IN THE FAIR WORK COMMISSION
REGISTRY: MELBOURNE

MATTER No: AM2024/9

Application by The Australian Retailers Association

THE AUSTRALIAN RETAILERS ASSOCIATION'S FURTHER SUBMISSIONS
(Filed pursuant to the further amended directions of the Full Bench dated 19 September 2025)

Introduction

1. These submissions are made on behalf of the Australian Retailers Association (**ARA**) and address the impact of:

   (a) the *Fair Work Amendment (Protecting Penalty and Overtime Rates) Act 2025* (Cth) (**PPOR Act**), which commenced operation on 30 August 2025; and

   (b) the decision of the Federal Court of Australia in *Fair Work Ombudsman v Woolworths Group Limited; Fair Work Ombudsman v Coles Supermarkets Australia Pty Ltd; Baker v Woolworths Group Limited; Pabalan v Coles Supermarkets Australia Pty Ltd* [2025] FCA 1092 (**Decision**), which was handed down on 5 September 2025.

2. As outlined below, the PPOR Act and the Decision give rise to additional matters for the Fair Work Commission's (**Commission**) consideration in connection with the ARA's application to vary the *General Retail Industry Award 2020* (**2020 GRIA**). The ARA elaborates on these additional considerations in respect of each of the relevant proposals below. In respect of some of the proposals, the ARA proposes further or alternative variations in **Annexure A** to address these additional matters.

3. Before turning to the relevant proposals it is necessary to outline briefly the legislative amendments and the Decision.

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The PPOR Act

4. The PPOR amended the *Fair Work Act 2009* (Cth) (**FW Act**) to include, in Division 2 – Overarching provisions of Part 2-3 – Modern Awards, new section 135A entitled "Special provisions relating to penalty rates and overtime rates". Sub-section 135A(1) provides:

> **135A Special provisions relating to penalty rates and overtime rates**
>
> (1) In exercising its powers under this Part to make, vary or revoke modern awards, the FWC must ensure that:
>
> (a) the rate of a penalty rate or an overtime rate that employees are entitled to receive is not reduced; and
>
> (b) modern awards do not include terms that substitute employees' entitlements to receive penalty rates or overtime rates where those terms would have the effect of reducing the additional remuneration referred to in paragraph 134(1)(da) that any employee would otherwise receive.

5. Section 134(1)(da) (the provision cross-referred to in s 135A(1)(b)) is a consideration that must be taken into account in the course of ensuring that a modern award provides a fair and relevant minimum safety net of terms and conditions.

6. Section 134(1)(da) refers to the need to provide additional remuneration for employees working overtime; employees working unsocial, irregular or unpredictable hours; employees working on weekends or public holidays; or employees working shifts.

7. Subsection 135A(2) provides that s 135A(1) does not limit the operation of section 144 (flexibility terms) or section 160 (which deals with variation to remove ambiguities or correct errors). Subsection 135A(3) provides that nothing in s 135A(1) requires the FWC to exercise its powers under this Part to make, vary or revoke modern awards.

8. Section 135A relevantly applies in relation to the exercise of the FWC's powers under Pt 2-3 to vary a modern award on and after the commencement of the PPOR Act, including in relation to an application for the variation of a modern award made before that commencement: FW Act Sch 1 Pt 19 cl 127. As the PPOR Act commenced operation on 30 August 2025 and the Full Bench is yet to determine whether to make a number of proposed variations in the ARA's application, s 135A(1) applies to the Full Bench's consideration of the outstanding proposed variations. Section 135A(1) does not operate retrospectively and therefore does not apply to previous determinations made by the Commission on the ARA's application.

9. It can be seen that, in exercising the Commission's powers to vary a modern award, s 135A(1) requires the Commission to ensure two things.

10. The first, in s 135A(1)(a), is to ensure that "the rate of a penalty rate or an overtime rate that employees are entitled to receive is not reduced". The text of this provision, construed in light

of its purpose and context, makes clear that it is relevantly directed to proposed reductions to the actual rate (i.e. percentage) of a penalty or overtime payment. In the Second Reading Speech on the Bill, the Minister relevantly stated: "*It is targeted to modern award terms that are about the 'percentage' of penalty or overtime rate to be paid* …".[1] The Revised Explanatory Memorandum to the Bill relevantly stated that it "*would prohibit reductions to the specified penalty and overtime rates, which are generally expressed as a percentage rate based on the employee's minimum or ordinary rate of pay* …".[2] Those statements of legislative intent are consistent with the text of the provision.

11. None of the ARA's proposed variations would reduce the rate of a penalty or an overtime rate that employees are entitled to receive within the meaning of this provision. They are therefore unaffected by it.

12. The second, in s 135A(1)(b), is to ensure that modern awards do not include terms that substitute employees' entitlements to receive penalty rates or overtime rates where those terms would have the effect of reducing the additional remuneration referred to in s 134(1)(da) that any employee would otherwise receive. Again, it is apparent from the text of this provision, construed in light of its context and purpose, that it is relevantly directed to proposals that "substitute" entitlements to receive penalty or overtime rates with a 'rolled up' rate of pay. In the Second Reading Speech, the Minister relevantly stated: "*It is targeted to modern award terms … that reduce workers' pay by 'rolling up' penalty and overtime rates with other modern award terms into a single rate of pay*."[3] The Minister further stated that "*exemption rate proposals that diminish workers' take-home pay cannot succeed in the future*".[4] The Revised Explanatory Memorandum provided the example of an application to insert an exemption rate clause into a modern award that would allow employers to pay employees in a particular classification at least 120% of their minimum weekly rate, with employees paid at or above that rate excluded from particular clauses including overtime and penalty rate clauses.[5] Again, these statements of legislative intent are consistent with the text of the provision.

13. The ARA anticipates that other parties will contend that this provision applies to the ARA's proposal J, which proposes the introduction of an exemption rate clause. We address this issue further below, including some further amendments to proposal J that the ARA proposes for the Commission's consideration. None of the ARA's other proposals would "substitute

[1] Minister's Second Reading Speech, House of Representatives Hansard, 24 July 2025, page 199.
[2] Revised Explanatory Memorandum, [7].
[3] Minister's Second Reading Speech, House of Representatives Hansard, 24 July 2025, page 199. See also at page 198: "Currently, penalty rates and overtime rates in modern awards can be rolled up into a single rate of pay that leaves employees worse off", followed by a reference to "current cases on foot where employers in the retail, clerical and banking sectors have made applications to the Fair Work Commission to trade away penalty rates of lower paid workers on awards."
[4] Minister's Second Reading Speech, House of Representatives Hansard, 24 July 2025, page 199.
[5] Revised Explanatory Memorandum, [9].

employees' entitlements to receive penalty rate or overtime rates" within the meaning of this provision. They are therefore unaffected by it.

The Decision

14. The Decision was made in proceedings brought by the Fair Work Ombudsman and class action applicants against Woolworths and Coles alleging contraventions of the *General Retail Industry Award 2010* (**2010 GRIA**) and the FW Act in relation to employees employed as salaried managers in supermarkets. The Decision addresses a wide range of issues involving the interpretation and application of particular clauses of the 2010 GRIA and provisions of the FW Act and *Fair Work Regulations 2009* (Cth) (**FW Regs**), and the operation of the principles of 'set-off' in the context of contractual salary payments. Aspects of the Decision are relevant to some of the ARA's existing proposals on this application.

15. The relevance of the Decision extends beyond questions of the proper construction of predecessor clauses to the 2020 GRIA and other points of law. The Decision also reinforces the pressing need for many of the variations sought by the ARA because of the unworkable practical and administrative consequences if the 2020 GRIA clauses are interpreted consistently with the Decision. The Full Bench's consideration of the ARA's proposals presents an important opportunity for these issues to be resolved and ensure that the 2020 GRIA operates in a manner which achieves the modern awards objective, including through the promotion of flexible modern work practices, reducing the regulatory burden, enhancing productivity and ensuring that the 2020 GRIA is simple and easy to understand. We address the issues arising from the Decision further below, including some amended and further proposed variations that the ARA proposes for the Commission's consideration, arising from the Decision.

16. At the risk of stating the obvious, it bears emphasis that the Court's role in those proceedings and Commission's role in this proceeding are fundamentally different. Relevantly, the Court's role has involved performing the judicial function of construing the 2010 GRIA,the FW Act and the FW Regs, determining the legal principles governing 'set-off', and applying them to the facts of those cases, in order to determine whether the relevant provisions of the statute and award had been contravened as alleged. The Commission's role in this proceeding (including in the decisions already made by the Commission to vary the 2020 GRIA at an earlier stage of the proceeding) involves a non-judicial function of determining whether to vary the 2020 GRIA in various respects either under s 157 to achieve the modern awards objective or under s 160 to remove ambiguity or uncertainty or to correct error.

17. Thus, while the Court's construction and application of the 2010 GRIA and provisions of the FW Act and FW Regs, and determination and application of the principles of 'set-off', are relevant matters for the Commission to consider, they are not necessarily determinative of the

issues in this proceeding. The Commission's task remains to consider whether the variations should be made, applying the criteria set out in ss 157 and 160 and associated provisions of the FW Act. In so doing, the Commission is not adjudicating a dispute about past legal rights under the 2010 GRIA or FW Act but determining what rights should exist under the 2020 GRIA in future.[6]

PROPOSALS

18. The ARA continues to rely on its previous written and oral submissions and evidence tendered in the proceeding. The ARA continues to seek the proposals contained in its application for the reasons submitted in the ARA's written and oral submissions and makes the further submissions below arising from the commencement of the PPOR Act and the findings made in the Decision. These further submissions highlight some pertinent issues addressed in the ARA's earlier submissions but otherwise does not seek to repeat each of the matters already addressed in previous submissions.

Proposal A (digital agreements and notices)

19. In the Decision, the Court made findings about what is necessary to create an agreement under various clauses of the 2010 GRIA.[7] However, proposal A does not seek to vary the meaning of agreement or how an agreement is created. The variation simply clarifies that if an agreement is required to be recorded in writing under the 2020 GRIA, it may be recorded digitally. The Decision does not impact on the Commission's ability to vary the 2020 GRIA consistently with proposal A.

20. However, the ARA's position is that the onerous nature of the requirements for making an 'agreement' consistent with findings in the Decision make it more urgent that the Commission take steps to confirm and clarify that such requirements can be met in electronic form.

21. Proposal A is also not impacted by the PPOR Act.

22. Accordingly, the ARA's position is that, consistent with the ARA's previous submissions, the Commission can, and should, make the variation contained in the ARA's proposal A.

Proposal B (split shifts)

23. Proposal B is not impacted by the Decision or the PPOR Act.

[6] Noting, of course, that if the FWC determines to vary an award under s 160 to remove ambiguity or uncertainty or correct error, it may determine that the variation come into operation at an earlier time if satisfied that there are exceptional circumstances justifying this: FW Act s 165(2).
[7] Decision, [193]-[194].

24. Accordingly, the ARA's position is that, consistent with the ARA's previous submissions, the Commission can, and should, make the variation contained in the ARA's proposal B.

Proposal C (minimum break between shifts)

25. The Commission partly dealt with proposal C in [2024] FWCFB 251, to the extent that it concerned the applicable rate of pay if an employee starts work without having had the minimum break. The ARA notes that in the Decision the Court construed the phrase "double the rate they would be entitled to" in the corresponding clause in the 2010 GRIA in a manner that was consistent with the outcome of the Commission's decision on proposal C.[8]

26. The PPOR Act does not impact on the Commission's variation made in [2024] FWCFB 251 as that variation came into operation prior to the commencement of the PPOR Act.

27. The remaining aspect of the proposal relates to the reduction of a minimum break between shifts from 12 hours to 10 hours. Proposal C is not impacted by the Decision or the PPOR Act.

28. Accordingly, the ARA's position is that, consistent with the ARA's previous submissions, the Commission can, and should, make the variation contained in the ARA's proposal C.

Proposal D (averaging hours)

29. Proposal D is not directly impacted by the Decision or the PPOR Act.

30. However, the ARA's position is that the findings in the Decision to the effect that set-off of award entitlements cannot occur across pay periods (addressed further below in connection with proposal J) make the need for the variation proposed in respect of clause 18.2 of the 2020 GRIA more pressing.

31. The proposed variation seeks to align the payment obligation to the employee's average ordinary hours attributed to the relevant pay period. The 2020 GRIA already permits the underlying ordinary hours to be averaged across pay periods, this variation simply brings the payment obligation into line with this.

32. Accordingly, the ARA's position is that, consistent with the ARA's previous submissions, the Commission can, and should, make the variation contained in the ARA's proposal D.

Proposal E (extended trading hours)

33. The Commission dealt with proposal E in [2024] FWCFB 197. In that decision, the Full Bench determined to vary clause 15.2(c) of the 2020 GRIA under s 160 with effect from 1 October

[8] Decision, [327].

2020, to revert to the term "retailer" in place of "establishment", and to insert the words "on all days of the week".[9]

34. Among other things, the Commission determined that the meaning of the word "retailer" was clear and referred to "an entity or business which sells goods direct to the public", and stated:

> "Where a business conducts such sales at multiple stores or other locations, the term 'retailer' is apt to describe the entirety of the business and would not be understood as referring to each of the business' particular stores or locations. Thus, in the equivalent to the current clause 15.2(c) as it was before the 2020 variation, the capacity to work ordinary hours until 11:00pm was available based on whether the relevant retail business as a whole had the prescribed extended trading hours. It was not a store-by-store proposition. The approach to the previous version of the clause taken in *Vickers* was consistent with this position, which was well understood and generally applied in the general retail industry."[10]

35. The Commission considered that the replacement of the term "retailer" with "establishment" had introduced uncertainty and ambiguity, causing doubt among multi-store retail employers about what ordinary hours are permitted under the clause, observing that "establishment" was more apt to refer to an individual store or retail location.[11] The Commission further observed that the words "on all days of the week" appeared in the previous version of the clause and "made its intended operation clearer".[12]

36. However, in the Decision, while the Court agreed that "retailer" means the entire organisation,[13] the Court found that the reference in cl 27.2(b)(iii) of the 2010 GRIA to "trading hours" was to a retailer's "actual trading hours", that if a retailer had more than one store it may have more than one set of trading hours, and that in such a case the ordinary hours determined by the clause would apply to each set of trading hours.[14] The Court further held that "all days" meant "all such days" – that is, days on which a retailer's actual trading hours extended beyond 9.00pm (on a weekday) or 6.00pm (on a weekend).[15]

37. Needless to say, the Court's construction of these phrases in cl 27.2(b)(iii) of the 2010 GRIA has given rise to significant uncertainty about the application of cl 15.2(c) of the 2020 GRIA to employers who operate multiple stores with different trading hours and whose trading hours vary from day to day. Uncertainty may be established even if the provision at issue has a clear meaning and is not ambiguous, since uncertainty may arise from the application of unambiguous terms to a given set of circumstances.[16] If the Court's construction were applied to cl 15.2(c) of the 2020 GRIA, it could mean that ordinary hours under cl 15.2(c) change from

[9] [2024] FWCFB 197, [23]-[25].
[10] [2024] FWCFB 197, [20]. (The reference to *Vickers* being to *Application by Vickers* [2016] FWC 6350.)
[11] [2024] FWCFB 197, [24].
[12] [2024] FWCFB 197, [25].
[13] Decision, [222].
[14] Decision, [211(a)], [228]-[250]. See also [259]-[273].
[15] Decision, [211(b)], [253]-[258]. See also [259]-[273].
[16] [2024] FWCFB 197, [8].

store to store and from day to day. This would be a radical departure from the position the Commission found "was well understood and generally applied in the general retail industry".[17] The problems this would create are obvious, and include that employees of one employer performing the same work at different stores and on different days would have different entitlements, and that employers would need to have different payroll configurations for different stores and on different days. Additionally, it is unclear what would need to occur where trading hours on a given day were unexpectedly changed, as is common in the retail industry, due to fluctuation of trade, natural disasters or state mandated closures. It is submitted that this gives rise to uncertainty within the meaning of s 160.

38. Further, if the Court's construction were applied to cl 15.2(c) of the 2020 GRIA, the clause may be said to involve error, in the sense that the clause was made in a form which did not reflect the Commission's intention.[18] The Commission's intention, as evinced by its earlier decision, was that the clause not operate on a store-by-store, day-by-day basis. To give effect to that intention, the Commission amended cl 15.2(c) of the 2020 GRIA so that it used (relevantly) the same language as cl 27.2(b)(iii) of the 2010 GRIA. The Court disagreed with the Commission's understanding that cl 27.2(b)(iii) of the 2010 GRIA did not operate on a store-by-store, day-by-day basis.[19] In circumstances where the Court, performing its judicial function of construing cl 27.2(b)(iii), has adopted a construction different from the one on which the Commission acted to vary cl 15.2(c), cl 15.2(c) can be said to have been made in a form which did not reflect the Commission's intention, and therefore to involve error within the meaning of s 160.

39. In these circumstances, the ARA respectfully submits that the Commission should vary cl 15.2(c) under s 160 to remove this uncertainty and/or to correct this error. Specifically, the ARA seeks that the following variation be made:

> (c) until 11:00 pm on ~~all days~~ every day of the week and at all of the retailer's stores if the trading hours of any of the retailer's stores on any day of the week extend beyond 9:00 pm on any of Monday to Friday or 6:00 pm on a Saturday or Sunday.

40. This would ensure that the clause operates as it was intended by the Commission to operate, and as it has been understood by the general retail industry to operate. Further, for substantially the same reasons as given by the Commission in its earlier decision, the ARA submits that the circumstances are exceptional and justify such a variation coming into operation on 1 October 2020, pursuant to s 165(2).[20]

41. This proposal is not impacted by the PPOR Act.

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[17] [2024] FWCFB 197, [20].
[18] [2024] FWCFB 197, [8].
[19] Decision, [230], [257], [272].
[20] [2024] FWCFB 197, [27].

42. Accordingly, the ARA's position is that the Commission can, and should, make the variation contained in the ARA's paragraph 39.

Proposal F (19 starts)

43. Proposal F proposes the removal of cl 15.6(i) and (j) of the 2020 GRIA. Clause 15.6(i) relevantly provides: "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" (underlining added).

44. The corresponding provision in the 2010 GRIA was cl 28.5, which provided: "In retail establishments employing on a regular basis 15 or more employees per week, unless specific agreement exists to the contrary between an employer and an employee, the employee will not be required to work ordinary hours on more than 19 days in each four week cycle" (underlining added).

45. In the Commission's decision in this proceeding on cl 15.2(c) discussed under proposal E above, the Commission stated: "'Establishment' on its ordinary meaning is more apt to describe a particular 'bricks and mortar' retail store or location. The term 'retail establishment' is used elsewhere in the Retail Award (in clause 4.1 and Schedule A) and, in *Application by Woolworths Group Limited*,[21] it was construed by a Full Bench in the following way: … An 'establishment' is, relevantly, 'a place of business … and everything connected to it (as furniture, fixtures, grounds, employees)', so that a 'retail establishment' is simply a place of business at which retailing – that is, the sale of goods to consumers or end-users – is conducted …'".[22] The Commission observed that this construction of 'retail establishment' suggested that cl 15.2(c) (as it then stood) was to be applied on a store-by-store basis.

46. However, in the Decision, the Court held that "retail establishment" in cl 28.5 of the 2010 GRIA referred to a retail corporate employer rather than a single store.[23]

47. If the Court's decision were applied to the term "establishment" in cl 15.6(i) of the 2020 GRIA, then this would be a departure from the interpretation of the term upon which the Commission acted to make cl 15.6(i). This would appear to have the effect that general retail employers who employ 15 or more employees in aggregate on a regular basis, but do not do so within any particular store, would be covered by cl 15.6(i). Such employers would reasonably have regarded themselves as not so covered, given the way in which the Commission had previously interpreted the term "establishment". For substantially similar reasons to those set out above in relation to proposal E, this may be said to give rise to uncertainty or error within the meaning of s 160.

[21] [2023] FWCFB 139.
[22] [2024] FWCFB 197, [22].
[23] Decision, [487].

48. In addition to the matters raised in the ARA's primary submissions, the issues in relation to the interpretation and practical implementation of cl 15.6(i) arising from the Decision provide further support for the ARA's primary contention that cl 15.6(i) and cl 15.6(j) should be removed from the 2020 GRIA.

49. If, contrary to the ARA's primary submission, the Commission is not persuaded to remove cll 15.6(i) and (j) altogether, the ARA submits that the Commission should vary cl 15.6(i) under s 160 to remove uncertainty or correct error, as follows:

> In an ~~establishment~~ individual store 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.

50. And for substantially similar reasons, the ARA submits that the circumstances are exceptional and justify such a variation coming into operation on 1 October 2020, pursuant to s 165(2).

51. Accordingly, the ARA's position is that, consistent with the ARA's previous submissions, the Commission can, and should, make the variation contained in the ARA's proposal F. If that position is not accepted, in the alternative the Commission should make the variation set out in paragraph 49 above.

Proposal G (four-day week)

52. Proposal G is not impacted by the PPOR Act or the Decision.

53. Accordingly, the ARA's position is that, consistent with the ARA's previous submissions, the Commission can, and should, make the variation contained in the ARA's proposal G.

Proposal H (consecutive days off)

54. Proposal H is not impacted by the PPOR Act or the Decision.

55. Accordingly, the ARA's position is that, consistent with the ARA's previous submissions, the Commission can, and should, make the variation contained in the ARA's proposal H.

Proposal I (regularly working Sundays)

56. In the Decision, the Court relevantly construed cl 28.13(a) of the 2010 GRIA, which provided that an employee who regularly works Sundays will be rostered so as to have three consecutive days off each four weeks and that the consecutive days off would include Saturday and Sunday.

57. The Court held that the term "regularly" in cl 28.13(a) is undefined and takes its ordinary meaning of periodically, consistently or substantially, which has to be determined on a case-

by-case basis depending on specific work patterns, especially where rosters differ in each roster period.[24]

58. The Court further held that "each four weeks" does not refer to a fixed four-week roster period but to any 'roving' four-week period.[25]

59. Clause 15.8(a) of the 2020 GRIA relevantly provides that an employer "must roster an employee who regularly works Sundays in such a way that they have 3 consecutive days off (including Saturday and Sunday) per 4 week cycle".

60. Proposal I (among other things) proposes the insertion of a definition of "employee who regularly works Sundays", namely "a full-time employee who based on that roster cycle will work at least three out of four Sundays". That variation was proposed under s 160 to remove uncertainty in the current meaning of an employee who regularly works Sundays. The ARA respectfully submits that the Court's construction of the term "regularly" in cl 28.13(a) of the 2010 GRIA set out above confirms that uncertainty, and reinforces the case for that proposed variation. That is, in light of the Decision, it is difficult to see how the undefined nature of 'regularly works Sundays' is 'simple' or 'easy to understand' as contemplated by s 134(1)(g) of the modern awards objective.

61. The ARA further submits that the Court's construction of "each four weeks" in cl 28.13(a) of the 2010 GRIA has given rise to uncertainty about the meaning and application of the phrase "per 4 week cycle" in cl 15.8(a) of the 2020 GRIA. While there is an argument that the use of the term "cycle" indicates it is intended to refer to a roster cycle, there is inevitably uncertainty about this. In the ARA's respectful submission, this uncertainty should be removed by further amending cl 15.8(a) of the 2020 GRIA under s 160 so that it says "per 4 week roster cycle". This would also align the clause with the ARA's proposed definition of 'regularly works Sundays'. For substantially similar reasons as set out above, the circumstances are exceptional and justify such a variation commencing operation on 1 October 2020 pursuant to s 165(2).

62. Proposal I is not impacted by the PPOR Act.

63. Accordingly, the ARA's position is that, consistent with the ARA's previous submissions, the Commission can, and should, make the variation contained in the ARA's proposal I along with the variation in paragraph 61 above.

[24] Decision, [494(a) and (b)], [497]-[498].
[25] Decision, [499]-[502].

Proposal J (exemption rate)

64. As set out earlier, s 135A(1)(b) relevantly obliges the Commission, in exercising its powers to vary modern awards, to ensure that modern awards do not include terms that "substitute employees' entitlements to receive penalty rates or overtime rates where those terms would have the effect of reducing the additional remuneration referred to in paragraph 134(1)(da) that any employee would otherwise receive". However, it does not prohibit the Commission from varying a modern award to include an exemption rate clause *per se*, if the clause does not meet the description in s 135A(1)(b).

65. The ARA's primary submission is that there is no reliable evidence that current proposal J, properly construed, would be a term that substitutes employee's entitlements to receive penalty rates or overtime rates in a way that has the effect of reducing the additional remuneration that any employee would otherwise receive.

66. *First,* none of the witnesses called by the SDA gave direct evidence that current proposal J would result in a reduction in their entitlements. The height of the opposing material on this issue were the roster analyses proffered by SDA and RAFFWU by way of submissions. The ARA filed submissions outlining the flaws in the SDA and RAFFWU analyses.[26] Given the nature of that material, the roster analyses are not a reliable basis to find any reduction in remuneration.

67. *Second,* current proposal J does not "substitute" employees' entitlements to receive penalty or overtime rates. Proposal J does not entitle an employer unilaterally to pay the annual salary for which it provides. Rather, the proposed clause would only apply where the employee has agreed in writing to its application, and after having been advised by the employer in writing of the annual salary and the provision of the award that would not apply.

68. Accordingly, in the ARA's submission the Commission is empowered to make the variation contemplated in the ARA's current proposal J.

69. However, if the Commission considers, contrary to the above submissions, that s 135A(1)(b) precludes a variation in the current form of proposal J, then the ARA puts forward the further amended proposal J in Annexure 1 for the Commission's consideration.

70. The principal additions in amended proposal J are:

(a) a requirement that the annual salary be the *higher of* at least 125% of the minimum weekly rate (multiplied by 52) or at least the amount calculated by the employer as the amount of remuneration that the employee would be entitled to under the award if they

[26] ARA Response to further Proposal J calculations filed on 25 March 2025.

were not paid pursuant to the clause, based on the roster for the employee at the time of entering an agreement under the clause, in proposed cl 17A.1(a)(ii); and

(b) a reconciliation clause, in proposed cl 17A.12.

71. The inclusion of cl 17A.1(a)(ii) would ensure that the amount of the annual salary is at least the amount the employee would be entitled to under the award if they were not paid an annual salary under an arrangement made under cl 17A.1, based on their roster at the time of entering the agreement. Given the "higher of" threshold in cl 17A.1(a), an employer would be required to undertake the relevant calculation prescribed by cl 17A.1(a)(ii) *even if* the annual salary ends up being at least 125% of the minimum weekly rate (multiplied by 52) pursuant to cl 17A(a)(i) because 125% is higher than the amount prescribed by cl 17A.1(a)(i). This amendment would ensure that an employee rostered to work nights, weekends or other times that attract penalty rates would be paid an annual salary which does not have the effect of reducing the additional remuneration that the employee would otherwise receive under the award. This amendment provides greater certainty that proposal J is not precluded by s 135A(1)(b).

72. The reconciliation clause would require that at least every 12 months after the commencement of an arrangement under the clause, and upon termination of the employment or termination of the arrangement under the clause, the employer calculate the amount of remuneration that would have been payable to the employee over the preceding period under the provisions of the 2020 GRIA as if cl 17A did not apply and compare it to the amount actually paid (including payments and time off in lieu under cl 17A) over the same period. If there is a shortfall, the employer must pay the employee the amount of the shortfall within one month. This addition would put beyond argument that the clause would not have the effect of reducing the remuneration that any employee would otherwise receive and would therefore not be precluded by s 135A(1)(b).

73. Amended proposal J also contains the addition of an explicit entitlement to paid rest breaks (cl 17A.10), a further enhancement for employees.

74. The amended proposal J also removes the "two tier" approach in respect of retailers with and without extended trading hours. This arises from the impact of the Decision on cl 15.2(c) addressed in paragraphs 33 to 40 above. In essence, if cl 15.2(c) is interpreted in accordance with the Decision, then whether an employer has extended trading hours is a store-by-store, day-by-day question. This would render current proposal J, or any proposal which contains alternative exemption rates which depend on the application of cl 15.2(c), unworkable.

75. In light of this, the ARA proposes amended proposal J which reverts to a single tier approach, removing the distinction between retailers with and without extended trading hours within the

meaning of cl 15.2(c). However, the addition of cl 17A.1(a)(ii) means that where it is expected that the employee will be working at times attracting penalty or overtime rates, this will be taken into account in determining their minimum salary.

76. Amended proposal J also contains several other minor amendments to current proposal J, which are marked up in the clause.

77. As previously addressed, the Commission is not bound by the ARA's proposal, and it would be open to the Commission to adjust the proposal further to address any remaining concerns it might have about it.

78. Following the Decision, the need for an exemption rate clause such as proposal J to facilitate the payment by agreement of annual salaries to managerial employees is even greater. In the Decision, the Court held that, applying the general law principles of set-off, it was not possible for the employers to set-off contractual payments of annual salary in one pay period against award entitlements arising in another pay period.[27] While the Court reached that conclusion having regard to the contractual set-off clauses in that case, the Court doubted that set-off between pay periods could be achieved however the contracts were drafted.[28] The Court also found that such a result could not be achieved by quantifying compensation under s 545(1) of the FW Act accordingly.[29]

79. This is likely to render the payment of contractual salaries unworkable, at least for many retail employers. Employers would be exposed to a claim for underpayment in any pay period where award entitlements exceed the contractual salary payment, even if the contractual salary payment exceeds award entitlements over a longer period (e.g. on an annual basis). For many retail employers, this might mean a decision that annual salaries are no longer a viable option.

80. As previously addressed, annual salaries are a long-standing and beneficial form of remuneration for managerial employees in the retail industry. They provide a consistent, stable and predictable income, which allows managerial employees to better plan and manage their finances and access credit. Their disappearance would be as much a loss for employees as for employers.

81. The ARA filed its application in February 2024, following on from the then Minister for Employment and Workplace Relations' request for the Commission to conduct a review of modern awards to, amongst other things, make them easier to use. The ARA has since that time sought to engage constructively and in good faith by putting forward balanced proposals to address known interpretation and compliance issues with the 2020 GRIA. The ARA has

[27] Decision, [37]-[89].
[28] Decision, [66].
[29] Decision, [837]-[841].

sought to improve on those proposals, to the benefit of employees, on a number of occasions, including in these submissions.

82. The implementation of compliant annual salaries is a well-known compliance challenge under the 2020 GRIA, and the Decision has only made that compliance challenge greater. In those circumstances, the 2020 GRIA does not meet the 'modern awards objective' in relation to managerial employees at Level 4 and above. Accordingly, in the ARA's respectful submission, it is necessary that the Commission make the variations proposed by the ARA.

Further proposal – Annual Salary Remuneration

83. In light of the Decision, the ARA has developed a further proposal to address the specific problem that contractual salary payments cannot be set-off against award entitlements in other pay periods. That proposal is set out in **Annexure A** and would insert a new cl 18.5 within cl 18 which deals with payment of wages. In summary, under proposed new cl 18.5, despite anything else in the 2020 GRIA, if:

(a) under a contract of employment, an employer pays an employee remuneration quantified by reference to an annual salary (which is termed **Annual Salary Remuneration**); and

(b) the contract of employment provides that the payment of such Annual Salary Remuneration is also to discharge the employer's obligation to make payments due under the 2020 GRIA (however such a provision is expressed); and

(c) the employer pays that Annual Salary Remuneration in periodic instalments (including, without limitation, weekly, fortnightly or monthly instalments),

then the total amount of those payments of Annual Salary Remuneration in a period of no more than a year (termed **Set-Off Period**) (termed **Amount 1**) will discharge the employer's obligations to make payments due under the 2020 GRIA in any pay period in Set-Off Period (the total of which award payment obligations is termed **Amount 2**), except to the extent that:

(d) Amount 2 exceeds Amount 1, in which case the amount of that excess will not be discharged by the payment of the Annual Salary Remuneration in Set-Off Period; or

(e) the contract of employment provides that the payment of the Annual Salary Remuneration does not discharge a particular obligation to make a particular payment under the 2020 GRIA, in which case the payment of the Annual Salary Remuneration will not discharge that particular obligation to make that particular payment under the 2020 GRIA.

84. This would, in effect, enable contractual payments of annual salary to be set-off against 2020 GRIA entitlements within a particular year, except to the extent that the latter exceed the

former, and except to the extent that the contract provides that contractual salary payments do not discharge particular 2020 GRIA entitlements.

85. This would go some way towards rectifying the problem of set-off between pay periods by enabling such a set-off within a particular year, while preserving an employee's award entitlements. The ARA's proposal does not result in an employee's entitlements under the 2020 GRIA being less over a particular year.

86. For substantially the same reasons as previously submitted in relation to proposal J, the ARA submits that this further variation is necessary to achieve the modern awards objective and should be made under s 157.

Further proposal – Monthly payment

87. The ARA has also developed a further proposal, set out in **Annexure A**, to amend cl 18.1 to enable any retail employer to pay employees classified at Retail Employee Level 4 or above on a monthly pay cycle, and not just retail employers who did so before 1 January 2010. It is proposed that cl 18.1 would be varied as follows:

> The employer may determine the pay period of an employee as being either weekly or fortnightly. However, ~~if before 1 January 2010 the~~ an employer may pay ~~paid~~ employees classified at Retail Employee Level 4 or above on a monthly pay cycle.~~, the employer may continue that arrangement.~~

88. This would enable more employers to offer managerial employees the benefit of equal monthly payments of annual salary.

89. The ARA also takes the position that an award term which seeks to limit monthly pay cycles only to those employers who adopted those practices more than 15 years ago is not consistent with the modern awards objective, including because it is not 'simple' or 'easy to understand'[30] or reflective of 'flexible modern work practices'[31].

90. For substantially the same reasons as previously submitted in relation to proposal J, the ARA submits that this further variation is necessary to achieve the modern awards objective and should be made under s 157.

Proposal L (notification of breaks)

91. Proposal L is not impacted by the PPOR Act or the Decision.

92. Accordingly, the ARA's position is that, consistent with the ARA's previous submissions, the Commission can, and should, make the variation contained in the ARA's proposal L.

[30] Section 134(1)(g) FW Act.
[31] Section 134(1)(d) FW Act.

Proposal M (clarification of overtime provisions)

93. Proposal M was made on 5 July 2024.[32]

94. Proposal M is not impacted by the PPOR Act or the Decision.

Proposal N (rostering ambiguities)

95. An alternative proposal N was made by the Commission on 25 July 2024[33] and cl 15.7(c) was varied under s 160 to remove ambiguity or uncertainty as follows:

> The employer may roster an employee to work ordinary hours on 6 days in one week <u>per two-week cycle</u>, <u>provided that in the other week in that cycle</u> the employee is rostered to work ordinary hours on no more than 4 days ~~in the following week~~.

96. In the Decision, the Court construed cl 28.10 of the 2010 GRIA which provided that if ordinary hours are worked on six days in one week, ordinary hours in the following week will be worked on no more than four days.[34] The Court considered that the key to interpreting that clause was the words "the following week".[35] On that basis, the Court considered that the clause applied on a rolling basis (that is, so that the clause applied "across a two week period which commences in whatever the current week is so that the following week will be next week").[36]

97. In that way, the Decision has given rise to uncertainty, within the meaning of s 160, about how cl 15.7(c) of the 2020 GRIA is now to be construed and applied. While the reference to a *cycle* inserted by the Commission in July 2024 might be taken to indicate that, by contrast with the 2010 GRIA, cl 15.7(c) applies to each 2 week period on a standalone basis rather than a rolling basis, there is uncertainty about this.

98. The ARA submits that cl 15.7(c) should be further varied under s 160 to refer to a 2 week *roster* cycle, as follows:

> The employer may roster an employee to work ordinary hours on 6 days in one week per two-week <u>roster</u> cycle, provided that in the other week in that <u>roster</u> cycle the employee is rostered to work ordinary hours on no more than 4 days.

99. This would clarify that cl 15.7(c) is to apply to a standalone basis to each two-week roster cycle.

100. Proposal N is not impacted by the PPOR Act.

101. Accordingly, the ARA's position is that the Commission can, and should, make the variation contained in paragraph 98.

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[32] [2024] FWCFB 302; [2024] FWCFB 288.
[33] [2024] FWCFB 302; [2024] FWCFB 288.
[34] Decision, [446].
[35] Decision, [446].
[36] Decision, [444], [446].

Proposal O (annual leave loading)

102. Proposal O is not impacted by the PPOR Act or the Decision.

103. Accordingly, the ARA's position is that, consistent with the ARA's previous submissions, the Commission can, and should, make the variation contained in the ARA's proposal O.

Proposal P (meal breaks)

104. Proposal P is not impacted by the PPOR Act or the Decision.

105. Accordingly, the ARA's position is that, consistent with the ARA's previous submissions, the Commission can, and should, make the variation contained in the ARA's proposal P.

Proposal Q (first aid allowance)

106. Proposal Q is not impacted by the PPOR Act or the Decision.

107. Accordingly, the ARA's position is that, consistent with the ARA's previous submissions, the Commission can, and should, make the variation contained in the ARA's proposal Q.

17 October 2025

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Annexure A

Proposal E – Extended trading hours

Amend Clause 15 of the 2020 GRIA to read:

15. Ordinary hours of work and rostering arrangements

15.1 Ordinary hours may be worked by an employee on the day specified in column 1 during the span of ordinary hours specified in column 2 of **Table 2—Span of hours.**

Table 2—Span of hours

Column 1 **Days**	**Column 2** **Span of hours**
Monday to Friday, inclusive	7:00am – 9:00pm
Saturday	7:00am – 6:00pm
Sunday	9:00am – 6:00pm

15.2 However, ordinary hours may be worked:

(a) from 5:00 am in a newsagency; or

(b) until midnight in a video shop; or

(c) until 11:00 pm on ~~all days~~ every day of the week and at all of the retailer's stores if the trading hours of any of the retailer's stores on any day of the week extend beyond 9:00 pm on any of Monday to Friday or 6:00 pm on a Saturday or Sunday.

Proposal F – 19 Starts for full-time employees

Delete clauses 15.6(i) and 15.6(j) of the 2020 GRIA.

Alternative if clauses 15.6(i) and 15.6(j) are retained:

Amend clause 15.6(i) of the 2020 GRIA to read:

In an ~~establishment~~ individual store 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.

Amended Proposal J - Exemption rate

17A. Salaries absorption (Managerial and higher-level staff)

17A.1.~~1~~ – Absorption rate ~~– retailers without extended trading hours~~
This clause applies to employees, other than casual employees and 'shiftworkers' employed under Part 6, classified at Retail Employee Level 4 to Retail Employee Level 8 ~~employed by a retailer that does not have extended hours of trade within the meaning of clause 15.2(c)~~ who:

(a) ~~(1)~~ are paid an annual salary (whether in weekly, fortnightly or monthly instalments) that is the higher of:

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

ii. at least the amount calculated by the employer as the amount of remuneration that the employee would be entitled to under the award if they were not paid pursuant to this clause, based on the roster for the employee at the time of entering an agreement under this clause, and

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

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

~~Note: Clause 17A1.1 does not apply to employees of retailers whose trading hours extend beyond 9.00 pm on Monday to Friday or 6.00 pm on Saturday or Sunday, as contemplated in clause 15.2(c).~~

~~**17A.1.2 – Absorption rate – retailers with extended trading hours**~~
~~This clause applies to employees, other than casual employees and 'shiftworkers' employed under Part 6, classified at Retail Employee Level 4 to Retail Employee Level 8, employed by a retailer that does have extended hours of trade within the meaning of clause 15.2(c) who:~~

~~(1) are paid an annual salary that is at least 135% of the minimum weekly rate (assessed on a pro-rata basis for part-time employees) specified in clause 17 applicable to the employee's classification multiplied by 52; and~~
~~(2) have agreed with their employer, in writing, to the application of this clause; and~~
~~(3) have been advised by their employer, in writing and prior to the employee agreeing to the application of this clause, of the annual salary that they will be paid and the provisions of the award that will not apply because of the application of this clause.~~

~~Note: Clause 17A1.2 only applies to employees of retailers whose trading hours extend beyond 9.00 pm on Monday to Friday or 6.00 pm on Saturday or Sunday, as contemplated in clause 15.2(c).~~

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

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

17A.4 An employee to whom this clause applies is not entitled to the benefit of the terms and conditions within the following clauses:
(a) Clause 10.8 to 10.10 – Part-time employees;
(b) Clause 15 – Ordinary hours of work and rostering arrangements;

(c) Clause 16 – Breaks;
(d) Clause 17 – Minimum rates;
(e) Clause 18.1 to 18.2 – Payment of wages;
(fg) Clause 19 – Allowances, except that clauses 19.6 – Moving expenses and 19.7 - Motor vehicle allowance will continue to apply;
(gf) Clause 21 – Overtime;
(hg) Clause 22 – Penalty Rates;
(ih) Clause 28.3 – Payment for annual leave loading;
(ji) Clause 33.3 and 33.4—Payment for work on public holiday or substitute day;
(k) Schedule B – Summary of Hourly Rates of Pay;
(l) Schedule C – Summary of Monetary Allowances.

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

17A.6 An employee to whom this clause applies should normally have a 10 hour break between when the employee finishes work on one day and starts work on the next day, unless otherwise agreed between the employer and the employee. If an employee is required to start work again without having had 10 hours off work, the employer must pay the employee for each hour worked at the rate in clause 16.6(b) (subject to clause 17A.11) until the employee has a break of 10 consecutive hours.

17A.7 Where an employee is required to work more than ~~an average of~~ 43 hours per week (or the pro-rata equivalent for a part-time employee) averaged over ~~a 6-month period~~ a period of not more than 6 months, all hours worked in excess of that number will not be covered by the annual salary amount set out in clause 17A.1(a) and must be separately compensated for either through additional salary payments (at the rate of 150% of the minimum hourly rate applicable to the employee's classification specified in clause 17) and/or time off in lieu arrangements. ~~Following the conclusion of each 6-month period,~~ At least every 6-months, an employer is required to quantify any hours worked in excess of an average of 43 hours per week over ~~that period and to make such payments or time off in lieu available to the employee~~ the period since the preceding assessment or the commencement of the arrangement under this clause. The employer must make such payments or time off in lieu available to the employee where those hours have not already been compensated for.

NOTE: An employee to whom clause 17A applies, remains subject to section 62 of the Fair Work Act 2009 (Cth), which prohibits an employee from being requested or required to work certain hours unless those hours are reasonable.

17A.8 Work on public holidays
An employee who is required to work on a public holiday is entitled to payment for those hours worked at the rate of pay calculated in accordance with clause 17A.11 or paid time off of equal length to the time worked on the public holiday. Such time off must be taken or paid in accordance with clause 17A.9.

17A.9 Accrued time off for working on a public holiday
(a) If the accrued time off referred to in clause 17A.8 is not taken or paid out within 6 months of its accrual, the employer must pay the employee for the accrued time off in the next pay period following those 6 months. This must be paid at the rate of pay calculated in accordance with clause 17A.11.

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

17A.10 ~~Meal~~ Breaks

(a) An employee must not be required to work for more than six hours without being allowed to take an unpaid meal break which will not count as time worked. The break must be for a minimum of 30 minutes duration.

(b) An employee must also be allowed to take a paid rest break of 10 minutes duration for each shift where up to 7 hours is worked, and two paid rest breaks of 10 minutes each for shifts longer than 7 hours.

17A.11 Calculation of hourly rate

Distinct to what the relevant base rate of pay is for the purposes of the NES for annualised wage arrangements which are not captured by clause 17A.1, the hourly ~~amount payable to an employee~~ rate which must be paid to an employee under this clause (except for clause 17A.6 or 17A.7) is to be 125% of the minimum hourly rate specified in clause 17.

It is the intention of this clause that where the annual salary amount paid by an employer to an employee already exceeds the amount set out in clause 17A.1(a)~~.1(1) or 17A.1.2(1) (as applicable)~~, then the part of the annual salary that exceeds the amount described in 17A.1(a)~~.1(1) or 17A.1.2(1) (as applicable)~~ can be used to satisfy (in full or in part) the amounts that would otherwise be due to the employee under clauses 17A.5, 17A.6, 17A.7, 17A.8, 17A.9 and 17A.~~9~~12.

17A.12 Reconciliation

At least every 12 months after the commencement of an arrangement under this clause, and upon the termination of the employment or termination of the arrangement under this clause, the employer must, in relation to each employee paid in accordance with this clause, calculate the amount of remuneration that would have been payable to the employee over the preceding period under the provisions of this award (as if clause 17A did not apply) and compare it to the amount actually paid (including payments and time off in lieu under this clause 17A) to the employee by the employer over the same period. Where the latter amount is less than the former amount, the employer must pay the employee the amount of the shortfall within one month.

For the avoidance of doubt, the obligation to make a payment under this clause arises within the month after the time the reconciliation is conducted, and is satisfied by an employer making the payment of any shortfall in that time.

Proposal I – Regular Sundays

Amend clause 15.8 of the 2020 GRIA to read:

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

Insert new definition in clause 2 as follows:

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

Proposal N – Rostering ambiguities

Amend clause 15.7(c) of the 2020 GRIA to read:

> The employer may roster an employee to work ordinary hours on 6 days in one week per two-week roster cycle, provided that in the other week in that roster cycle the employee is rostered to work ordinary hours on no more than 4 days.

Additional variation – General provision relating to payment of annual salaries

Insert new clause 18.5 into the 2020 GRIA:

18.5 Payment of remuneration quantified by reference to annual salary

Despite anything else in this award, if:

(a) under a contract of employment, an employer pays an employee remuneration quantified by reference to an annual salary (**Annual Salary Remuneration**); and

(b) the contract of employment provides that the payment of such Annual Salary Remuneration is also to discharge the employer's obligation to make payments due under this award (however that provision is expressed); and

(c) the employer pays that Annual Salary Remuneration in periodic instalments (including, without limitation, weekly, fortnightly or monthly instalments),

then the total amount of those payments of Annual Salary Remuneration in a period of no longer than a year (**Set-Off Period**) (the total of which payments in the Set-Off Period is called **Amount 1**) will discharge the employer's obligations to make payments due under this award in any pay period in the Set-Off Period (the total of which award payment obligations in the Set-Off Period is called **Amount 2**), except to the extent that:

(d) Amount 2 exceeds Amount 1, in which case the amount of that excess will not be discharged by the payment of the Annual Salary Remuneration in the Set-Off Period; or

(e) the contract of employment provides that the payment of the Annual Salary Remuneration does not discharge a particular obligation to make a particular payment under this award, in which case the payment of the Annual Salary Remuneration will not discharge that particular obligation to make that particular payment under this award.

Additional variation – Monthly payments

Amend clause 18.1 of the 2020 GRIA to read:

> **18.1** The employer may determine the pay period of an employee as being either weekly or fortnightly. However, ~~if before 1 January 2010 the~~ an employer may pay ~~paid~~ employees classified at Retail Employee Level 4 or above on a monthly pay cycle.~~, the employer may continue that arrangement.~~