-[42], [45]; Shelton Statement, [38]; Dunstan Statement, [37], [47].
[71] *Electronic Transactions Act 1999* (Cth), ss 9(1), 9(2), 10(1), 11(1), 11(2), 12(1), 12(2), 12(4).

records are more easily held, accessed and audited, as compared with hard copy documents which may not be stored in a central location.[72]

61. In the award flexibility proceeding which resulted in the inclusion of the explanatory notes to clauses 10.5 and 10.6, the Full Bench acknowledged that the requirement to record a clause 10.6 variation agreement in writing and to keep such an agreement and provide it to the employee places a regulatory burden on employers.[73] The Full Bench also recognised the need to safeguard employees against being pressured into agreeing to vary their regular pattern of work, when the employer needs additional hours of work but is not willing to pay overtime.[74] The Full Bench sought to strike the appropriate balance between the regulatory burden of the record-keeping requirements in clause 10 against the need to provide adequate safeguards to employees and determined (amongst other things) that the notes in clause 10.5 and 10.6 reduced the regulatory burden.[75] A similar balance is struck by the ARA's present proposal in respect of the remaining clauses of the GRIA 2020 which provides additional safeguards by expressly permitting certain agreements and notices to be made in writing while easing the administrative burden on employers by permitting them to use electronic means.

62. As outlined above at paragraph 33, operational improvements of this kind are necessary to improve productivity and enable retailers to remain competitive in the current challenging economic environment of the retail sector.

Section 134(1)(g) – the need to ensure a simple and easy to understand modern award

63. As outlined above, the current terms of the GRIA 2020 creates uncertainty in the application of the requirement to record certain agreements and notices in writing.

64. In the *4 yearly review of modern awards – Fast Food Industry 2010* [2019] FWCFB 272, the Full Bench observed that a variation to the *Fast Food Industry Award 2010* to clarify that a recording of a variation to agreed regular hours may occur by electronic means reflected the need to promote flexible modern work practices and assisted in making the award simple and easy to understand, consistent with s 134(1)(g).[76] Similarly, the Proposal A variation creates a simple, easy to understand requirement that is consistent with the modern award principles.

[72] Shelton Statement, [38]; Dunstan Statement, [38]; McDonald Statement, [18], [25]; Tassigiannakis Statement, [26]; Di Tirro Statement, [41].
[73] *Award flexibility – General Retail Industry Award 2020* [2021] FWCFB 2820, [18].
[74] *Award flexibility – General Retail Industry Award 2020* [2021] FWCFB 2820, [18].
[75] *Award flexibility – General Retail Industry Award 2020* [2021] FWCFB 2820, [20].
[76] *4 yearly review of modern awards – Fast Food Industry 2010* [2019] FWCFB 272, [50]-[53].

65. Each of the above considerations weighs in favour of the variations under Proposal A being made.

D.2. PROPOSAL B – Amendment to allow for split shifts with employee agreement

66. The ARA, through Proposal B, seeks to make the working of split shifts an available option for employees that want to work them because it suits their needs. Importantly, there would be no requirement that employees work split shifts, and they would only be rostered where an employee agreed to do so.

67. Split shifts are currently precluded by clause 15.3 of the GRIA 2020, which requires ordinary hours of work on any day to be "continuous", except for meal breaks and rest breaks.[77]

68. A further impediment to split shifts is the three-hour minimum daily engagement period for casual employees and part-time employees, except for casual employees who are full-time secondary school students where the minimum daily engagement is 1.5 hours (cll 10.9, 11.2 and 11.3).

69. The ARA seeks, by Proposal B, to introduce the ability for employees who want to work split shifts to agree to be rostered for split shifts (in two blocks) by the introduction of new clause 15.X. The new clause would enable an employee to agree to be rostered to work their ordinary hours in two blocks on one day with an unpaid period of at least one hour between the two blocks.

70. The specific variations sought by Proposal B are as follows:

(a) an amendment to clause 15.2 as follows (amendment in underlining):

> *15.3 Ordinary hours of work on any day are continuous, except for rest breaks and meal breaks as specified in clause 16 — Breaks, <u>or where agreed between an employer and employee under clause 15.X</u>*

(b) insertion of a new clause 15.X:

> *15.X Split-shifts*
>
> *(1) By agreement between the employer and an individual employee, the employee may be rostered to work a split-shift such that they work ordinary hours in two blocks on one day with an unpaid period of at least one hour in between the end of the first work block and the beginning of the second work block.*

[77] *Coles Supermarkets Australia Pty Ltd* [2024] FWCFB 250, [25].

(2) Where an employee works a split-shift pursuant to clause 15.X(a), clauses 10.9 and 11.2 will apply in respect of the totality of hours the employee is engaged for each day.

(3) Where an employee works a split-shift pursuant to clause 15.X(a), clause 16.2 will apply in respect to the hours within each block, assessed separately.

(4) For the avoidance of doubt, clause 16.6 does not apply to the period between the two blocks of ordinary hours rostered as part of a split-shift under clause 15.X(a).

NOTE: The Recall allowance in clause 19.11 does not apply where an employee returns to work for the second part of a split-shift pursuant to clause 15.X.

(c) an amendment to the title in Column 1 of Table 3 in clause 16.2 of the GRIA 2020 as follows (amendment in underlining):

Hours worked per shift, <u>or per work block where a split-shift is worked pursuant to clause 15.X(a).</u>

71. Clauses 15.X(2) to (4) seek to clarify the application of other requirements under the GRIA 2020 to hours worked in each block as follows:

(a) clause 15.X(2) is directed at modifying the minimum daily engagement period for casual employees and part-time employees to make clear that the minimum applies to the total number of hours per day (rather than per block of shifts);

(b) clause 15.X(3) modifies the application of clause 16.2 regarding entitlements to meal breaks and rest breaks to ensure that the hours worked to qualify for a meal break or rest break are assessed by reference to each block of shifts and not the total ordinary hours worked in a day;

(c) clause 15.X(4) makes clear that the minimum break period between shifts on different days outlined in clause 16.6 does not apply between the two blocks of shifts.

72. Similarly, the drafting note clarifies that the recall allowance under clause 19.11, which relevantly applies to an employee recalled to work to perform specific duties on a day on which they have completed their normal roster, does not apply in respect of the second block of shifts.

73. The ARA seeks that Proposal B be made under s 157(1)(a) on the basis that the ability to agree to split shifts is necessary to achieve the modern awards objective, particularly taking into account the considerations under s 134(aa), (ab) (c), (d), (f) and (h).

Necessary to achieve the modern award objectives

Section 134(1)(aa) – the need to improve access to secure work; section 134(1)(ab) and (c) – the need to promote social inclusion through increased workforce participation and gender equality; section 134(1)(d) – the need to promote flexible modern work practices

74. The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) amended the modern awards objective to include s 134(1)(aa) and 134(1)(ab). These sections refer to improving access to secure work and to the need to achieve gender equality in the workplace by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and providing workplace conditions that facilitate women's full economic participation.

75. While the focus of section 134(1)(c) is upon obtaining employment,[78] the broader notion of social inclusion is a matter that can be appropriately taken into account in the Commission's consideration of the legislative requirement to "*provide a fair and relevant minimum safety net of terms and conditions"* in section 134(1) of the FW Act.[79]

76. As outlined above, there is a greater focus on flexible work practices within the retail sector, which is particularly important in a sector with a high proportion of female workers and students.[80] The current requirement to work ordinary hours continuously in any one day hinders flexible work practices. The ability to work split shifts provides employees with greater choice and flexibility in the way they work and enables their work to be rostered around their personal commitments, such as childcare or school pick-up responsibilities.[81]

77. The ability to better accommodate parental and caring responsibilities facilitates gender equality in the retail sector and women's full economic participation. This is supported by labour workforce data, which suggests that flexible work arrangements enables greater workforce participation, particularly for women in the retail rector.[82] Such flexibility also promotes social inclusion (s 134(1)(c)), consistent with the recent observations of the Full Bench in *Telstra Corporation Limited* [2022] FWCFB 46, at paragraph [88]:

> "greater flexibility in working arrangements with appropriate safeguards poses fewer barriers including for those with parental and caring responsibilities, and this is consistent with the need to promote greater social inclusion."

78. The ability to roster an additional shift on the same day could also result in more permanent hours being offered to more part-time employees, thereby reducing reliance on casual employees,[83] and improving access to secure work and increased workforce participation.[84]

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[78] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001; 265 IR 1 at [179] and [1932].
[79] *Telstra Corporation Limited* [2022] FWCFB 46, [88].
[80] Rumbens Report, [4.4]-[4.5].
[81] Melton Statement, [48], [49]; Tassigiannakis Statement, [31]; Dunstan Statement, [40].
[82] Rumbens Report, [4.7].
[83] Melton Statement, [47]; Tassigiannakis Statement, [29].
[84] Dunstan Statement, [44].

The increased number of ordinary hours that could be offered also has the potential for increased superannuation contributions.[85]

79. Employee support for the ability to agree to split shifts is demonstrated by the recent employee and SDA support for the *Coles Retail Enterprise Agreement 2024*, which provides for voluntary additional shifts that are not continuous with a rostered shift on the same day. A majority of 50,000 employees who voted on the terms of the Agreement, approved it.[86] Further, the SDA endorsed the terms of the agreement and supported the application and approval for the agreement by the Commission.[87] In the first two weeks after the *Coles Retail Enterprise Agreement 2024* came into operation, being, 7 October 2024, over 1,700 Coles employees have already registered their agreement to allow them to be rostered for split shifts.[88]

80. The *Kmart National Agreement 2024* which is currently before the Commission for approval also provides for the working of a 'Voluntary Second Start'.[89] The *Kmart National Agreement 2024* was endorsed by the SDA and received support from approximately 92% of employees that voted on its approval.[90]

81. Further, employees of a number of retail businesses have requested to perform split shifts for reasons including to better accommodate study or childcare responsibilities.[91] Such views of employees are important considerations in the evaluative assessment of whether the modern award provides a fair and relevant minimum safety net.[92]

82. The current restrictions in the GRIA 2020 achieve the counter-intuitive outcome of forcing employees that want to work multiple shifts in one day to work those shifts across multiple retail employers, an outcome that is difficult to see as being intended from a policy perspective.[93]

83. Whilst there is a clear demand from employees for the ability to work split shifts, the proposed variation includes a safeguard to ensure that employees are only rostered for split shifts where they have agreed to do so.

[85] Melton Statement, [50].
[86] Shelton Statement, [42].
[87] Shelton Statement, [43].
[88] Shelton Statement, [46].
[89] *Kmart National Agreement 2024*, cl 14.3.
[90] Melton Statement, [16].
[91] Dunstan Statement, [40]-[41]; Tassigiannakis Statement, [31].
[92] *Re Telstra Corporation* [2022] FWCFB 46, [95].
[93] Melton Statement, [49]; Dunstan Statement, [44].

84. Further, in relation to the adjustment to the minimum engagement period, the Full Bench in the 4 yearly review explained the key rationale underpinning the minimum engagement period in the following terms:

> [399] Minimum engagement periods in awards have developed in an ad hoc fashion rather than having any clear founding in a set of general principles. However **their fundamental rationale has essentially been to ensure that the employee receives a sufficient amount of work, and income, for each attendance at the workplace to justify the expense and inconvenience associated with that attendance by way of transport time and cost, work clothing expenses, childcare expenses and the like**. An employment arrangement may become exploitative if the income provided for the employee's labour is, because of very short engagement periods, rendered negligible by the time and cost required to attend the employment. Minimum engagement periods are also important in respect of the incentives for persons to enter the labour market to take advantage of casual and part-time employment opportunities (and thus engage the consideration in paragraph (c) of the modern awards objective in s.134).[94]
>
> (Emphasis added.)

85. The fundamental rationale of minimum engagement periods is, therefore, primarily concerned with sufficient work and income. The continuing application of the minimum engagement period, to the total number of *daily* hours, requested under Proposal B, therefore does not undermine this.

86. The variation at clause 15.X(3) is necessary to ensure that an appropriate assessment of the need for a break occurs in circumstances where an employee working a split shift will already have at least a one hour break off work between each shift. The proposal ensures that where on a standalone basis an employee works a continuous period entitling them to a break then they will still receive such a break.

87. Having regard to the above, the additional flexibility of split shifts is therefore necessary to ensure the rostering principles under the GRIA 2020 operate fairly between employees, particularly having regard to the importance placed on gender equality under the FW Act (given women tend to carry the majority of the burden of caring responsibilities)[95].

88. These considerations weigh in favour of the variations under Proposal B being made.

Section 134(1)(d) – the need to promote the efficient and productive performance of work; section 134(1)(f) – the likely impact on productivity; section 134(1)(h) – likely impact on sustainability and competitiveness of the national economy

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[94] *4 yearly review of modern awards – Casual employment and Part time employment* [2017] FWCFB 3541, [399].
[95] Rumbens Report, [4.6].

89. The ability to agree to split shifts promotes the efficient and productive performance of work because employees can be rostered for an additional shift at peak times, such as to perform stocktake, or where there is an unexpected operational need for additional staff, such as where there is a breakdown of machinery or during natural disasters.[96] Split shifts also facilitate more efficient rostering for businesses whose peak trading periods are in the morning and afternoon.[97]

90. There is also a greater ability for employees to attend education opportunities and team meetings, which can be critical to a retail business's operations, in a separate block from their usual shifts, which employees have expressed is their preference as opposed to a standalone shift on a non-working day or an extension to the employees' usual shift.[98]

91. Further, as outlined above, at paragraph 33, allowing employees to have more control over their shifts can increase productivity, and effective staff scheduling can lower operational costs, thereby enabling businesses to maintain their competitiveness in the market. Further, as noted in the Rumbens Report, it is typically more cost effective for employers to increase hours of existing workers where possible than to hire more people.[99]

92. These considerations weigh in favour of the variations under Proposal B being made.

Section 134(1)(da) – the need to provide additional remuneration

93. The Commission has previously considered that the requirement for ordinary hours to be worked continuously prevents disabilities that might be experienced by employees required to work split shifts, such as personal inconvenience, additional commuting time and fatigue.[100] However, these potential detriments can be removed if split shifts can be worked only with the agreement of employees. The proposed clause simply gives the employees additional choices about how they work.

94. Further, there is no lost additional remuneration as employees are currently precluded from working split shifts and, as recently found by the Commission, none of the current terms of the GRIA 2020 give rise to an entitlement to overtime payments for split shifts.[101]

95. This consideration is therefore neutral.

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[96] Shelton Statement, [45]; Tassigiannakis Statement, [29]-[30].
[97] Dunstan Statement, [42].
[98] Canning-Casey Statement, [22], [24], [26]-[33].
[99] Rumbens Report, [4.13].
[100] *Coles Supermarkets Australia Pty Ltd* [2024] FWCFB 250, [25].
[101] *Coles Supermarkets Australia Pty Ltd* [2024] FWCFB 250, [25].

D.3. PROPOSAL C – Amendment to minimum break between shifts on different days

96. The ARA, through Proposal C, seeks to bring the default minimum break period under the GRIA 2020 into alignment with other comparable awards and the existing working practices of many employees in the sector.

97. Clause 16.6 of the GRIA 2020 currently imposes a minimum break period of 12 hours between work periods finishing on one day and starting on the next day, unless the employer agrees with an individual employee or a group of employees for a minimum break of 10 hours.

98. The ARA, by the remaining item in Proposal C, seeks to amend the default minimum break between shifts on different days from 12 hours to 10 hours by amending clause 16.6(a) and (b) as follows (amendments in strikethrough and underlining):

> **16.6 Breaks between work periods**
>
> (a) An employee must have a minimum break of ~~12~~ 10 hours between when the employee finishes work on one day and starts work on the next.
>
> (b) If an employee starts work again without having had ~~12~~ 10 hours off work, the employer must pay the employee for each hour worked at the rate of 200% of the employee's minimum hourly rate until the employee has a break of ~~12~~ 10 consecutive hours.
>
> (c) The employee must not suffer any loss of pay for ordinary hours not worked during the period of a break required by clause 16.6.

99. The ARA also seeks the deletion of clause 16.6(d), which currently provides:

> The employer and an individual employee or a group of employees may agree that clause 16.6 is to have effect as if it provided for a minimum break of 10 hours.

100. The ARA seeks that Proposal C be made under s 157(1)(a) on the basis that an amendment to clause 16.6 to reduce the minimum break period between shifts to 10 hours is necessary to achieve the modern awards objective, particularly taking into account the considerations under s 134(d), (f), (g) and (h).

Necessary to achieve modern award objectives

Section 134(1)(d) – the need to promote flexible modern work practices and the efficient and productive performance of work

101. There are two main reasons why the variation promotes flexible modern work practices and the efficient and productive performance of work.

102. *First,* the 10-hour minimum break reflects the current predominant preference of employees and is thus reflective of flexible *modern* work practices within the retail sector. Whilst the GRIA 2020 currently provides for the ability to agree to a 10-hour minimum break period under clause 16.6(d), the ARA submits that the level of employee support for the shorter 10-hour minimum break period indicates that the 10-hour minimum break reflects the current modern work practice in the retail sector. Employee preference for the 10-hour minimum break period is reflected in the following:

(a) a number of employers have enterprise agreements which provide for a default 10-hour minimum break period, and have been utilised to roster 10-hour minimum break periods;[102] and

(b) a significant number of employees have opted to change their minimum break period to 10 hours (for example, at Kmart 80% of salaried managers have opted for such a change, and at Coles 90% of wages employees and 98% of salaried managers have opted for such a change).[103]

103. In terms of the fairness of the proposed variation, the shorter minimum break period is beneficial to employees for a range of reasons, including that a 12 hour minimum break period between shifts means that an employee who works an evening shift will effectively be "locked-in" to working evening shifts until they have a day off because they are not able to rotate into a shift with an earlier start the following day.[104] A change to a 10 hour minimum break period increases the kinds of shifts that employees can be rostered to work, increasing their ability to be rostered around personal commitments.[105] For example, a university student who wishes to work after their classes on a Friday night can then work the following Saturday morning, without having a 12 hour break between shifts.[106]

104. *Second,* a 10-hour minimum break period between shifts provides for greater flexibility and rostering options.

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[102] *CostCo Wholesale Australia Enterprise Agreement 2023-2027,* cl. 6.2.5; De Pasquale at [37]-[41]; *Bunnings Retail Enterprise Agreement 2023,* cl 11.2(b); *Officeworks Store Operations Agreement 2024*, cl 24.9.1.
[103] Melton Statement, [55] (80% of salaried managers); Shelton Statement, [51] (just over 90% of wages employees and 98% of salaried employees); Mein Statement, [29].
[104] Shelton Statement, [52]; De Pasquale Statement, [28]; Melton Statement, [57].
[105] Shelton Statement, [52].
[106] Shelton Statement, [52].

105. In the contemporary retail environment, trading and operational requirements continue late into the evening and commence again early the next morning, particularly over the Christmas extended trading period.[107] The "locking-in" of shifts referred to above reduces the number of available employees who can be rostered in the late evening and early morning to attend to store trading and operational requirements, including for stock replenishment following a busy day of trading.[108] The increased roster options promotes flexible modern work practices and promotes the efficient and productive performance of work.[109]

Section 134(1)(f) and (h) – the likely impact on productivity, the regulatory burden and the likely impact on the performance and competitiveness of the national economy

106. There is currently an administrative burden in ensuring that employees have entered into an agreement to reduce the minimum break period.[110] This imposes inconvenience and inefficiencies for the business.[111]

107. The purpose of a minimum break between shifts is to ensure that employees receive a period of rest between their shifts. The existence of a default minimum break period of less than 12 hours in comparable industries (see below at paragraph 109) and in enterprise agreements within the retail sector (see above at 102(a)), coupled with the ability for employees to agree to a 10-hour minimum break period under the GRIA 2020 (for which there is a high take up rate), indicate that a 10-hour minimum break period is sufficient to provide a proper break between shifts. The length of the minimum break need not be more onerous than the purpose for which it was intended. A requirement to ensure a break between shifts that is longer than necessary to achieve its intended purpose puts a burden on businesses that impacts productivity, employment and increases the regulatory burden.

108. Further, as outlined above, at paragraph 33, allowing employees to have more control over their shifts can increase productivity, and effective staff scheduling can lower operational costs, thereby enabling businesses to maintain their competitiveness in the market.

Section 134(1)(g) – the need to ensure a simple, easy to understand and stable modern award system

[107] Tassigiannakis Statement, [35]-[36].
[108] De Pasquale Statement, [29].
[109] McDonald Statement, [28]; Tassigiannakis Statement, [36].
[110] Mein Statement, [30]-[31].
[111] Mein Statement, [31].

109. The GRIA 2020 requires a 12-hour break between shifts, which is inconsistent with other comparable awards. In contrast to the GRIA 2020, the *Hospitality Industry (General) Award 2020* provides for a default minimum 10-hour break between shifts (cl 15.5(e)), the *Restaurant Industry Award 2020* provides for a default minimum 8-hour break between shifts (cl 23.2), and the *Fast Food Industry Award 2020* provides no such minimum. A minimum break period that is more aligned with other comparable awards is, therefore, more appropriate and necessary to give effect to the modern award objectives as it ensures a more stable and consistent modern award system.

110. Each of the above considerations weighs in favour of the variations under Proposal C being made.

D.4. PROPOSAL D – Amendment to improve ability to average hours over longer periods

111. Proposal D (alongside Proposals F, G, H and I) seeks to improve flexibility in the rostering of full-time employees. Prior to turning to Proposal D, it is necessary to consider the current framework for the work arrangements of full-time employees under the GRIA 2020.

Full-time employees

112. Under clause 9 of the GRIA 2020, a full-time employee is engaged to work "an average of 38 ordinary hours per week in accordance with an agreed hours of work arrangement". Clause 15 is headed "ordinary hours of work and rostering arrangements". Clause 15.6 is headed "Full-time employees" and outlines the way in which an hours of work arrangement for full-time employees can be assessed and agreed. Clause 15.6, and surrounding clauses, also contain rostering conditions, which limit the ways in which ordinary hours can be rostered.

113. Clause 15.6(a) provides that:

> "in each establishment an assessment must be made as to the kind of arrangement for working the average of 38 ordinary hours per week required for full-time employment that best suits the business of the establishment."

114. A number of protections are built into the making of full-time work arrangements, including that either the employer or the employee may initiate the making of an assessment but it cannot be made more frequently than once per year (cl 15.6(c)).

115. Clauses 15.5, 15.6, 15.7 and 15.8 impose a lengthy list of rostering conditions in respect of full-time employees. The rostering conditions the subject of this Application are overly rigid and do not reflect flexible modern work practices or permit the flexibility expected by employees in the retail sector. These rostering conditions are:

(a) the maximum number of ordinary hours that can be worked on any day is 9 but an employee can agree to work up to 11 ordinary hours on one day per week (cll 15.4 and 15.5);

(b) an employee must not be rostered to work more than 152 hours over four consecutive weeks (unless there is agreement to work an average of 38 hours per week over a longer period) (cl 15.6(g)(iv)-(v));

(c) in an establishment at which at least 15 employees are employed per week on a regular basis, the employee must not be rostered to work ordinary hours on more than 19 days per 4 week cycle (unless agreed otherwise) (cl 15.6(i) and (j));

(d) an employee must have at least two consecutive days off per week or three consecutive days off per two week cycle (unless agreed otherwise at the employee's written request) (cl 15.7(d)); and

(e) an employee who regularly works Sundays must have three consecutive days off (including Saturday and Sunday) per four week cycle (unless agreed otherwise at the employee's written request) (cl 15.8).

116. There are a range of other rostering conditions, which are not the subject of this Application, which apply under the GRIA 2020. Whilst the ARA does not seek to alter those rostering conditions, the flexibility sought should be viewed in the context of the compounding effect of these other rigid rostering conditions, such as the six-day limit for the maximum number of consecutive days (cl 15.7(e)).

Averaging of ordinary hours

117. Proposal D concerns clause 15.6, which as noted above contains a number of restrictions on full-time working arrangements. One of the restrictions on these arrangements is that a full-time employee can only be rostered to work in the ways expressly stipulated in clause 15.6(g), being:

(a) working 38 hours per week;

(b) working 76 hours over two consecutive weeks;

(c) working 114 hours over three consecutive weeks;

(d) working 152 hours over four consecutive weeks; or

(e) working an average of 38 hours per week over a longer period agreed between the employer and the employee.

118. The ARA seeks, by Proposal D, to allow employers and full-time employees to average the ordinary hours of work over longer periods of up to six months or as agreed, rather than the current averaging period of one to four weeks under the GRIA 2020, or longer period as agreed. The variation is sought to be made by the following amendments to the following clauses (amendments in strikethrough and underlining):

(a) clause 15.6(g)(v):

> working an average of 38 hours per week over a longer period <u>of up to six months or as</u> agreed between the employer and the employee.

(b) clause 15.7(a):

> A roster period cannot exceed 4 weeks except ~~by agreement in~~ <u>where hours are averaged over a longer period pursuant to</u> clause 15.6(g)(v).

(c) clause 18.2:

> Wages must be paid for a pay period according to the number of hours worked by the employee in the period <u>or where an employee's ordinary hours are averaged over a period of time permitted by this award an employee may be paid for the average number of ordinary hours attributed to the relevant pay period.</u> ~~they may be averaged over a fortnight.~~

119. The ARA seeks that the variation be made pursuant to s 157(1)(a) on the basis that it is necessary to achieve the modern awards objective, particularly taking into account sections 134(1)(d), (f), (g) and (h) of the FW Act.

Necessary to achieve modern award objectives

Section 134(1)(d) – the need to promote flexible modern work practices and the efficient and productive performance of work; s 134(1)(f) and (h) – likely impact on employment costs and improve productivity

120. In the absence of agreement, the maximum period over which the 38 ordinary hours of full-time employees can be averaged is up to four weeks. By enabling ordinary hours to be averaged over a period of up to six months or as agreed, Proposal D promotes flexible modern work practices because it provides more rostering options so that ordinary hours worked in a roster cycle can be balanced against hours worked outside of that cycle.

121. Requiring an average of 38 hours per week over a cycle of up to four weeks does not appropriately take into account seasonal variations in trade which are experienced by retailers and leads to employees requiring days off at the same time given the narrow range within which their ordinary hours must be worked.[112]

122. The variation also provides greater flexibility for employers to take into account employees' preferences for rostered days off.[113] Some employees value the ability to take longer periods off during the off-peak seasons.[114]

123. Although the ARA proposes that specific agreement need not be required to enable the longer averaging period, the proposal retains the overarching protections for employees in clause 15.6 in the making of full-time work arrangements (as referred to above).

124. If the averaging period is increased as proposed by the ARA, it is also appropriate that the payments owed to employees in respect of a particular pay cycle align to the average hours for that pay cycle as this provides greater certainty and consistency in relation to the amount received by employees each pay cycle and makes it easier to administer in payroll systems.[115] The ARA therefore seeks that consequential amendments be made to clause 18.2 to reflect that an employee may be paid for the average number of ordinary hours attributed to the relevant pay period.

125. Allowing for the payments owed in a particular pay cycle to align to the average hours for that pay cycle will also help to ensure that employees participating in an averaging arrangement receive a consistent income over the course of the year, which is likely to help them better manage their financial commitments.

126. Further, as outlined above, at paragraph 33, allowing employees to have more control over their shifts can increase productivity, and effective staff scheduling can lower operational costs, thereby enabling businesses to maintain their competitiveness in the market.

Section 134(g) – stable modern award system

127. In many other awards, employers and employees are able to average the hours of work over longer periods than up to four weeks.[116] The variation would also assist to make GRIA 2020 more consistent with other comparable awards. This would be consistent with

[112] Shelton Statement. [57]; Melton Statement, [62]; McDonald Statement, [30]; Mein Statement, [34].
[113] Shelton Statement, [58]; Mein Statement, [33], Melton Statement, [63]; Justice Statement, [26].
[114] Mein Statement, [35].
[115] Shelton Statement, [60].
[116] *Professional Employees Award 2020,* cl 13.2 (up to 13 weeks); *Security Services Industry Award 2020, cl 13,1* (up to 8 weeks).

ensuring a more simple, consistent, easy to understand modern award system as anticipated by the modern award objectives.

128. Each of the above considerations weighs in favour of the variations under Proposal D being made.

D.5 Proposal F - Amendment to remove restriction of 19 starts for full-time employees

129. This proposal also concerns full-time employee work arrangements under the GRIA 2020, and seeks to remove an outdated rostering requirement which is not supported in practice by a significant number of employees. The framework for the making of full-time work arrangements is outlined above at paragraphs 112 to 116.

130. A further restriction currently imposed on full-time work arrangements for establishments at which at least 15 employees are employed per week on a regular basis is that full-time employees cannot be rostered to work ordinary hours on more than 19 days, often referred to as "19 starts", per 4 week cycle, unless the employer agrees to the contrary with an individual employee.

131. The ARA seeks, by Proposal F, to remove the restriction of 19 starts in a 4 week cycle for full-time employees by deleting the following sub-clauses:

> (i) in an establishment at which at least 15 employees are employed per week on a regular basis, the employer must not roster an employee to work ordinary hours on more than 19 days per 4 week cycle.
>
> (j) clause 15.6(i) is subject to any agreement to the contrary between the employer and an individual employee.

132. The ARA seeks that the Commission make the variation under s 157(1)(a) on the basis that the variation to remove the requirement for 19 starts is necessary to achieve the modern awards objective, particularly taking into account the considerations under s 134(1)(d), (f), (g) and (h) of the FW Act.

Necessary to achieve modern award objectives

Section 134(1)(d) – the need to promote flexible modern work practices and the efficient and productive performance of work; section 134(1)(f) – likely impact on productivity

133. Removing the 19 starts requirement allows both employers and employees to choose more flexible working arrangements that are more efficient and productive consistent with the modern award objectives. One of the major difficulties with the 19 starts restriction is that a full-time employee cannot be rostered to work their ordinary hours in a consistent

weekly pattern each week, meaning that they cannot be rostered for the same five working days each week in a 4-week cycle.[117]

134. From the perspective of employees, the 19 starts restriction does not reflect the needs or preferences of many employees in the retail sector. This is demonstrated by a number of workplaces where most, if not all, employees have agreed to opt out of the restriction (see for example, Coles where over 90% of employees have opted-out of the restriction and MECCA where all full-time employees have opted out).[118] Employees who agree not to be restricted by the 19 starts requirements desire regularity and consistency in their rostered hours.[119]

135. From the perspective of employers, the variation is necessary because the rigid rule of 19 day starts does not align with retail trading patterns and workloads and can lead to shortages at various points across the roster cycle.[120] Further, rostering systems are often aligned with the employer's ordinary rostering cycles and cannot easily accommodate an anomalous weekly roster every four weeks.[121]

136. While the ARA proposes that specific agreement with individual employees no longer be required, the proposal retains the employee overarching safeguards in clause 15.6 for the making of such arrangements.

137. Further, as outlined above, at paragraph 33, allowing employees to have more control over their shifts can increase productivity, and effective staff scheduling can lower operational costs, thereby enabling businesses to maintain their competitiveness in the market.

Section 134(1)(g) – the need to ensure a stable modern award system

138. The Proposal F variation also assists to make the entitlements under the GRIA 2020 more consistent with the modern award rostering requirements for comparable industries.[122] This would be consistent with ensuring a more simple, consistent, easy to understand modern award system as anticipated by the modern award objectives.

139. Each of the above considerations weighs in favour of the variations under Proposal F being made.

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[117] Shelton Statement, [66]; Melton Statement, [70].
[118] Shelton Statement, [64]; Canning-Casey Statement, [36].
[119] Canning-Casey Statement, [37]; Melton Statement, [70].
[120] Melton Statement, [69]; Justice Statement,[29] .
[121] Shelton Statement, [67]; Canning-Casey Statement, [38]-[39].
[122] *Hospitality Industry (General) Award 2020,* cl 15.1(b) (permits a 19 day month but does not require it); *Restaurant Industry Award 2020* cl 15 (includes no 19 starts equivalent).

D.6. PROPOSAL G – Amendment to allow greater flexibility for 38 ordinary hours to be worked across four days

140. The desire for employees to work full-time over a four-day working week is gaining momentum across the economy and is being promoted by a variety of organisations (including various unions) given the flexibility it provides to a diverse range of employees. The ARA, through proposal G, seeks to make this flexibility available to employees in the retail sector.

141. The GRIA 2020 currently limits the maximum number of ordinary hours that can be worked on any one day to 9 hours, except that employees can agree to work up to 11 hours on one day per week.

142. The ARA seeks, by Proposal G, to vary the daily maximum number of ordinary hours to facilitate more easily a four day working week for full-time employees. The ARA seeks to introduce this flexible work arrangement by amending the following clauses (amendments in strikethrough and underlining):

(a) amend clause 15.4 of the GRIA 2020 to read:

> 15.4 Subject to clause 15.5, the maximum number of ordinary hours that can be worked on any day is ~~9~~10.

(b) amend clause 15.5 of the GRIA 2020 to read:

> 15.5 An employer may roster an employee to work up to 11 ordinary hours on one day per week, or two days per week by agreement between the employer and an individual employee.

(c) amend clause 21.2(c)(iii) of the GRIA 2020 to read:

> (iii) in excess of the maximum daily ordinary hours determined by clauses 15.4 and 15.5. ~~11 hours on one day of the week and in excess of 9 hours on any other day of the week~~

143. The ARA seeks the variation on the basis that the increased flexibility to work 38 ordinary hours across four days is necessary to achieve the modern awards objective, taking into account the considerations under s 134(1)(aa), (ab), (c), (d), (f), (g) and (h) of the FW Act.

Necessary to achieve modern award objectives

Section 134(1)(aa) – the need to improve access to secure work; section 134(1)(ab) and (c) – the need to promote social inclusion through increased workforce participation and gender equality; section 134(1)(d) the need to promote flexible modern work practices

144. The effect of Proposal G is to provide more flexibility for employees to compress their weekly ordinary hours into a shorter working week, thereby increasing the number of rostered days off during the week.

145. The variation is necessary to provide more options for employees who prefer alternative working arrangements that accommodate caring responsibilities or other family or personal commitments. As outlined above, accommodating more flexible work practices is key to achieving gender equality in the workplace.

146. Employees have expressed their preference to work their full-time ordinary hours across a four day week, including because of their caring and family commitments.[123] This has become particularly attractive to employees following the COVID-19 pandemic.[124] The strong support for the ability to work a four-day working week is exemplified by the recent negotiations between Kmart and the SDA in respect of the *Kmart National Agreement 2024*, which has been lodged with the Commission for approval.[125] The SDA introduced a claim to include a four day working week in the *Kmart National Agreement 2024*, for which representatives of the SDA, including Kmart employees, strongly advocated.[126] There was overwhelming support for the terms of the *Kmart National Agreement 2024,* with 92% of voting employees voting to approve the agreement.[127]

147. The *Woolworths Australian Food Group Agreement 2024* provides for the working of a four day week by full-time employees which is facilitated by working ordinary hours up to 9.5 hours per day.[128] This agreement was supported by the SDA and received a majority "yes" vote with 58,757 team members voting in support in June 2024.[129]

148. The *Bunnings Retail Enterprise Agreement 2023* also provides for a full-time employee to work a 'four day working week', which is facilitated by the default daily ordinary hours cap being 9.5 hours.[130]

[123] Melton Statement, [74]; McDonald Statement, [34]; Tassigiannakis Statement, [40].
[124] Melton Statement, [74].
[125] Melton Statement, [15], [76].
[126] Melton Statement, [76]; Annexure CM-5.
[127] Melton Statement, [16].
[128] *Woolworths Australian Food Group Agreement 2024,* cl 8.2(h).
[129] Di Tirro Statement, [43].
[130] *Bunnings Retail Enterprise Agreement 2023*, cl 3.1(a)(iv), cl 10.1.

149. The *Officeworks Store Operations Agreement 2024* also provides for a full-time employee to work a 'four day week' which is facilitated by the default daily ordinary hours cap being 9.5 hours.[131]

150. The changes proposed by the ARA would also enable employers to offer more secure, permanent positions or guaranteed hours of work to employees who may not prefer (or are not able to) work across a five day week.[132] This promotes social inclusion through increased workforce participation particularly among employees with caring and family responsibilities. This is supported by labour workforce data, which suggests that flexible work arrangements enables greater workforce participation, particularly for women in the retail rector.[133] The need to provide attractive flexible working options is particularly urgent in the current retail environment given:

(a) the current skills shortages in the retail sector with 76% of hiring retailers reporting, in one study, difficulties in filling vacancies;[134] and

(b) the high turnover rate within the retail sector with 12% of retail employees leaving the industry over the following 12 months, compared to 9.8% across the broader economy (not including seasonal employees).[135]

Section 134(1)(f) and (h) - improved productivity and reduction of costs

151. Extending the maximum ordinary hours by one hour also better enables managerial employees to perform administrative tasks outside of trading hours.[136] This can lead to improved productivity given such administrative tasks, which encompass roster planning, reviewing reports and responding to customer emails are more efficiently and effectively completed outside store hours.[137]

152. Further, as outlined above, at paragraph 33, allowing employees to have more control over their shifts can increase productivity, and effective staff scheduling can lower operational costs, thereby enabling businesses to maintain their competitiveness in the market.

Section 134(1)(g) – the need to ensure a stable modern award system

[131] *Officeworks Store Operations Agreement 2024,* cl 24.10.
[132] Mein Statement, [41].
[133] Rumbens Report, [4.6].
[134] Rumbens Report, [4.53].
[135] Rumbens Report, [4.16].
[136] McDonald Statement, [33].
[137] McDonald Statement, [33].

153. Increasing the daily maximum ordinary hours to 10 hours is consistent with many other modern awards, including the *Clerks Private Sector Award 2020* (which provides for a maximum of 10 hours excluding unpaid meal breaks); the *Textile, Clothing, Footwear and Associated Industries Award 2020* and *Commercial Sales Award 2020* (which provides for a maximum of 10 hours on any day); and the *Wine Industry Award 2020* and *Miscellaneous Award 2020* (which provides for a maximum of 10 hours on any day, with the ability to agree to extend up to 12 hours).

154. The proposal also provides for fewer maximum ordinary hours per day than other comparable awards including the *Fast Food Industry Award 2020*, which provides for a maximum number of 11 ordinary hours worked in one day, and the *Hospitality Industry (General) Award 2020* and *Restaurant Industry Award 2020* which both provide for a maximum of 11.5 hours per day on up to 8 occasions in a 4-week cycle with remaining days capped at 10 ordinary hours.

155. The proposal ensures protection for employees by only allowing the additional 11-hour shift length to occur with employee agreement.

156. Each of the above considerations weighs in favour of the variations under Proposal G being made.

D.7. PROPOSAL H – Amendment to improve flexibility to remove requirements for consecutive days off by agreement

157. Proposal H concerns full-time work arrangements, which are referred to above at paragraphs 112 to 116. There are two key amendments sought by Proposal H. The primary amendment is to remove unnecessary administrative requirements when employees want to agree to not be rostered on consecutive days off as prescribed by clause 15.7(d). The second amendment is to amend the heading of clause 15.7 to clarify that the rostering arrangements under clause 15.7 apply only to full-time employees.

Variation to clause 15.7(d) – agreement not to be rostered for consecutive days off

158. Clause 15.7 imposes limitations on the way in which ordinary hours of full-time employees can be rostered. Clause 15.7(d) is headed “consecutive days off” and prescribes that an employer must roster an employee to work ordinary hours in such a way that they have two consecutive days off per week or three consecutive days off per two week cycle (cl 15.7(d)(i)).

159. Under clause 15.7(d)(ii), an employer and an individual employee may agree to different arrangements to enable the employee to be rostered for non-consecutive days off but the agreement is subject to the requirement that the agreement is made at the written request of the employee (cl 15.7(d)(ii)).

160. Clause 15.7 includes other safeguards, including that the agreed arrangement must be recorded in the time and wages record (cl 15.7(d)(iii)), the employee may end an agreement at any time by giving 4 weeks' notice and an employee cannot be required as a condition of employment to make a request under clause 15.7(d)(ii).

161. The ARA seeks, by Proposal H, to amend clause 15.7(d) to provide more flexibility for employees and employers to agree to alternative arrangements by removing the administratively burdensome requirements for a written request and the requirement to record the agreement in a time and wages record. The ARA seeks to give effect to this variation by amending clause 15.7(d) as follows (amendments in strikethrough and underlining):

> (d) Consecutive days off
>
> (i) The employer must roster an employee to work ordinary hours in such a way that they have 2 consecutive days off per week or 3 consecutive days off per 2 week cycle.
>
> (ii) Clause 15.7(d)(i) is subject to any agreement for different arrangements entered into between the employer and an individual employee ~~at the written request of the employee.~~
>
> ~~(iii) Different arrangements agreed under clause 15.7(d)(ii) must be recorded in the time and wages record.~~
>
> (iv) The employee may end an agreement under clause 15.7(d)(ii) at any time by giving the employer 4 weeks' notice.
>
> (v) An employee cannot be required as a condition of employment to make an ~~request~~ agreement under clause 15.7(d)(ii).

162. The proposal retains the core protection that the different arrangement occur only with employee agreement. The proposal also retains the additional safeguard regarding the ability to terminate an agreement at any time with 4 weeks' notice, and makes a consequential modification to the prohibition on requiring a request as a condition of employment by referring to the agreement, rather than a request.

163. The ARA seeks that the Commission make the proposed variation to clause 15.7(d) of the GRIA 2020 under s 157(1)(a) of the FW Act on the basis that the amendments to remove the requirement for a written request is necessary to achieve the modern awards objective, particularly taking into account the considerations under s 134(1)(aa), (ab), (c), (d), (f) and (h) of the FW Act.

Necessary to achieve the modern awards objective

Section 134(1)(aa) – the need to improve access to secure work; section 134(1)(ab) and (c) – the need to promote social inclusion through increased workforce participation and gender equality; section 134(1)(d) the need to promote flexible modern work practices

164. Although the Proposal H amendments most immediately concern the administrative burdens applying to agreements relating to the consecutive days off requirements under clause 15.7(d)(i), the ultimate objective is to better facilitate more flexible roster practices.

165. Limiting the ability to roster employees differently from the consecutive days off restrictions in clause 15.7(d)(i) impedes flexibility in that employers are not able to proactively ask an employee whether they would agree to a roster arrangement that does not require the consecutive days off under clause 15.7(d)(i), which does not reflect the reality of how rostering conversations can be initiated by managers who are responsible for setting rosters.[138] There is significant employee support for not having to be rostered to have two consecutive days off per week or three consecutive days per two week cycle.[139]

166. The ability to roster days off flexibly without the consecutive days off requirements is particularly important for small businesses and smaller parts/departments of larger retail employers' businesses where there are fewer employees, or where employees have the same overlapping requirements to have consecutive days off (such as on weekends).[140] Both can result in insufficient employees to ensure effective coverage of the store across the store's trading hours.[141]

Section 134(1)(f) and (h) - improved productivity and reduction of regulatory burden

167. As outlined above, better facilitating the making of agreements to roster employees outside of the consecutive days off restrictions gives employers greater flexibility to roster

[138] Di Tirro Statement, [43]-[44].
[139] Canning-Casey Statement, [42] (47% of full-time employees); Shelton Statement, [71] (69% of wages paid employees and over 98% of salaried employees); Melton Statement, [81] (63% of salaried managers), Tassigiannakis Statement, [44]; Justice Statement, [31].
[140] De Pasquale Statement, [44]; Shelton Statement, [74].
[141] De Pasquale Statement, [44]; Shelton Statement, [74].

their workforce according to the operational needs of the business. The variation therefore addresses the need for improved productivity.

168. The variation will also have the likely impact of reducing the regulatory burden on employers. The need for a request to be made in writing and for the agreement to be recorded in time and attendance records adds a significant administrative burden on employers as they are required to create and maintain various additional record keeping processes.[142] This regulatory burden is exacerbated if the Proposal A variation, which clarifies that such agreement could be recorded electronically, is not made.[143]

169. For large organisations employing large numbers of employees, time and attendance and payroll systems are complex and often multiple systems are required to implement the relevant processes.[144] Those processes often need to be calibrated to comply with the various rostering and pay requirements under the GRIA 2020.[145] Adding the additional steps of a written request and the recording of an agreement in the employer's time and wages record compounds the administrative complexity and burden for employers.

170. Further, the need to add additional steps into the process for making an agreement, can increase the risk that the agreement is not properly processed in the system and can lead to increased risk of inadvertent non-compliance. For example, at one retail business, the need to make a written request means that an employee must click through 13 steps to input the request in the system.[146] The need to ensure that each step has been properly executed also adds a further regulatory burden on employers.[147] The proposed variation eases the regulatory burden on employers by enabling them to simplify, streamline and consolidate administrative processes.[148]

171. The requirement to reach agreement without the need for a written request strikes the necessary balance of protecting an employee's right to choose whether or not to be rostered in accordance with the consecutive days off rules while easing the regulatory burden on employers by streamlining their administrative processes.

172. The proposal also reduces the administrative burden on employees by taking away the requirement for the step of an employee having to submit a written request before agreement can be reached. For example, currently, if an employee approaches their

[142] Canning-Casey Statement, [16]; Melton Statement, [80]; Dunstan Statement, [47]; Mein Statement, [44]; Tassigiannakis Statement, [44]; Justice Statement, [32].
[143] Shelton Statement, [72]-[73].
[144] Canning-Casey Statement, [18].
[145] Canning-Casey Statement, [17]-[18], [43].
[146] Canning-Casey Statement, [45(c)]; Annexure DCC-1.
[147] Canning-Casey Statement, [46].
[148] Canning-Casey Statement, [46]; Di Tirro Statement, [43]-[44].

manager and verbally states that they do not want to be subject to clause 15.7(d)(i), instead of their manager then processing such a request, the GRIA 2020 effectively requires that the manager tell the employee that they must go away and send through a formal written request before the employer can take any steps to action the employee's preference. It is difficult to see how this step adds any real protection for employees or how it can be said to be consistent with a productive modern workplace.

173. Each of the above considerations weighs in favour of the making of the variations under Proposal H.

174. Further, as outlined above, at paragraph 33, allowing employees to have more control over their shifts can increase productivity, and effective staff scheduling can lower operational costs, thereby enabling businesses to maintain their competitiveness in the market.

Variation to heading of clause 15.7 – Correction of error or uncertainty

175. The ARA also seeks that the heading of clause 15.7 of the GRIA 2020 be amended to clarify that it applies to full-time employees as follows (in underlining):

> ***Full-time employees –*** *rostering arrangements*

Relevant provisions of the GRIA 2020 and equivalent provisions prior to the plain language re-drafting process

176. Clause 15.7 of the GRIA 2020 is currently headed "Rostering arrangements" and states:

> **15.7 Rostering arrangements**
>
> **(a)** A roster period cannot exceed 4 weeks except by agreement in clause 15.6(g)(v).
>
> **(b)** The employer must not roster an employee to work ordinary hours on more than 5 days per week, except as provided by clause 15.7(c).
>
> **(c)** The employer may roster an employee to work ordinary hours on 6 days in one week per two-week cycle, provided that in the other week in that cycle the employee is rostered to work ordinary hours on no more than 4 days.
>
> **(d) Consecutive days off**
>
> **(i)** The employer must roster an employee to work ordinary hours in such a way that they have 2 consecutive days off per week or 3 consecutive days off per 2 week cycle.

(ii) Clause 15.7(d)(i) is subject to any agreement for different arrangements entered into between the employer and an individual employee at the written request of the employee.

(iii) Different arrangements agreed under clause 15.7(d)(ii) must be recorded in the time and wages record.

(iv) The employee may end an agreement under clause 15.7(d)(ii) at any time by giving the employer 4 weeks' notice.

(v) An employee cannot be required as a condition of employment to make a request under clause 15.7(d)(ii).

(e) Consecutive days of work

The maximum number of consecutive days on which an employee may work (whether ordinary hours or reasonable additional hours) is 6.

177. Prior to the introduction of clause 15.7 in the GRIA 2020, the equivalent clauses in the *General Retail Award 2010* (**GRIA 2010**), clauses 28.9, 28.10, 28.11 and 28.12, were found within clause 28, which was headed "38 hour week rosters".

178. Clause 28 of the GRIA 2010 provided:

28. 38 hour week rosters

28.1 A full-time employee will be rostered for an average of 38 hours per week, worked in any of the following forms or by agreement over a longer period:

(a) 38 hours in one week;

(b) 76 hours in two consecutive weeks;

(c) 114 hours in three consecutive weeks; or

(d) 152 hours in four consecutive weeks.

28.2 The 38 hour week may be worked in any one of the following methods:

(a) shorter days, that is 7.6 hours;

(b) a shorter day or days each working week;

(c) a shorter fortnight, i.e. four hours off in addition to the rostered day off;

(d) a fixed day off in a four week cycle;

(e) a rotating day off in a four week cycle;

(f) an accumulating day off in a four week cycle, with a maximum of five days being accumulated in five cycles.

28.3 In each shop, an assessment will be made as to which method best suits the business and the proposal will be discussed with the employees concerned, the objective being to reach agreement on the method of implementation. An assessment may be initiated by either the employer or employees not more than once a year.

28.4 Circumstances may arise where different methods of implementation of a 38 hour week apply to various groups or sections of employees in the shop or establishment concerned.

28.5 In retail establishments employing on a regular basis 15 or more employees per week, unless specific agreement exists to the contrary between an employer and an employee, the employee will not be required to work ordinary hours on more than 19 days in each four week cycle.

28.6 Where specific agreement exists between an employer and employee, the employee may be worked on the basis of:

(a) not more than 4 hours' work on one day in each two week cycle;

(b) not more than 6 hours' work on one day in each week;

(c) not more than 7.6 hours' work on any day.

28.7 Substitute rostered days off (RDOs)

(a) An employer, with the agreement of the majority of employees concerned, may substitute the day or half day an employee is to take off in accordance with a roster arrangement for another day or half day in the case of a breakdown in machinery or a failure or shortage of electric power or to meet the requirements of the business in the event of rush orders or some other emergency situation.

(b) By agreement between an employer and an employee, another day may be substituted for the day that employee is to be rostered off.

28.8 Accumulation of RDOs

By agreement between the employer and an employee, the rostered day off may be accumulated up to a maximum of five days in any one year. Such accumulated periods may be taken at times mutually convenient to the employer and the employee.

28.9 A roster period cannot exceed four weeks.

28.10 Ordinary hours will be worked on not more than five days in each week, provided that if ordinary hours are worked on six days in one week, ordinary hours in the following week will be worked on no more than four days.

28.11 Consecutive days off

(a) Ordinary hours will be worked so as to provide an employee with two consecutive days off each week or three consecutive days off in a two week period.

(b) This requirement will not apply where the employee requests in writing and the employer agrees to other arrangements, which are to be recorded in the time and wages records. It cannot be made a condition of employment that an employee make such a request.

(c) An employee can terminate the agreement by giving four weeks' notice to the employer.

28.12 Ordinary hours and any reasonable additional hours may not be worked over more than six consecutive days.

28.13 Employees regularly working Sundays

(a) An employee who regularly works Sundays will be rostered so as to have three consecutive days off each four weeks and the consecutive days off will include Saturday and Sunday.

(b) This requirement will not apply where the employee requests in writing and the employer agrees to other arrangements which are to be recorded in the time and wages records. It cannot be made a condition of employment that an employee make such a request.

(c) An employee can terminate the agreement by giving four weeks' notice to the employer.

28.14 Notification of rosters

(a) The employer will exhibit staff rosters on a notice board, which will show for each employee:

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

(ii) the days of the week on which work is to be performed; and

(iii) the commencing and ceasing time of work for each day of the week.

(b) The employer will retain superseded notices for twelve months. The roster will, on request, be produced for inspection by an authorised person.

(c) Due to unexpected operational requirements, an employee's roster for a given day may be changed by mutual agreement with the employee prior to the employee arriving for work.

(d) Any permanent roster change will be provided to the employee in writing with a minimum seven days notice. Should the employee disagree with the roster change, they will be given a minimum of 14 days written notice instead of seven days, during which time there will be discussions aimed at resolving the matter in accordance with clause 9—Dispute resolution, of this award.

(e) Where an employee's roster is changed with the appropriate notice for a once-only event caused by particular circumstances not constituting an emergency, and the roster reverts to the previous pattern in the following week, then extra work done by the employee because of the change of roster will be paid at the overtime rate of pay.

(f) An employee's roster may not be changed with the intent of avoiding payment of penalties, loading or other benefits applicable. Should such circumstances arise the employee will be entitled to such penalty, loading or benefit as if the roster had not been changed.

179. While "full-time employees" was not the express heading to clause 28, the clause 28 heading of "38 hour week rosters" should be understood as having an equivalent meaning to "full-time employees", who were defined as employees engaged to work an average of 38 hours per week (cl 11). It was also implicit in the terms of clause 28.1(a), which provided that a full-time employee will be rostered for an average of 38 hours per week, that clause 28 applied only to full-time employees.

180. Further, clause 12 of the GRIA 2010, which was entitled, "part-time employees" set out separate requirements for rostering (cl 12.8) and patterns of work for part-time employees, 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.

12.4 The agreement and variation to it will be retained by the employer and a copy given by the employer to the employee.

12.5 An employer is required to roster a part-time employee for a minimum of three consecutive hours on any shift.

12.6 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.

12.7 A part-time employee employed under the provisions of this clause will be paid for ordinary hours worked at the rate of 1/38th of the weekly rate prescribed for the class of work performed. All time worked in excess of the hours as agreed under clause 12.2 or varied under clause 12.3 will be overtime and paid for at the rates prescribed in clause 29.2—Overtime.

12.8 Rosters

(a) 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.

(b) The rostered hours of part-time employees may be altered at any time by mutual agreement between the employer and the employee.

(c) Rosters will not be changed except as provided in clause 12.8(a) from week to week, or fortnight to fortnight, nor will they be changed to avoid any award entitlements.

12.9 Award entitlements

A part-time employee will be entitled to payments in respect of annual leave, public holidays, personal leave and compassionate 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.

12.10 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.

181. The distinction between clauses 12 (as relating to part-time employees) and clause 28 (as relating to full-time employees) was further made clear by the overtime clause (cl 29.2), which provided (among other things):

29.2 Overtime

(a) Hours worked in excess of the ordinary hours of work, outside the span of hours (excluding shiftwork),or roster conditions prescribed in clauses 27 and 28 are to be paid at time and a half for the first three hours and double time thereafter.

(b) Hours worked by part-time employees in excess of the agreed hours in clause 12.2 or as varied under clause 12.3 will be paid at time and a half for the first three hours and double time thereafter.

(c) Hours worked by casual employees:

(i) in excess of 38 ordinary hours per week or, where the casual employee works in accordance with a roster, in excess of 38 ordinary hours per week averaged over the course of the roster cycle;

(ii) outside of the span of ordinary hours for each day specified in clause 27.2;

(iii) in excess of 11 hours on one day of the week and in excess of 9 hours on any other day of the week;

shall be paid at 175% of the ordinary hourly rate of pay for the first three hours and 225% of the ordinary hourly rate of pay thereafter (inclusive of the casual loading).

182. Although no express reference was made to full-time employees in sub-clause 29.2(a), it was clearly limited to full-time employees given that part-time employees and casual employees were separately dealt with in clauses 29.2(b) and (c), respectively. Having

regard to the terms of clause 29.2(a) to (c), overtime for full-time employees was payable by reference to clause 28, whereas overtime for part-time employees was determined by reference to their agreed hours under clause 12 (and not by reference to any roster conditions under clause 28).

183. The Commission has previously concluded that clause 28 is limited to full-time employees (and not applicable to casual employees). In *Prouds Jewellers Pty Ltd T/A Prouds Jewellers Pty Ltd* [2020] FWCA 2424, the Commission accepted a submission that clause 28 applied only to full-time employees. The Commission stated, at paragraph [38]:

> **[38]** Clause 28 is entitled "*38 Hour Week Rosters*". Clause 28.1 provides that a full-time employee will be rostered for an average of 38 hours per week and sets out the ways in which those hours may be rostered. The provisions that then follow in clause 28.2 – 28.8 refer to 38 hour weeks and other working arrangements which can only apply to employees working 38 hours per week or an average of 38 hours per week. It is clear that employees that work 38 hours per week or an average of 38 hour per week in the context of the GRIA are full-time employees. I accept as contended by the SDA that the subsequent Consecutive Day Clauses refer to "*employee*" or "*employees*", without limitation. I also accept that "*employee*" is defined in clause 3 of the GRIA as contended for by the SDA. However, I reject the contention that the Consecutive Day Clauses must therefore be constructed as applying to all employees, including casual employees. "*Employee*" is used in the clauses which precede the Consecutive Day Clauses. Its first use is in clause 28.3. It is not contended that "*employee*" as used in those clauses means anything other than a full-time or permanent employee. The construction advanced by the SDA would require that the word "*employee*" be ascribed different meanings at different points in the clause. The SDA contends that that point is clause 28.10. I find such a construction implausible and the clause to contain nothing which could support such a construction. The clause must be read as a whole. When read as a whole, I consider that clause 28 is intended to apply to employees who are required to work 38 hours per week or an average thereof and puts in place safeguards in relation to how those required hours may be rostered. While casual employees could, potentially, work 38 hours per week they are not employed on that basis. It is inherent in the nature of casual employment that there is no requirement to work 38 hours per week or an average thereof and, as has been noted by the Full Bench, most do not. Indeed, there is no requirement for a casual employee to work any hours at all. A casual employee cannot be required to work excessive days without consecutive days off. In the absence of the roster conditions, a full-time employee could be so required. As such, I do not consider any construction of clause 28 advanced on the disutility of casual employees being required to work excessive days without consecutive days off can be sustained. Accordingly, I do not consider on a plain reading that the Consecutive Day Clauses apply to casual employees.

184. The Commission considered that the above construction was supported by the historical context of clause 28 and the interaction with the overtime provisions.[149] The decision was upheld on appeal.[150]

Plain language re-drafting process

185. The relevant variations to clause 28 were made as part of the Commission's plain language re-drafting process.

186. On 5 July 2017, the Commission published the first plain language exposure draft of what became the GRIA 2020 (**Exposure Draft**). As provided on the first page of the Exposure Draft, the Exposure Draft "[did] not seek to amend any entitlements under the [GRIA 2010]".

187. Clause 28 was amended and relocated to clause 15. A comparison between the terms of clause 28 of the GRIA 2010 and clause 15 of the Exposure Draft is set out in Annexure B to these submissions. Clause 15.6 was headed "Full-time Employees" and clause 15.7 was headed "Rosters (Full-time and part-time employees)".

188. The equivalent of clauses 28.9, 28.10, 28.11 and 28.12 of the GRIA 2010 were relocated to clause 15.7 under the heading, "15.7 Rosters (full-time and part-time employees)", which provided:

> **15.7 Rosters (Full-time and part-time employees)**
>
> (a) A roster period cannot exceed 4 weeks except by agreement in clause 15.6(g)(v).
>
> (b) By agreement between the employer and an individual employee, the employee may be rostered to work:
>
> **(i)** not more than 4 hours on one day per 2 week cycle; or
>
> **(ii)** not more than 6 hours on one day per week; or
>
> **(iii)** not more than 7 hours and 36 minutes on any day.
>
> (c) Except as provided by paragraph (d), the employer must not roster an employee to work ordinary hours on more than 5 days per week.
>
> (d) The employer may roster an employee to work ordinary hours on 6 days in one week if the employee is rostered to work no more than 4 days in the following week.

[149] *Prouds Jewellers Pty Ltd T/A Prouds Jewellers Pty Ltd* [2020] FWCA 2424, [39]-[45].
[150] *Shop, Distributive and Allied Employees Association v Prods Jewellers Pty Ltd* [2020] FWCFB 4864, [24]-[25].

(e) In an establishment at which at least 15 employees are employed per week on a regular basis, the employer must not roster an employee to work ordinary hours on more than 19 days per 4 week cycle.

(f) Paragraph (e) is subject to any agreement to the contrary between the employer and an individual employee.

(g) The employer must roster an employee to work ordinary hours in such a way that they have 2 consecutive days off per week or 3 consecutive days off per 2 week cycle.

(h) Paragraph (g) is subject to any agreement for different arrangements entered into between the employer and an individual employee at the written request of the employee.

(i) Different arrangements agreed under paragraph (h) must be recorded in the time and wages record.

(j) The employee may end an agreement under paragraph (h) at any time by giving the employer 4 weeks' notice.

(k) An employee cannot be required as a condition of employment to agree to an arrangement under paragraph (h).

(l) The maximum number of consecutive days on which an employee may be scheduled to work (whether ordinary hours or overtime) is 6.

189. It is not clear why the reference to "part-time employees" was included in the heading to clause 15.7. As outlined above, given the structure of clause 28, the original clauses 28.9, 28.10, 28.11 and 28.12 applied only to full-time employees.

190. On 4 August 2017, the SDA filed submissions regarding the Exposure Draft, which noted that some of the clauses under the Exposure Draft (cl 15.7(b) (maximum hourly limit per day), 15.7(e)/(f) (19 starts); cl 15.8 (substituted rostered days off) and cl 15.9 (banking of RDO's)) were limited to full-time employees and that the relocation within the new structure under clause 15 would result in substantive changes to the GRIA.[151] The SDA also submitted that it was not clear that clause 15.7(a) (previously 28.9 regarding 4 week maximum roster periods) applied to part-time employees.[152] The SDA did not support the insertion of clauses 15.7(c), (d) and (g) to (k) due to cross-referencing and readability of the new clauses but made no reference to whether it considered that those provisions applied to part-time employees.[153] Other parties filed submissions noting the same concerns that clause 15 may have inadvertently extended the operation of terms under the GRIA 2010 to employees other than full-time employees.[154]

[151] Submissions – General Retail Industry Award 2010 – plain language exposure draft- award specific clause, SDA dated 4 August 2017 (**SDA Submissions**), [91]-[103].
[152] SDA Submissions, [106].
[153] SDA Submissions, [108]-[113].
[154] Submissions in Reply of Australian Business Industrial and the NSW Business Chamber Ltd dated 22 August 2017 [5.1]-[5.2].

191. On 27 October 2017, the Commission issued a statement[155] reporting on a conference held on 26 October 2017 to discuss the plain language re-drafting of the GRIA 2010. The statement provides, at [8], that the following changes were agreed:

> "Delete "(Full-time and part-time employees)" from the title of clause 15.7."
>
> "Clauses 15.7(b), (e) and (f), 15.8 and 15.9 be moved to clause 15.6 (clauses 15.6(k), (i), (j) and (l) and (m) respectively)."

192. The statement includes a cross-references to the relevant transcript supporting the above amendments. Based on the transcript, clauses 15.7(b), (e) and (f), 15.8 and 15.9 were relocated to clause 15.6 because those clauses were identified as being limited to full-time employees only.[156] No party indicated that the remaining clauses in clause 15.7 applied only to part-time employees. To the contrary, the SDA, in addressing the deletion of "full-time and part-time employees" in the title of clause 15.7, suggested that parts of clause 15.7 applied to full-time employees, part-time employees and casual employees. The transcript records the following exchange between the representative of the SDA and the then President of the Commission, Ross J:

> PN180 JUSTICE ROSS: Then let's go to 45. This is about 15.7.
>
> PN181 MS PATENA: Your Honour, can I just start by making a point in relation to the heading of 15.7, which is a new heading.
>
> PN182 JUSTICE ROSS: Yes.
>
> PN183 MS PATENA: In terms of what is in the current award and that's rosters for full-time and part-time employees. So we have a separate section for full-time employees, it's proposed in 15.6.
>
> PN184 JUSTICE ROSS: Yes.
>
> PN185 MS PATENA: I would note that the drafting of this provision in the current award - it's good it's being revised because it is quite messy in parts but there is parts of that rostering provision that have application to all employees under the award - so both full-time, part-time and casual. So particularly in terms of limitations or restrictions around - in relation to consecutive days, Sunday work and we wanted to consider whether that heading should be either amended to just - to be, "rosters," so delete full-time and part-time employees or to be extended to include full-time, part-time and casual employees.
>
> PN186 JUSTICE ROSS: What if it just said, "rosters," generally?
>
> PN187 MS PATENA: I think that would - - -
>
> PN188 JUSTICE ROSS: Because there would be some casuals - - -

[155] Statement [2017] FWC 5589.
[156] Transcript (26 October 2017), PN 166 – 177, 181 – 193.

> PN189 MS PATENA: That would address our concerns, I think, because the award is silent in terms of how it specifically deals with casuals in those provisions but, yes, or not silent - it doesn't directly address them.
>
> PN190 JUSTICE ROSS: Yes.
>
> PN191 MS PATENA: I think that would satisfy our concerns.
>
> PN192 JUSTICE ROSS: All right. Well, if we start by deleting what's in the bracket, "full-time and part-time employees," and just say, "rosters," because there will be some casuals, of course, who might not be employed on a roster at all.
>
> PN193 MS PATENA: That's right.
>
> PN194 JUSTICE ROSS: Yes, so I think if you include casuals in the heading then the implication might be that every casual has to be employed on a roster and that's not the intention. It's really that this deals with rosters generally.
>
> PN195 MS PATENA: Yes, I would agree with those comments, your Honour.
>
> PN196 JUSTICE ROSS: All right, well, let's see what that looks like. Is there anything else arising from 45?

193. The above exchange was focused on the distinction between casual employees and other full-time or part-time employees. However, the SDA submitted that parts of the rostering provisions applied to both full time and part-time employees. However, as outlined above, that interpretation was, with respect, erroneous given that clause 28 (from which all of the terms in clause 15.7 originated) applied only to full-time employees. In this regard, it is relevant that in considering clause 28, Ross J appeared to accept that clause 28 applied only to full-time employees given it referred to 38-hour week rosters and the introduction to clause 28.1 referred to full-time employees:

> PN170 JUSTICE ROSS: Well, it's talking about 38-hour week rosters and the introduction in 28.1 talks about, "A full-time employee will be rostered on an average of 38 hours per week," so it seems to be the case that the clause is intended to apply to full-timers. So the drafter says if that's right, then he suggests that clause 15.7(e) and (f) of the [Exposure Draft] be moved into 15.6 because of course 15.7 deals with the rosters for full-time and part-time employees. Does that address the issue you've raised or do you want to see what that looks like and then make a comment on it?

194. There does not seem to have been any acknowledgement in the above exchanges that clauses 15.7(g) to (l) of the Exposure Draft also formed part of clause 28 of the GRIA 2010, which, as outlined above, only applied to full-time employees. Nor was there any acknowledgement that part-time employees were rostered according to the specific rostering rules which applied to them under clause 12.8 and that it was those rules which determined an employee's entitlement to overtime under clause 29.2(b) of the GRIA 2010 and not the roster conditions under clause 28 of the GRIA 2010. The heading in clause

15.7 was ultimately varied to "rostering arrangements" following the "light touch" process, which ensured consistency and simplicity across the exposure drafts.[157] The variation determination took effect from 1 October 2020.[158]

195. The restructuring of clause 15.7 and failure to clarify that the clause applied only to full-time employees led to a loss of clarity. The process was not intended to have the effect of changing the meaning of existing provisions (unless that intention was made clear in a Commission decision),[159] and accordingly, the ARA submits that the GRIA 2020 should be clarified consistent with the pre-existing position.

196. The ARA seeks that the variation be made under s 160(1) of the FW Act to correct an error during those proceedings, when the reference to "full-time employees" was inadvertently omitted. Alternatively, the variation is required to remove uncertainty created by the omission of the reference to "full-time employees".

D.8. PROPOSAL I – Amendment to improve flexibility for employees regularly working Sundays and to clarify employees regularly working Sundays

197. Proposal I seeks similar amendments to those sought by Proposal H but in respect of clause 15.8 regarding employees regularly working Sundays. There are three aspects of Proposal I.

(a) The first relates to improving flexibility in the application of the rostering restrictions under clause 15.8(a) applying to employees who regularly work Sundays.

(b) The second is to clarify the definition of "employees who regularly works Sundays".

(c) The third is to amend the heading of clause 15.8 to clarify that the rostering arrangements under clause 15.8 apply only to full time employees and to correct the same inadvertent error arising from the plain language re-drafting proceeding the subject of Proposal H (regarding clause 15.7).

[157] *4 yearly review of modern awards – plain language project – determination of various issues* [2019] FWCFB 5409, [6], Attachment A; *4 yearly review of modern awards — finalisation of exposure drafts and variation determinations—General Retail Industry Award* [2020] FWCFB 4839.
[158] *4 yearly review of modern awards — finalisation of exposure drafts and variation determinations—General Retail Industry Award* [2020] FWCFB 4839.
[159] *General Retail Industry Award 2020* [2024] FWCFB 197, [21].

First variation to clause 15.8 – improve flexibility for employees regularly working Sundays

198. Under clause 15.8, employers must roster employees who regularly work Sundays in such a way that they have three consecutive days off (including Saturday and Sunday) per 4 week cycle.

199. Clause 15.8(a) provides that an individual employee can enter into an agreement with their employer for different arrangements but is subject to the employee making a written request (cl 15.8(b)), and the agreed arrangement being recorded in the time and wages record (cl 15.8(c)).

200. Clause 15.8 includes other safeguards, namely that an employee may end an agreement at any time by giving 4 weeks' notice (cl 15.8(d)) and an employee cannot be required as a condition of employment to make an agreement under clause 15.8(a) (cl 15.8(d)).

201. The ARA seeks, by Proposal I, to improve flexibility by removing the requirements for a written request, that the agreement recorded in a time and wages record, and that the consecutive days off include Saturday and Sunday. Specifically, the ARA seeks to amend clause 15.8 as follows (amendments in underlining and strikethrough):

> **<u>Full-time</u> employees regularly working Sundays**
>
> (a) The employer must roster an employee who regularly works Sundays in such a way that they have 3 consecutive days off ~~(including Saturday and Sunday)~~ per 4 week cycle.
>
> (b) Clause 15.8(a) is subject to any agreement for different arrangements entered into by the employer and an individual employee ~~at the written request of the employee~~.
>
> ~~(c) Different arrangements agreed under clause 15.8(b) must be recorded in the time and wages record.~~
>
> (d) The employee may end an agreement under clause 15.8(b) by giving the employer 4 weeks' notice.
>
> (e) An employee cannot be required as a condition of employment to agree to an arrangement under clause 15.8(b).

202. As is the case with Proposal H, each of the remaining safeguards in clause 15.8, including the need for agreement, are retained.

203. The ARA seeks that the variation be made under s 157(1)(a) on the basis that the variation is necessary to achieve the modern awards objective, particularly taking into account the considerations under s 134(1)(d), (da), (f), (g) and (h) of the FW Act.

Necessary to achieve the modern awards objective

Section 134(1)(d) the need to promote flexible modern work practices

204. Similar to Proposal H, whilst the variations sought by Proposal I partly focus on removing restrictions on the making of an agreement to be rostered differently from the consecutive days requirement prescribed by clause 15.8(a), one of the principal objectives of the variation is to facilitate greater flexibility for the rostering of employees who regularly work Sundays.

205. The ability to work on weekends is of importance to many employees as it allows them to work while balancing other commitments such as study and caring responsibilities.[160] The variation provides greater flexibility to facilitate regular Sunday work for employees who desire to do so.

206. Employees' support for this flexibility is demonstrated by a substantial number of employees having agreed to arrangements that differ from the requirements under clause 15.8(a).[161] Employees have expressed their preference for regular shift patterns, which more readily support an employee's ability to plan around their shifts.[162]

Section 134(1)(da) – the need to provide additional remuneration for employees working on weekends

207. One of the key reasons for employees entering into agreements outside of the consecutive days off requirement under clause 15.8(a) is the ability to access higher penalty rates under the GRIA.[163] Under clause 22.1 of the GRIA 2020, full-time employees working on Sundays are entitled to a higher penalty rate of 150% (as compared with 125% on Monday to Friday (after 6.00pm) and Saturdays (125%)). The variation could therefore lead to employees who regularly work Sundays accessing additional remuneration for work on Sundays.

Section 134(1)(f) and (h) - improved productivity and reduction of regulatory burden

208. The requirement to record each instance where team members request to regularly work Sundays without a Saturday and Sunday off per four week cycle is administratively burdensome and is complex to integrate into employer time and attendance and payroll

[160] Justice Statement, [36].
[161] Canning-Casey Statement, [50] (51% of full-time employees); Melton Statement, [87] (45% of salaried managers); Dunstan Statement, [50] (45% of store-based employees), Shelton Statement, [79] (just under 63% of wages team members and 85% of salaried team members).
[162] Canning-Casey Statement, [50], [51]; Melton Statement, [69].
[163] Canning-Casey Statement, [50], [51]; Melton Statement, [85]; Dunstan Statement, [53]; Mein Statement, [47]; Shelton Statement, [78]; Tassigiannakis Statement, [48].

systems.[164] These requirements place a significant regulatory burden on employers as they require the creation and maintenance of separate administrative processes within already complex electronic systems.[165] The proposed variation will ease the regulatory burden by simplifying administrative processes.[166]

209. As with proposal H, the proposed change will also remove the administrative burden on employees by removing the step of employees being required to submit a written request before agreement can be reached between an employee and their employer.

210. The variation would also increase productivity by enabling more employees to perform work on a Sunday.[167] Further, as outlined above, at paragraph 33, effective staff scheduling can reduce costs and enhance the productivity of Australian businesses and enable them to maintain their competitiveness in the market.

Section 134(1)(g) – the need to ensure a stable modern award system

211. Work in similar industries (with similar customers and employee characteristics) is not subject to equivalent restrictions on regular Sunday work under the terms of those awards (see *Hospitality Industry (General) Award 2020, Restaurant Industry Award 2020* and the *Food Industry Award 2020*).

212. Each of the above considerations weighs in favour of the variations under Proposal I being made.

Second variation to clarify definition of "employees who regularly work Sundays"

213. There is currently no definition of "employees who regularly work Sundays" under the GRIA 2020. There is, therefore, uncertainty about which cohort of employees are subject to the rostering restrictions under clause 15.8(a).

214. The ARA seeks to remedy the uncertainty by inserting the following simple and easy to apply definition into clause 2:

> **Employee who regularly works Sundays** means a full-time employee who based on that roster cycle will work at least three out of four Sundays.

215. This definition reflects the current assessment practice of a number of retail employers.[168]

[164] Canning-Casey Statement, [43], [45], [52]-[53]; Dunstan Statement, [51]; Mein Statement, [47]; Tassigiannakis Statement, [48]; Justice Statement, [37].
[165] Canning-Casey Statement, [16].
[166] Di Tirro Statement, [44].
[167] Dunstan Statement, [53].
[168] Canning-Casey Statement, [49]; Melton Statement, [86]; Dunstan Statement, [52].

216. The definition proposed by the ARA aligns with the modern awards objective (specifically clause 134(1)(g)) as it is simple to understand for both employers and employees, and can easily be assessed by reference to the current roster cycle (rather than needing to conduct a more complicated averaging exercise or forward-looking assessment).

217. In these circumstances, the ARA seeks that the proposed definition be inserted under s 160(1) to rectify uncertainty in the definition of an employee who regularly works Sundays, and thus the relevant employees in respect of whom clause 15.8 operates.

Third variation to heading of clause 15.7 – Correction of error or uncertainty

218. The ARA seeks that the heading of clause 15.8 be amended to clarify that it applies to full time employees only as follows (in underlining):

> **15.8 <u>Full-time</u> employees regularly working Sundays**

219. Prior to the variations made by the plain language re-drafting proceeding, the predecessor to clause 15.8 of the GRIA 2020 was clause 28.13 of the GRIA 2010. Clause 28.13 provided:

> **28.13 Employees regularly working Sundays**
>
> (a) An employee who regularly works Sundays will be rostered so as to have three consecutive days off each four weeks and the consecutive days off will include Saturday and Sunday.
>
> (b) This requirement will not apply where the employee requests in writing and the employer agrees to other arrangements which are to be recorded in the time and wages records. It cannot be made a condition of employment that an employee make such a request.
>
> (c) An employee can terminate the agreement by giving four weeks' notice to the employer

220. Clause 28.13 was located within clause 28, which applied only to full-time employees, having regard to the terms of clause 28 and the interactions between clause 28, the provisions relating to part-time and casual employees and the overtime provisions (as addressed above at paragraphs [177] to [184]).

221. As referred to above at paragraphs [185] and [189], the Exposure Draft which was issued during the plain language re-drafting proceeding restructured clause 28 to move only some of the rostering conditions in clause 28 into a separate clause 15.6 which was entitled "full-time employees". Clause 28.13 was initially moved to a separate subclause, clause 15.10, which stated:

15.10 Employees regularly working Sundays

(a) Unless otherwise agreed between the employer and the employee, the employer must roster an employee who regularly works Sundays in such a way that they have 3 consecutive days off (including Saturday and Sunday) per 4 week cycle.

(b) An agreement under paragraph (a) may only be entered into at the written request of the employee.

(c) Different arrangements agreed under paragraph (a) must be recorded in the time and wages record.

(d) The employee may end an agreement under paragraph (a) at any time by giving the employer 4 weeks' notice.

(e) An employee cannot be required as a condition of employment to agree to an arrangement under paragraph (a).

222. The SDA filed a submission on 4 August 2017, which stated that the SDA did not support the insertion of the Exposure Draft clause 15.10 but on the basis that the new clause was a substantive change as the ability to vary the agreement had been given more weight rather than the absolute obligation of an employer when rostering days off to include a Saturday and Sunday.

223. Clause 15.10 was ultimately renumbered to clause 15.8 and minor variations were made, by agreement, to address the SDA's concerns about the weight given to the agreement to vary rostered days off.[169] As outlined above at paragraphs [190] to [194], while there were some parts of clause 28 that were acknowledged to be limited to full-time employees only, neither the Commission nor the parties who filed submissions in the proceeding addressed the potential expansion of the application of clause 15.8 of the GRIA 2020 to part-time or casual employees.

224. As was the case for clause 15.7, the restructuring of clause 15.8 and failure to clarify that the clause applied only to full-time employees similarly led to a loss of clarity. The process was not intended to have the effect of changing the meaning of existing provisions (unless that intention was made clear in a Commission decision),[170] and accordingly the ARA submits that the GRIA 2020 should be clarified consistent with the pre-existing position.

225. The ARA seeks that the variation be made under s 160(1) of the FW Act to correct an error during those proceedings, being the omission of a reference to "full-time

[169] *Statement* [2017] FWC 5589, [8]; Transcript (26 October 2017), PN [246]-[256]; *Statement* [2018] FWC 702; *4 yearly review of modern awards – Plain language re-drafting – General Retail Industry Award 2010* [2018] FWCFB 6850, [15]-[18].
[170] *General Retail Industry Award 2020* [2024] FWCFB 197, [21].

employees". Alternatively, the variation is required to remove uncertainty created by the omission of the reference to "full-time employees".

D.9. PROPOSAL J – Amendment to introduce salaries absorption for managerial and higher-level staff

226. Annualised salaries are a longstanding and mutually beneficial arrangement for managerial employees in the retail sector.[171] Annualised salaries provide competitive remuneration in a consistent manner that allows senior employees to plan their finances and access lending services. The ARA's proposal seeks to regularise these longstanding arrangements in a manner that provides certainty for employers and employees, and enhanced flexibility for employees reflective of their management roles, whilst including fair and appropriate safeguards.

227. The ARA seeks, by Proposal J, to insert an exemption rate clause to provide that managerial and higher-level employees classified at Retail Employee Level 4 to Retail Employee Level 8 who agree to be paid an annualised wage that is at least 125% of the minimum weekly rate are exempt from certain terms of the GRIA 2020, including overtime, penalty rates, some allowances and rostering arrangements. The proposed clause would not apply to casual employees.

228. As outlined in Schedule A – Classification Definitions, Retail Employee Levels 4 to 8 cover managerial employees. Indicative tasks and titles for each of these levels include (but are not limited to):

(a) Retail Employee Level 4 – assistant, deputy or second-in-charge shop manager of a shop without departments responsible for managing a defined department or section;

(b) Retail Employee Level 5 – a service supervisor (more than 15 employees)

(c) Retail Employee Level 6 – department or section manager with 5 or more employees (including self); manager or duty manager in a shop without departments or sections (may be under direction of a person not exclusively involved in shop management);

[171] In this regard, ARA notes that prior to the introduction of the GRIA 2010, the *Retail Industry Award State – 2004* in Queensland, included an exemption rate clause which provided:

> *1.4.3 This Award with the exception of clauses 5.5 [superannuation], 7.1 [annual leave], 7.2 [sick leave], 7.3 [long service leave] and 7.6 [public holidays] with the exception of employees engaged in the demonstration and/or sale and/or hire and/or rental of television receivers and/or parts in the homes of prospective clients does not apply to employees (excluding clerks) in receipt of a weekly wage which is equal or greater than 125% of the rate prescribed in the Award for Show Assistants. This amount is exclusive of bonuses or commissions.*

assistant or deputy or second-in-charge to a shop management of a shop with departments or sections;

(d) Retail Employee Level 7 – visual merchandiser (Diploma); and

(e) Retail Employee Level 8 – shop manager of a shop with departments or sections.

229. Employees falling within Levels 4 to 8 are considered senior roles within a retailers' business and are responsible for the successful operations of the store, which, in some cases process significant annual revenue ranging up to over $400 million.[172] Store leadership roles provide long-term career options for employees in the retail sector.[173] Significant learning and development resources are provided to them to assist with their development as managers.[174] They hold significant responsibility and discretion in the performance of their roles and are often effectively responsible for determining their own rosters.[175] Some retailers also offer managers the option of participating in incentive programs which provides the opportunity to earn additional payments.[176]

230. In *Re Restaurant & Catering Industrial* [2021] FWCFB 4149 (***Restaurant & Catering Industrial***), the Full Bench determined to vary the *Restaurant Industry Award 2020* to include an exemption rate clause. In that case, the Full Bench concluded that the Commission can include exemption rate clauses in modern awards provided that:

(a) it is satisfied that they are necessary to achieve the modern awards objective in s 134 of the Act;

(b) they are about matters set out in s 139 of the Act;

(c) they are not terms that must not be included in a modern award; and

(d) they do not have the effect that employees earning above a certain rate stop being covered by the award altogether (unless the Commission is satisfied that those employees would instead be covered by another modern award (other than the Miscellaneous Award) that is appropriate for them).[177]

[172] Melton Statement, [90]; Shelton Statement, [84]; De Pasquale Statement, [47]; Di Tirro Statement, [47].
[173] Melton Statement, [91]; Shelton Statement, [85]; Di Tirro Statement, [50].
[174] Melton Statement, [91]; Shelton Statement, [86]-[89]; Di Tirro Statement, [51].
[175] Melton Statement. [92]; Shelton Statement, [91]; De Pasquale Statement, [49]-[50], [38]; McDonald Statement, [41]; Di Tirro Statement, [53].
[176] Melton Statement, [96]; Shelton Statement, [95]; De Pasquale Statement, [48].
[177] *Restaurant & Catering Industrial*, [91].

231. The Full Bench also accepted, as a general proposition, that an exemption rate clause could reduce award complexity and the regulatory burden on business and may encourage collective bargaining.[178] The Full Bench went on to state at paragraph [92]:

> Whether this potential is realised will depend on the terms of the clause itself, and how it will operate in the relevant industry. In particular the Commission needs to consider whether the exemption rate has been set at a sufficiently high level so that it does not disadvantage employees and whether it is consistent with the need to provide additional remuneration for employees as set out in s.134(1)(da). Further, the factors the Full Bench considered in *Clerks* in deciding to remove the exemption rate clause may also be relevant to whether an exemption rate clause provides a fair and relevant minimum safety net. These factors include that the Act already provides a level at which high income employees do not receive award entitlements, with s.47(2) providing that modern awards do not apply to employees at a time they are high income employees (currently those earning above $158,500).

232. The Full Bench also stated, at paragraph [99], that:

> It is appropriate to adopt a cautious approach to the insertion of such provisions in modern awards. They should generally be confined to the higher classification levels in the award and should include safeguards aimed at ensuring that employees are not disadvantaged.

233. Further, in *4 yearly review of modern awards – Penalty rates* [2017] FWCFB 1001, the Full Bench observed that there was merit in considering the insertion of appropriate loaded rates into the Hospitality and Retail awards and that subject to appropriate safeguards, schedules of "loaded rates" may make awards simpler and easier to understand, consistent with the considerations in s 134(1)(g) of the FW Act, and allow small businesses to access additional flexibility without the need to enter into an enterprise agreement.[179]

Proposed new clause

234. The ARA seeks that the GRIA 2020 be varied to include an exemption rate in the following terms:

> **17A. Salaries absorption (Managerial and higher-level staff)**
>
> 17A.1 This clause applies to employees, other than casual employees, classified at Retail Employee Level 4 to Retail Employee Level 8 who:
>
> (1) are paid an annual salary that is at least 125% of the minimum weekly rate (assessed on a pro-rata basis for

[178] *Restaurant & Catering Industrial*, [92].
[179] *4 yearly review of modern awards – Penalty rates* [2017] FWCFB 1001, [90].

part-time employees) specified in clause 17 applicable to the employee's classification multiplied by 52; and

(2) have agreed with their employer, in writing, to the application of this clause; and

(3) have been advised by their employer, in writing and prior to the employee agreeing to the application of this clause, of the annual salary that they will be paid and the provisions of the award that will not apply because of the application of this clause.

17A.2 An employer must keep a record of any agreement reached in accordance with clause 17A.1 as an employee record until at least 7 years from the earliest of the date of the agreement ending, the employee ceasing to be covered by this Award, or the termination of the employee's employment.

17A.3 An employer must keep a record of the hours worked by each employee working under an agreement reached in accordance with clause 17A.1.

17A.4 An employee to whom this clause applies is not entitled to the benefit of the terms and conditions within the following clauses:

(a) Clause 10.8 to 10.10 – Part-time employees;

(b) Clause 15 – Ordinary hours of work and rostering arrangements;

(c) Clause 16 – Breaks;

(d) Clause 17 – Minimum rates;

(e) Clause 19 – Allowances, except that clauses 19.6 – Moving expenses and 19.7 - Motor vehicle allowance will continue to apply;

(f) Clause 21 – Overtime;

(g) Clause 22 – Penalty Rates;

(h) Clause 28.3 – Payment for annual leave loading;

(i) Clause 33.3 and 33.4—Payment for work on public holiday or substitute day.

17A.5 An employee to whom this clause applies should normally have a minimum of 16 days off during each 8-week cycle of work (or equivalent roster period). Where this does not occur, the employee must either be provided equivalent time off in lieu within six months or be paid for the additional hours worked (at the rate of pay calculated in accordance with clause 17A.11).

17A.6 An employee to whom this clause applies should normally have a 10 hour break between when the employee finishes work on one

day and starts work on the next day, unless otherwise agreed between the employer and the employee. If an employee is required to start work again without having had 10 hours off work, the employer must pay the employee for each hour worked at the rate in clause 16.6(b) (subject to clause 17A.11) until the employee has a break of 10 consecutive hours.

17A.7 Where an employee is required to work more than an average of 43 hours per week over a 6-month period (or the pro-rata equivalent for a part-time employee), all hours worked in excess of that number will not be covered by the annual salary amount set out in clause 17A.1(a) and must be separately compensated for either through additional salary payments (at the base rate of pay calculated in accordance with clause 17A.11) and/or time off in lieu arrangements.

17A.8 Work on public holidays

An employee who is required to work on a public holiday is entitled to payment for those hours worked at the rate of pay calculated in accordance with clause 17A.11 or paid time off of equal length to the time worked on the public holiday. Such time off must be taken or paid in accordance with clause 17A.9.

17A.9 Accrued time off for working on a public holiday

(a) If the accrued time off referred to in clause 17A.8 is not taken or paid out within 6 months of its accrual, the employer must pay the employee for the accrued time off in the next pay period following those 6 months. This must be paid at the rate of pay calculated in accordance with clause 17A.11.

(b) If, on termination of the employee's employment, accrued time off for working on a public holiday has not been taken or paid out, the employer must pay the employee for the accrued time off at the rate of pay calculated in accordance with clause 17A.11.

17A.10 Meal Breaks

An employee must not be required to work for more than six hours without being allowed to take a meal break. The break must be for a minimum of 30 minutes duration.

17A.11 Calculation of hourly rate

Distinct to what the relevant base rate of pay is for the purposes of the NES for annualised wage arrangements which are not captured by clause 17A.1, the hourly amount payable to an employee under this clause (except for clause 17A.6) is to be 125% of the minimum hourly rate specified in clause 17.

It is the intention of this clause that where the annual salary amount paid by an employer to an employee already exceeds the amount set out in clause 17A.1(a), then the part of the annual salary that exceeds the amount described in 17A.1(a)

can be used to satisfy (in full or in part) the amounts that would otherwise be due to the employee under clauses 17A.5, 17A.6, 17A.7, 17A.8 and 17A.9.

235. The central features of the proposed exemption rate are:

(a) It only applies to senior employees otherwise paid at the level 4 to level 8 and not to casual employees, which limits the application of the clause to managerial and higher level staff.

(b) It operates by agreement with an individual employee and such agreement must be recorded in writing.

(c) The employee must be paid at least 125% of the minimum weekly rate (assessed on a pro-rata basis for part-time employees) specified in clause 17 applicable to the employee's classification multiplied by 52.

(d) That it contains the safeguard of employers being required to keep a record of all hours worked by each employee working under an agreement reached in accordance with clause 17A.1.

(e) Where an employee is required to work more than an average of 43 hours per week over a 6-month period (or the pro-rata equivalent for a part-time employee), all hours worked in excess of 43 hours must be separately compensated for either by additional payments or time off in lieu.

(f) Employees should normally have 16 days off in an eight week cycle of work. If this does not occur, employees are entitled to equivalent time off in lieu within six months or be paid for the additional hours worked.

(g) Employees should normally have a 10 hour break between shifts, unless otherwise agreed. If not, the employer must pay the employee for each hour worked at the rate in clause 16.6(b) (subject to the minimum hourly rate being 125% of the minimum hourly rate specified in clause 17) until the employee has a break of 10 consecutive hours.

(h) Employees required to work public holidays are entitled to payment for those hours or time off in lieu in accordance with the rules outlined in clause 17A.9.

(i) An employee cannot be required to work for more than six hours without being allowed to take a meal break of 30 minutes duration.

(j) An exemption rate agreement means that the following clauses of the Award do not apply:

(i) Clause 10.8 to 10.10 – Part-time employees;

(ii) Clause 15 – Ordinary hours of work and rostering arrangements;

(iii) Clause 16 – Breaks;

(iv) Clause 17 – Minimum rates;

(v) Clause 19 – Allowances, except that clauses 19.6 – Moving expenses and 19.7 - Motor vehicle allowance will continue to apply;

(vi) Clause 21 – Overtime;

(vii) Clause 22 – Penalty Rates;

(viii) Clause 28.3 – Payment for annual leave loading;

(ix) Clause 33.3 and 33.4 – Payment for work on public holiday or substitute day.

236. The proposed clause is largely based on the salaries absorption clause in the *Hospitality Industry (General) Award 2020* (clause 25). However, the proposed clause provides an additional safeguard for employees such that the number of hours of work that can be absorbed is capped at an average of 43 hours per week (there being no corresponding provision in the *Hospitality Industry (General) Award 2020*). A number of other modern awards contain exemption rate clauses, which do not require any reconciliation process.[180]

237. Importantly, the proposed clause would not result in the exclusion of any classifications from award coverage.

238. The ARA seeks that the variation sought by Proposal J be made on the basis that it is necessary to achieve the modern awards objective, taking into account considerations under s 134(1)(d), (f), and (g) of the FW Act.

Necessary to achieve the modern awards objective

Section 134(1)(d) and (f) – the need to promote flexible modern work practices and likely reduction of regulatory burden on employers

[180] *Book Industry Award 2020,* cll 12.3, 13.2, 18.4; *Broadcasting, Recording, Entertainment and Cinemas Award 2020,* cl 34.2(f); *Business Equipment Award 2020,* cll 16.1, 16.2, 16.3; *Journalists Published Media Award 2020,* cl 4.9; *Market and Social Research Award 2020,* cl 14.4; *Professional Employees Award 2020,* cl 18.6; *Racing Industry Ground Maintenance Award 2020,* cl 11.3; *Registered and Licensed Clubs Award 2020,* cl 18.4(a), 18.4(b); *Restaurant Industry Award 2020,* Schedule R, clause R.3; *Sugar Industry Award 2020,* cl 17.2.

239. In the retail sector, annualised salary arrangements are a standard engagement model for store-based managerial employees.[181] A key benefit of this proposed variation is that employees value consistent and predictable higher salary payments.[182] The proposed clause seeks to provide improved flexibility and recognition of the seniority and responsibility of those roles. This is particularly important having regard to the rigid rostering restrictions applying to full-time employees. As outlined above, managers are often responsible for rostering themselves. When building rosters, managers are restricted by the various complex rostering principles outlined in the GRIA 2020. A number of those rostering restrictions are the subject of this Application and are summarised above at paragraph 115. There are a number of other rostering restrictions under the GRIA 2020 applying to full-time managers, including in respect of the span of ordinary hours (cll 15.1 and 15.2), the number of ordinary hours that can be worked per day (cl 15.6(h) and (k)), the number of days that can be worked per week (cl 15.7(b) and (c)), the number of consecutive days of work (cl 15.7 (e)) and the length and timing of breaks (cl 16). Removing the need to have regard to these complex rostering principles will provide managers greater flexibility to determine the hours of work that best suit their needs and the needs of the business.

240. Further, the introduction of an exemption rate will reduce both the administrative and regulatory burden associated with conducting complex and administratively burdensome reconciliation processes, which may otherwise be required to engage employees on annualised salaries.[183] In *Restaurant & Catering Industrial,* the Full Bench accepted that the exemption rate would reduce the regulatory burden on employers.[184]

241. The exemption rate will also promote compliance. Currently, there are a range of compliance risks associated with an annualised salary, including the uncertainty regarding the availability of a general law 'set off' across pay periods. In this regard, the Full Bench has previously acknowledged that "*this means of paying an annualised wage to an employee to whom a modern award applied is not entirely free from legal difficulty."*[185]

242. As was recognised by the Full Bench in *Restaurant & Catering Industrial,* at paragraph [110]:

> Non-compliance is an issue in the hospitality sector and the most common breaches relate to under/non-payment of penalty rates. The reasons given for non-compliance by employers include paying flat hourly rates to save on administration costs but failing to adequately compensate employees for their full

[181] McDonald Statement, [38].
[182] Melton Statement, [93]; McDonald Statement, [38].
[183] McDonald Statement, [47].
[184] *Restaurant & Catering Industrial,* [140].
[185] *Annualised Wage Arrangements* [2018] FWCFB 154 at [102].

> entitlement. **We would expect that the inclusion of an exemption rate proposal would promote compliance** – by specifying the rate which must be paid to 'exempt' an employee from the specified award entitlements; **rather than leaving it to employers to 'guess' at an appropriate loaded hourly rate**.
>
> (Emphasis added.)

243. In circumstances where non-compliance has been identified as an issue in the retail sector due to the adoption of loaded rates which may underestimate the payment of penalty rates,[186] the Full Bench's observations regarding the positive effect of exemption rate clauses on award compliance apply equally to the GRIA 2020.

244. While Proposal J would reduce the regulatory burden on employers, it would still ensure there are appropriate safeguards for employees, including:

(a) providing for a minimum of 16 days off during each 8-week cycle (the equivalent of two days off per week), with time off in lieu or additional payments required where this is not provided;

(b) a default of a 10 hour break between shifts on different days, with an employee to receive pay at 200% of the GRIA 2020 base rate if not provided;

(c) additional payments or time off in lieu where an employee works in excess of an average of 43 hours per week over a 6-month period;

(d) additional payments or time off in lieu arrangements for work on public holidays; and

(e) providing that an employee must not be required to work for more than six hours without being allowed a 30 minute meal break.

245. These are significantly more beneficial safeguards for employees than contained in the salaries absorption clause in the *Hospitality Industry (General) Award 2020,* which the Commission has previously found to be suitable for managers in a comparable industry to the retail industry.

246. Proposal J also contains significantly more safeguards for employees than the exemption rate in the *Professional Employees Award 2020*, which does not even require employers to record the hours of work of employees paid above 125% of the minimum wage in that award.

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[186] *Australian Hotels Association* [2021] FWCFB 4513, [24] citing *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001, [90].

247. Further, as outlined above, at paragraph 33, operational improvements can reduce costs and, therefore, enhance the productivity of Australian businesses and enable them to maintain their competitiveness in the market.

Section 134(1)(da) the need to provide additional remuneration

248. The proposed minimum exemption rates (as compared with the minimum annual rate) are:

Classification	**Minimum annual rate**[187]	**Proposed exemption rate**
Level 4	$53,679.60	$67,099.50
Level 5	$55,884.40	$69,855.50
Level 6	$56,695.60	$70,869.50
Level 7	$59,540	$74,425
Level 8	$61,958	$77,447.50

249. The ARA submits that, having regard to typical rosters expected to be worked by managerial staff, the proposed exemption rate addresses the need to provide additional remuneration for employees working overtime, unsocial, irregular or unpredictable hours, weekends or shifts (cl 134(1)(da)(i) – (iv)). Further, in accordance with proposed clauses 17A.8 and 17A.11, employees will continue to be paid additional public holiday penalty rates for work performed on a public holiday.

250. By way of example, Coles has compared award entitlements based on model rosters for a number of salaried manager positions classified at level 6 under the GRIA 2020 with the proposed 125% exemption rate, which comparison indicates that such employees would be better off (up to around $7,800 per annum for customer service and click & collect managers) under the exemption rate than if they were paid overtime and penalty rates for those rostered hours under the GRIA 2020.[188]

251. Given that the level of wages ultimately paid to employees will depend on the actual hours worked and the actual payments received by employees, it is difficult to predict with precision the extent of any additional remuneration. Having regard to the above and the calculation of model rosters for managers, there is a significant likelihood of a salary

[187] Calculated by multiplying the minimum weekly adult rate in clause 17.1 of the GRIA 2020 by 52.
[188] Shelton Statement, [99], Annexure GS-3.

absorption rate of 125% satisfying or exceeding the remuneration they would have otherwise received for hours attracting overtime and penalty rates.

Section 134(1)(g) – ensure simple and easy to understand modern award system

252. Consistent with the observations of the Full Bench in the *4 yearly review – Penalty Rates* case, an exemption rate makes a modern award simpler and easier to understand. Further, the use of exemption rates may result in employers relying on the terms of the award rather than solely on common law contracts. In *Restaurant & Catering Industrial*, the Full Bench accepted a submission that this would reinforce the sustainability of the GRIA 2020 and its part in the modern award system.[189]

253. The proposed exemption rate is simple and easy to understand for both employers and employees across the retail sector. Under Proposal J, employees will understand the amount of their regular annualised salary and also understand that they will be entitled to be paid an easily calculable additional amount where they work more than an average of 43 hours per week. This can be contrasted with approaches that rely on regular reconciliations, under which it is difficult to imagine how any employee could calculate their entitlements without purchasing their own subscription from a payroll services provider.

254. Each of the above considerations weighs in favour of the making of the Proposal J.

D.10. PROPOSAL L - Amendment to remove requirements to notify break times in advance

255. The ARA supports the rights of employees to take meal breaks and rest breaks and does not propose any change to these substantive entitlements. However, it seeks to modernise the GRIA 2020 to remove the unrealistic and unnecessary requirement that such break times be specified in a roster weeks in advance of an employee actually working. Under Proposal L, employees will still receive the same break entitlements, but the timing of such breaks can be determined closer to the time that the relevant shift is worked.

256. The entitlement to meal and rest breaks is outlined in Table 3 under clause 16.2 as follows:

Table 3 – Entitlements to meal and rest break(s)

[189] *Restaurant & Catering Industrial*, [142].

Column 1 Hours worked per shift	Column 2 Breaks	Column 3 Meal breaks
4 or more but no more than 5	One 10 minute paid rest break	
More than 5 but less than 7	One 10 minute paid rest break	One unpaid meal break of at least 30 minutes and not more than 60 minutes
7 or more but less than 10	Two 10 minute paid rest breaks (one to be taken in the first half of the shift and one in the second half)	One unpaid meal break of at least 30 minutes and not more than 60 minutes
10 or more	Two 10 minute paid rest breaks (one to be taken in the first half of the shift and one in the second half)	Two unpaid meal breaks of at least 30 minutes

257. Clause 16.3 of the GRIA 2020 requires the rostering of breaks and provides:

> The timing of rest and meal breaks and their duration are to be included in the roster and are subject to the roster provisions of this award.

258. Relevantly, for the purpose of the Proposal L variation, clause 15.9 requires employers to 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. The practical effect of clauses 16.3 and 16.9 is that the timing of meal and rest breaks must be determined at the time that the roster is issued, usually a number of weeks in advance of the relevant roster period.[190]

259. The ARA seeks, by Proposal L, to remove the requirements to notify break times in advance (for full-time and casual employees) by deleting clause 16.3 of the GRIA 2020. The ARA also seeks an equivalent change in respect of part-time employees (deleting clause 10.5(c)), but understands that will be dealt with by the Commission in a separate proceeding.

[190] De Pasquale Statement, [54]; Melton Statement, [99].

260. The ARA seeks that the variation be made under s 157(1)(a) on the basis that the deletion of clause 16.3 of the GRIA 2020 is necessary to achieve the modern awards objective, particularly having regard to the considerations under s 134(1),(d) and (f).

Necessary to achieve the modern awards objective

Section 134(1)(d) – the need to promote flexible modern work practices; section 134(1)(f) – likely impact on productivity

261. As outlined above, the practical effect of clause 16.3 is that rest and meal breaks must be determined well in advance of a shift being worked.

262. To meet the unpredictable fluctuations in customer demand and staffing movements in a fast-paced retail environment, the requirement of advanced notice of breaks should be removed to allow for breaks to be determined on the day of the relevant shift and timed in accordance with the operational requirements of the relevant workplace.[191] Once rosters are posted, there are often unpredictable operational demands which arise requiring flexibility in the scheduling of break times. These include unpredictable surges in customer demand, unexpected delivery of stock and last minute absenteeism.[192]

263. The removal of the requirement for advance notice of break times also allows employers to accommodate requests from team members on the day of their shift or shortly beforehand to change their break times, such as to take or make a phone call or attend to an ad hoc appointment.[193] Further, it is unclear why breaks need to be notified in a roster well in advance of those breaks being taken. In a retail environment in which employees largely stay in the store (or in close proximity), it is difficult to understand what practical purpose is served by requiring notification of breaks several weeks in advance.

264. Further, as outlined above, at paragraph 33, allowing employees to have more control over their shifts can increase productivity, and effective staff scheduling can lower operational costs, thereby enabling businesses to maintain their competitiveness in the market.

265. These considerations weigh in favour of the variations in Proposal L being made.

[191] McDonald Statement, [52]; Tassigiannakis Statement, [51].
[192] De Pasquale Statement, [54]; Melton Statement [100]; Dunstan Statement, [56]; McDonald Statement [52]; Justice Statement, [40].
[193] Melton Statement, [100]; Dunstan Statement, [57]; McDonald Statement, [53]; Mein Statement, [49]; Tassigiannakis Statement, [52], [53]; Justice Statement, [40].

D.11. PROPOSAL O – Amendment to clarify annual leave loading

266. The ARA, through Proposal O, seeks to ensure that there is a clear fall-back position for the calculation of an employee's entitlement to annual leave loading where their ordinary hours of work are unknown, and to correct an inadvertent error in the specification of the penalty rates to be taken into account in any calculation.

267. Clause 28.3 is headed "Additional payment for annual leave" and provides for the calculation of the rate of an employee's entitlement to annual leave loading for ordinary hours of work during a period of paid annual leave.

268. Clause 28.3 states:

> **28.3 Additional payment for annual leave**
>
> (a) During a period of paid annual leave an employer must pay an employee an additional payment in accordance with clause 28.3 for the employee's ordinary hours of work in the period.
>
> (b) The additional payment is payable on leave accrued.
>
> (c) For an employee other than a shiftworker the additional payment is the greater of:
>
> (i) 17.5% of the employee's minimum hourly rate for all ordinary hours of work in the period; or
>
> (ii) The employee's minimum hourly rate for all ordinary hours of work in the period inclusive of penalty rates as specified in clause 22—Penalty rates.
>
> (d) For a shiftworker the additional payment is the greater of:
>
> (i) 17.5% of the employee's minimum hourly rate for all ordinary hours of work in the period; or
>
> (ii) The employee's minimum hourly rate for all ordinary hours of work in the period inclusive of penalty rates for shiftwork as specified in clause 25—Rate of pay for shiftwork.

269. Clause 28.3 is ambiguous and uncertain because the existing clause does not provide clarity in respect of how the rate of annual leave loading should be determined in circumstances where employees are performing variable hours of work. This may lead to inadvertent non-compliance where an employer is unsure what the employee's ordinary hours of work would have been in the period of annual leave (including whether it would include weekend penalty rates).

270. Further, during the plain language re-drafting process, an inadvertent error was made to expand the scope of clause 28.3(c)(ii) to take into account 'all penalty rates' (which would include evening penalty rates on weekdays and public holidays) whereas the previous drafting in cl 32.3(b)(i) of the GRIA 2010 only took into account 'relevant weekend penalty rates'.

271. Under the GRIA 2010, prior to the variations made by the plain language re-drafting process, the predecessor clause to clause 28.3 was contained in clause 32.3 and stated:

> **32.3 Annual leave loading**
>
> **(a)** During a period of annual leave an employee will receive a loading calculated on the rate of wage prescribed in clause 17—Minimum weekly wages of this award. Annual leave loading is payable on leave accrued.
>
> **(b)** The loading will be as follows:
>
> **(i) Day work**
>
> Employees who would have worked on day work only had they not been on leave—17.5% or the **relevant weekend penalty rates**, whichever is the greater but not both.
>
> **(ii) Shiftwork**
>
> Employees who would have worked on shiftwork had they not been on leave—a loading of 17.5% or the shift loading (including **relevant weekend penalty rates**) whichever is the greater but not both.
>
> (Emphasis added.)

272. As per the terms outlined above, clause 32.3(b)(i) specified that for "day work" or non-shiftworkers the relevant rate was the greater of 17.5% or the relevant *weekend* penalty rates. The Exposure Draft issued on 5 July 2017 introduced the annual leave loading clause which was in the same terms as ultimately included in the GRIA 2020 at clause 28.3 (outlined above). No submissions were made by any party in the plain language re-drafting process about the removal of the reference to "relevant weekend penalty rates" in former clause 32.3.

273. The variation resulted in a substantive change to entitlements because the removal of the words "relevant weekend penalty rates", which previously existed in cl 32.3(b)(i) of the GRIA 2010 extended the relevant rate beyond weekend penalty rates to include all penalty rates under clause 22, such as evening and public holiday penalty rates. This was clearly not intended by the express limitation of "weekend" penalty rates in the

predecessor clause. As outlined above, the plain language re-drafting process was not intended to have the effect of changing the meaning of existing provisions (unless that intention was made clear in a Commission decision).[194] Clause 28.3 should, therefore, be varied to preserve the original intent of the clause.

274. The ARA seeks, under s 160(1) of the FW Act, to vary clause 28.3 to remedy the above ambiguity/uncertainty and inadvertent error by clarifying that the annual leave loading is the greater of 17.5% of the minimum hourly rate or the penalty component of weekend penalty rates and to provide that 17.5% applies where an employee's ordinary hours are not known or identifiable. The proposed amendments to clause 28.3 are as follows (in strikethrough and underlining):

28.3 Annual leave loading

(a) During a period of paid annual leave an employer must pay an employee an additional payment in accordance with clause 28.3 for the employee's ordinary hours of work in the period.

(b) The additional payment is payable on leave accrued.

(c) For an employee other than a shiftworker the additional payment is the greater of:

(i) 17.5% of the employee's minimum hourly rate for all ordinary hours of work in the period; or

(ii) The ~~employee's minimum hourly rate for all ordinary hours of work in the period inclusive of~~ penalty component of the weekend penalty rates as specified in clause 22.1(Penalty rates) for the employee's ordinary hours of work in the period.

(d) For a shiftworker the additional payment is the greater of:

(i) 17.5% of the employee's minimum hourly rate for all ordinary hours of work in the period; or

(ii) The ~~employee's minimum hourly rate for all ordinary hours of work in the period inclusive of~~ penalty component of the penalty rates for shiftwork as specified in clause 25 (Rate of pay for shiftwork employees) for the employee's ordinary hours of work in the period

(e) Notwithstanding clauses 28.3(c) and 28.3(d), where the hours that would attract the relevant penalty or shift penalty amounts specified in clauses 28.3(c)(ii) or 28.3(d)(ii) is not known or identifiable, the employee must be paid 17.5% of the employee's minimum hourly rate for all ordinary hours of work in the period.

275. The ARA's amendments to clause 28.3 rectify the above issues and are required to ensure the GRIA 2020 is simple and easy to understand.

[194] *General Retail Industry Award 2020* [2024] FWCFB 197, [21].

276. Further, or alternatively, the ARA seeks that the Commission make the variation under s 157(1)(f) and (g) on the basis that the variation is necessary to make the award simpler and easier to use as it provides certainty about the method of calculating an employee's entitlement to annual leave loading, particularly in circumstances where it is difficult to identify the ordinary hours that the employee would have worked during the relevant annual leave period. Under the current terms of clause 28.3, no guidance is provided about how an employee's hours of work should be determined. As outlined above, an employer is, therefore, left to make assumptions about the hours that the employee would have worked during the period of annual leave which is an inherently imprecise exercise and gives riseto a risk of non-compliance. The variation ensures that employers understand their obligations in respect of annual leave loading and that the GRIA 2020 is simple and easy to understand. This weighs in favour of the variation being made.

D.12. PROPOSAL P – Amendment to provide an ability for employees to waive a meal break and go home early, or combine break entitlements

277. The ARA is aware that many employees would prefer to take their breaks at different times or to waive a break in order to be able to leave work early without any loss of pay. The ARA, through Proposal P, seeks to make this option available to employees under the GRIA 2020.

278. The entitlements to meal and rest breaks are outlined in Table 3 at clause 16.2 (which is extracted above at paragraph 256). The number of rest and meal breaks an employee is entitled to take depends on the number of hours worked in any one shift. Clause 16.5 imposes restrictions on when rest and meal breaks can be taken. It states:

> 16.5 An employer cannot require an employee:
>
> (a) to take a rest break or meal break within the first or the last hour of work; or
>
> (b) to take a rest break combined with a meal break; or
>
> (c) to work more than 5 hours without taking a meal break.

279. The ARA seeks, by Proposal P, to introduce a new clause 16.6, which provides the ability for employees to agree to take their meal and rest breaks in more flexible ways. Specifically, proposed clause 16.6 provides:

> 16.6 An employer and employee may agree, on an ongoing basis or for a specified period of time, to one or more of the following arrangements, where the employee is entitled to the relevant break(s):
>
> (a) the employee will take rest breaks and / or meal breaks within the first and / or last hour of work;

(b) the employee will take one or more rest break(s) combined with one or more meal break(s); and/or

(c) the employee will work up to 6 hours without taking a meal break.

280. The ARA also seeks consequential amendments to renumber existing references to clause 16.6 as clause 16.7.

281. The ARA seeks that the variations be made under s 157(1)(a) on the basis that the additional flexibility in the taking of roster and meal breaks is necessary to achieve the modern awards objective, particularly taking into account the considerations under s 134(1)(a)(b),(d), (f) and (g).

Necessary to achieve the modern awards objective

Section 134(1)(ab) – the need to achieve gender equality; Section 134(1)(d) – the need to promote flexible modern work practices; section 134(1)(f) – likely impact on productivity

282. Currently, clause 16.5 of the GRIA 2020 places a number of restrictions upon when an employer can require an employee to take a meal break. The ARA's proposed variation provides greater flexibility to enable an employee to agree to a particular alternative arrangement (such as taking meal breaks combined with rest breaks). This change is required to give effect to the preferences of employees, including those who would prefer to leave work earlier in order to attend to caring responsibilities (without loss of pay).[195] In other workplaces, for example at 7-Eleven stores, employees have requested the ability to waive a meal break and finish their shift earlier because there have been periods of decreased customer traffic during their shift when they have been able to have some respite on shift.[196]

283. The ARA's drafting still provides for appropriate parameters on the taking of meal and rest breaks as a default position, with the ability for flexibility only where an employee agrees to the changes. A safeguard is also applied whereby an employee can only work up to 6 hours without taking a meal break, even in circumstances where the employee's preference might be to agree to a longer period.

284. A similar arrangement is provided for at clause 7.2(d) of the *Woolworths Australian Food Group Agreement 2024*, which allows for employees to take an 'early mark' and finish their shift early. This agreement was supported by the SDA and received a majority "yes" vote with 58,757 team members voting in support in June 2024.[197]

[195] Shelton Statement, [104]; Mein Statement, [52],[53]; Tassigiannakis Statement, [55]; Justice Statement, [43].
[196] Dunstan Statement, [61]; Melton Statement, [106],[107].
[197] Di Tirro Statement, [43].

285. The recently approved *Officeworks Store Operations Agreement 2024* also provides for an equivalent 'early mark' arrangement which allows employees working shifts up to six hours to waive their meal break and finish their shift early.[198]

286. Further, as outlined above, at paragraph 33, allowing employees to have more control over their shifts can increase productivity, and effective staff scheduling can lower operational costs, thereby enabling businesses to maintain their competitiveness in the market.

Section 134(1)(g) – stable modern award system

287. The proposed variations are also consistent with the flexibilities to take meal and rest breaks in other modern awards. For example, under the *Hospitality Industry (General) Award* 2020, the default position for a shift up to six hours is that no break is provided, however an employee working between five to six hours can make a request of their employer for such a break.[199]

288. By way of further example, under the *Concrete Products Award 2020*, the meal break may be commenced within the fourth to sixth hours from the commencement of ordinary working hours.[200] Other modern awards also allow for agreement to extend the period an employee may be required to work without a break beyond five hours.[201] Further, a number of modern awards enable agreement as to the timing of rest breaks, including combining rest breaks and being able to take them immediately before finishing work.[202] There are also a number of modern awards that enable agreement to combine meal breaks and rest breaks.[203]

289. Each of the above considerations weighs in favour of the making of the Proposal P variation.

D.13. PROPOSAL Q – Amendment to clarify the application of the first aid allowance

[198] *Officeworks Store Operations Agreement 2024,* cl 25.1.7 and 25.1.8.
[199] *Hospitality Industry (General) Award* 2020, cl 16.2, 16.4.
[200] *Concrete Products Award 2020,* cl 15.1(a).
[201] *Meat Industry Award 2020*, clause 15.1(a); *Cement, Lime and Quarrying Award 2020*, clause 15.1(a)(ii); *Cotton Ginning Award 2020*, clause 16.1; *Food, Beverage and Tobacco Manufacturing Award 2020*, clause 13.1(b); *Seafood Processing Award 2020*, clause 14.1(a); *Telecommunications Services Award 2020*, clause 14.4(a)(i); *Textile, Clothing, Footwear and Associated Industries Award 2020*, clause 18.1(c)(i); *Pharmaceutical Industry Award 2020*, clause 14.1(b) .
[202] *Car Parking Award 2020*, clause 16.2(c); *Racing Clubs Events Award 2020*, clause 16.3(b); *Racing Industry Ground Maintenance Award 2020*, clause 14.2(c).
[203] *Car Parking Award 2020*, clause 16.2(c); *Cotton Ginning Award 2020*, clause 16.2; *Sugar Industry Award 2020*, clause 16.4(e).

290. The ARA, through Proposal Q, seeks to clarify that the first aid allowance is only paid when an employee is appointed to perform such duties and that it is payable on a pro-rata basis by reference to the number of hours per week the duties are performed.

291. Proposal Q concerns a variation to the first aid allowance under clause 19.10 of the GRIA 2020. Clause 19.10 currently provides:

> **19.10 First aid allowance**
>
> (a) Clause 19.10 applies to an employee who:
>
> (i) has a current first aid qualification from St John Ambulance Australia or a similar body; and
>
> (ii) is appointed by the employer to perform first aid duty.
>
> (b) The employer must pay the employee an allowance of $13.42 per week.

292. In practice, some employees are appointed to be responsible for first aid duties for one shift per week, while others are appointed to be responsible for first aid duties for several shifts during the week.

293. Clause 19.10 is ambiguous in respect of employees who are appointed to perform first aid duties only in respect of a working day or shift (rather than for a week or longer). In these circumstances it is unclear:

(a) whether the allowance is payable only in circumstances where the employee has actually been appointed for the relevant working day or shift to be responsible for performing first aid duties. This is an interpretation that is widely implemented in the sector.

(b) where an employee is only appointed to perform first aid duties on one shift or any period less than a week, whether the employee is entitled to the full weekly first aid allowance or only to an allowance prorated for that day or shift.

294. The ARA's amendments clarify when the first aid allowance is applicable and also provide for an hourly payment rate (calculated pro-rata by reference to the weekly rate), which better reflects the working arrangements of those who are responsible for performing first aid during work hours. An hourly allowance also makes it more likely that part-time and casual employees will be given the opportunity to earn the allowance.

295. The ARA relies on s 160(1) and ss 157(1)(a) on the basis that the variation rectifies the ambiguity and uncertainty regarding the entitlement to the first aid allowance where an employee is appointed for a period of less than one week, and is necessary to meet the modern awards objective particularly having regard to the need to ensure that the GRIA 2020 is easy to understand (consistent with s 134(1)(g)).

E. CONCLUSION

296. For the reasons outlined above, the ARA seeks that the variations in Annexure A to these submissions be made under either s 157(1)(a) or s 160(1) as outlined above.

297. The ARA seeks that the Commission specify, pursuant to s 165(1) of the FW Act, that the variation determinations regarding Proposal H (in relation to the change of the heading to clause 15.7), Proposal I (in relation to the change of the heading to clause 15.8) and Proposal O come into operation with effect from 1 October 2020. For all other proposed variations, the ARA seeks that the determinations be made operative one week after the date of the determination.

1 November 2024

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ANNEXURE A

Consolidated list of ARA's proposed variations to the General Retail Industry Award			
Ref no. in Application	**Retail Award Clause(s)**	**Issue**	**Proposal / proposed draft clause**
Proposal A (Items 1 and 2)	1. Insert new clause 2A 2. Delete notes at clauses 10.5 and 10.6	A - Amendment to make clear that 'written' records include digital records	**Insert a new clause 2A in the General Retail Industry Award 2020 (GRIA):** *2A. For the purposes of any agreement or notice that is required to be recorded in writing under this award, the agreement or notice may be provided and recorded digitally, including through an exchange of emails, text messages, a record in an electronic system or by other electronic means.* **Delete the below notes that appear at clauses 10.5 and 10.6:** *NOTE: An agreement under clause 10.5 could be recorded in writing including through an exchange of emails, text messages or by other electronic means.* *NOTE 1: An agreement under clause 10.6 could be recorded in writing including through an exchange of emails, text messages or by other electronic means.*
Proposal B (Items 3, 4 and 5)	3. Amend clause 15.3 4. Insert new clause 15.X 5. Amend the title in Column 1 of Table 3 in clause 16.2	B - Amendment to allow for split shifts with employee agreement	**Amend clause 15.3 of the GRIA 2020 as follows:** *15.3 Ordinary hours of work on any day are continuous, except for rest breaks and meal breaks as specified in clause 16 — Breaks, or where agreed between an employer and employee under clause 15.X.* **Insert a new clause 15.X of the GRIA 2020 as follows** *15.X Split-shifts* *(1) By agreement between the employer and an individual employee, the employee may be rostered to work a split-shift such that they work ordinary hours in two blocks on one day with an unpaid period of at least one hour in between the end of the first work block and the beginning of the second work block.* *(2) Where an employee works a split-shift pursuant to clause 15.X(a), clauses 10.9 and 11.2 will apply in respect of the totality of hours the employee is engaged for each day.* *(3) Where an employee works a split-shift pursuant to clause 15.X(a), clause 16.2 will apply in respect to the hours within each block, assessed separately.*

Consolidated list of ARA's proposed variations to the General Retail Industry Award			
Ref no. in Application	**Retail Award Clause(s)**	**Issue**	**Proposal / proposed draft clause**
			(4) For the avoidance of doubt, clause 16.6 does not apply to the period between the two blocks of ordinary hours rostered as part of a split-shift under clause 15.X(a). *NOTE: The Recall allowance in clause 19.11 does not apply where an employee returns to work for the second part of a split-shift pursuant to clause 15.X.* **Amend the title in Column 1 of Table 3 in clause 16.2 of the GRIA 2020 as follows:** *Hours worked per shift, or per work block where a split-shift is worked pursuant to clause 15.X(a).*
Proposal C (Items 6 and 7)	6. Amend clause 16.6(a) – (c) 7. Delete clause 16.6(d)	C - Amendment to minimum break between shifts on different days	**Amend clauses 16.6(a) – (c) of the GRIA 2020 to read:** *16.6 Breaks between work periods* *(a) An employee must have a minimum break of ~~12~~ 10 hours between when the employee finishes work on one day and starts work on the next.* *(b) If an employee starts work again without having had ~~12~~ 10 hours off work, the employer must pay the employee for each hour worked at the rate of 200% of the employee's minimum hourly rate until the employee has a break of ~~12~~ 10 consecutive hours.* *(c) The employee must not suffer any loss of pay for ordinary hours not worked during the period of a break required by clause 16.6.* **Delete clause 16.6(d) of the GRIA 2020.**
Proposal D (Items 8, 9 and 10)	8. Amend clause 15.6(g)(v) 9. Amend clause 15.7(a) 10. Amend clause 18.2	D - Amendment to improve ability to average hours over longer periods	**Amend clause 15.6(g)(v) of the GRIA 2020 to read:** *(v) working an average of 38 hours per week over a longer period of up to six months or as agreed between the employer and the employee.* **Amend clause 15.7(a) of the GRIA 2020 to read:** *(a) A roster period cannot exceed 4 weeks except ~~by agreement in~~ where hours are averaged over a longer period pursuant to clause 15.6(g)(v).*

Consolidated list of ARA's proposed variations to the General Retail Industry Award			
Ref no. in Application	**Retail Award Clause(s)**	**Issue**	**Proposal / proposed draft clause**
			Amend clause 18.2 of the GRIA 2020 to read: *18.2 Wages must be paid for a pay period according to the number of hours worked by the employee in the period or where an employee's ordinary hours are averaged over a period of time permitted by this award an employee may be paid for the average number of ordinary hours attributed to the relevant pay period. ~~they may be averaged over a fortnight.~~*
Proposal F (Item 12)	12. Delete clauses 15.6(i) and 15.6(j)	F - Amendment to remove restriction of 19 starts for full-time employees	**Delete clauses 15.6(i) and 15.6(j) of the GRIA 2020.**
Proposal G (Items 13, 14 and 15)	13. Amend clause 15.4 14. Amend clause 15.5 15. Amend clause 21.2(c)	G - Amendment to enable 38 ordinary hours to be worked across four days	**Amend clause 15.4 of the GRIA 2020 to read:** *15.4 Subject to clause 15.5, the maximum number of ordinary hours that can be worked on any day is ~~9~~10.* **Amend clause 15.5 of the GRIA 2020 to read:** *15.5 An employer may roster an employee to work up to 11 ordinary hours on one day per week, or two days per week by agreement between the employer and an individual employee.* **Amend clause 21.2(c) of the GRIA 2020 to read:** *(iii) in excess of the maximum daily ordinary hours determined by clauses 15.4 and 15.5. ~~11 hours on one day of the week and in excess of 9 hours on any other day of the week~~*
Proposal H (Items 16 and 17)	16. Amend the heading of clause 15.7 17. Amend clause 15.7(d)	H - Amendment to improve flexibility to remove requirement for consecutive days off by agreement	**Amend the heading of clause 15.7 of the GRIA 2020 to read:** ***Full-time employees –*** *rostering arrangements* **Amend clause 15.7(d) of the GRIA 2020 to read:**

Consolidated list of ARA's proposed variations to the General Retail Industry Award			
Ref no. in Application	**Retail Award Clause(s)**	**Issue**	**Proposal / proposed draft clause**
			d. Consecutive days off *i. The employer must roster an employee to work ordinary hours in such a way that they have 2 consecutive days off per week or 3 consecutive days off per 2 week cycle.* *ii. Clause 15.7(d)(i) is subject to any agreement for different arrangements entered into between the employer and an individual employee ~~at the written request of the employee.~~* *iii. ~~Different arrangements agreed under clause 15.7(d)(ii) must be recorded in the time and wages record.~~* *iv. The employee may end an agreement under clause 15.7(d)(ii) at any time by giving the employer 4 weeks' notice.* *v. An employee cannot be required as a condition of employment to make an ~~request~~ agreement under clause 15.7(d)(ii).*
Proposal I (Items 18 and 19)	18. Amend clause 15.8 19. Insert new definition in clause 2	I - Amendment to clarify employees regularly working Sundays	**Amend clause 15.8 of the GRIA 2020 to read:** **Full-time employees regularly working Sundays** *(a) The employer must roster an employee who regularly works Sundays in such a way that they have 3 consecutive days off ~~(including Saturday and Sunday)~~ per 4 week cycle.* *(b) Clause 15.8(a) is subject to any agreement for different arrangements entered into by the employer and an individual employee ~~at the written request of the employee~~.* *~~(c) Different arrangements agreed under clause 15.8(b) must be recorded in the time and wages record.~~* *(d) The employee may end an agreement under clause 15.8(b) by giving the employer 4 weeks' notice.* *(e) An employee cannot be required as a condition of employment to agree to an arrangement under clause 15.8(b).* **Insert new definition in clause 2 as follows:** ***Employee who regularly works Sundays*** *means a full-time employee who based on that roster cycle will work at least three out of four Sundays.*
Proposal J (Item 20)	20. Add clause 17A	J - Amendment to introduce salaries absorption for	**Add a clause 17A to the GRIA 2020 as follows:** ***17A. Salaries absorption (Managerial and higher-level staff)***

Consolidated list of ARA's proposed variations to the General Retail Industry Award			
Ref no. in Application	**Retail Award Clause(s)**	**Issue**	**Proposal / proposed draft clause**
		managerial and higher-level staff	*17A.1 This clause applies to employees, other than casual employees, classified at Retail Employee Level 4 to Retail Employee Level 8 who:* *(1) are paid an annual salary that is at least 125% of the minimum weekly rate (assessed on a pro-rata basis for part-time employees) specified in clause 17 applicable to the employee's classification multiplied by 52; and* *(2) have agreed with their employer, in writing, to the application of this clause; and* *(3) have been advised by their employer, in writing and prior to the employee agreeing to the application of this clause, of the annual salary that they will be paid and the provisions of the award that will not apply because of the application of this clause.* *17A.2 An employer must keep a record of any agreement reached in accordance with clause 17A.1 as an employee record until at least 7 years from the earliest of the date of the agreement ending, the employee ceasing to be covered by this Award, or the termination of the employee's employment.* *17A.3 An employer must keep a record of the hours worked by each employee working under an agreement reached in accordance with clause 17A.1.* *17A.4 An employee to whom this clause applies is not entitled to the benefit of the terms and conditions within the following clauses:* *(a) Clause 10.8 to 10.10 – Part-time employees;* *(b) Clause 15 – Ordinary hours of work and rostering arrangements;* *(c) Clause 16 – Breaks;* *(d) Clause 17 – Minimum rates;* *(e) Clause 19 – Allowances, except that clauses 19.6 – Moving expenses and 19.7 - Motor vehicle allowance will continue to apply;* *(f) Clause 21 – Overtime;* *(g) Clause 22 – Penalty Rates;* *(h) Clause 28.3 – Payment for annual leave loading;*

Consolidated list of ARA's proposed variations to the General Retail Industry Award			
Ref no. in Application	**Retail Award Clause(s)**	**Issue**	**Proposal / proposed draft clause**
			(i) Clause 33.3 and 33.4—Payment for work on public holiday or substitute day. *17A.5 An employee to whom this clause applies should normally have a minimum of 16 days off during each 8-week cycle of work (or equivalent roster period). Where this does not occur, the employee must either be provided equivalent time off in lieu within six months or be paid for the additional hours worked (at the rate of pay calculated in accordance with clause 17A.11).* *17A.6 An employee to whom this clause applies should normally have a 10 hour break between when the employee finishes work on one day and starts work on the next day, unless otherwise agreed between the employer and the employee. If an employee is required to start work again without having had 10 hours off work, the employer must pay the employee for each hour worked at the rate in clause 16.6(b) (subject to clause 17A.11) until the employee has a break of 10 consecutive hours.* *17A.7 Where an employee is required to work more than an average of 43 hours per week over a 6-month period (or the pro-rata equivalent for a part-time employee), all hours worked in excess of that number will not be covered by the annual salary amount set out in clause 17A.1(a) and must be separately compensated for either through additional salary payments (at the base rate of pay calculated in accordance with clause 17A.11) and/or time off in lieu arrangements.* ***17A.8 Work on public holidays*** *An employee who is required to work on a public holiday is entitled to payment for those hours worked at the rate of pay calculated in accordance with clause 17A.11 or paid time off of equal length to the time worked on the public holiday. Such time off must be taken or paid in accordance with clause 17A.9.* ***17A.9 Accrued time off for working on a public holiday*** ***(a)*** *If the accrued time off referred to in clause 17A.8 is not taken or paid out within 6 months of its accrual, the employer must pay the employee for the accrued time off in the next pay period following those 6 months. This must be paid at the rate of pay calculated in accordance with clause 17A.11.*

Consolidated list of ARA's proposed variations to the General Retail Industry Award			
Ref no. in Application	**Retail Award Clause(s)**	**Issue**	**Proposal / proposed draft clause**
			(b)** If, on termination of the employee's employment, accrued time off for working on a public holiday has not been taken or paid out, the employer must pay the employee for the accrued time off at the rate of pay calculated in accordance with clause 17A.11.* ***17A.10 Meal Breaks *An employee must not be required to work for more than six hours without being allowed to take a meal break. The break must be for a minimum of 30 minutes duration.* ***17A.11 Calculation of hourly rate*** *Distinct to what the relevant base rate of pay is for the purposes of the NES for annualised wage arrangements which are not captured by clause 17A.1, the hourly amount payable to an employee under this clause (except for clause 17A.6) is to be 125% of the minimum hourly rate specified in clause 17.* *It is the intention of this clause that where the annual salary amount paid by an employer to an employee already exceeds the amount set out in clause 17A.1(a), then the part of the annual salary that exceeds the amount described in 17A.1(a) can be used to satisfy (in full or in part) the amounts that would otherwise be due to the employee under clauses 17A.5, 17A.6, 17A.7, 17A.8 and 17A.9.*
Proposal L (Item 23)[204]	23. Delete clause 16.3	L - Amendment to remove requirements to notify break times in advance	**Delete clause 16.3.**
Proposal O (Item 27)	27. Amend clause 28.3	O - Amendment to clarify annual leave loading	**Amend clause 28.3 to read:** ***28.3 Annual leave loading*** *(a) During a period of paid annual leave an employer must pay an employee an additional payment in accordance with clause 28.3 for the employee's ordinary hours of work in the period.* *(b) The additional payment is payable on leave accrued.*

[204] The Commissions Statement [2024] FWC 2163 provides that the aspect of proposed variation L set out at item 22 will be dealt with as part of the 2025 review of award provisions regulating part-time employment.

Consolidated list of ARA's proposed variations to the General Retail Industry Award			
Ref no. in Application	**Retail Award Clause(s)**	**Issue**	**Proposal / proposed draft clause**
			(c) For an employee other than a shiftworker the additional payment is the greater of: *(iii) 17.5% of the employee's minimum hourly rate for all ordinary hours of work in the period; or* *(iv) The ~~employee's minimum hourly rate for all ordinary hours of work in the period inclusive of~~ penalty component of the weekend penalty rates as specified in clause 22.1(Penalty rates) for the employee's ordinary hours of work in the period.* *(d) For a shiftworker the additional payment is the greater of:* ***1*** *17.5% of the employee's minimum hourly rate for all ordinary hours of work in the period; or* ***2*** *The ~~employee's minimum hourly rate for all ordinary hours of work in the period inclusive of~~ penalty component of the penalty rates for shiftwork as specified in clause 25 (Rate of pay for shiftwork employees) for the employee's ordinary hours of work in the period* *(e) Notwithstanding clauses 28.3(c) and 28.3(d), where the hours that would attract the relevant penalty or shift penalty amounts specified in clauses 28.3(c)(ii) or 28.3(d)(ii) is not known or identifiable, the employee must be paid 17.5% of the employee's minimum hourly rate for all ordinary hours of work in the period.*
Proposal P (Items 28, 29 and 30)	28. Amend clause 16.5 29. Insert new clause 16.6 30. Rename references to existing clause 16.6	P - Amendment to provide an ability for employees to waive a meal break and go home early	**Amend clause 16.5 of the GRIA 2020 to read:** *16.5 Subject to clause 16.6, an employer cannot require an employee:* *(a) to take a rest break or meal break within the first or the last hour of work; or* *(b) to take a rest break combined with a meal break; or* *(c) to work more than 5 hours without taking a meal break.* **Insert new clause 16.6 as follows:** *16.6 An employer and employee may agree, on an ongoing basis or for a specified period of time, to one or more of the following arrangements, where the employee is entitled to the relevant break(s):* *(a) the employee will take rest breaks and / or meal breaks within the first and / or last hour of work;*

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			(b) the employee will take one or more rest break(s) combined with one or more meal break(s); and/or *(c) the employee will work up to 6 hours without taking a meal break.* **Rename existing clause 16.6 as clause 16.7 and other existing references to clause 16.6 in the GRIA 2020 to 16.7 accordingly.**
Proposal Q (Item 31)	31. Amend clause 19.10	Q - Amendment to clarify the application of the first aid allowance	**Amend clause 19.10 as follows:** **19.10 First aid allowance** *(a) Clause 19.10 applies to an employee who:* *(i) has a current first aid qualification from St John Ambulance Australia or a similar body; and* *(ii) is ~~appointed~~ nominated by the employer to be responsible for performing first aid duties during particular nominated hours of work.* *(b) If the employee has been nominated by the employer to be responsible for performing first aid duties under clause 19.10(a)(ii), the employer must pay the employee an allowance of $0.3405 per hour (up to a maximum of $12.94 per week) that the employee has been allocated to perform the first aid duties during their hours of work.*

28. 38 hour week rosters **28.1** A full-time employee will be rostered for an average of 38 hours per week, worked in any of the following forms or by agreement over a longer period: **(a)** 38 hours in one week; **(b)** 76 hours in two consecutive weeks; **(c)** 114 hours in three consecutive weeks; or **(d)** 152 hours in four consecutive weeks. **28.2** The 38 hour week may be worked in any one of the following methods: **(a)** shorter days, that is 7.6 hours; **(b)** a shorter day or days each working week; **(c)** a shorter fortnight, i.e. four hours off in addition to the rostered day off; **(d)** a fixed day off in a four week cycle; **(e)** a rotating day off in a four week cycle; **(f)** an accumulating day off in a four week cycle, with a maximum of five days being accumulated in five cycles. **28.3** In each shop, an assessment will be made as to which method best suits the business and the proposal will be discussed with the employees concerned, the objective being to reach agreement on the method of implementation. An assessment may be initiated by either the employer or employees not more than once a year.	**15.6 Full-time employees** **(a)** In each establishment an assessment must be made as to the kind of arrangement for working the average of 38 ordinary hours per week required for full-time employment that best suits the business of the establishment. **(b)** Either the employer or the employee may initiate the making of an assessment. **(c)** An assessment cannot be made more frequently than once per year. **(d)** Any proposed arrangement arising out of the making of an assessment must be discussed with the affected employees with the objective of reaching agreement on it. **(e)** Different groups of employees may be subject to different arrangements. **(f)** An arrangement may provide for a full-time employee to be rostered to work the required number of hours in any of the ways mentioned in paragraph (g) and may adopt any of the options mentioned in paragraph (h) for working the average of 38 hours per week. **(g)** The ways are: **(i)** working 38 hours per week; or **(ii)** working 76 hours over 2 consecutive weeks; or **(iii)** working 114 hours over 3 consecutive weeks; or **(iv)** working 152 hours over 4 consecutive weeks; or

28.4 Circumstances may arise where different methods of implementation of a 38 hour week apply to various groups or sections of employees in the shop or establishment concerned.	**(v)** working an average of 38 hours per week over a longer period agreed between the employer and the employee. **(h)** The options are: **(i)** working 5 days of 7 hours and 36 minutes each per week; or **(ii)** working days of varying length per week; or **(iii)** taking 4 hours off per fortnight in addition to the rostered day off; or **(iv)** taking a fixed day off per 4 week cycle; or **(v)** taking a rotating day off per 4 week cycle; or **(vi)** having an accumulating day off per 4 week cycle with a maximum of 5 days being accumulated over 5 such cycles.
28.5 In retail establishments employing on a regular basis 15 or more employees per week, unless specific agreement exists to the contrary between an employer and an employee, the employee will not be required to work ordinary hours on more than 19 days in each four week cycle. **28.6** Where specific agreement exists between an employer and employee, the employee may be worked on the basis of: **(a)** not more than 4 hours' work on one day in each two week cycle; **(b)** not more than 6 hours' work on one day in each week; **(c)** not more than 7.6 hours' work on any day.	**15.7 Rosters (Full-time and part-time employees)** **(a)** A roster period cannot exceed 4 weeks except by agreement in clause 15.6(g)(v). **(b)** By agreement between the employer and an individual employee, the employee may be rostered to work: **(i)** not more than 4 hours on one day per 2 week cycle; or **(ii)** not more than 6 hours on one day per week; or **(iii)** not more than 7 hours and 36 minutes on any day.

28.9 A roster period cannot exceed four weeks.

28.11 Consecutive days off

(a) Ordinary hours will be worked so as to provide an employee with two consecutive days off each week or three consecutive days off in a two week period.

(b) This requirement will not apply where the employee requests in writing and the employer agrees to other arrangements, which are to be recorded in the time and wages records. It cannot be made a condition of employment that an employee make such a request.

(c) An employee can terminate the agreement by giving four weeks' notice to the employer.

28.12 Ordinary hours and any reasonable additional hours may not be worked over more than six consecutive days.

(c) Except as provided by paragraph (d), the employer must not roster an employee to work ordinary hours on more than 5 days per week.

(d) The employer may roster an employee to work ordinary hours on 6 days in one week if the employee is rostered to work no more than 4 days in the following week.

(e) In an establishment at which at least 15 employees are employed per week on a regular basis, the employer must not roster an employee to work ordinary hours on more than 19 days per 4 week cycle.

(f) Paragraph (e) is subject to any agreement to the contrary between the employer and an individual employee.

(g) The employer must roster an employee to work ordinary hours in such a way that they have 2 consecutive days off per week or 3 consecutive days off per 2 week cycle.

(h) Paragraph (g) is subject to any agreement for different arrangements entered into between the employer and an individual employee at the written request of the employee.

(i) Different arrangements agreed under paragraph (h) must be recorded in the time and wages record.

(j) The employee may end an agreement under paragraph (h) at any time by giving the employer 4 weeks' notice.

(k) An employee cannot be required as a condition of employment to agree to an arrangement under paragraph (h).

(l) The maximum number of consecutive days on which an employee may be scheduled to work (whether ordinary hours or overtime) is 6.

28.7 Substitute rostered days off (RDOs) **(a)** An employer, with the agreement of the majority of employees concerned, may substitute the day or half day an employee is to take off in accordance with a roster arrangement for another day or half day in the case of a breakdown in machinery or a failure or shortage of electric power or to meet the requirements of the business in the event of rush orders or some other emergency situation. **(b)** By agreement between an employer and an employee, another day may be substituted for the day that employee is to be rostered off.	**15.8 Substitution of rostered days off** **(a)** With the agreement of the majority of affected employees, an employer may substitute another day or half day for a rostered day or half day off of an employee in any of the following circumstances: **(i)** a machinery breakdown; or **(ii)** an electrical power shortage or breakdown; or **(iii)** an unexpected spike in the work required to be performed by the business; or **(iv)** another emergency situation. **(b)** A rostered day off may be changed by the employer and an employee by mutual agreement.
28.8 Accumulation of RDOs By agreement between the employer and an employee, the rostered day off may be accumulated up to a maximum of five days in any one year. Such accumulated periods may be taken at times mutually convenient to the employer and the employee. **28.10** Ordinary hours will be worked on not more than five days in each week, provided that if ordinary hours are worked on six days in one week, ordinary hours in the following week will be worked on no more than four days.	**15.9 Banking of rostered days off** **(a)** By agreement between the employer and an employee, up to 5 rostered days off may be banked in any one year. **(b)** A banked rostered day off may be taken at a time that is mutually convenient to the employer and the employee.
28.13 Employees regularly working Sundays **(a)** An employee who regularly works Sundays will be rostered so as to have three consecutive days off each four weeks and the consecutive days off will include Saturday and Sunday.	**15.10 Employees regularly working Sundays** **(a)** Unless otherwise agreed between the employer and the employee, the employer must roster an employee who regularly works Sundays in such a way that they have 3

(b) This requirement will not apply where the employee requests in writing and the employer agrees to other arrangements which are to be recorded in the time and wages records. It cannot be made a condition of employment that an employee make such a request. **(c)** An employee can terminate the agreement by giving four weeks' notice to the employer.	consecutive days off (including Saturday and Sunday) per 4 week cycle. **(b)** An agreement under paragraph (a) may only be entered into at the written request of the employee. **(c)** Different arrangements agreed under paragraph (a) must be recorded in the time and wages record. **(d)** The employee may end an agreement under paragraph (a) at any time by giving the employer 4 weeks' notice. **(e)** An employee cannot be required as a condition of employment to agree to an arrangement under paragraph (a).
28.14 Notification of rosters **(a)** The employer will exhibit staff rosters on a notice board, which will show for each employee: **(i)** the number of ordinary hours to be worked each week; **(ii)** the days of the week on which work is to be performed; and **(iii)** the commencing and ceasing time of work for each day of the week. **(b)** The employer will retain superseded notices for twelve months. The roster will, on request, be produced for inspection by an authorised person. **(c)** Due to unexpected operational requirements, an employee's roster for a given day may be changed by mutual agreement with the employee prior to the employee arriving for work.	**15.11 Notification of rosters** **(a)** The employer must ensure that the work roster is available to all employees, either 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 roster for at least 12 months and produce it, on request, for inspection by an authorised person. **(d)** Due to unexpected operational requirements, the roster of an employee may be changed by mutual agreement by the

(d) Any permanent roster change will be provided to the employee in writing with a minimum seven days notice. Should the employee disagree with the roster change, they will be given a minimum of 14 days written notice instead of seven days, during which time there will be discussions aimed at resolving the matter in accordance with clause 9—Dispute resolution, of this award. **(e)** Where an employee's roster is changed with the appropriate notice for a once-only event caused by particular circumstances not constituting an emergency, and the roster reverts to the previous pattern in the following week, then extra work done by the employee because of the change of roster will be paid at the overtime rate of pay. **(f)** An employee's roster may not be changed with the intent of avoiding payment of penalties, loading or other benefits applicable. Should such circumstances arise the employee will be entitled to such penalty, loading or benefit as if the roster had not been changed.	employer and employee at any time before the employee arrives for work. **(e)** The roster of an employee may be changed at any time by the employer giving the employee at least 7 days' written notice of the change. If the employee objects to the change before it takes effect, the employer must give them at least 14 days' written notice of the change. NOTE: The employer and employee may seek to resolve a dispute about a roster change in accordance with clause 39—Dispute resolution. **(f)** Paragraph (g) applies to an employee whose roster is changed in accordance with clause 15.11—Notification of rosters in a particular week for a one-off event not constituting an emergency and then reverts to the previous roster in the following week. **(g)** The employer must pay the employee at the overtime rate specified in **Table 9—Overtime rates** for any extra time worked by the employee because of the roster change. NOTE: See clause 31—Rostering restrictions for the rosters of shiftworkers.