

SUBMISSIONS CONCERNING APPLICATION OF CLAUSES 15.7 AND 15.8 OF THE GENERAL RETAIL INDUSTRY AWARD 2020 TO CASUALS

Introduction

1. This is a submission seeking variation to clauses 15.7 and 15.8 of the General Retail Industry Award 2020 (GRIA 2020) to clarify that they do not apply to casual employees.
2. The lack of clarity in relation to those clauses is causing operational and interpretation difficulties for ABI/BNSW members in relation to the proper use of casuals in retail.
3. Clauses 15.7 and 15.8 of GRIA 2020 did not exist, in their current form, in the General Retail Industry Award 2010 (GRIA 2010).
4. In fact, the whole of clause 15 did not exist in the GRIA 2010 and only came about through the 2014 Modern Review process and the implementation and issuing of the final determination effective from 1 October 2020 per the decision of the Full Bench in *4 yearly review of modern awards* [2020] FWCFB 4839 (10 September 2020).
5. Since then, clause 15 (and particularly clause 10) of the GRIA 2020 has come under further scrutiny and variation in *Award Flexibility – General Retail Industry Award 2020* [2021] FWCFB 3571 (28 June 2021).

Relevance of old clause 28 of the GRIA 2010

6. The closest version of clauses 15.7 and 15.8 that existed in GRIA 2010 can be found at clause 28 of the GRIA 2010.
7. Clause 28 in GRIA 2010, it is submitted, applied only to full time employees (or as that clause was termed “38 hour a week rosters”).
8. The view that clause 28 only applied to full time employees is fortified by the Full Bench’s own comments in the decision of [2017] FWCFB 1001 at [1676] where it states that clauses 28.11 (consecutive days off) and 28.13 (employees regularly working Sundays) applied only to full time employees.
9. This statement from the Full Bench would appear to confirm that clause 28, in its entirety, applied to full time employees only.
10. Respectfully, this view is further strengthened we submit, by applying first principles of interpretation.
11. When one looks at the language of clause 28 it is headed “38 hour

week rosters” and the first sentence at clause 28.1 starts with “A full time employee will be rostered for an average 38 hours per week.....” (my emphasis).

12. It then sets out the forms and methods by which the 38 hours can be worked in clause 28.1 and 28.2. The remaining sub clauses of clause 28 support and add ancillary assistance to the 38 hour week concept in the award, and support the clause being isolated to full time employees only, by its wording.
13. Based on the structure and wording of clause 28 and the unequivocal statement from the Full Bench referenced at paragraph 8 above, it should be evident that clause 28 applied to full time employees only.

Removal of clause 28 and insertion of clause 15 (and particularly clauses 15.7 and 15.8) into GRIA 2020

14. The removal of clause 28 and the insertion of clause 15 into the GRIA 2020 has unfortunately brought confusion to ABI/BNSW members as to the application of certain sub clauses in clause 15. This confusion is highlighted by the Full Bench’s considerations and decision in [2021] FWCFB 3571.
15. The particular sub-clauses that are causing issues for our members and potentially, may at worst, cause possible breaches of the GRIA 2020 as it currently stands (if applicable to casuals) are sub clauses 15.7 and 15.8, it is submitted are incongruous with the offering and implementation of casual employment in retail.
16. That these sub-clauses were never intended to apply to casuals is supported by the fact that these or very similar obligations sat within clause 28 of GRIA 2010 itself (which only applied to full time employees historically).
17. The table below illustrates where obligations in current clauses 15.7 and 15.8 sat within the old clause 28 (in the same or very similar form).

Award obligations	Clause 28 GRIA 2010	Clause 15.7 GRIA 2020	Clause 15.8 GRIA 2020
Roster period cannot exceed 4 weeks except by agreement	28.9	15.7(a)	
Employer must not roster employee to work ordinary hours on more than 5 days per week	28.10	15.7(b)	
The employer may roster an employee to work ordinary hours on 6 days in one week if the employee is rostered to work ordinary hours on no more than 4 days in following week	28.10	15.7(c)	
Employer must roster an employee to work ordinary hours in such a way that they have 2 consecutive days off per week or 3 consecutive days off per 2 week cycle	28.11(a)	15.7(d)(i)	
Different arrangements can be agreed, must be recorded as a time and wage record, can be ended by the employee on 4 weeks' notice and such an arrangement cannot be a condition of employment	28.11(b) to (c)	15.7(d)(ii) to (v)	
The maximum number of consecutive days on which an employee may work (whether ordinary hours or reasonable additional hours) is 6	28.12	15.7(e)	
The employer must roster an employee who regularly works Sundays in such a way that they have 3 consecutive days off (incl. a Sat and Sun) per 4 week cycle	28.13(a)		15.8(a)
Different arrangements can be agreed, must be recorded as a time and wage record, can be ended by the employee on 4 weeks' notice and such an arrangement cannot be a condition of employment	28.13(b) and (c)		15.8(b) to (e)

18. The table above illustrates the origins of clauses 15.7 and 15.8 and that they derived from the text of clause 28 of GRIA 2010, a clause applicable to full time employees only.
19. The obligations in clauses 15.7 and 15.8 were never, we submit, intended to apply to casuals. They simply morphed over to the new clause 15 without a sufficient consideration at the time as to their appropriate application to all employment types.
20. In fact when one traces through the amendments to the GRIA it would appear the issue of appropriate application of clauses 15.7 and 15.8 to casuals has not ever been subject to specific consideration.

21. The closest consideration of some of the clauses in clause 15 of GRIA 2020 and their appropriate application to casuals is seen in [2021] FWCFB 3571 and at paragraphs [54] to [56] and regarding rostering at clause 15.9. The Full Bench did not express a view regarding the application of that clause to casuals.

Operation of clauses 15.7 and 15.8 inconsistent with casual employment in retail

22. Respectfully we submit that when the actual text of clauses 15.7 and 15.8 are examined they are inconsistent with the nature of casual employment in retail.
23. In practice, casuals will often work irregular patterns of hours that may be substantial in some periods and minimal in others. Examples of periods of high usage include tertiary holidays or Christmas sales periods (where work volumes increase markedly).
24. Businesses would be unreasonably restricted in their use of casuals if they must observe 2 days off each week or 3 days off per 2 week cycle in engaging casuals - especially when employees often seek extra shifts during peak periods.
25. Restricting employers from engaging casuals to work more than 5 days per week or six in one week and no more than four in another, again removes the inherent flexibility and attraction to hiring casuals for peak periods if they are subject with the same permanent employee rostering restrictions.
26. Similar arguments can be presented for working Sundays. Some casuals may only be able to work regular Sundays as part of their lifestyle and external commitments and which is why they chose casual employment in retail in the first place. Applying clause 15.8 to casuals restricts this flexibility.
27. Requiring a casual to have 3 days off (including Saturdays and Sundays) per 4 week working cycle is an impediment to retaining a reliable casual workforce at peak times and can add rostering complexity for employers and frustrate employees seeking higher volumes of work at peak periods.
28. Casual employees provide an employer with flexibility to meet variable demand, provided the employee is willing to work. Casuals retain the

ability to reject each shift offered. With this in mind, if a casual is willing to work during a peak period, there is considerable advantage to both the employer and employee not being bound by the restrictions contained in clause 15.7 and 15.8.

Conclusion and modern awards objective

29. In summary, ABI and BNSW submit there is a sound basis to clarify that clauses 15.7 and 15.8 do not apply to casuals. This basis derives from:
- (a) the historic operation of the GRIA (the Full Bench is respectfully reminded that it itself agreed that consecutive days off provisions and employees regularly working Sundays provisions under the old clause 28 did not apply to casuals (only applied to full time employees) (see *[2017] FWCFB 1001* at [1676]); and
 - (b) the modern awards objective, most notably:
 - (i) s134(1)(a), which requires the needs of the low paid to be considered - including the desire of casuals to seek out work;
 - (ii) s134(1)(d), which requires awards to ensure flexible modern work practices and the efficient and productive performance of work; and
 - (iii) s134(1)(f), which requires the impact of modern award powers on the regulatory burden to be considered.
30. The detrimental effect that would be associated with clauses 15.7 and 15.8 applying to casuals warrants the Bench clarifying this issue and reaffirming its previous view that the obligations at clause 15.7 and 15.8 in GRIA 2020 (very similar clauses to clause 28.11 and 28.13 of the GRIA 2010) as matter of practicality are not appropriate to apply to casuals.



DRAFT DETERMINATION

Fair Work Act 2009

s.157—FWC may vary etc. modern awards if necessary to achieve modern awards objective

s.579(2)(aa)—Promoting cooperative and productive workplace relations and preventing disputes

Modern Awards Review 2023-24

(AM2023/21)

GENERAL RETAIL INDUSTRY AWARD 2020

[MA000004]

General Retail Industry

JUSTICE HATCHER, PRESIDENT
DEPUTY PRESIDENT GOSTENCNIK
DEPUTY PRESIDENT MILLHOUSE
DEPUTY PRESIDENT O'NEILL
COMMISSIONER TRAN

SYDNEY, XX MONTH 2023

A. Further to the Statements issued by the President on 15 September 2023 and 26 September 2023 ([2023] FWC 2481) and the Statements issued by the Full Bench of the Fair Work Commission on 4 October 2023 ([2023] FWCFB 179) and on 24 November 2023 ([2023] FWCFB 218), the above award is varied as follows:

1. By inserting as a first sentence at clause 15.7 the following:
“This clause applies to full time and part time employees.”
2. By inserting as a first sentence at clause 15.8 the following:
“This clause applies to full time and part time employees”
3. By updating the table of contents and cross-references accordingly.

B. This determination comes into operation on [DATE].

PRESIDENT

