IN THE FAIR WORK COMMISSION
AT SYDNEY

Application by the Australian Retailers Association
AM2024/9

Variation at the Commissions own Initiative
AM2024/33

Application by Anthony Hicks
AM2024/26

Application by the Shop, Distributive and Allied Employees Association
AM2024/40

SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION – SUBMISSIONS ON THE APPLICATION IN MATTERS AM2024/9 & AM2024/33

A. INTRODUCTION

1. By way of application filed on 6 February 2024, known to the Fair Work Commission (**the Commission**) as AM2024/9 (**the ARA Application**), the Australian Retailers Association has sought to vary the *General Retail Industry Award 2020* (**the GRIA**) pursuant to sections 157(1) and 160 of the *Fair Work Act 2009* (Cth) (**the FW Act**).

2. The variations sought in the ARA Application were numerous, 17 in total. Although several variations have been determined or resolved, 13 remain outstanding.

3. On 18 July 2024, the Full Bench of the Commission issued the final report into the 2023-2024 Modern Award Review (**the Final Report**).[1] Arising from the Final Report was an application by the Commission, on its own motion pursuant to sections 157(3) and/or 160(2)(a) of the FW Act. This matter became known to the Commission as AM2024/33 (**the Commission's Application**).[2]

4. The Commission further issued a statement that the ARA Application and the Commission's Application would be heard and determined together.[3] An application by Mr Anthony Hicks known to the Commission as AM2024/26 (**the Hicks**

[1] *Modern Awards Review 2023-24* (**Final Report**, 18 July 2024).
[2] Final report at [167(3)].
[3] *Application by the Australian Retailers Association* [2024] FWC 2163 at [5].

Application) and an application known to the Commission as AM2024/40 (**the SDA Application**) were joined to these proceedings by his Honour Justice Hatcher.[4]

5. Pursuant to order 6(a) of the Amended Directions issued by this Commission on 19 September 2024, this document serves as the Shop, Distributive and Allied Employees' Association (**the SDA**) submission in response to material filed in the ARA Application and the Commission's Application. Submissions in respect of the Hicks Application and the SDA Application will be filed at a later date in accordance with the Amended Directions.

B. OUTSTANDING VARIATIONS

6. The variations arising from the ARA Application that remain outstanding in these proceedings that are dealt with in these submissions are as follows:

    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;

[4] See generally, the Directions of Vice President Gibian dated 11 September 2024.

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.

7. On 1 November 2024, the Australian Industry Group (**AiGroup**) filed submissions in respect of the ARA, the Commission's, the Hicks and the SDA Applications (**the AiGroup Submissions**).

8. There is significant overlap between the proposals contained in the ARA Application and the AiGroup Submissions. Insofar as there is an overlap between the ARA proposals and the matters raised in the AiGroup Submissions, they are dealt with jointly.

9. In this respect, the AiGroup Submissions are dealt with collectively in the following parts of these submissions as follows:

    a. Breaks are dealt with in the submissions in proposal L;

    b. First aid allowance is dealt with in proposal Q; and

10. Exemption rates are dealt with in proposal J.

11. Although no application has been made by AiGroup, they have made submissions on varying clause 18 – payment of wages, this is dealt with separately in these submissions.

C. EVIDENCE & MATERIAL FILED BY THE SDA

12. The SDA relies on the submissions below in support of their position in respect of each of the above proposals.

13. In addition to the SDA's position in respect of the above proposals, the SDA also relies on the following lay witnesses:

    a. Statement of Bethany L dated 19 February 2025 (**Bethany L Statement**);

    b. Statement of Nadia L dated 20 February 2025 (**Nadia L Statement**);

    c. Statement of Blake R dated 20 February 2025 (**Blake R Statement**);

    d. Statement of Eugene M dated 20 February 2025 (**Eugene M Statement**);

    e. Statement of Elizabeth M dated 19 February 2025 (**Elizabeth M Statement**);

    f. Statement of Donna C dated 21 February 2025 (**Donna C Statement**);

    g. Statement of Nathan G dated 20 February 2025 (**Nathan G Statement**);

    h. Statement of Christopher C dated 19 February 2025 (**Christopher C Statement**);

    i. Statement of Jason D dated 18 February 2025 (**Jason D Statement**);

    j. Statement of Robert M dated 21 February 2025 (**Robert M Statement**);

    k. Statement of Rebecca C dated 19 February 2025 (**Rebecca C Statement**);

    l. Statement of Toni M dated 17 February 2025 (**Toni M Statement**);

    m. Statement of Rukman M dated 21 February 2025 (**Rukman M Statement**);and

n. Statement of Steven H dated 20 February 2025 (**Steven H Statement**).

14. In addition to the above lay witnesses, the SDA relies on a summary and analysis of rosters of employees who will be affected by Proposal J titled '*Annualised Salary Summary and Analysis – GRIA Variation 2024*' (**the Roster Analysis Document**) filed with these submissions.

D. CONTEXT – THE OBJECTS OF THE FAIR WORK ACT

15. In performing functions and exercising its powers under the FW Act in relation to a matter, the Commission must take into account:

    a. the object of the FW Act and any objects of the relevant part of the Act;

    b. equity, good conscience and the merits of the matter; and

    c. the need to respect and value the diversity of the work force by helping to prevent and eliminate discrimination.[5]

16. The object of the FW 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, *inter alia*:

    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;

    b. ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders;

    c. assisting employees to balance their work and family responsibilities by providing for flexible working arrangements; and

[5] FW Act, section 578.

d. achieving productivity and fairness through an emphasis on enterprise - level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action.

The Significance of Bargaining

17. As noted above, the Act's objects include the establishment of a fair, cooperative, and productive workplace relations system. A core element of these objectives is the promotion of collective bargaining at the enterprise level, built on a hierarchy of minimum employment conditions, beginning with the National Employment Standards (NES) and modern Awards, which are limited to industry-wide minimum standards (ie a safety net). This design encourages parties to pursue genuine productivity gains and tailored outcomes through enterprise bargaining, rather than relying on ongoing Award variations.

18. Sections 3(a) and (f) of the Act underscore this legislative intention by emphasising that while modern Awards set a baseline, enterprise level variations in terms and conditions are intended to be secured through enterprise bargaining. Over-reliance on the Award through attempts to expand its scope beyond a safety-net function may have the effect of discouraging bargaining at the enterprise level, which is contrary to the Act's objectives.

19. Moreover section 134(1)(b) of the Modern Awards Objective requires the Commission to take into account the need to encourage collective bargaining. The Commission has previously observed that proposed changes to Modern Awards which have removed an incentive to bargaining, even if small, are not supported by this consideration.[6]

Variations to a Modern Award and the Modern Awards Objective

20. The ARA seeks to vary the GRIA under sections 157 and 160 of the FW Act. To enliven the Commission's power under section 157 it is necessary for it to find that the variation sought is necessary to achieve the modern awards objective.

[6] *4 yearly review of modern awards - Public Holidays* [2018] FWCFB 4 at [87] and [124].

21. The power is discretionary in nature.[7] The modern awards objective is defined in section 134(1) of the FW Act, which states that the Commission must ensure that modern awards, together with the National Employment standards, provide a *'fair and relevant minimum safety net of terms and conditions.*' In giving effect to the modern awards objective, the Commission is required to take into account the mandatory considerations in subsections 134(1)(a) to (h) of the FW Act. The Commission must consider the *'relative living standards and the needs of the low paid*.' [8]

22. The principles governing the Commission's approach to considering the modern awards objective are well established.[9] In *Application to vary the Real Estate Industry Award 2020*, the Full Bench of the Commission (Hatcher VP (as he then was), Asbury DP (as she then was), Spencer C) stated:

> *The modern awards objective is very broadly expressed. It is a composite expression which requires that modern awards, together with the National Employment Standards (NES), provide a fair and relevant minimum safety net of terms and conditions, taking into account the matters in s 134(1)(a)–(h). Fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question. 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.*
>
> *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(a) – (h) and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance.*
>
> *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 pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence. It is also the case that where variations are not self-evident, an applicant seeking a change, must adduce probative evidence to support the contention that the variations are necessary to achieve the modern awards objective.*[10]

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[7] *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227, [35].
[8] Section 134(1)(a) of the FW Act.
[9] *Application to vary the Real Estate Industry Award 2020* [2020] FWCFB 3946, [54]-[56]; *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001, [115]; *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)*(2012) 205 FCR 227, [35]-[37], [46].
[10] [2020] FWCFB 3946, [54]-[56] (internal citations removed).

23. In the *4 yearly review of modern awards – Penalty Rates* decision, the Full Bench made the following observations as to what constitutes a '*fair and minimum safety net*' for the purposes of the modern awards objective:

    a. First, 'fairness' in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question.[11]

    b. Second, in providing a relevant minimum safety net, the word 'relevant' is intended to convey that a modern award should be suited to contemporary circumstances.[12]

    c. Third, the award system forms part of a minimum safety net which underpins direct bargaining.[13]

Variation of Modern Awards to Remove Ambiguity or Uncertainty

24. The ARA seeks in Proposals A, H, I, O and Q to vary the GRIA pursuant to section 160 of the FW Act.[14] Under section 160 of the FW Act, the Commission may make a determination varying a modern award to remove an ambiguity or uncertainty or to correct an error.

25. The principles governing the interpretation and application of section 160 are also well established.[15]

26. The Commission has a discretion as to the terms of the variation to be made, subject to the variation determined having the purpose of removing or correcting the identified ambiguity, uncertainty or error.[16]

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[11] [2017] FWCFB 1001, [117].
[12] Ibid., [120].
[13] Ibid., [121]-[128].
[14] In its initial F46 application dated 6 February, the ARA stated that 'the variations listed in the schedule as C, E, H, I, K, M, N, O and Q are sought pursuant to section 160(1) of the FW Act. It appears, having regard to the submissions, that the ARA now seeks to rely on s 160 in respect of Proposal A and not in respect of Proposal C.
[15] *Application by The Australian Retailers Association* [2024] FWCFB 197, [8]; *Variation on the Commission's own motion – Modern award superannuation clause review* [2023] FWCFB 264, [51]-[53]; *Re Australian Industry Group* [2021] FWCFB 115, [15]-[21].
[16] *Variation on the Commission's own motion – Modern award superannuation clause review* [2023] FWCFB 264, [52].

Retrospective Operation of Award Variations

27. Under s 165(1) of the FW Act, a determination that varies a modern award comes into operation on the day specified in the determination. Under s 165(2), the determination should not operate retrospectively unless:

    a. the determination is made under s 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.

28. The day of operation of a determination that varies a modern award will almost always be on or after the day that the determination is made. The Commission may only vary an award retrospectively in very limited circumstances.[17]

29. The Commission should have regard to the way in which an ambiguous clause has been applied – a determination to vary a clause should not operate retrospectively where there is no evidence as to how the clause operates in practice.[18] The Commission should exercise caution in granting retrospectivity where it may result in repayments owed by employees to an employer.[19]

E. PROPOSED VARIATIONS OF ARA

30. Each of the variations proposed by the ARA and disputed by the SDA are outlined in detail below.

E.1. PROPOSAL A – Amendment to make clear that 'written' records include digital records

31. The ARA proposes a variation to the GRIA to the following effect:

[17] *Fair Work Bill 2008*, Explanatory memorandum, [629].
[18] *Application by The Australian Retailers Association* [2024] FWCFB 251, [50].
[19] Ibid.

New clause 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.

32. The proposed variation is reflective of existing notes to the GRIA attached to clauses 10.5 and 10.6 (dealing with agreements in relation to part-time employment patterned (shift) work and changes to previous agreements in relation to agreed hours which must be 'in writing').

33. The ARA's amendment would operate with broader effect. It would apply not only to agreements (and not merely in relation to the particular agreements required (clause 10.5) or permitted (clause 10.6) to be entered into between the employer and a part-time employee under clause 10 of the GRIA), but it would also apply to every situation in which notice is required to be recorded in writing under the GRIA. The ARA's proposal additionally introduces a new concept ('a record in an electronic system') as part of the means by which agreement or the giving of notice may be evidenced or recorded in writing.

SDA's Alternative Proposal

34. The ARA's proposal, lacks adequate safeguards. The SDA would propose the following amendment in the alternative:

New clause 2A:

2A.1 For the purposes of any agreement required to be recorded in writing under this award, the agreement may be recorded digitally, including through an exchange of emails or text messages, a record in an electronic system or by other electronic means, provided that the record clearly sets out all the terms of the agreement being made and is in a form readily retrievable and accessible to the parties to the agreement.

2A.2 The agreement must be maintained by the employer in the time and wages record system or otherwise as part of the employee's employment records (such as an employee's personnel file).

2A.2 An employee or former employee must be able to access and see any agreement they have entered into upon request including by means of online access processes facilitated by the employer.

2A.4 The record of the agreement must be maintained in a form which prevents it from being altered, edited or varied by one party, without the knowledge and consent of the other party.

Amendment in relation to recording agreement

35. The SDA proposal is submitted to address the deficiencies in the ARA proposal which does not provide enough detail and explanation to either the employer or employee as to the various conditions and obligations that need to be addressed. The ARA proposal also lacks adequate safeguards in a process proposed to convert the greater certainty of a written document into more easily manipulable electronic information. This is particularly so in a situation where the full terms of the agreement may now comprise an exchange of separate communications. For example, by text message exchange.

36. The GRIA needs to be drafted in a way that is both informative and easily understood so that the requirements necessary to meet an award obligation are clear.

37. As noted earlier, the ARA proposal goes further than any previous prescription by the FWC and parties in the various proceedings regarding digital or electronic agreements. The previous matters cited in the employer submissions have had limited applicability. Current facilitation of, or recognition given to, agreements recorded by electronic means, has had limited applicability They were limited to one or two specific aspects of recording an agreement or posting a roster. Therefore, some caution needs to be applied in expanding the breadth and applicability of digital/electronic records.

38. The SDA counterproposal allows for the greater flexibility sought by the ARA but it importantly provides some cues and guidance to assist compliance and understanding for both the employer or employee.

39. The SDA's proposed wording 'form readily retrievable and accessible' highlights to all parties that any agreement by these means must be part of an electronic record which has permanence. For example, the agreement cannot be concluded on an electronic system that is ephemeral (an automatically deleting communication

between parties on programs such as Snapchat), or that an employee cannot later retrieve.

40. Similarly, having the 'agreement' in (but not necessarily part of) the time and wages record, or a similar database of information means that such agreements can be found, noted or examined if there are any future issues over what was agreed. This is a safeguard that protects both parties to the agreement.

41. The other key protection is to clearly acknowledge the right of the employee (or a former employee) to have future access to any agreement they have entered. This will eliminate disputation as to the 'ownership' of the record or the 'confidentiality' of the record that could be asserted depending on the system and mechanism used. This is necessary in circumstances where the ARA's desire for electronic recording of agreements under the GRIA gives prima facie direct control over that shared record to the employer. The SDA's proposal makes it clear that an employee has a right to access the records comprising the terms of any alleged agreements to which he or she is a party.

42. The SDA's proposal, whilst making provision for a right of access by a former employee, has not otherwise gone to the extent of placing time constraints on rights of access. Some employees may need instant access, other employees may only require access at a later time in the event of some dispute as to agreed terms. This is submitted to be reasonable in circumstances where the ARA's proposal is now directed towards a need to cover any situation in which agreement needs to be recorded.

43. If the Commission is to make general provision for the creation and maintenance of electronic records evidencing the rights of parties, it is necessarily contingent that the form in which the record is kept needs to be accessible. If a special program controlled by one party to the agreement restricts who can read the document, that would not be satisfactory.

Reliance by the ARA on the *Electronic Transactions Act* 1999 (Cth)

44. Some of these considerations have arisen in the context of the provisions of the *Electronic Transactions Act 1999* (Cth) (**the ETA**). The ARA relies on the ETA to support its proposed variation.

45. The Attorney General's Department provides a straightforward explanation of this Act on a webpage titled '*Electronic documents, written information and records*.' This explanation, in simple language provides the key requirements that are needed for using digital systems and records.

46. The two key requirements that are needed for using digital systems and records are as follows:

> ***Requirements for sending, giving and storing electronic documents and records***
>
> *Under Commonwealth law, you may be required or permitted to:*
>
> *1. send written information to someone*
>
> *2. give a physical document to another person*
>
> *3. store a record for a period of time.*
>
> *The Electronic Transactions Act 1999 (**ETA**) allows for these tasks to be done using electronic methods or communications so long as certain criteria are met.*
>
> *These criteria are generally meant to ensure that information should be accessible again in the future, and that documents and records are secure from being easily altered – the same way they would generally be if sent, given or stored in paper.*
>
> ***Storing electronic records***
>
> *The ETA says that anyone can store written information, documents and records of past communications electronically instead of in physical form, like on a computer, hard drive or database, so long as:*
>
> 1. *they can be reopened and read again*
> 2. *the method used to make a document or recorded communication reliably prevents it from being altered (other than with certain immaterial changes)*
>
> *In some cases, the record should also include key details to help identify the information. For example, stored electronic communications should include the time that the communication was sent.*

> *The ETA does not set any specific method that needs to be used, giving people the freedom to choose the technology that works best for them.*
>
> *The method should generally be as reliable as appropriate in the circumstances. It should also be reasonable to expect that it will work when the record is stored.*[20]

47. The Attorney General's Department's observations accord with the SDA's submissions. A digital record needs to be able to be:

    a. reopened and read;

    b. accessible in the future; and

    c. reliably free from the risk of being subsequently altered or changed without the knowledge or consent of a party.

48. These callouts are addressed in the SDA proposed variation. The SDA proposal, unlike that of the ARA, make the variation workable, understandable and modern. The ARA proposal contains none of the safeguards set out in the ETA that underpin transactional engagement between parties by digital means.

ARA's proposal in relation to Notice

49. The ARA's proposed variation has a significant additional aspect to it. The ARA is proposing that *any* obligation under the GRIA to give another party notice in writing (not just evidence of agreement between parties) can be satisfied by the same mechanisms of digital or electronic communication.

50. The SDA opposes this proposal.

51. Recording an agreement by electronic means necessarily involves recording participation by both parties to the agreement in its making. There cannot be an agreement without a "meeting of minds".

[20] https://www.ag.gov.au/legal-system/electronic-signatures-documents-and-transactions/electronic-documents-written-information-and-records, retrieved 15 February 2025.

52. Giving notice, on the other hand is a unilateral act. Under the award notice provisions can involve significant matters – e.g. redundancy (cl.38.1), notice of major workplace change (cl.34.1).

53. Allowing such notices to be given in the way proposed by the ARA involves a significant change. The effect of such a proposal in respect of such matters has not been explored fully in the ARA submissions.

54. The proposal should not be accepted in this regard without a full examination of how it would operate in all circumstances and a consideration of the ramifications in respect of each potential type of notification under the award.

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

55. In summary, the SDA opposes Proposal B on the basis that:

    a. the variation does nothing to ameliorate the disability suffered by an employee who is placed on a split shift; and

    b. the proposed wording contains ambiguity in respect of the manner in which overtime and other penalties accrue; and

    c. in agreements where split shifts presently exist, employees currently experience pressure and negative treatment from employers.

56. The ARA has sought the introduction of a new clause 15.X and an amendment to clause 15.3 of the GRIA to allow an employee, by agreement between the individual employee and their employer, to be rostered to work a split-shift such that they work their ordinary hours in two blocks on one day with an unpaid period of at least one hour between the end of the first work block and the commencement of the second work block.

57. The practical effect of Proposal B is that an employee may be rostered for as little as three hours over two periods in a day. For example, the ARA's proposal would

allow an employer to roster an employee for one two-hour block of work, followed by an unpaid break of an hour in duration, and then another one-hour block of work.

58. The ARA also seeks some further machinery amendments that remove the current recall allowance and provide clarity around breaks and minimum engagement periods.

59. In support of this position, the ARA relies on section 134(1)(aa), (ab), (c), (d), (f) and (h) of the FW Act.

60. The SDA does oppose the implementation of 'split' shifts in GRIA. However additional shifts have been introduced as a result of bargaining in a few agreements which are subject to protections such as those in the Coles Supermarkets agreement discussed below in PN 64-70. Bargaining is the place to address such matters.

<u>The variation does nothing to ameliorate the disability suffered by an employee who is placed on a split shift</u>

61. First, even with the consent of an employee, there is an inherent disability suffered by an employee who works a split shift. It has been identified by the Full Bench of this Commission that employees who work split shifts experience detriment, such as personal inconvenience, additional commuting time and fatigue.[21]

62. Split shifts have also been found to lead to an increased risk of absence due to work related injury and disease.[22] More specifically, a study of temporary retail workers assigned to work split shifts found that these workers often had short, divided working hours, were paid a low gross income and were more stressed. The net effect of which could make it difficult for them to balance their work and personal lives.[23]

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[21] *Coles Supermarkets Australia Pty Ltd* [2024] FWCFB 250 at [25].
[22] Ko, Kwon, Park, Jae Bum et al, '*Association between split shift work and work-related injury and disease absence*' Annals of Occupational and Environmental Medicine, 19 August 2021 https://pmc.ncbi.nlm.nih.gov/articles/PMC8446369/
[23] Zeytinoglu, Isik, Lillevik, Waheeda, et al '*Part-Time and Casual Work in Retail TradeStress and other Factors Affecting the Workplace*' Relations Industrielles / Industrial Relations Vol 59, No 3, Summer 2004 516-544 https://www.erudit.org/en/journals/ri/2004-v59-n3-ri893/010923ar/

63. Split shifts have historically not existed in the broad retail sector including all previous Retail State and Territory Awards.

64. In some collective agreements approved by the Commission and its predecessors, there has been a concept of voluntary additional shifts. These were 'extra full shifts' which an employee could agree to work and in respect of which they could withdraw their consent at any time. In current agreements. Coles Supermarkets and Kmart have re-introduced such arrangements for part time and casual employees, referred to as *'Voluntary Second Start*' in the Kmart Agreement[24] and '*Voluntary Additional Shifts*' in the Coles Agreement[25] in their respective enterprise Agreements in 2024.

65. The approval of the Coles Agreement was subject to a hearing by the Full Bench of this Commission. Three issues were identified by the Full Bench as being of concern as to the approval of the agreement. Of those issues, one was what implications the voluntary additional shift clause had for the '*Better Off Overall Test*' (**the BOOT**) when approving the agreement.[26]

66. These issues were of significant concern to the Full Bench in the Coles Agreement (despite the protections already built in) and undertakings were required to satisfy the Commission that these disabilities had been ameliorated and fairness and protections for employees were provided.[27]

67. The Full Bench also required Coles to undertake that the request to work voluntary additional shifts could not be made by a prospective employee. The concern of the Full Bench appeared to be that a prospective employee may apprehend that requesting to work additional voluntary shifts would improve their prospects or may even be in satisfaction of some condition of gaining employment.[28]

68. The Full Bench was also concerned with the provision for an employee who had consented to working additional shifts to give 28 days' notice to revoke that consent. Again, an undertaking by Coles was required.[29]

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[24] *Kmart National Agreement 2024* clause 14.3.
[25] *Coles Retail Enterprise Agreement 2024* clause 4.3.3.
[26] *Coles Supermarkets Australia Pty Ltd* [2024] FWCFB 250 at [2B].
[27] *Coles Supermarkets Australia Pty Ltd* [2024] FWCFB 250 at [23]-[26].
[28] *Coles Supermarkets Australia Pty Ltd* [2024] FWCFB 250 at [26].
[29] *Coles Supermarkets Australia Pty Ltd* [2024] FWCFB 250 at [26].

69. The Coles Agreement provides protections well above and beyond that of Proposal B. In particular:

    a. each shift must be at least three hours in duration;

    b. the two shifts are treated as a single shift for the calculation of entitlements including that of overtime; and

    c. there is a minimum of two hours between each shift.

70. The agreement also has arbitration rights for disputes where an employee can seek to have arbitrated any issue without consent of the employer.[30]

71. In the present application, none of these measures have been put in place. Further the well-known negative effects of split shifts establish a circumstance where the incorporation of split shifts into the GRIA would not meet the modern award objectives.

72. Proposal B makes no effort to ameliorate the disability caused by the implementation of split shifts into the GRIA. Indeed, the proposed variation allows for as little as one hour between shifts, hardly enough time for an employee to undertake almost any task before they are to return to work.

73. The existence of additional shifts in agreements involving the SDA does not mean that they are suitable more generally. The fact that the SDA is involved in a workplace of itself means that protections provided to employees under the agreements can more readily be supervised and enforced than where there is no union presence at the workplace. Moreover, the detriment involved in any such provisions must be balanced against the benefits of an agreement for it to pass the BOOT.

[30] *Coles Retail Enterprise Agreement 2024* clause 13.1.

Ambiguity in respect of Overtime

74. Secondly, Proposal B does not make any provision for the payment of overtime when working a split shift. It is unclear as to whether for the purposes of penalties such as overtime whether an employee is entitled to allowances and when those allowances accrue.

75. Such ambiguity fails to meet the modern award objective of ensuring a simple modern award system pursuant to section 134(g) of the FW Act.

Negative experiences of employees

76. Finally in respect of Proposal B, the Commission should consider the experiences of retail employees who work in stores that presently have split shift arrangements in place.

77. Rebecca C has given evidence that as the back office person with knowledge and experience of how split shifts work, she regularly has to advise employees and management on the effect of split shifts. From her experience, she has observed:

    a. employees having a limited understanding of what they are signing;

    b. employees being strongly encouraged to adopt roster practices such as split shifts; and

    c. only employees who have made roster choices such as split shifts are allocated additional shifts and hours.[31]

78. Further to the experience of Rebecca C, those that have given evidence have all opposed the implementation of split shifts, citing family reasons,[32] negative prior experiences,[33] and an overall desire not to embrace Proposal B as part of their employment.[34]

[31] Rebecca C Statement at [19]-[20], [25].
[32] Nathan G Statement [30]-[32].
[33] Jason D Statement at [18]-[20].
[34] Donna C Statement at [17]-[21]; Chris C Statement at [10]-[14].

Proposal B does not meet the Modern Awards Objective

79. The ARA argues that Proposal B meets the modern awards objective, in particular sections 134(1)(aa), (ab), (c), (d), (f) and (h) of the FW Act. From the above, it is clear that Proposal B meets none of these objectives.

80. Ultimately, the impact of Proposal B will be that employees will be given less opportunity to access work that is consistent, stable and that provides access to overtime.

81. Employees will be given less choice in what work they undertake, as well as disenfranchising those with caring and other family responsibilities.

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

82. The starting point for any consideration of Proposal C is an examination of the current award. If Proposal C is accepted, it will not give the employee the *right* to have a 10 hour rather than 12-hour break between shifts. Deciding the length of the break between shifts (subject to any other provisions of the award) will remain a decision for the employer.

83. Under the GRIA, the employee's position is the same. They can ask for a 10-hour break between shifts rather than a 12-hour break, but the employer does not have to agree.

84. Accordingly, the change sought is simply one which allows the employer to *impose* on an employee a 10 hour break rather than a 12-hour break. Thus, the proposal does not increase flexibility for employees, it reduces it. It does however increase flexibility for employers.

85. The ARA relies on three sub-paragraphs of the Modern Awards Objective; section134(1)(d) – the need to promote flexible modern work practices in the efficient and productive performance of work; 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; section134(1)(g) – the need to ensure a simple, easy to understand and stable modern award system.

86. Neither individually nor collectively do the considerations raised under these headings render it necessary to vary the GRIA in the way sought to achieve the modern award's objective.

Section 134(1)(d)

87. The ARA's argument in respect of this consideration is two-fold. First it is asserted that the 10-hour minimum break reflects the current predominant preference of employees, and it is thus reflective of flexible modern work practices within the retail sector.

88. The only evidence which is presented in relation to this is that there are several employers who have enterprise agreements with a default 10-hour minimum break. The agreements cited are the *COSTCO Wholesale Australia Enterprise Agreement 2023-2027*; the *Bunnings Retail Enterprise Agreement 2023*; and the *Officeworks Store Operations Agreement 2024*.

89. These three employers do not represent the majority of persons employed in the retail sector. Moreover, each of those agreements pays a substantial premium over the GRIA minimum rate. The ARA's proposal does not involve any increase to the minimum rate. The Costco Agreement provides for a minimum wage of 13.6% over the GRIA and weekly minimum contract hours of 24 hours for part-timers.[35] The Bunnings Agreement provides for a minimum wage premium of 8.4% over the GRIA and provides an extra week of annual leave for permanent employees.[36] The Officeworks Agreement provides a 2% premium on the GRIA and a 12-hour minimum engagement for permanent part-time employees.[37]

90. The reliance of the figures for salary managers at K-mart (80%) says nothing about the other employees. Salaried managers comprise just 5.4% of K-mart's employees.[38]

[35] Cl. 5.1.1 (wages) and cl. 4.2.2 (minimum hours).
[36] Cl. 1.1(a) and 1.5(a) (wages) and cl.6.1(b) (extra annual leave).
[37] Cl.10.1 (wages) and cl. 12 (contract hours).
[38] Statement of Chris Melton dated 31 October 2024 (**Melton Statement**) at [12] Table

91. Taken at face value the Coles figures of 90% of wage employees and 98% of salaried managers[39] suggests that there is some demand for the shorter break. However, the figures in the statements are just that, bare figures. Given how different they are from other employers, for example K-mart, there must be a question about the extent to which employees are aware of their choice, or indeed the degree of agency in the 'choice.' This is present in the statement of Robert M who gives evidence that:

> *[20]: the duty manager said to me that if I wanted to receive extra shifts, I would have to confirm on roster choices that I agreed to a minimum break of 10 hours between shifts. I agreed.*
>
> *[21]: the manager kept pointing at boxes on the roster choices page. The manager said, "check that", to indicate roster conditions that the team member should agree to.*[40]

92. However, even if they are accepted at face value, they simply demonstrate that there is no particular problem with the current award provision.

93. Against this is the evidence in the statements filed on behalf of the SDA about the inconvenience and difficulty that can arise from the short break.[41]

94. The next point raised by the ARA is one of fairness. The sole argument in relation to this is that the 12-hour minimum break can lock employees into working evening shifts because they are not able to rotate to an earlier start the following day. This submission is disingenuous, the 12-hour minimum break does no such thing. An employee can elect to have a 10-hour break if that is what they want. No employee is locked into an evening shift because they have to have a 12-hour break given it is the employee's choice to opt for a 10-hour break if the employer agrees.

95. The next argument under this heading at [104]-[105] of the ARA submissions is that a removal of the 12-hour minimum break would allow greater flexibility in rostering. That is no doubt true. So would a removal of all rostering rules. The question for the Commission is whether the 12-hour minimum break should be removed to allow for that flexibility because it is *necessary* to achieve the modern awards objective. Given the toll that can be imposed on employees with a 10-hour minimum, as demonstrated by the evidence referred to above, it is simply not fair to say that every employee should

[39] Statement of Grant Shelton dated 23 October 2024 (**Shelton Statement**) at [51].
[40] Robert M Statement at [20]-[21].
[41] Rebecca C Statement at [26]; Rukman M Statement at [27] – [29].

be able to be required to return to work after a 10 hour break. An employee who travels an hour each way to work would thus have 8 hours to wind down, eat, rest, get ready for work and leave for the next shift. Some people do not live an hour's drive from work. Some live further. The award has struck an appropriate balance by allowing the flexibility of a shorter break but not requiring its imposition on an unwilling employee.

Section 134(1)(f) and (h)

96. The three brief paragraphs set out in support of this proposition at [105] to [108] of the ARA Submissions do not withstand examination.

97. First it is said there is an administrative burden: the witness statements of Mr Mein are relied upon. That evidence raises no higher than saying that having to put a tag on a system is an additional step which creates '*inconveniences and inefficiencies for the business and employees, in particular our managerial employees handling the administration*.' No detail is given in respect of this and no explanation for it. The mere fact that a record must be kept on a functioning computerised system ought not to be regarded as the sort of inefficiency that would justify giving the employer a right to require employees to return to work after 10 hours.

98. Secondly at [107] of the ARA Submissions it is suggested that the fact that other awards do not have a 12 hour break and the GRIA requirement for a 12 hour break indicates that a 10 hour break is sufficient. It does no such thing. The evidence referred to above and common human experience would indicate that a 10-hour break is not usually, let alone always, going to be sufficient. The fact that shorter breaks are available in other industries says nothing in respect to retail. Retail is, now, an almost continuous operation. Other industries are not. Historically, there may have been no need to consider a minimum break in the restaurant and catering industry for instance because the employers concerned only operated in general at certain times of day. Ultimately, the ARA submission comes down to bald assertion and should be rejected.

99. Finally, in [108] the ARA submission is made that reducing the break to 10 hours allows employees to have more control over their shifts and thus increases productivity. How this can be is a mystery. Employees have control now – they can agree to a 10-hour break. They cannot require an employer to give them a 10-hour

break. Nor would they be able to under the ARA proposal. The proposal would lead to employees having less control, not more.

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

100. It is not clear how what is submitted under [109] of the ARA's submissions relates to this objective. The provisions applicable in other awards need to be examined in context which the ARA has made no attempt to do. The SDA has presented significant evidence that the current arrangements are fair and strike an appropriate balance between an employee's need for rest and the availability and flexibility taking into account the circumstances of individual employees. A blanket introduction of the 10 hour minimum can give rise to the circumstances set out in Rebecca C's statement:

> *[26] I am often required to explain to employees the effect of their roster choices after they have elected to make them.*
>
> *[27] I have had one employee who elected to remove themselves from a rostered choice. The employee was a University student who elected to remove the 12 hour break between shifts.*
>
> *[28] This worker had become exhausted from having a roster pattern that required them to work closing shifts followed by an opening shift.*
>
> *[29] They approached me to seek help on how they could extend the breaks in between their shifts.*
>
> *[30] The worker conveyed that the time it took them to get home, unwind, do housework (washing clothes, cooking dinner, etc) and some life admin left them little time to get adequate rest and that this was leading to them feeling exhausted.*
>
> *[31] The worker did not know of their right to exit out of the ultimate arrangement, and when I advised them that they could request to exit out of this agreement they did so.*[42]

101. None of the reasons advanced by ARA to support its contention that the proposed variation is necessary to meet the Modern Awards Objective is made out. The evidence strongly supports the contention that the present provision strikes a fair balance of competing interests and does not need to be changed.

[42] See also witness statement of Donna C at [22]-[25]; witness statement of Nathan G at [36]; witness statement of Christopher C at [15]-[21]; witness statement of Robert M [10] and [20].

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

102. The SDA opposes Proposal D on the following grounds:

a. the proposal undermines existing roster safeguards for full-time employees;

b. the proposal may lead to full-time employees working excessive and onerous ordinary time hours during peak periods;

c. clause 15.6(g)(v) and clause 21 of the GRIA already provide for flexible rostering arrangements for full-time employees; and

d. the ARA has not demonstrated that the proposed variation is necessary to achieve the modern awards objective.

Rostering safeguards for full-time employees

103. An employee who is engaged to work an average of 38 ordinary hours per week in accordance with an agreed hours of work arrangement is a full-time employee.[43] Clause 15.6(a) states:

> *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.*

104. Clause 15.6 provides safeguards that protect full-time employees from working excessive hours and reflect the importance of an appropriate work/life balance for employees. This includes outlining the ways in which the average of 38 hours per week can be worked, [44] and the options for working those hours each week. [45]

105. Overtime is payable to full-time employees for hours worked in excess of or outside the roster conditions the ordinary hours of work. [46] The overtime provisions

[43] Clause 9 of the GRIA.
[44] Clause 15.6(g) of the GRIA.
[45] Clause 15.6(h) of the GRIA.
[46] Clause 21.2(a) of the GRIA.

in the GRIA protect full-time employees and compensate employees for the detriment associated with working excessive hours of work.

106. The ARA's proposed variation would enable employers to roster employees to onerous and excessive ordinary hours of work.

107. If Proposal D was adopted, an employer would be entitled to roster a full-time employee to work a total of 47 ordinary hours (four 9-hour days and one 11-hour day) in a week. [47]

108. Permanent retail employees often work a '6/4' roster. These employees work a fortnightly roster in which they work six days in week one, and four days in week two. [48] An employer could roster an employee working a 6/4 roster to work a total of 56 hours in one week (five 9-hour days and one 11-hour day).

109. If Proposal D was adopted alongside ARA Proposal G,[49] an employer would be entitled to roster a full-time employee to work a total of 51 ordinary hours per week (four 10-hour days and one 11-hour day). An employer could roster an employee working a 6/4 roster to work a total of 61 hours in week one (five 10-hour shifts and one 11-hour shift), and 41 hours in week two (three 10-hour shifts and one 11-hour shift).

110. For employees, working excessive hours in a week can lead to mental and physical exhaustion. It can be a significant intrusion on an employee's work/life balance and on their carer responsibilities.[50]

111. The SDA is also concerned about the extent to which the averaging of hours will be used to require employees to work excessive ordinary hours during peak periods. Employees face real difficulty taking leave during peak trading periods, when there is greater need for staff. [51]

[47] See clauses 15.5 and 15.6 of the GRIA.
[48] Witness Statement of Elizabeth M, [28].
[49] Which provides for amendments to cl 15.4 to be amended to increase the maximum number of ordinary hours in a day to be increased from 9 to 10. Clause 15.5 would be amended to allow an employer to roster an employee to work 11 ordinary hours on two days per week by agreement.
[50] Witness Statement of Nathan G [39]-[42].
[51] Witness Statement of Christopher C [33]-[34], Witness Statement of Jason D [26]-[29].

112. Contrary to the submissions of the ARA,[52] the long-term averaging model undermines employee flexibility. Employees could be required to work excessive, disadvantageous hours of work without the benefit of overtime payments. The proposal will also enable employers to undermine the stability and predictability of employees' rosters.

113. Employees may also lose tangible overtime benefits under the proposed variation. The proposed long-term averaging variation would mean that employees working excessive ordinary hours in a week are unlikely to be paid overtime, or to access additional leave instead of a payment for overtime under cl 21.3(b) of the GRIA. It is also unclear whether an employee working excessive ordinary hours will receive penalty rate payments under cl 22 of the GRIA if the employee working these excessive ordinary hours worked at times which would attract a penalty rate that was not payable under the average roster.

114. In any event, the GRIA already provides for flexible working arrangements for full-time employees.

115. Under clause 15.6(g)(v), an employer and an employee can enter into an arrangement where the employee can work 'an average of 38 hours per week over a longer period agreed between the employer and the employee.' Clause 15.6(g)(v) promotes flexible work practices, but also maintains the important safeguards: the requirement for employee agreement, and the roster protections in clauses 15.6(h) and 15.7.

<u>The Bank of Hours Model</u>

116. In previous enterprise agreements, Bunnings adopted a long-term averaging model. Under the '*Bank of Hours*' system, where a team member was paid for more hours than they worked, they 'owed' hours to the employer.[53] Employees were expected to reduce the number of hours owed by working additional hours.

117. The Bank of Hours led to employees facing pressure to work additional hours beyond their capacity or preference, during periods in which they 'owed' hours to

[52] ARA Submissions at [115], [121].
[53] *Bunnings SDA Retail Trade Agreement 2013, cl 5.3, Bunnings Warehouse Agreement 2010, cl 11.*

the employer. [54] The Bank of Hours system has been abolished under the *Bunnings Retail Enterprise Agreement 2023*.

118. If the Commission makes the proposed variation, employees are likely to face similar pressure to work additional hours during peak trading periods, or towards the end of the six-month averaging period.

119. 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. The ARA submits that Proposal D promotes flexible modern work practices by appropriately taking into account seasonal variations in trade and by taking into account employee preferences. [55]

121. The ARA's evidence in support of this proposition is very limited. The evidence appears to go no further than a stated preference among employer witnesses for longer averaged periods. [56] The evidence also rests on the (incorrect) assumption that the ability to average a full-time employee's hours over a period longer than four weeks is not available under the GRIA.

122. On the contrary, the ARA's proposed variation abolishes the existing flexibility available to employees under these clauses.

123. Clause 15.7(a) is proposed to be amended to remove the requirement that a roster period cannot exceed 4 weeks except by agreement. The period of six months thus becomes a standard roster-averaging period. An employer does not require an employee's agreement to the longer period. Clause 15.6(g)(v) of the GRIA would cease to have any role to play.

124. The ARA model would lead to *inflexibility*. Employees would be consigned to roster averaging over a 6-month period, regardless of their preferences or personal circumstances.

[54] Witness Statement of Christopher C at [23]-[32].
[55] ARA Submissions, [121].
[56] Witness Statement of Grant Shelton at [57], Witness Statement of Chris Shelton at [61].

Section 134(g) – stable modern award system

125. The ARA contends that Proposal D supports a stable modern award system by making the GRIA more consistent with other comparable awards. [57] The ARA relies on averaging provisions in cl 13.2 of the *Professional Employees Award* (**PEA**) and cl 13.1 of the *Security Services Industry Award 2020* (**SSIA**). This submission should not be accepted.

126. First, no such averaging provisions exist in the *Hospitality Industry (General) Award 2020*, the *Restaurant Industry Award 2020* or the *Fast Food Industry Award 2020*.' The ARA appears to accept that these are awards which cover workforces more closely comparable to those covered by the GRIA. [58]

127. Second, the PEA and the SSIA cover very different types of employees in very different workplaces to those covered by the GRIA. Neither of these awards cover workers understood to be 'low paid.'

128. Third, the averaging provision in the SSIA is confined to a period of eight weeks. The averaging provision in the PEA is limited to a period of 13 weeks, and requires employee agreement. The proposed variation is radically more expansive.

129. The existing ordinary hours and overtime provisions in the GRIA properly balance the need for flexible workplace practices with the needs of the low paid, and the need to provide addition remuneration for working overtime and unsocial, irregular or unpredictable hours. The proposed variation is not necessary.

E.5. PROPOSAL F – Amendment to remove restriction of 19 starts for full-time employees

130. The ARA proposes to delete clauses 15.6(i) and 15.6(j) of the GRIA. The SDA opposes the proposed variation. The Commission should refuse the proposed variation on the basis that the clauses provide real benefit to some employees,

[57] Submissions of the ARA, [127].
[58] Submissions of the ARA, [109].

while allowing for employees and employers to agree to alternative arrangements where appropriate.

131. Clause 15.5(i) provides that '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' (**the 19-starts clause**). Clause 15.6(j) provides that 'cl 15.6(i) is subject to any agreement to the contrary between the employer and an individual employee.'

132. Contrary to the submissions of the ARA, the 19-starts clause is not outdated, and remains an important roster provision.[59] The removal of this clause would remove a tangible benefit for employees who value this roster schedule. Employees continue to work 19 days in a four-week cycle.[60] Employees value the extra day off each month they receive as a result of working.[61] As one witness explains:

> *This day is important to me. I use it to organise my house/do housework, go shopping with my family, relax and catch up with friends on either the Tuesday or the Monday night before hand, and arrange medical appointments or other activities that improve my life outside of work.*[62]

133. The ARA contends that 19-starts clause is 'rigid.'[63] In fact, employers and employees have significant flexibility within clause 15.6 as to how the 19-starts clause can operate. Clause 15.6(i) of the GRIA is subject to alternative agreement between an employer and an individual employee.[64] The GRIA also offers flexibility in the ways a '19-starts' employee can be rostered under cl 15.6(g), and the rostering options in cl 15.6(h).

134. Clause 15.6(h)(vi) of the GRIA gives an employee the option to accumulate one Rostered Day Off (**RDO**) per four-week cycle (up to a maximum of five days being accumulated over five cycles. Clause 15.6(m) allows these RDOs to be banked and used at a later date. A banked rostered day off may be taken at a time that is mutually convenient to the employer and the employee.[65] The appropriate use of

[59] Submissions of the ARA, [129].
[60] Witness Statement of Nathan G at [45]; Witness Statement of Rukman M at [38]
[61] Witness Statement of Nathan G at [45].
[62] Witness Statement of Rukman M at [39]-[40].
[63] Submissions of the ARA, [135].
[64] GRIA, clause 15.6(j).
[65] GRIA, clause 15.6(m)(ii).

cl 15.6(g), (h) and (m) allows employers and employees great flexibility in managing the roster of a 19-starts employee, or otherwise to agree to different arrangements.

135. The ARA's evidentiary basis for the proposed variation is thin. The ARA witnesses express concern with how rostering systems can accommodate 19-starts employees within their roster cycles.[66] It is difficult to give any weight to this concern when, through its other proposed variations, the ARA is proposing rostering schedules that may be radically different and more difficult to coordinate in each roster cycle.[67] The employers also have demonstrated administrative capacity to obtain agreement from employees to opt out of their 19-starts roster cycle.[68]

136. The ARA also relies on high rates of employee agreement at certain times to vary the 19-starts as evidence supporting the variation. But as discussed already in these submissions, evidence of 'employee agreement' should be treated with caution, where it is unclear whether employees truly understood what they were agreeing to.[69]

137. The ARA also appears to contend that the removal of the 19-starts clause will allow employees to have more control over their shifts.[70] What is really being proposed is greater control for employers. By deleting cl 15.6(i), employees are denied agency to make alternative suitable arrangements.

138. The ARA also contends that the removal of the 19-starts clause will lead to consistency with modern award rostering requirements for comparable industries.[71] This is not a compelling basis for a variation that removes a meaningful benefit for retail employees. But in any event, reference to the *Restaurant Industry Award 2020* and the *Hospitality Industry (General) Award 2020* reveals that there is no one, uniform rostering system that applies across these awards

[66] ARA Submissions at [135].
[67] For example, proposals B and D.
[68] ARA Submissions at [134].
[69] Witness Statement of Rebecca C; Witness Statement of Robert M.
[70] ARA Submissions at [137].
[71] ARA Submissions at [138].

139. The 19-starts clause in the GRIA strikes an appropriate balance between preserving the entitlement to a rostered day off for those who value it and providing flexibility to employers to roster 19-starts employees within existing GRIA parameters. The GRIA also contains a mechanism for employees to reach an alternative agreement where appropriate. The ARA has not demonstrated that proposed variation F is necessary.

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

140. The ARA commences its submissions on this proposal, at paragraph 140, by asserting that the desire for employees to work full-time over a four-day working week is gaining momentum. No probative evidence is referred to in order to support this proposition. However, more importantly, what is proposed is not designed to achieve the outcome of meeting that asserted demand.

141. What is proposed is set out in paragraph 142 and involves three amendments. The first is to increase the maximum number of ordinary hours to be worked in any day to 10. The second is to give the employer the ability to roster an employee for 11 ordinary hours on two days per week rather than one day per week. The second day is expressed to be "by agreement between the employer and an individual employee". The third variation is simply a machinery change to reflect the other two changes.

142. It should first be noticed that there is no requirement for employee agreement in respect of the 10 hour maximum proposed to be introduced.

143. Next, while there is lip service to the proposition of the employee agreement in respect of 11 hours for a second day per week, there is no machinery proposed to be introduced to the award in respect of that agreement. For example, it is not proposed that no such agreement can be made conditional for obtaining a job. Further, there is no requirement for any record to be kept of such agreement.

144. Nor do the additional hours have to have a connection with a four day week. That would be in the employer's discretion.

145. In those circumstances it can be seen that the real effect of what is proposed is simply to give employers the ability to roster employees for longer hours.

146. The problems with requiring employees to work longer hours have been dealt with elsewhere in these submissions and need not be repeated here.

147. Under the heading '*Necessary to Achieve Modern Award Objectives*' (sic) the ARA submissions refer to providing options for employees. As discussed above that is not what they do.

148. It is then suggested at paragraph 146 that employees have expressed a preference to work over four days. The evidence in support of this can be found in the Melton statement at 74, the McDonald statement at 34 and the Tassigiannakis statement at 40 but the evidence does not support the proposition contended for. The Melton statement is vague, impressionistic and conclusionary. It is not even anecdotal. The McDonald statement suffers from the same vices and is confined to vague, secondhand evidence and hearsay in respect of managerial employees. The Tassigiannakis statement is likewise impressionistic and reflects the statement maker's preferences rather than necessarily the preferences of employees.

149. If the ARA was going to make good its contentions, a sensibly conducted survey might have provided support. However even if that were the case any relevant clause would need to be protective of employees having a real choice. Moreover, it should be expressed in terms of an option to work a four day week rather than an option for employers to roster employees for excessive hours on any day.

150. Three agreements to which the SDA is a party are relied upon by ARA at paragraphs 147-149. These are the Woolworths Agreement, the Bunnings Agreement and the Officeworks Agreement. Each of these agreements has an ordinary hours cap of 9½ hours not 10. The ARA seeks something quite different and as a result something much more favourable to employer flexibility rather than employee flexibility.

151. It is suggested that the proposed change might also promote workforce participation and thereby social inclusion. The difficulty with that is that the

changes proposed are not directed at a four day working week but instead directed at greater flexibility for employers.

152. ARA also relies upon improved productivity. In this regard it refers to "allowing employees to have more control over their shifts". A simple reading of the proposed changes shows that this is not about employee control but about employer control.

153. At paragraphs 153-155 the ARA talks again about ensuring a stable modern award system and, in the way it has in a number of other proposals for variation, does this through reference to awards which contain provisions similarly to what it is seeking.

154. The difficulty with all of these submissions is that the ARA relies on different awards in each case. It could not in any way be said that the way to achieve a stable modern award system is for an employer to go through all the modern awards and pick out from any one of them the provisions they like best in that award and then argue that the award that they are covered by should contain the cherry picked employer favourable provisions.

155. The ARA's submission is not well made and should be rejected.

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

156. The ARA has sought to vary clause 15.7 of the GRIA to remove requirements for consecutive days off by agreement. To achieve this, the ARA has proposed two amendments to clause 15.7:

a. first, by amending clause 15.7(d) by:

i. removing the requirement in clause 15.7(d)(ii) that any agreement between an employee and employer to enter into a different arrangement other than 2 consecutive days off per week or 3 consecutive days off per 2 week cycle be in writing;

ii. deleting the obligation in clause 15.7(d)(iii) that any different arrangements agreed between employees and employers be recorded in time and wages records; and

iii. changing the prohibition on being required as a condition of employment to make a request under clause 15.7(d)(ii) to a prohibition on making an agreement under clause 15.7(d)(ii).

b. secondly, by amending the heading under clause 15.7 to only apply to full-time employees.

157. In relying on the above proposed variations, the ARA claims that the variation to clause 15.7(d)(ii) is necessary to achieve the modern awards objective, taking into account the considerations under section134(1)(aa), (ab), (c), (d), (f) and (h).[72] They further claim that the amendment to the heading under clause 15.7 is necessary to correct an error or uncertainty.[73]

158. The SDA opposes proposal H on the basis that it does not meet the modern awards objective, and there is no ambiguity present in clause 15.7.

Proposal H does not meet the modern awards objective

159. The ARA submit that 'the ultimate objective' of proposal H is to better facilitate more flexible roster practices.[74] Proposal J seeks to allow managers the ability to have rostering conversations with employees to allow for consecutive days off by agreement with minimal paperwork and record keeping requirements.

160. The ARA makes the argument that allowing managers to initiate roster discussions, not requiring requests to be in writing or even recorded in times and wages records, meets the modern award objective of the need to improve access to secure work, the need to promote social inclusion through workforce participation and gender equality and the need to promote flexible work practices.

[72] ARA submissions at [163].
[73] ARA submissions at [175].
[74] ARA submissions at [164].

161. However, the reality is that Proposal J does not meet these objectives at all. Evidence from Elizabeth M demonstrates that the effect of a 6/4 roster, where an employee works six days in one week, and four days in another, had a significant negative impact on her life.[75]

162. The experience of Donna C illustrates the reality of what can occur when employers have the ability to commence 'discussions' with employees to remove their right to have consecutive days off by agreement.[76] Donna C's experience shows that employers may exert influence over employees to have them not have consecutive days off and in some circumstances, the objections of the employee are only heard when the SDA become involved in the dispute.

163. Nathan M who has oversight of rostering in his department notes that often employees are presented with 6/4 rosters without proper explanation and employees working that roster pattern have complained that they are unhappy with working six days a week.[77]

164. This evidence establishes clearly the practical realities of Proposal H which is ripe for exploitation, misinformation and a lack of choice and flexibility for employees.

165. Proposal H also removes the requirement that proposals be in writing and that the arrangement is recorded in the employer's time and wages record.

166. Both these aspects of the current clause 15.7(d) of the GRIA are critical in ensuring that employees are properly protected. Further, these requirements are necessary to ensure that employers are compliant with the modern award and that they maintain proper records in the event of a dispute or if enforcement action is taken against them.

167. Absent these records, establishing whether proper consent was given by an employee to not have consecutive days off in a week or two-week period would be difficult, creating issues for both employees and employers if a dispute were to arise or enforcement action taken. In this respect, any efficiencies created by the reduction in record keeping obligations will be far outweighed by the

[75] Elizabeth M Statement at [28]-[29].
[76] Donna C Statement at [27]-[38].
[77] Nathan G Statement [48]-[55].

inconvenience to both employers and employees if a dispute in respect of clause 15.7(d) arises.

There is no uncertainty present in clause 15.7

168. Secondly, the ARA contends that there is ambiguity in clause 15.7 of the GRIA on the basis that the previous clauses 28.9 to 28.12 of the *General Retail Industry Award 2010* (**the 2010 Award**) which regulated consecutive days off applied only to 38 hour a week or full-time employees. The ARA also rely on the decision in *Prouds Jewellers Pty Ltd T/A Prouds Jewellers Pty Ltd* (**the Prouds Approval Decision**)[78] as authority for this proposition.

169. The ARA argue that the Plain Language Exposure Draft process (**the PLED process**) created ambiguity in the GRIA as it does not specify that clause 15.7 only applies to full-time employees.

170. This position is simply not correct. The PLED process commenced in 2017 where the Commission undertook a process to adopt plain language and clearer provisions into the 2010 Award (as it then was).

171. A proposed draft to revise the 2010 Award was issued in July 2017.[79] A separate comparison document was also issued that compared the redrafted 2010 Award alongside the 2010 Award as it was at the time. The Commission further invited interested parties to comment on the proposed draft.[80]

172. The comparison document circulated in July 2017 clearly identified the clauses that applied to only full-time employees. Silence, or a failure to reference full-time employees in a specific clause did not, and does not, establish that those clauses only applied to full time employees.

173. The ultimate outcome of the PLED Process was to consult with parties at large to ensure the GRIA was written clearly and in line with the plain language principles which included removing ambiguity. The PLED Process did just that, and it is clear

[78] [2020] FWCA 2424.
[79] AM2016/15 – *Exposure Draft* – Retail Award, 5 July 2017.
[80] AM 2016/15 – *Comparison of Exposure Draft to Modern Award: Comparison Document – General Retail Industry Award 2010/Plain Language Exposure Draft* – Retail Award, 5 July 2017.

that the rostering arrangement benefits of clause 15.7 applies to full time and part time employees equally.

174. Moreover, it was well understood that the provisions at clauses 28.9 to 28.12 applied not only to full time but also part time employees. In a document prepared by Coles in support of its 2014 enterprise agreement, Coles compared the proposed agreement with the 2010 award in respect of consecutive days off[81].

175. In respect of the 2017 Agreement in a similar document Coles stated that the rostering principles applied to all employees.[82]

176. In neither case was it suggested in Coles Form 17 that these provisions of the agreements were more beneficial than the GRIA.

177. The same applied in respect of Woolworths which had similar provisions in its enterprise agreement.[83]

178. This background confirms the understanding that the SDA had at the time the PLED was dealt with as does the fact that no-one commented on the PLED proposal which was incorporated into the GRIA.

179. Finally, the ARA refers to the Prouds Approval Decision in support of the argument that there is ambiguity in clause 15.7. In the Prouds Approval Decision, the 2010 Award was the relevant award to which the agreement was being compared, at the time the 2020 iteration containing the PLED Process outcomes had not come into effect. What follows is that the Prouds Approval Decision did not deal with the GRIA in its present form and cannot be called in aid of the argument that ambiguity exists in clause 15.7.

180. There is no ambiguity in clause 15.7 and Proposal J should be rejected.

[81] See Annexure 'A' to these submissions.
[82] See Annexure 'B' to these submissions.
[83] Woolworths Supermarkets Agreement 2018, clauses 8.3(a) and 8.6(a).

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

181. Similar to Proposal H, the ARA has sought to amend clause 15.8 in respect of employees working on Sundays. Proposal H is in three parts:

    a. first, to remove rostering restrictions in respect of employees who regularly work Sundays;

    b. secondly, to amend the definition of '*employees who regularly work Sundays*'; and

    c. thirdly, to amend the heading of clause 15.8 so that the rostering arrangements under that clause only apply to full time employees.

182. In support of the first two aspects of Proposal I, the ARA submits that the variation be made under section 157(1)(a) on the basis that the variation is necessary to achieve the modern awards objective particularly in relation to the considerations under section 134(1)(d), (da), (f), (g), and (h) of the FW Act.

183. The SDA opposes proposal I in its entirety.

<u>Proposal I does not meet the modern awards objective – Removing rostering restrictions</u>

184. The removal of the requirement that regular Sunday work proposals be in writing and that the arrangement is recorded in the employer's time and wages record will not meet the modern awards objective. The reasons for this are identical to the argument in respect of clause 15.7 above but warrant repeating.

185. Both aspects of the current clause 15.8 of the GRIA are critical in ensuring that employees are properly protected. Further, these requirements are necessary to ensure that employers are compliant with the modern award and that they maintain proper records in the event of a dispute or if enforcement action is taken against them.

186. Absent these records, establishing whether proper consent was given by an employee to not have consecutive days off in a week or two-week period would

be difficult, creating issues for both employees and employers if a dispute were to arise or enforcement action taken. In this respect, any efficiencies created by the reduction in record keeping obligations will be far outweighed by the inconvenience to both employers and employees if a dispute in respect of clause 15.8 arises.

187. Furthermore, the ability for the employer to remove the restrictions on weekend work at their suggestion or initiative places greater influence on the employee and exposes them to a greater risk of exploitation, misinformation and a lack of choice and flexibility. This is made clear by the evidence of both Robert M[84] of Coles.

188. Insofar as there are flexibility gains made by Proposal I they are far outweighed by the negative impact on employees. For this reason, Proposal I should be rejected.

Definition of employee who regularly works Sundays

189. The ARA has submitted that a new definition of 'employee who regularly works Sundays' should be inserted to be 'a full-time employee who based on that roster cycle will work at least three out of four Sundays.'

190. Such a definition is inappropriate as it is written in anticipation that variation I will apply only to full time employees. For the reasons outlined below this should not occur. Accordingly, there is no need for the definition as sought.

Proposal I contains no ambiguity

191. The ARA relies on the argument in Proposal H that there was an error in the PLED Process that meant that clauses 15.7 and 15.8 now apply to full and part time employees when they should only apply to full time employees.

192. The analysis outlined in paragraphs [0]-[0] apply equally to clause 15.7 as they do clause 15.8. No error or ambiguity can be found in the PLED Process and the Commission should not make any variation to clause 15.7 as a consequence.

[84] Statement of Robert M at [20]-[23].

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

193. The ARA has sought to insert a new clause 17A of the GRIA to introduce an absorption rate of 125% of the annual equivalent of the minimum weekly rate in the GRIA. The ARA seeks to have these provisions apply to managerial and other high level staff from Retail Employee Level 4 and above.[85]

194. In support of this position, the ARA relies on section 134(1)(aa), (ab), (c), (d), (f) and (h) of the FW Act.

195. Although labelled as an 'absorption rate' the real and practical effect of Proposal J is that the ARA is proposing to introduce an annualised salary provision into the GRIA.

Exemption Rate Variation

196. AiGroup has filed submissions in respect of several variations in the present matters. In particular, AiGroup has filed submissions calling for the inclusion of an exemption rate in a new clause 20 of the GRIA.[86]

197. AiGroup propose a variation that would have the effect that various provisions of the GRIA would not apply to employees from Retail Employee Level 4 to Retail Employee Level 8 who are paid a salary which is at least 25% more than the salary calculated from the relevant minimum weekly classification rate multiplied by 313/6.[87]

198. It is unclear what application AiGroup are responding to in the filing of these submissions as it appears that they have not made an application in their own right but rather have simply filed submissions generally in matters AM2024/9, AM2024/26, AM2024/33, and AM2022/40. This is of particular importance in the Exemption Rates Variation as, although strikingly similar in effect, the variation

[85] ARA Submissions at [228].
[86] Ai Group Submissions filed 1 November 2024 (**Ai Group Submissions**) at [40].
[87] Ai Group Submissions at [41]-[42].

sought by AiGroup differs from Proposal J sought by the ARA. Further, AiGroup has asked that their claim be determined separately from Proposal J.[88]

199. In support of this position, AiGroup relies on section 134(1)(a), (d), (f) and (g) of the FW Act.

200. The SDA opposes the introduction of any annualised salary provision (howsoever described) in the GRIA.

201. Furthermore, Proposal J and the Exemption Rate Variation should be determined together. In this respect, except for the argument that the Exemption Rate Variation does not allow for the consent of the employee, the below arguments apply equally to both Proposal J and the Exemption Rate Variation.

The Historical Basis for the SDA's Opposition to Annualised Salaries

202. First, the Commission should embrace the well-established position that the Commission and its predecessors did not generally insert annualised salary provisions into an award unless there was widespread history of such provisions in the previous awards (whether state based or otherwise) or similar instruments.[89]

203. There is no widespread history of annualised salary provisions in previous awards or similar instruments. The extent of any annualised salary provision in a retail award seems to be entirely confined to the *Retail Industry State Award – 2004* (QLD) which can be accurately described as an outlier when compared to other retail awards and instruments.

204. The Commission should also embrace the position that although annualised salary provisions may be common in workplace agreements, they are rare in the Commission's awards. In this respect, they are rare for good reason, particularly in industries such as the retail industry where short hours employment is common, hours may vary unpredictably, and compliance with annualised salary provisions may be problematic.[90]

[88] Ai Group Further Submissions filed 15 November 2024 (**Ai Further Submissions**) at [13]-[16].
[89] *Annualised Wage Arrangements* [2018] FWCFB 154 at [10].
[90] *Annualised Wage Arrangements* [2018] FWCFB 154 at [10].

205. Proposal J and the Exemption Rate Variation are not the first application made by an employer in respect of introducing an annualised salary provision into the GRIA. In 2010 the National Retailers Association (**NRA**) attempted to vary clause 17 of the GRIA to insert an annualised salary provision in the same terms as the *Clerks Private Sector Award 2010* (as it applied at the time).[91]

206. The NRA Application was dismissed by the Full Bench of this Commission. In dismissing the NRA Application, the Commission applied the principles elucidated above at paragraph [0] above and placed significant weight on the absence of any history of annualised salaries in the GRIA.[92]

207. Both the ARA and AiGroup fail to identify how either Proposal J or the Exemption Rates Variation is in any way different from previous attempts to introduce annualised salaries into the GRIA. Put simply, this should result in this Commission declining to make Proposal J and the Exemption Rates Variation.

Proposal J and the Exemption Rate Variation does not meet the Modern Award Objectives

208. Further to the above, Proposal J and the Exemption Rate Variation do not meet the modern awards objectives. In particular, that an employee would receive less pay over the course of a year than they would have received had the GRIA been applied in the ordinary way. The Full Bench has previously stated that in no circumstance should an annualised wage arrangement clause in a modern award permit or facilitate such a situation. Further, the Full Bench has said that it is 'essential' that any annualised salary clause contain a mechanism or combination of mechanisms to ensure that an employee is not paid less than what they would have been paid had the relevant award applied.[93]

209. Utilising real roster data, the Roster Analysis Document has been produced. This summary and analysis provide a real picture of what the practical effect of Proposal J would have on employees.

210. The Roster Analysis Document shows that of the 21 rosters analysed, 13 employees would be worse off under Proposal J. Furthermore, Proposal J does

[91] *General Retail Industry Award 2010* [2010] FWAFB 1958 at [3].
[92] *General Retail Industry Award 2010* [2010] FWAFB 1958 at [7].
[93] *Annualised Wage Arrangements* [2018] FWCFB 154 at [129(4)].

not provide a mechanism or combination of mechanisms to ensure that employees will be no worse off under the ARA's proposal. Similarly, the Exemption Rates Proposal advanced by AiGroup suffers from the same issue.

211. Under the ARA's proposal, an employee can be required to work up to 43 hours.

212. None of the rosters analysed are 43-hour rosters. However, if an employee were to have a 43-hour roster then they would be worse off as compared to the rosters currently analysed.

213. The Full Bench has also previously developed three model clauses that would (if found to be appropriate to insert into an award) meet the modern awards objective.[94] Both Proposal J and the Exemption Rates Proposal fail to adopt any of the Full Bench's model clauses, in particular they fail to have an appropriate no-disadvantage or a reconciliation provision.

214. A reconciliation clause is 'fundamental' in ensuring that no employee is worse off. Reconciliation and review of annualised salaries need to be completed regularly (at least annually) and by force of the award itself, rather than by request of an employee.[95]

215. The proposals before this Commission do not require any reconciliation at all. Such an approach leaves employees open to exploitation and disadvantage with no appropriate and relevant checks and balances to detect and rectify any issues.

216. In circumstances where Proposal J and the Exemption Rates Proposal have the clear potential to leave employees worse off and fail to have appropriate mechanisms in place to prevent such disadvantage, the Commission should reject the annualised salary proposals.

[94] *Annualised Wage Arrangements* [2018] FWCFB 154 at [130].
[95] See the discussion in *4 yearly review of modern awards - Annualised Wage Arrangements* [2019] FWCFB 1289 at [36]-[41].

Proposal J and the Exemption Rate Variation applies to Part Time Employees

217. On the face of both Proposal J and the Exemption Rate Proposal, it appears that the annualised salary provisions will apply not only to full time employees, but also part time employees.

218. The issue of annualised salary arrangements for part time employees (in a general sense) was previously considered by the Full Bench. In considering the application of annualised salary arrangements to part time employees, the Full Bench held:

> *It is not possible to formulate any standard provision which might apply to part-time employees because of the wide divergence in part-time employment provisions as between different modern awards.*[96]

219. The above statement demonstrates the Commission's reluctance to embrace annualised salaries for part time employees unless a proper bespoke provision is developed for the industry and work patterns the employees are engaged in.

220. Both Proposal J and the Exemption Rate Variation fail to establish a system that provides fair and appropriate remuneration for part time employees engaged on an annualised salary basis.

221. Furthermore, the absence of a reconciliation clause in both proposals is more pronounced in respect of part time employees. The need to reconcile annualised salary arrangements for part time employees who often work unusual or irregular hours or hours that may otherwise attract penalties is essential to minimise the risk of exploitation and underpayment.

222. Consequently, the application of Proposal J and the Exemption Rate Variation is inappropriate for part time employees.

[96] See the discussion in *4 yearly review of modern awards - Annualised Wage Arrangements* [2019] FWCFB 1289 at [50].

Exemption Rate Variation – the variation imposes an exemption rate on an employee without the employee's consent

223. Finally, AiGroup's Exemption Rate Variation seeks to apply in circumstances where an employee is classified as a Retail Employee Level 4 to 6 who is paid at least 25% more than the relevant minimum classification rate multiplied by 313/6. The Exemption Rate Variation applies to both part-time and full-time employees.[97]

224. The practical effect of the Exemption Rate Variation is that there is no ability for an employee to opt-in to the annualised salary provisions as proposed by AiGroup. Rather, the exemption rate would just simply apply to an employee who meets the criteria.

225. Such an approach is unsatisfactory, depriving employees of choice and the ability to earn overtime and penalties without their consent. For this reason, and the reasons that apply equally to annualised salary proposals above, the Commission should not make the variations as sought.

E.10. PROPOSAL L – Amendment to remove requirements to notify break times in advance

226. By proposed variation L, the ARA seeks to delete the following clauses of the GRIA:

> *At the time of engaging a part-time employee, the employer must agree in writing with the employee on a regular pattern of work that must include all of the following:*
> *…*
> *(c) when meal breaks may be taken and their duration.*
> *…*
> ***16.3** 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.*

227. Clauses 10.5 and 16.3 of the GRIA provide clarity and certainty to employees. It may allow employees to arrange to attend to personal matters during breaks. Employees know precisely when to take their breaks, which may be important when a manager or supervisor is not present. Scheduled rostered breaks may also

[97] AiGroup Submissions at [41]-[42].

allow employees to arrange phone calls or appointments during periods in which they know in advance they will not be working.

228. Scheduled rostered breaks also ensure that employers consider and adhere to cl 16.4 of GRIA, which provides that 'in rostering rest and meal breaks, the employer must seek to ensure that the employee has meaningful breaks during work hours.'

229. Employers and employees are already able to change break times by agreement under the GRIA. Part-time employees can agree with their employer to vary their regular pattern of work (including break times) on a temporary or ongoing basis. This agreement must be recorded in writing.[98] For other employees, their roster may be changed due to unexpected operational requirements at any time before they commence work.[99]

230. As with other proposed variations, the ARA asserts that Proposal L is about 'allowing employees to have more control.'[100] It isn't. Proposal L does not increase employee control. Proposal L removes the certainty and stability that is afforded to employees under clauses 10.5 and 16.3 and grants more control to employers, who can vary an employee's roster without agreement.

231. The ARA then submits that this 'employee control' can increase productivity and lower operational costs. There is no evidence to support these assertions, or any explanation as to how Proposal L will achieve this.

232. To the extent that employer witnesses support the proposal to meet 'the operational requirements of the business,' that power already exists under cl 15.9(d) of the GRIA.[101]

233. The effects of Proposal L must be considered alongside the ARA's proposed variation P, discussed below. If Proposal P is adopted, employers would have even greater control as to the timing of breaks, which may lead to unsafe rostering practices.

[98] GRIA, clause 10.6
[99] GRIA, clause 15.9(d).
[100] ARA Submissions at [264].
[101] ibid.

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

234. The ARA's proposal in respect of the payment of annual leave loading seeks to clarify something which is not unclear. Moreover, the proposed change would be liable to create confusion.

235. Clause 28.3 provides for additional payments on top of the ordinary rate during an employee's annual leave. The additional payment is either 17.5% of the minimum hourly rate or the employee's actual hourly rate including penalty rates, whichever is the greater.

236. The asserted ambiguity is said to arise where employees perform variable hours of work. No concrete example of how this is said to arise is given.

237. If an employee is full time they will have a roster. A roster can only be altered after consultation (clause 35 of the Award). The change to roster must be notified at least seven days in advance if not agreed (clause 15.9(e)).

238. There must be a regular pattern of work agreed with part time employees on engagement (clause 10.5). That can only be changed by agreement, or on notice by the employer (however it cannot be changed by the employer from week to week) (clause 10.10).

239. Therefore, given that in all cases the relevant roster of an employee will be known in respect of the time when they are to take their annual leave there is no difficulty in calculating whether the 17.5% loading is appropriate, or the payment should be in respect of the actual payments due for the relevant hours.

240. The only time when an issue might arise in this regard is where the part time employee has regularly worked hours over and above their agreed hours. That employee will of course have accrued annual leave in respect of those hours. The question of whether they get paid for annual leave in relation to those hours arises not under this provision but under the NES (s.90). If any particular question does arise in respect of part time employees, then the review initiated by the Commission into part time provisions of the GRIA is the appropriate place for that question to be dealt with.[102]

[102] *President's Statement Modern Awards Review 2023-24* – Final Report 18 July 2024 at [5](6).

241. Finally, it should be noted that the proposal by the ARA only requires an employee to be paid for lost time in respect of weekend penalties not penalties for work in the evenings.

242. The second aspect of the ARA application concerns removal of payment for penalties other than weekend penalties and reversion to the 17.5% penalty only. As the statements filed by the SDA[103][1] show this will have a significant deleterious effect on employees. They will lose remuneration and be discouraged from taking leave. The clause as it exists is consistent and achieves the purpose of ensuring that employees do not receive less pay while they are on leave than they would otherwise have done if they had worked their normal ordinary hours.

243. For these reasons the application in respect of Proposal O should be rejected.

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

244. The SDA opposes variation P proposed by the ARA and supported in the submissions of AiGroup (**Proposal P**).[104] Rest breaks and meal breaks are essential to the health and wellbeing of employees in the workplace. Rest and meal breaks are provided to workers to ensure they have adequate access to breaks for the purpose of rest, recuperation and sustenance.

245. Breaks are beneficial because they provide for:

a. the avoidance of fatigue;

b. personal enjoyment;

c. the opportunity to eat food;

d. the opportunity to engage in social interactions; and

[103] See generally, Bethany L Statement, Nadia L Statement and Blake R Statement.
[104] AiGroup Submissions at [5]-[16].

e. the benefit of using time to attend to 'life admin.'

246. The importance of breaks is reflected in cl 16.4 of the GRIA, which provides that 'in rostering rest and meal breaks, the employer must seek to ensure that the employee has meaningful breaks during work hours.'

247. The proposed variations may lead to unsafe break and rostering practices. An employee who takes a rest break at the commencement of their shift may then work for six hours before taking their meal break. This undermines a key purpose of breaks, which is adequate and appropriate rest from work.[105]

248. Where employers are not required to engage staff cover for employees who take mid-shift breaks, employees may be rostered to work by themselves for up to six hours.

249. The ARA has not conducted a work health and safety risk assessment, or otherwise led any evidence to inform the Commission as to the impact these break provisions will have on the health and safety of employees. In the absence of evidence, the Commission should be extremely cautious to adopt this proposed variation.

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.

250. The ARA relies on evidence that goes no further than general assertions that some employees have expressed a preference to waive their breaks and leave early.[106]

251. The ARA's evidence does not engage with the real value retail employees place on rest and meal breaks.[107] There is also no evidence that employees have expressed any interest in taking breaks within the first hour of work.[108]

252. Retail work is physically challenging because employees are exposed to long periods of standing and manual handling. Retail work can also be mentally challenging.[109] Employees face deadlines to finish their work and may have to

[105] Safe Work Australia, *Guide for Managing the Risk of Fatigue at Work*, November 2013, 8.
[106] ARA Submissions at [282].
[107] Statement of Jason D at [33]-[36], Statement of Robert M at [39]-[44].
[108] Statement of Chris C at [38].
[109] Statement of Robert M at [39]-[44]; Statement of Elizabeth M at [24]-[25].

manage difficult or abusive customers.[110] Breaks are essential to managing these work health and safety risks.[111]

253. AiGroup does not lead any evidence at all. Its support for the variation is premised on the mere assertion that 'impracticability or difficulty could arise from unexpected events at the workplace' that may lead an employee to seek a break available under the proposed variation.[112] But AiGroup makes no attempt to engage with the importance of breaks to employees or the work, health and safety impact of the proposed variations.

254. While the revised break entitlements in Proposal P require an employee's agreement,[113] the ARA and AiGroup have provided little evidence or explanation as to how an employee's agreement will be obtained. It is apparent that in practice, employees often agree to proposed roster variations in circumstances where they have little understanding of the implications of the variations, or feel they have little choice but to agree.[114]

255. The ARA also refers to two enterprise agreements – the *Woolworths Australian Food Group Agreement 2024* and the *Officeworks Store Operations Agreement 2024*, which provide for employees to take an 'early mark' and finish their shift early. The break provisions in these agreements are different from the proposed variation. Under the agreement, an employee can revoke their consent by giving four weeks' written notice. [115] Neither agreement provides for breaks to be taken in the first hour of work.

256. The Woolworths and Officeworks agreements also cover large businesses with robust HR systems that allow for the tracking of breaks, and adequate staff cover where employees are on break. These safeguards are not present at smaller employers who may only be staffed by one employee during trading hours.

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[110] Statement of Elizabeth M at [24]-[25].
[111] Safe Work Australia, *Managing psychosocial hazards at work: Code of Practice, July 2022, 34-36. Safe Work Australia, Hazardous manual tasks: Code of Practice*, October 2018, 42-43, 46.
[112] AiGroup Submissions at [12].
[113] ARA Submission at [283]; AiGroup Submissions at [7]-[10].
[114] Statement of Robert M at [20]-[23]; Statement of Rebecca C at [21]-[32].
[115] *Woolworths Australian Food Group Agreement 2024*, cl 7.2(d)(ii); *Officeworks Store Operations Agreement 2024*, cl 25.1.7 and 25.1.8.

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

257. The ARA refers to other modern awards that require employees to work longer periods without a break, or providing for a different timing of rest breaks.[116] AiGroup also refers to break provisions in a suite of modern awards in support of the proposition that Proposal P 'is not novel.'[117]

258. The ARA proposal would not facilitate a stable modern award system. The break entitlements in the modern awards cited by the ARA and AiGroup are themselves different and distinct from each other and reflect the fact that break entitlements should be relevant and applicable to the workforce each award covers.

259. The break entitlements in the GRIA are also quite similar to break entitlements in the *Fast Food Industry Award 2020*.[118]

260. The break provisions currently in the GRIA provide flexibility to employees and employers, while ensuring that employees receive the benefit of meaningful breaks during their work hours. The ARA and AIGroup have not demonstrated that any variation to existing break entitlements in the GRIA is necessary.

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

261. The ARA has sought to 'clarify' the application of the first aid allowance so that it is only paid when an employee is appointed to perform duties and that it is payable on a pro-rata basis by reference to the number of hours an employee performs first aid duties.[119]

262. Similarly, AiGroup, in its submissions submit that the first aid allowance should only be paid to an employee '*whilst they are appointed by the employer to perform first aid duty*.'[120]

263. Both proposals are opposed by the SDA for the reasons outlined below.

[116] ARA Submissions at [287]-[288].
[117] AiGroup Submissions at [14].
[118] Clause 14 of the *Fast Food Industry Award 2020*.
[119] ARA Submissions at [290].
[120] AiGroup Draft Determination at [5].

Proposal Q

264. The ARA argue that the variation to the first aid allowance is necessary on the basis that the variation rectifies a perceived ambiguity or uncertainty in respect of the entitlement to a first aid allowance and on the basis that the variation is necessary to achieve the modern awards objective being that the amendment is needed to ensure an easy to understand modern award system.[121]

265. The Commission should not make the variation as proposed by the ARA on the basis that there is no ambiguity or uncertainty in respect of the present first aid allowance clause and the present clause is easy to understand.

266. Notwithstanding the above submissions, the ARA has failed to demonstrate any reason as to why the Commission should depart from the present arrangement of paying an employee a weekly allowance (presently $13.42 per week) and instead pay employees the allowance on an hourly rate.

267. Historically, first aid allowances in the GRIA have been paid on a weekly basis. Although first aid allowances were not directly addressed by the Commission in the award modernisation process in 2008, the Commission implemented allowances that were relevant to the industry that each award regulated.[122] In the case of first aid allowances, this was to pay the allowance on a weekly basis.

268. In 2013, the National Retailers Association made an application to vary the GRIA in similar terms to Proposal Q. In dispensing with the NRA's application on the first aid allowance, the Commission found:

> ***[57]*** *The expression of a first aid allowance as a weekly amount for all employees appointed to perform such duties is a common feature of many modern awards across a variety of industries. The NRA only referred to one modern award provision that refers specifically to a daily rate for full-time employees appointed to perform first aid duties, which would then apply to part-time employees on the basis of days worked. I do not consider that the adoption in the Award of a common formulation for the payment of a first aid allowance represents an anomaly or technical difficulty arising from the award modernisation process, or that any variation to clause 20.9 is required to achieve the modern awards objective. It has also not been shown that there is any cogent reason for altering the provision determined by the Award*

[121] ARA Submissions at [195].
[122] *Award Modernisation - Decision - Full Bench* [2008] AIRCFB 1000 at [287].

> *Modernisation Full Bench in the circumstances of the general retail industry. I have therefore decided not to make the variation proposed by the NRA.*
>
> ***[58]*** *As was acknowledged by the parties in the proceedings, if there is real concern by employers about the payment of the full first aid allowance to part-time or casual employees, employers may simply choose to appoint as first aid attendants only full-time employees or other employees who are engaged for a significant number of hours in each week. However such an approach may be contrary to the otherwise desirable objective of encouraging employees to undertake first aid training and to be available to provide first aid assistance at the workplace when required.*[123]

269. In the intervening decade, little has changed. The vast majority of awards with first aid allowances are paid on a weekly basis and no award pays all employees a first aid allowance on an hourly basis. There is nothing to suggest that paying employees their first aid allowance on a weekly basis is unusual or improper.

270. In the 2013 application made by the NRA the issue of ambiguity or uncertainty was not raised by any of the parties, including the ARA who participated in the proceedings. It appears that in 2013 the clause was clear to the parties, and no reason has been advanced in these proceedings as to how that position has changed.

271. Similarly, the argument that the first aid allowance clause is not 'easy to understand' suffers from the same issue as the above. In the 2013 challenge to the first aid allowance clause, none of the parties, including the ARA made the argument that the clause was not easy to understand. Again, this proposal fails to articulate what has changed since 2013 and how all of a sudden the clause is difficult to understand.

272. Ultimately, proposal Q seeks to achieve one goal, and that is to reduce the amount of the allowance payable to an employee who brings the essential skills of providing first aid to fellow staff and the public. This reason alone is not sufficient to give rise to an amendment to the GRIA, and the proposal should be rejected.

[123] *Application by Business SA; Application by P & P Holdings P/L; Application by Baking Manufacturers' Industry Association of Australia* [2013] FWC 6056 at [57]-[58].

F. AiGroup Proposal – Payment of Wages

273. Although it has not made any formal claim, AiGroup has suggested an amendment to the GRIA at paragraphs 17-34 of its submissions in respect of payment of wages.

274. Without committing or agreeing to the concerns raised in the AiG submission, the SDA believes for full-time employees that the regular payment of 38 ordinary hours each week is desirable. For some workers it is a necessity.

275. Depending on a roster arrangement a full time employee can work less ordinary hours over a roster cycle, for example 6 days in week 1 and 3 days in week 2, 4 days in week 3 and 5 days in 4, resulting in a large difference between pays for these 4 weeks.

276. This would cause large changes in a 'base' pay.

277. To overcome this issue the SDA would suggest that the following wording be adopted

> Notwithstanding anything else in this award, where a Full-time employee's ordinary hours are averaged over their roster cycle, the employee may be paid 38 ordinary hours attributed to each week in the roster cycle regardless of whether 38 ordinary hours are worked in each week. Penalties and other payments will be made according to the actual hours worked in the cycle and pay period.

G. RETROSPECTIVITY

278. Although not sought in its application to the Commission, the ARA in its submissions at paragraph 22 seeks that any determinations made in respect of Proposal H, Proposal I and Proposal O be made retrospective.

279. As noted above, exceptional circumstances are required to justify such retrospectivity. The ARA submission asserts exceptional circumstances but does not in any way explain why that is so other than to assert that they arise from errors and are therefore "out of the ordinary course" and "unusual". That is an insufficient basis upon which to disturb accrued rights. Nor does the ARA explain what is proposed to be done in respect of any payments which might have been made in the past which would not have been made had the provisions of the award operated as proposed by the variation applications.

280. In these circumstances the ARA has not established that there is a justification for retrospective operation in relation to those provisions.

H. CONCLUSION

281. Aside from the few variations which the SDA has agreed to in the submissions above, there is a common theme running through the changes proposed by the ARA. Frequently, the ARA dresses up its proposals as being put forward for the benefit of employees. For example, proposal C on the reduction of the break between shifts. As demonstrated above, there is no additional benefit for employees from that proposal. The ARA's real argument concerns additional flexibility for employers.

282. On some occasion these arguments are combined with provisions that allow for changes only to be made with the consent of employees. That is positive as far as it goes, but there are many potential problems. First, employees aren't always aware that they have a real choice. For example, the evidence given about the manager telling the new employee where to tick the boxes.

283. Secondly, employees often do not know they have an option to withdraw from agreements which they have made. Thirdly, the nature of the workforce dictates that care should be taken in allowing the option of agreements to vary the award.

284. In the Commission's publication of March 2023, *A Profile of Employee Characteristics Across Modern Awards*[124] information relevant to the nature of employment and the type of employees employed under the GRIA is contained in table 5.1 at page 29.

285. Of importance in that table is the fact that there is a very high proportion female employees (67%), of employees under the age of 18 (that is those on junior rates of pay: 17.8%), a high proportion of part time employees (78.2%) and a very high proportion of casual employees (67%).

[124] Calvin Yuen and Josh Tomlinson, *A Profile of Modern Characteristics Cross Modern Awards,* March 2023.

286. These demographic and employment status factors are of particular importance when considering the numerous variation applications which allow for departure from the GRIA mandated norm by agreement of the employee. Particular care will need to be taken in assessing there are sufficient protections in respect of such agreements if any of the relevant applications are granted.

287. It is telling also that one of the arguments which is repeatedly had over these choice provisions is the level of record keeping that employers have to maintain. The record keeping is important as it creates a requirement to maintain evidence of an employee's actual choice. The more "flexible" the provisions in relation to record keeping the less protection there is given to employees.

288. It is recognised that much of this requires the striking of a balance between competing interests. However, the GRIA for a significant period of time has operated on the basis of a balance which has been struck. Too often in its submissions the ARA, rather than seeking to justify its proposed changes on the basis of necessity, does so simply on the basis that it or its members consider that the changes are desirable.

289. One factor which the ARA relies upon at a number of points is the fact that the SDA has entered into agreements which are similar to some of the changes it has proposed. The Commission should not assume because such agreements exist in particular workplaces the SDA accepts that such provisions are desirable in a modern award. There are a number of protections for employees in workplaces where there are union agreements. The union's presence in the workplace is one. The employees are entitled to obtain union representation. The agreements that are relied upon invariably contain clauses which allow for arbitration of disputes. Moreover, the agreements also invariably provide superior conditions in other regards and if they did not they would not pass the better off overall test. There is simply no basis upon which it can be said that because the union has supported an agreement in a particular context it would or could support such a change in the modern award. The Commission must remember that the GRIA applies to every high street shop with any number of employees. In the retail industry those employees are often young and will have difficulty asserting themselves. Awards exist to address the power imbalance which usually exists between employer and employee. Many retail employees enter the workforce for the first time in a retail job which exacerbates this imbalance.

290. All these matters must be borne steadily in mind when considering the ARA's application. Generally, for those reasons and more particularly for the reasons set out above the proposals for variation should be rejected to the extent they are not accepted by the SDA.

291. Finally, and importantly, regard must be had to the significance of bargaining in the scheme of the Act. In this application the ARA, and the other supporting organisations are seeking to vary the GRIA, relying almost exclusively on witness statements from major retailers. However, these same retailers have successfully negotiated dozens of Enterprise Agreements with the SDA.

292. Rather than pursuing significant Award variations through their industry body, retailers seeking to alter GRIA conditions are better placed to meet the Act's objects by engaging directly in enterprise-level bargaining with the SDA.

293. This approach aligns with the Act's objects, particularly sections 3(a) and (f), which promote bargaining as a vehicle for securing productivity gains and ensuring fair employment conditions. By engaging in BOOT-compliant bargaining, retailers can achieve work arrangements that are tailored for the enterprise level, share the productivity benefits with employees, and maintain the safety net afforded by the Award.

294. It is not consistent with the objects of the Fair Work Act to introduce more and more "flexibilities' into the Award to the extent that, from an employer's perspective, bargaining is unnecessary. The dampening effect on bargaining, even if small, leads to the conclusion that the part of the Modern Awards Objective which requires encouragement of collective bargaining weighs against the making of the change. Given the nature of the changes sought here this creates a significant obstacle for the proposals advanced by the employer parties.

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21 February 2024