

22 September 2020

Justice Iain Ross  
President, Fair Work Commission  
Level 4, 11 Exhibition Street  
Melbourne VIC 3000

By email: [chambers.ross.p@fwc.gov.au](mailto:chambers.ross.p@fwc.gov.au)  
[amod@fwc.gov.au](mailto:amod@fwc.gov.au)

Dear President Ross,

**AM2020/93 – Variation of awards at the initiative of the Commission  
RE General Retail Industry Award 2010**

We write in relation to the above matter.

The National Retail Association Limited, Union of Employers (**NRA**) would like to take this opportunity to register its support for the Fair Work Commission's proposed extension of Schedule X in modern awards until 29 March 2021, as set out in the Statement issued on 16 September 2020.<sup>1</sup>

However, we note that the modern awards in relation to which this is proposed as listed in Attachment B to that Statement refers to the *General Retail Industry Award 2010 (the 2010 Award)*.

Further to the decision of the Full Bench in the four-yearly review of modern awards in relation to the 2010 Award issued on 10 September 2020<sup>2</sup> and the determination<sup>3</sup> issued pursuant to that decision, the 2010 Award will be revoked in its entirety on 1 October 2020 and replaced with the *General Retail Industry Award 2020 (the 2020 Award)*.

At present, the 2020 Award does not include Schedule X, as at the time the determination was made Schedule X was due to expire on 30 September 2020 and no extension was expressly contemplated.<sup>4</sup>

As such, in order to give effect to the Commission's current intention, a variation to the 2020 Award, rather than the 2010 Award, is required in order to insert Schedule X (as extended until 29 March 2020) in its entirety into the 2020 Award. Merely altering the expiry date of Schedule X in the 2010 Award will have no meaningful effect.

As the decision by which the 2020 Award was made expressly contemplated Schedule X, and rejected its inclusion, the absence of Schedule X in the 2020 Award is not a circumstance in which the use of the statutory analogue of the "slip rule" provided by section 602 of the *Fair Work Act 2009 (Cth) (the Act)* is permissible.<sup>5</sup>

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<sup>1</sup> [2020] FWCFB 4986

<sup>2</sup> [2020] FWCFB 4839

<sup>3</sup> PR722492

<sup>4</sup> [2020] FWCFB 4839 at [14]

<sup>5</sup> See *Explanatory Memorandum to the Fair Work Bill 2008* at paragraph 2316 and *RotoMetrics Australia Pty Ltd T/A RotoMetrics v "Automotive, Food, Metals, Engineering and Kindred Industries Union" known as the Australian Manufacturing Workers Union and others* [2011] FWAFCB 7214 at [27] – [32]



In the NRA's view, the proper means to give effect to the Commission's current intention will be for the Commission to exercise its powers under section 157 of the Act to make a determination varying the 2020 Award, rather than attempting to vary a previous determination of the Commission.

The NRA submits that the fact that the 2020 Award has yet to commence operation is immaterial, as there is nothing in the text of section 157 of the Act, or any provision on Part 2-3 of the Act, which limits the exercise of the Commission's powers under that part to modern awards that are in operation.

Should any interested party object to the inclusion of Schedule X, as extended to 29 March 2021, in the 2020 Award, the NRA will seek to be heard.

Yours sincerely,

A handwritten signature in black ink that reads "L. Carroll".

**Lindsay Carroll**  
Deputy Chief Executive Officer  
National Retail Association

A handwritten signature in blue ink that reads "Millman".

**Alexander Millman**  
Senior Workplace Relations Advisor  
National Retail Association