



Fair Work Commission

Award Review 2014

AM2017/60

## **Submission –Substantive Issues**

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1. The Shop Distributive and Allied Employees' Association (SDA) makes this submission in relation to the Award review process in accordance with the Directions issued on the 12<sup>th</sup> February 2019<sup>1</sup>.

#### **The SDA's Claim**

2. The SDA seeks to vary the General Retail Industry Award 2010 (the Award or GRIA) to limit junior rates applying to classification Level 1 only.
3. The SDA seeks to vary Clause 18 to provide for the payment of junior rates to Level 1 employees only.
4. This would ensure employees engaged at higher levels requiring higher skill than Level 1 are paid the full adult rate.
5. Level 1 of GRIA is the general shop assistant classification. The indicative job titles<sup>2</sup> for Level 1 are: ....
  - o *Shop Assistant,*
  - o *Clerical Assistant,*
  - o *Check-out Operator,*
  - o *Store Worker,*
  - o *Reserve Stock Hand,*
  - o *Driver,*
  - o *Boot/Shoe Repairer (Not Qualified),*
  - o *Window Dresser (Not Qualified),*
  - o *LPO,*
  - o *Photographic Employee,*
  - o *Store Greeter,*
  - o *Assembler,*
  - o *Ticket Writer (Not Qualified),*
  - o *Trolley Collector,*
  - o *Video Hire Worker,*
  - o *Telephone Order Salesperson,*
  - o *Door-to-door Salesperson, or Retail Outdoor Salesperson, and,*
  - o *Demonstrator and/or Merchandiser not elsewhere classified (including a Demonstrator and/or Merchandiser who is not a direct employee of the retailer).*

6. The majority of employees in retail covered by the GRIA are engaged at this Level 1

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<sup>1</sup> <https://www.fwc.gov.au/sites/awardsmodernfouryr/am201760-dirs-120219.pdf>

<sup>2</sup> GRIA Schedule B 1.3

7. The GRIA currently applies junior percentages to all of the 8 levels of the classification structure. This means junior %'s apply from the base shop assistant to the store manager. The GRIA clause provides at Clause 18.2:

Junior employees will be paid the following percentage of the appropriate wage rate in clause 17 from the first pay period commencing on or after 1 July 2015:

Age	% of weekly rate of pay
Under 16 years of age	45
16 years of age	50
17 years of age	60
18 years of age	70
19 years of age	80
20 years of age, employed by the employer for 6 months or less	90
20 years of age, employed by the employer for more than 6 months	100

8. Where an employee is performing work at a higher classification than Level 1, the employee is recognised as having the necessary skills and competencies applicable for a higher classification. The roles above level 1 demand skill or qualifications and/or ability to be responsible and in charge. The SDA submits that the full adult rate should apply to the rates paid to these employees, irrespective of age.

#### **Context of the Review**

9. The FWC considered the conduct of the Four Yearly Review and on 17 March 2014 issued a statement<sup>3</sup> (The Preliminary Jurisdictional decision) outlining some observations including various considerations of the relevant legislation.
10. The statement included a summary of considerations on the conduct of the Review :

#### *Summary*

*[60] On the basis of the foregoing we would make the following general observations about the Review:*

- 1. Section 156 sets out the requirement to conduct 4 yearly reviews of modern awards and what may be done in such reviews. The discretion in s.156 (2) to make determinations varying modern awards and to make or revoke modern awards in a Review, is expressed in general terms. The scope of the discretion in s.156 (2) is limited by other provisions of the FW Act. In exercising its powers in a Review the Commission is exercising 'modern award powers' (s.134 (2)(a)) and this has important implications for the matters*

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<sup>3</sup> [2014] FWCFB 1788



which the Commission must take into account and for any determination arising from a Review. **In particular, the modern awards objective in s.134 applies to the Review.**

2. The Commission must be constituted by a Full Bench to conduct a Review and to make determinations and modern awards in a Review. Section 582 provides that the President may give directions about the conduct of a Review. The general provisions relating to the performance of the Commission's functions apply to the Review. Sections 577 and 578 are particularly relevant in this regard. In conducting the Review the Commission is able to exercise its usual procedural powers, contained in Division 3 of Part 5-1 of the FW Act. Importantly, the Commission may inform itself in relation to the Review in such manner as it considers appropriate (s.590).
3. The Review is broader in scope than the Transitional Review of modern awards completed in 2013. **The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a 'stable' modern award system (s.134(1)(g)).** The need for a 'stable' modern award system suggests that a party **seeking to vary** a modern award in the context of the Review must **advance a merit argument** in support of the proposed variation. The extent of such an argument will depend on the circumstances. Some proposed changes may be self evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation. In conducting the Review the Commission will also have regard to the historical context applicable to each modern award and will take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so. The Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made.
4. **The modern awards objective applies to the Review. The objective is very broadly expressed and is directed at ensuring that modern awards, together with the NES, provide a 'fair and relevant minimum safety net of terms and conditions'.**
5. In the Review the proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective (see s.138). What is 'necessary' in a particular case is a value judgment based on an assessment of the



*considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations.*

*(emphasis added)*

11. In conducting the 4 yearly review of modern awards pursuant to s.156 of the Fair Work Act 2009 (the **Act**), the Commission must review each modern award<sup>4</sup> against the modern awards objective so as to ensure 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 considerations set out in Section 134(1)(a)-(h) of the Act.

12. Section 134 (1) of the Act states:

*(1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:*

- (a) relative living standards and the needs of the low paid; and*
- (b) the need to encourage collective bargaining; and*
- (c) the need to promote social inclusion through increased workforce participation; and*
- (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and (da) the need to provide additional remuneration for:*
  - (i) employees working overtime; or*
  - (ii) employees working unsocial, irregular or unpredictable hours; or*
  - (iii) employees working on weekends or public holidays; or*
  - (iv) employees working shifts; and*
- (e) the principle of equal remuneration for work of equal or comparable value; and*
- (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and*
- (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and*

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<sup>4</sup> Section 156(5) of the Act.

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

13. These criteria are “broad considerations which the Commission must take into account in considering whether a modern award meets the objective set by s 134(1)”.<sup>5</sup> No particular weight should be attached to any one consideration over another; and not all of the matters identified in s. 134(1) will necessarily be relevant to a particular proposal to vary a modern award.<sup>5</sup> To the extent there is any tension between some of the considerations in section 134(1), “*the Commission’s task is to balance the various considerations and ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions.*”<sup>6</sup>

### General approach

14. The Preliminary Jurisdictional decision provided detailed guidance about the conduct of the 4 yearly review and related jurisdictional issues. At [23] the Full Bench stated (emphasis added):<sup>6</sup>

*The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a 'stable' modern award system (s.134(1)(g)). The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. We agree with ABI's submission that some proposed changes may be self evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.*

15. The Penalty Rate decision of 2017<sup>7</sup> articulated the Review as follows

*The scope of the Review was considered in the 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues Decision. We adopt and apply that decision and in particular the following propositions:*

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<sup>5</sup> *National Retailers Association v Fair Work Commission* (2014) 225 FCR 154, [109] (Collier, Bromberg, Katzman JJ).

<sup>5</sup> *Four Yearly Review of Modern Awards – Annual Leave* [2015] FWCFB 3406, [19], [20] (the **Annual Leave decision**).

<sup>6</sup> [2014] FWCFB 1788 at [23], [24], [27], footnotes omitted

<sup>7</sup> [2017] FWCFB 1001 PN 101

*(i) The Review is broader in scope than the Transitional Review of modern awards completed in 2013.*

*(ii) In conducting the Review the Commission will have regard to the historical context applicable to each modern award.*

*(iii) The Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time it was made.*

*(iv) Variations to modern awards should be founded on merit based arguments. The extent of the argument and material required will depend on the circumstances*

16. The proposed changes the SDA seeks to make to the GRIA in this matter are underpinned by a merit argument and expert evidence supporting the proposed variation.
17. The submission also identifies key issues with past decisions relating to the making of the General Retail Industry Award which the SDA believes shows that the award cannot be accepted to 'prima facie' have met the modern awards objective at the time it was made.
18. The SDA makes this submission as longstanding advocates for the low paid and long-term supporters of the principle of equal pay for equal work, regardless of age.
19. The current application of junior rates in respect of classification levels was principally set in the award as part of modernisation process of 2008. This consideration was limited to a standardisation of the various predecessor award conditions in each industry, rather than an examination of the merits of the rates themselves.

*The federal awards and NAPSAs with which we are dealing contain a very wide range of rates for junior employees and apprentices. The relevant instruments fix percentages of the adult wage for juniors and apprentices based on a host of historical and industrial considerations, most of which can only be guessed at. **It is not possible to standardise these provisions on an economy-wide basis, at least not at this stage.** We have adopted the limited objective of developing new*



*rates which constitute a fair safety net for each of the modern awards based on the terms of the relevant predecessor awards and NAPSAs.*<sup>8</sup>

20. In the **2008 Decision**, the Full Bench recognised they had a '*limited objective*'<sup>9</sup> in regards to the issue of junior rates. The Full Bench recognised it was not possible at that stage to standardise the hugely variable NAPSAs and federal award provisions on an economy-wide basis, and sought instead to provide a uniform set of rates across the retail industry.
21. There was no opportunity for consideration of the merits of the provisions themselves. The Full Bench's comments that 'this stage' was not appropriate for a substantive exploration of junior rates suggest that another 'stage' would be more appropriate for such an exploration.
22. The limitations under which the previous Full Bench considered junior rates of pay provide a reason to depart from the **2008 Decision** where it can be seen that the merit of the rate setting was not substantively addressed in the award modernisation process or that the SDA contends later was flawed.
23. The Levels above the Level 1 rate set a higher rate of pay in recognition of the required higher skills, competencies and responsibility to perform the work. Applying the junior percentages to Levels above Level 1 diminish the additional monetary compensation provided for in recognition of the higher skills, competencies and responsibility.
24. The SDA submits that the 2014 Review is the appropriate opportunity to redress the inequity and discrimination faced by young workers as a result of continuing the current junior rates provisions in the GRIA.
25. Equal pay for equal work is enshrined in two international conventions to which Australia is signatory, the *International Labour Organisation's Equal Remuneration Convention, 1951 (No. 100)* and the United Nations' *Convention on the Elimination of All Forms of Discrimination against*

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<sup>8</sup> [2008] AIRCFB 1000 at [71]

<sup>9</sup> Ibid at [71]

*Women (CEDAW)*. It is a long-held principle of the Australian industrial relations system. This fundamental principle is currently not applied young workers who have demonstrated a capacity for work above the base shop assistant level in the GRIA. .

26. The SDA submits that the retention of the current junior rates of pay provisions in the GRIA fails to meet both the Object of the Act and the modern awards objective<sup>10</sup> of providing a fair and relevant minimum safety net of terms and conditions, taking into account the matters prescribed by sections 3(a), 3(b) and 134(1) of the *Fair Work Act 2009* (the **Act**).

27. In regards the matters prescribed in s.134(1), the SDA makes the following submissions in respect of why junior rates in the GRIA do not provide a fair and relevant safety net for thousands of young Australians employed in the retail industry:

- i. s.134(1)(e): It is obvious that the provision of junior rates in the GRIA across all classifications levels is in direct opposition to the principle of equal remuneration for work of equal or comparable value, with many skilled young Australian retail workers performing exactly the same tasks as older colleagues, for significantly less pay.
- ii. s.134(1)(a): Not only are these skilled young people's relative living standards and needs eroded by the retention of discriminatory, discounted wages in one of Australia's lowest paid industries<sup>11</sup>, but their cost of living pressures and caring responsibilities have also increased in line with the general population. However, there is little recognition or amelioration of the realities faced by many young people in the industrial relations arena.
- iii. s.134(1)(c): The retention of junior rates across all classifications levels in the GRIA actually exacerbates social exclusion and jeopardises workforce participation. The payment of discounted wages based on age rather than experience denies younger workers the equal remuneration they are entitled

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<sup>10</sup> *Fair Work Act 2009* s.134(1)

<sup>11</sup>[2013] FWCFB 1635 at [208] and [212]. See also Australian Bureau of Statistics 6302.0 - Average Weekly Earnings, Australia, Nov 2012, 1/02/2013.

to in line with principle of equal pay for equal work. Providing the adult rate of pay for all employees at levels 2 – 8 will enable many young Australian workers, and their families, to achieve a more reasonable standard of living and participate more fully in all aspects of their lives.

28. In regards to the remaining areas of the modern awards objective which must also be taken into account, it is our submission that the removal of junior rates of pay would not adversely impact upon these matters, and in some cases, would further enhance these areas, as outlined below:

- i. s.134(1)(c) The granting of the application would encourage more young employees to take on roles with higher responsibilities and skills which allows them to participate more fully and equally in the workforce in a meaningful way.
- ii. s.134(1)(f) The relatively small number of employees who could receive a benefit from removing junior rates applying to the higher Levels 2-8 of GRIA would not have a significant impact on business as a whole in relation to employment costs. It would not increase the regulatory burden for business. It is likely to increase the productivity of the employees affected.
- iii. s.134(1)(h): Varying GRIA to pay adult rates to all employees at levels 2 – 8 will not detrimentally affect employment growth, inflation and sustainability, performance and competitiveness of the national economy.

29. The SDA makes the submissions around s.134(1)(f) and s.134(1)(h) on the following grounds;

- i. The FWC approved increase in the 20 yr old rate to the adult rate has not shown any detriment to employment.
- ii. Many 20 year olds in retail are already paid the adult rate of pay now. This is either through the award or an enterprise agreement. This limits the impact this variation will have on the industry.
- iii. The variation would apply to all retail businesses, making any change equitable for all employers and thus retaining a competitive and level playing field;



- iv. Finally, the retail industry, as a domestic market, would still require jobs to be done by the same number of workers. Irrespective of the levels of remuneration for young workers, overall employment will not change.

30. The SDA further asserts that the retention of such rates is inequitable and anomalous in a modern industrial relations' environment which promotes equal pay for equal work and rewards for skills acquired and used in their employment.

#### **Junior Rates setting today in GRIA**

31. In the 2008 Decision<sup>12</sup>, the Full Bench recognised they had a "limited objective" in regards to the issue of junior rates and sought to establish new, uniform rates for each award, rather than attempting to standardise or even examine the hugely variable NAPSA's and federal award provisions on an economy-wide basis:

*The federal awards and NAPSA's with which we are dealing contain a very wide range of rates for junior employees and apprentices. The relevant instruments fix percentages of the adult wage for juniors and apprentices based on a host of historical and industrial considerations, most of which can only be guessed at. It is not possible to standardise these provisions on an economy-wide basis, at least not at this stage. We have adopted the limited objective of developing new rates which constitute a fair safety net for each of the modern awards based on the terms of the relevant predecessor awards and NAPSA's. We have attempted to strike a balance as between, in some cases, wildly varying provisions. In the case of junior employees the rates will be expressed as a percentage of the rate for the relevant adult classification.<sup>13</sup>*

32. It is apparent from the 2008 Decision that:

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<sup>12</sup> [2008] AIRCFB 1000

<sup>13</sup> [2008] AIRCFB 1000 at [71]

- i. The Full Bench did not have opportunity to examine the merits of the historical and industrial considerations which underpinned the pre-reform provisions around junior rates.
- ii. The Full Bench did not have opportunity to standardise the existing pre-reform junior rates provisions on an economy-wide basis during award modernisation.
- iii. The Full Bench considered that it had a limited objective to standardise the terms of the predecessor awards and NAPSAs in order to establish new rates for junior employees.

33. Under the limited provisions of Schedule 5, Item 14—Variation of modern award Fair Work (Transitional Provisions and Consequential Amendments) Act 2009, the SDA applied to have the Junior Rates provision not apply to trades classifications and higher classifications levels. FWA rejected that application as it was opposed and not supported by underpinning instruments.<sup>14</sup>

34. This decision will be discussed later as it appears that it drew incorrect conclusions about the underpinning instruments not supporting the position.

35. As part of the Modern Awards Review 2012 the SDA was successful in increasing the 20 year old rate of pay. If a 20 year old has 6 months of experience they receive the adult rate of pay, not the 90% rate. In doing this a Full Bench of FWC concluded:

[168] We have carefully considered all the evidence and submissions presented in the proceedings together with the relevant legislative provisions relating to the transitional review of the Award and the determination of the application before us. We have reached the following conclusions in relation to the issues raised relating to junior rates

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<sup>14</sup> [2010] FWA FB 305 PN 25

of pay and whether it is necessary and appropriate at this time to vary the Award so as to provide adult rates for 20 year old retail employees.

[169] We have decided that the Award is not achieving the modern awards and minimum wages objectives. We consider that the discounted rate for all 20 year old retail employees is not a fair and relevant minimum safety net<sup>15</sup>

36. Recently in July 2017, the FWC has approved a similar variation to another retail related award to limit the applicability of junior rates to lower classifications levels only.

37. In the 4 yearly review of modern awards, the Pharmacy Industry Award (**PIA**) was varied such that junior rates only applied to Levels 1 and 2<sup>16</sup>.

38. This was a consent position between the parties before the Commission but the variation had to be approved by the Commission and meet the requirements of the FWA including it being a necessary variation and satisfying Section 134 of the Act.

39. The level 1 and 2 in PIA are equivalent to the GRIA level 1. A level 2 PIA is the level for a person with a Certificate II in Community Pharmacy, as determined from time to time by the National Quality Council<sup>17</sup>. A Level 3 in PIA has a Certificate III. This Certificate II qualification aligns with GRIA level 1.

40. The issue of when junior rates applied to higher levels in GRIA was considered in 2009/10 by the AIRC (then FWA.) The SDA applied to have the Junior Rates provision not apply to trades classifications and higher classifications levels in GRIA. FWA rejected that application as it was opposed and not supported by underpinning instruments. <sup>18</sup>

41. The FWA Full Bench dismissed the SDA application by stating:

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<sup>15</sup> [2014] FWCFB 1846

<sup>16</sup> [2017] FWCFB 3540

<sup>17</sup> Pharmacy Industry Award Schedule B

<sup>18</sup> [2010] FWAFB 305 PN 25



*The SDA seeks to exclude junior rates from applying to trades classifications. The application is opposed and not supported by underpinning instruments. We reject the application.*<sup>19</sup>

42. The variation the SDA had sought and brief reasoning was :

*Clause 18 Junior Rates*

*Junior percentages should not apply to tradespersons and above rates. A person who is a tradesperson should not be paid less than the full trade rate. As the clause currently stands, tradespeople and higher qualified persons could be paid a lower rate if they are aged 20 or under. The variation seeks to limit the payment of junior rates to persons employed at below the tradesperson level*

*The justification for junior rates is that they constitute an age based discounted rate on the skill based rate to take account of the lack of work experience, skill and maturity of junior workers. Employees employed at the level of tradesperson or higher are working at such levels of skill and responsibility that age based discounted wage rates are no longer appropriate*

43. The variation applications were limited to being brief and in writing only.

44. The decision does raise a couple of issues.

45. First the decision only talks about 'tradespersons' and ignores the rest of the claim. Again, given the limitations imposed by both the legislation and the AIRC on the conduct of the proceeding for these variation applications, it is not surprising either an item was missed in either the Tribunal's consideration or decision. It is now unknown which or what occurred precisely.

46. Secondly and more importantly, the Tribunal did incorrectly identify in its reason that the underpinning awards did not support the variation. This on examination is untrue and incorrect.

47. This is an error that questions the validity of the decision and the ability for the award to be deemed to meeting the Modern Award Objective at the time it was made.

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<sup>19</sup> [2010] FWAFB 305 PN 25

48. One possible source of this misinformation could have been the awards comparison documents. This was work done by the AIRC comparing various conditions across multiple Federal Awards and NAPSAs.

49. This document had the junior rates provisions compared. On looking at that, it appears that for some of the awards it didn't properly reflect the application of junior rates.

50. There were significant Awards that applied in the Retail industry prior to the making of the modern award that recognised Junior employees at skill levels above the base generic shop assistant level, received the full adult rate. These Awards included

The Shop, Distributive and Allied Employees Association - Victorian Shops

The Shop Employees (State) Award (NSW)

Retail and Wholesale Industry – Shop Employees- ACT- Award 2000

51. The Victorian Award restricted junior rates to Level 1 employees. The NSW retail award and ACT Shops award also primarily restricted junior rates to the base shop assistant level

52. The Victorian Award or the NSW award provided the largest majority of employees when one of them aligned with the other States/Territories.

53. In this instance, the two heavy weight awards plus the ACT Retail Award have aligned and would have provided the majority position on this junior rate issue to exclude junior rates applying to levels 2-8

54. The AIRC and then FWA repeatedly stated they used the majority positions to determine various conditions for Modern Awards.

55. Clearly this was not done in this case and places doubt over the reasoning behind this decision.

56. On the aspect of the Tradesperson rates most of the retail awards did not contain Trades Rates or apprenticeship rates. So in part the FWA were correct in the decision but what was not appreciated it appears, was the fact that these trades classifications and apprentices came from other awards which contained these provisions. The areas primarily concerned were Butchers and Bakers
57. The lack of awareness regarding these awards is not surprising given the number of applications the Bakery Association made in 2010 to incorporate various award conditions that had applied for Bakers.
58. The applications included 40 hour week application and shift work penalties (early morning). The early morning application was in part successful, with the FWA adopting pre modern award conditions that had applied to bakers.
59. The SDA has analysed the same awards that were considered and examined in those 2010 proceedings for the conditions applying to juniors and apprentices. This analysis is at Attachment A
60. This shows that for apprentices, once they completed their apprenticeship they were then paid the adult trade rate in the vast majority of the underpinning awards.
61. On the issue of junior rates some awards had no junior rates. The other awards mostly had restricted junior rates applying to limited classifications. Also awards recognised 18 year olds as receiving the adult rate of pay.
62. This examination of both the Retail awards and the Baking Awards clearly shows that there was strong support for the SDA application and the reasoning of FWA in dismissing the application was incorrect.



63. This does mean that the GRIA cannot be said to 'prima facie' have been made at the time achieving the Modern Awards Objective.

***The principle of equal remuneration for work of equal value***

64. Equal pay for work of equal value is a principle that Australian society has embraced. It is a principle enshrined in two international conventions to which Australia is a signatory. It is part of the modern awards objective. Equal remuneration for work of equal or comparable value has thus been accepted, legislated and applied in many facets of the industrial relations landscape; it must now be applied to the matter of junior rates for adult employees..

65. It is the SDA's submission that there are three principles that should be applied to having equity in pay:

- same work;
- same range of work;
- same conditions.

66. Equal remuneration for work of equal or comparable value is fundamental to the Objects of the Act and a key feature of the modern awards objective.

67. It is, and always has been, the SDA's firm belief that equal pay for equal work of equal value is a fundamental principle in achieving equity and fairness for working Australians. The SDA submits that the retention of junior rates in its' current form in the GRIA is failing the modern awards objective.

68. The principles of equity and work value have long been a feature of the Australian industrial relations system, as evidenced by a number of significant reform processes to redress wage discrimination against groups of workers and provide equal pay for equal work e.g. for women, indigenous Australians and most recently, social and community services workers.

69. The Human Rights and Equal Opportunity Commission (HREOC) advocated against junior rates on that very basis, stating:

*“Junior rates cause hardship and poverty among young workers and place growing pressure on low income families. They... reinforce negative and inaccurate stereotypes about young workers.”<sup>20</sup>*

## **Low Paid**

70. It is clear that the relative living standards and needs of the low paid is another key plank in the Modern Awards Objective. However, for employees in one of the lowest paying industries in Australia, performing the same recognised higher skilled work for less pay than their colleagues aged 21 or older, it is equally clear that their living standards and needs are not being met by the current junior rates of pay provisions in the GRIA.

71. The SDA notes the Full Bench’s comments in the Penalty Rates Case 2012, on the low paid nature of the retail industry and the ensuring relevance of s.134(1)(a) in determining applications to vary the GRIA:

*The industries under review have relatively low base rates of pay and the remuneration package as a whole arising from the relevant modern awards cannot properly be described as excessive.<sup>21</sup>*

*We are satisfied that a high proportion of employees in the accommodation and food services and retail industries are low paid.<sup>22</sup>*

*A consideration of the ‘relative living standards and the needs of the low paid, as required by s.134(1)(a) of the Act is clearly relevant in determining the applications before us, to be balanced against the other factors within the modern awards objective.<sup>23</sup>*

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<sup>20</sup> Human Rights and Equal Opportunity Commission (1999). *Age matters? A discussion paper on age discrimination*, p.39

<sup>21</sup> [2013] FWCFB 1635 at [208]

<sup>22</sup> [2013] FWCFB 1635 at [212]

<sup>23</sup> [2013] FWCFB 1635 at [216]

*Second, it is not possible or appropriate to determine minimum wages or other terms and conditions of employment by reference to the variety of household circumstances in which employees are found or to make assumptions as to the meeting of the needs of the low paid workers within their households.<sup>27</sup>*

76. The SDA submits that young workers experience the same raft of living expenses and financial pressures as older employees, pressures which are exacerbated by discounted wage structures.
77. The SDA endorses the submissions in Section 6 of the ACTU in its Apprentice Wage Review paper<sup>28</sup> in regards to living cost pressures endured by the changing demographics of the traditional 'young' workforce. We note the ACTU's submissions apply to apprentices; however, strong and relevant parallels can be drawn about the significant impact of cost of living pressures on discounted wage rates.

#### **Junior Rate Rational**

78. In the Junior Rates Case the Full Bench accepted that the rationale for junior rates was that they were needed "as an "equal opportunity measure" and as a reflection of the "true value of the work to the employer".<sup>29</sup> Junior rates reflected "the general lack of experience of young employers".<sup>30</sup>

[104] The productivity of young workers and value to employers being less than that of adult employees has been long accepted by Federal and State industrial tribunals. Junior rates reflect the general lack of experience of young employees and can act as an incentive or encouragement to employers to engage young persons, thereby allowing young persons to get a start or foothold in employment when they might otherwise struggle to compete against older applicants. Further, it is generally the case that the engagement of young persons will be associated with additional costs to the employer because of training and supervision needs<sup>31</sup>

79. Examining this decision point there are certain conclusions and remarks to be made which clearly demonstrate they do not apply to employees in Level 2-8 of GRIA. .

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<sup>27</sup> Ibid at [215]

<sup>28</sup> Appendix C - ACTU Submission AM2012/18 & others APPRENTICESHIP WAGE REVIEW. D No. 01/2013.

<sup>29</sup> [2014] FWCFB 1846, (*the Junior Rates case*).at PN 100 and 104

<sup>30</sup> Ibid PN 104

<sup>31</sup> [2014] FWCFB 1846, (*the Junior Rates case*).at PN 104



80. On the 'lack of experience of young workers' point , the higher levels of classifications are predicated on the ability of a person to perform the duties. It would seem not to be believable or credible that a person appointed to 'supervise', be in charge of a department/store , working alone or has a recognised certificate qualification is then subjected to the artifice of junior rates saying they are not doing the classification requirements.
81. The employees at level 2-8 are not in the category of getting "a start or a foothold in employment". They have demonstrated skills or qualifications. If an employee has gained a Certificate III or above it is not designated a 'junior' certificate. The employee has met all the criteria to qualify for the certificate.
82. If a junior employee is appointed to supervise other employees, it cannot be maintained that this employee needs higher levels of supervision. They are doing the supervision.
83. Further there were significant Awards that applied in the Retail industry prior to the making of the modern award that recognised Junior employees at skill levels above the base generic shop assistant level, received the full adult rate. These Awards included
- The Shop, Distributive and Allied Employees Association - Victorian Shops
- The Shop Employees (State) Award (NSW)
- Retail and Wholesale Industry – Shop Employees- ACT- Award 2000
84. This clearly shows that Federal and State Tribunals had accepted junior employees who worked at higher levels were not of lesser value or productivity to the employer. This is an important factor in considering the application of junior rates to all levels of skill and qualification in the GRIA.
85. From the SDA's knowledge of the alignment of awards to find a prevalent condition to apply in the Modern Award, the Victorian Award and the NSW Award rarely if ever aligned on a key issue. The Victorian Award or the NSW award provided the largest majority of employees when one of them aligned with the other States/Territories.

86. In this instance, the two heavy weight awards plus the ACT Retail Award have aligned and would have provided the majority position on this junior rate issue to exclude junior rates applying to levels 2-8.

### **The impact of the claim**

87. The SDA submits that this application is sustainable and affordable. For these reasons, the SDA submits that the granting of this variation will not have a detrimental impact on employers or on the broader economy.

88. The SDA engaged Dr Martin O'Brien to examine the number of employees who could be impacted by the SDA application.

89. The report of Dr Martin O'Brien<sup>32</sup> shows that there are 774,675 employees in Retail.

90. Dr O'Brien's report clearly shows the limited number of employees this claim could impact on. At most approximately 17,000 employees could be entitled to an increase in wages. This number would be lower given the number of 20 year olds in that group who would already be paid the adult rate of pay.

91. The report also shows the majority of this sub group of under 21 year old working at levels 2-8 are in the 18- 20 year old age bracket. The increase in wages would be between 30 – 0% for the individuals. The largest number of employees (5,468) sit at the 20 year old age where the increase would be small or zero. In fact this is over 30% of these 17,244 identified juniors.

92. 2.22% is the proportion of the total number of employees in retail who could receive a wage increase. This clearly shows the limited impact of this claim in retail.

93. The SDA further refers to and endorses Section 7 of the ACTU in its Apprentice Wage Review paper<sup>33</sup> in this regard, particularly in reference to the long-standing, largely unsubstantiated opposition to wage increases.

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<sup>32</sup> Expert Report Of Dr Martin O'Brien dated 5<sup>th</sup> June 2019

<sup>33</sup> ACTU Submission AM2012/18 & others APPRENTICESHIP WAGE REVIEW. D No. 01/2013

94. The SDA submits that the ongoing existence of junior rates for workers in classification levels 2-8 is discriminatory, contrary to the Object of the Fair Work Act. It diminishes the existence of the classification structure in the Award in itself and the compensation attached to the higher levels in recognition of skills and responsibilities.
95. It is a practice that effects a relatively small number of employees in the overall Retail Industry covered by the GRIA. For these employees it is however a significant detriment.
96. The retention of junior rates for retail employees in its current format perpetuates the significant financial challenges faced by young workers today, and fails to uphold the concept of equal pay for equal work.
97. A positive effect on the rates of pay for a confined group of low-paid workers would occur with this variation. Consequently, the cost impact on the retail industry would be very minimal, yet a significant improvement in living standards would be achieved for these low-paid workers, and greater contribution to gross national income would also be achieved.

## **Conclusion**

98. Given the development of the current junior provisions in GRIA and the issues of past decisions the SDA believes there is a strong case to grant the SDA claim as this has demonstrated issues with past determinations. There is also clear differentiations with the views held on the 'reasoning' for junior rates that distinguish their applicability to this claim to pay Level 2-8 employees the adult rate regardless of age.
99. The expert analysis of the potential employees who could benefit from the claim show that this is small proportion of employees in the Retail Industry. The cost would be tiny to employers.
100. The variation would achieve the Objects of the Act and meet the various requirements set under s134.
101. The variation is not inconsistent with other decisions of the Commission in this review.



Attachment A

AWARD: Bakery	Junior/Apprentice Condition
<p>* -- NSW Bread AN120080</p>	<p>Juniors U/17 71% 17 yo 85% 18 yo 100%</p> <p>Apprentice rates level 3 6 level classifications</p>
<p>* Pastry Cooks AN120410</p>	<p>Junior rates apply only to Junior Packer, Junior Assistant Group 2, Junior Assistant Group 3</p> <p>Apprentice rates apply to trades levels 15 levels in classifications</p>
<p>* Bread Trade (Vic) AP769688</p>	<p>No junior rates</p> <p>Apprentice rates apply level 5 5 level classifications</p>
<p>* Pastry Cooks (Vic) AP792620</p>	<p>Junior rates apply to 2 levels</p> <p>CI 15.1.1 Persons under 21 years of age (other than Apprentices) employed as follows: Level 2 (General Hands) Level 4 (Employees engaged decorating Christmas, Wedding, Birthday and Similar Cakes)</p>

Attachment A

	5 level classification structure Apprentice rates apply to level 5.
* Baking Industry Southern & Mackay AN140024	CI 5.1 Junior rates apply till 21 yrs. Apprentice rates 4 classifications
* Baking Industry TAS AN170007	7 level classification structure. Each level has a production/transport section, clerical role and a Sales role (3 different roles at most level)  Junior rates apply as Level 2 Production * 20 yr old paid as adult  Level 3 Clerks Level 4 Sales  Apprentice Rates apply to level 5 rates
Retail In-Store Bakehouse SA AN150129	2 Level classification  Juniors % apply to Bakery Assistant  Apprentice % apply to Baker
Bread & Yeast Goods Award SA AN150017	Junior rates apply to level 1 and 2 (classification relativities 89%, 92%)  Apprentice rates apply to level 3
Bakers (Metro) WA AN160023	Structure Bakers Assistants then Trade classifications (3)

Attachment A

	<p>Junior Rates            Under 16 years 45%            Between 16 and 17 60%            Between 17 and 18 70%            Between 18 and 19 80%            Between 19 and 20 90%            Between 20 and 21 100%</p>
<p>* Bakers (ACT) AP769420</p>	<p>6 Levels classifications            Junior rates            Level 1-3            At 18 years of age and under 80%            At 19 years of age 90%            At 20 years of age 100%            A junior employee employed at baking or pastry worker levels 4, 5 and 6 will be paid the full adult rate.            Apprentice rates apply level 4.</p>
<p>Baking &amp; Pastry Cooks NT AP819011 CRN</p>	<p>No Junior Rates            6 level classification            Apprentice rates apply to level 4</p>



5th June 2019  
Fair Work Commission  
Terrace Tower  
80 William Street  
East Sydney NSW 2000

Dear Award Modernisation Team

Re: Four Yearly Review of Modern Awards – Award Stage – Group 4 Awards – Substantive Issues – General Retail Industry Award 2010 – AM2017/60

Please find attached my report responding to the request from A. J Macken and Co of 27<sup>th</sup> May 2019 to address the following:

- “(i) What are the total number of employees engaged in the general retail industry?  
(ii) What number of employees engaged in the general retail industry are under 21 years?; and  
(iii) In respect of the number of junior employees identified by you in .... (ii) above, what percentage of that employee cohort would be employed in classifications higher than Level 1?”

It should be noted that I have read the Harmonised Expert Witness Code of Conduct and agree to be bound by it. The opinions expressed in this report are based wholly or substantially on specialised knowledge arising from my training, study or experience. I have included a detailed curriculum vitae, setting out my expertise, in addition to the original letter of instruction from A. J. Macken and Co.

Kind Regards



Dr Martin O'Brien  
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MBA Director  
Director of Centre for Human and Social Capital Research (CHSCR)  
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## Brief Summary

The purpose of this report is to address the following request:

Provide the SDA with a written report using available and relevant data containing your expert opinion in relation to the following questions:

- (i) What are the total number of employees engaged in the general retail industry?
- (ii) What number of employees engaged in the general retail industry are under 21 years?; and
- (iii) In respect of the number of junior employees identified by you in ... (ii) above, what percentage of that employee cohort would be employed in classifications higher than Level 1?

In order to address these questions, a survey of available labour force data sources identified Australian Bureau of Statistics (ABS) Census data as the only suitable data set to answer these questions. Using data from the 2016 Census it was determined that:

- the total number of employees in the general retail industry was 774,675.
- the number of employees in the general retail industry under 21 years was 160,848.
- of these junior employees, 17,244 or 11%, were determined to be employed in classifications higher than Level 1.



## Glossary of Terms

ABS	Australian Bureau of Statistics
ANZSCO	Australian and New Zealand Standard Classification of Occupations
ANZSCO Unit Group	4 digit ANZSCO category
ANZSIC	Australian and New Zealand Standard Industry Classification
ANZSIC Class	4 digit ANZSIC category
AWRS	Australian Workplace Relations Survey
Census	ABS Census of Population and Housing
General Retail Industry	Employees covered by the General Retail Industry Award 2010
HILDA	Household Income and Labour Dynamics Australia
n.e.c.	Not elsewhere classified
n.f.d.	Not further defined
Retail Trade	Employees covered by Retail Trade ANZSIC Division G





## Full Report

### Data Source

1. The first step in addressing the research questions was to survey potential data sources. If the questions had simply referred to calculating employment estimates for the retail industry or retail trade, Australian and New Zealand Standard Industry Classification (ANZSIC) Division G Retail Trade data could have been used (ABS 2006a). This ANZSIC division data is widely available in the Household Income and Labour Dynamics Australia (HILDA) survey, the Australian Workplace Relations Survey (AWRS) and numerous ABS labour surveys. In contrast, the General Retail Industry, being the industry relevant to this report, is not reported in any publicly available survey.
2. Fortunately, the General Retail Industry can be constructed manually from ABS ANZSIC data. The Fair Work Commission publish the ANZSIC classes<sup>1</sup> relevant to each modern award on their website (Fair Work Commission nd).<sup>2</sup> The General Retail Industry, being the relevant industry for those covered by the General Retail Industry Award 2010, differs from the ANZSIC Retail Trade Division in a number of ways. The two main differences are as follows:
3. First, the General Retail Industry excludes Motor Vehicle and Motor Vehicle Parts Retailing, and Fuel Retailing, comprising ANZSIC Retail Trade Subdivisions 39 and 40, respectively. However, it also includes a number of ANZSIC classes located outside of the ANZSIC Retail Trade Division. Namely, Video and Other Electronic Media Rental Hiring (class 6632), Other Goods and Equipment Rental and Hiring n.e.c. (class 6639), Travel Agency and Tour Arrangement Services (class 7220), Domestic Appliance Repair and Maintenance (class 9421), Other Repair and Maintenance (class 9499), and Photographic Film Processing (class 9532). Unfortunately, most available surveys do not report this 4 digit ANZSIC class data as the sample sizes used in most surveys are not large enough to produce accurate estimates at this detailed level.

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<sup>1</sup> ANZSIC *classes* are detailed industry descriptions reported at the 4 digit level.

<sup>2</sup> The Fair Work Commission ANZSIC class mapping document for the General Retail Industry Award is reproduced in Appendix 1.



4. Second, the General Retail Industry explicitly excludes *clerks*. It also excludes employees covered by the Fast Food Industry Award 2010, the Meat Industry Award 2010, the Hair and Beauty Award 2010, and the Pharmacy Award 2010, all of whom may be reported within the ANZSIC Retail Trade Division. To make these exclusions requires the availability of 4 digit Australia and New Zealand Standard Classification of Occupations (ANZSCO) *unit group* occupation data (ABS 2006b). As with industry data, occupation unit group data is generally not reported at this detailed level.
5. The choice of an appropriate data source is further complicated by the need to disaggregate the level of pay, specifically to exclude junior employees paid at Level 1 (research question iii). Fortunately, the Fair Work Ombudsman publishes job descriptions of all Awards and pay levels (Fair Work Ombudsman nd). While the Fair Work Ombudsman job descriptions do not line up exactly with definitions used by ANZSCO, 4 digit occupation unit group data may be used to proxy the ANZSCO occupations reflected by the Fair Work Ombudsman job descriptions.
6. The need to use both 4 digit ANZSIC class and ANZSCO unit group data to determine the size of the employee population in the General Retail Industry, as well as to isolate junior employees classified above Level 1, necessitates the use of Census data. Data at the 4 digit level is available for both industry and occupation and can be extracted from the most recent 2016 Census using the ABS Census Tablebuilder product (ABS nd).

## Method

7. In order to construct employment figures for the General Retail Industry the first step is to follow Fair Work Commission ANZSIC mapping instructions (Fair Work Commission nd). As such, we ignore the Motor Vehicle and Motor Vehicle Parts Retailing, and Fuel Retailing subdivisions in the Retail Trade ANZSIC Division, and only include Food Retailing (sub-division 41), Other Store-Based Retailing (sub-division 42), and Non-Store Retailing and Commission-Based Buying and/or Selling (sub-division 43). Added to these Retail Trade sub-divisions are various ANZSIC (4 digit) classes as described in paragraph 3 (and Appendix 1).
8. Next, further exclusions are applied as specified by the Fair Work Commission ANZSIC Mapping instructions as described in paragraph 4 (and Appendix 1). Namely, removal of 4





digit ANZSCO unit groups associated with the Fast Food Industry Award, Meat Industry Award, Hair and Beauty Industry Award, and Pharmacy Industry Award. Finally, 4 digit ANZSCO unit groups with “clerk” in their descriptions are removed.

9. In order to answer questions (ii) and (iii) we require data on juniors age groups. Fortunately, the Census contains data for each individual year of age. As such, we are able to compile employee totals in the General Retail Industry for those aged 15 to 20 years.
10. In order to address question (iii) is to exclude juniors paid at Level 1. The Fair Work Ombudsman provides a list of job descriptions that encompass each level of pay within awards (Fair Work Ombudsman nd). Again, 4 digit ANZSCO data is required to identify and then remove Level 1 employees from our calculations. Unfortunately, the job descriptions provided by the Fair Work Ombudsman do not line up exactly with ANZSCO descriptions. Therefore, a level of judgement is required in this process. A summary of General Retail Award Level 1 job descriptions and ANZSCO occupations judged as encompassing these descriptions is provided in Table 1.
11. Finally, it should be noted that the following analysis is restricted to employees only.<sup>3</sup>

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<sup>3</sup> That is, excluding owner managers of incorporated and unincorporated enterprises, and contributing family members.





Table 1. Mapping Fair Work Ombudsman General Retail Industry Award Level 1 Job Descriptions to ABS ANZSCO Unit Groups

Fair Work Ombudsman Level 1 Description <sup>4</sup>	ANZSCO Unit Group (4 digit) <sup>5</sup>
An employee performing one or more tasks at a Retail establishment: Preparation for ale and or display of goods in or about any shop Pre-packing or packing, weighing, assembling, pricing or preparing of goods or provisions or produce for sale Display, shelf filling, presentation for sale of goods Sale / hire of goods Arranging payment Recording of sales Wrapping/packing of goods for dispatch Delivery of goods Window dressing/merchandising Demonstration of goods for sale Indicative job titles which are usually Within the definition of a Retail Employee Level 1 are: Shop Assistant	Food Preparation assistants n.f.d. Packers, Product Assemblers Shelf Fillers Sales Assistants Checkout Operators and Office Cashiers Sales Assistants Packers Delivery Drivers Visual Merchandisers Models and Sales Demonstrators
Clerical Assistant Check-out Operator Store Worker Driver Assembler Ticket writer Telephone Order Salesperson	Sales Assistants and Salespersons n.f.d., Sales Assistants (General), Other Sales Assistants and Salespersons, Miscellaneous Sales Support Workers n.f.d. Other Clerical and Office Support Checkout Operators and Office Cashiers Storeperson Delivery Driver Product Assemblers Ticket Salesperson Telemarketer

<sup>4</sup> Fair Work Ombudsman (nd)

<sup>5</sup> ABS (2006b)



**Question (i)**

12. All individual calculation components for total employees in the General Retail Industry are presented in Table 2, with a summary presented below. Employee totals in the award and clerk columns are subtracted from the first column total to arrive at a total of 774,675 employees for the General Retail Industry. That is,

847,995	Column 1
- 474	Column 2
- 941	Column 3
- 1,189	Column 4
- 43,741	Column 5
- 26,975	Column 6
<hr/>	
= 774,675	

**Question (ii)**

13. The detailed components for the calculation of employees aged under 21 years, or junior, employees is presented in Table 3, with a summary presented below. A total of 168,848 employees under the age of 21 years were employed in the General Retail Industry using the same calculation as that above to remove clerks and those employed in awards not associated with the General Retail Industry,

172,275	Column 1
- 171	Column 2
- 79	Column 3
- 163	Column 4
- 9,804	Column 5
- 1,210	Column 6
<hr/>	
= 160,848	



14. An individual age breakdown of the number of junior employees in the General Retail Industry is:

15 years 11,625

16 years 21,618

17 years 27,154

18 years 31,635

19 years 34,042

20 years 34,774

**Question (iii)**

15. To determine the percentage of the above General Retail Industry junior employee cohort that are employed in classifications higher than Level 1, we remove the occupations associated with Level 1 employment from the total junior employee number presented in paragraph 13. The individual occupations and junior employee numbers for each occupation linked to Level 1 employment are reported in Column 7 of Table 3. A total of 143,604 junior employees were determined to be in occupations associated with Level 1 employment.

16. The largest contributors to Level 1 total were Sales Assistants (General) and Check Out Operators. While the term “Check-out Operator” used by the Fair Work Ombudsman lines up clearly with “Checkout Operator and Office Cashier” used in ANZSCO, there is an element of judgement allocating the ANZSCO classification of “Sales Assistants (General)” to the Level 1 description of “Shop Assistant”. The rationale is based on The Fair Work Ombudsman wording that a General Retail Industry Level 1 worker would perform “sale / hire of goods”, “packing of goods”, “display ... presentation for sale of goods”, “provision of information and assistance to customers”, and “recording sales” as part of their functions at a retail establishment (Fair Work Ombudsman nd).

17. In comparison, the description of tasks performed by the ANZSCO Sales Assistant (General) unit group are:

“determining customer requirements and advising on product range, price, delivery, warranties and product use and care

- demonstrating and explaining to customers the establishment's goods and services

- selling food, beverages, clothing, footwear and other personal and household goods and services





- accepting payment for goods and services by a variety of payment methods and preparing sales invoices
- assisting with the ongoing management of stock such as product inventories and participating in stocktakes
- stacking and displaying goods for sale, and wrapping and packing goods sold”  
ABS (2006b, p624)

18. Notably, the word “sales” is not mentioned anywhere in relation to General Retail Industry Level 2 employment. To reach Level 3 a worker is expected to provide “supervisory assistance”, “opening and closing of premises” or “security of cash”, and is associated with a job title of “senior” salesperson or sales assistant. Likewise, Level 4 is associated with descriptive terms such as “manage”, “supervise”, “buying / ordering” or utilising “trade qualifications”. Therefore, the judgement was made that ANZSCO Sales Assistant (General) is most consistent with description of General Retail Industry Level 1 only, and as such subtracted from the junior employee total for research question (iii).

19. Subtracting all 143,604 junior employees in ANZSCO occupation unit groups associated with General Retail Industry Level 1 employment from the total junior employee count of 160,848 results in an estimate of 17,244 junior employees classified as higher than Level 1 in the General Retail Industry. This translates to a percentage of 11% of junior employment in this industry.

20. An individual age breakdown of the number of junior employees in the General Retail Industry classified higher than Level 1 is:

15 years 808

16 years 1,548

17 years 1,947

18 years 3,108

19 years 4,365

20 years 5,468

I have made all the inquiries that I believe are desirable and appropriate (save for any matters identified in my Report) and that no matters of significance that I regard as relevant have, to my knowledge, been withheld from the Commission.




Table 2. Summary of the Calculation of Total Employees in General Retail Industry (Number of Employees in Brackets)

1. ANZSIC Sub-Divisions and Classes included	2. Fast Food Industry Award	3. Meat Industry Award	4. Hair and Beauty Industry Award	5. Pharmacy Award	6. Clerks
Food Retailing (318,492)	Fast Food Cooks (474)	Meat Boners and Slicers, and Slaughterers (312)	Hairdressers (687)	Pharmacists (12,557)	General Clerks (6,464)
Other Store-Based Retailing (479,310)		Meat, Poultry and Seafood Process Workers (629)	Beauty Therapists (502)	Pharmacy Assistants (31,184)	Inquiry Clerks n.f.d. (8)
Non-Store Retailing and Retail Commission-Based Buying and/or Selling (5,179)					Call or Contact Centre Information Clerks n.f.d. (11)
Video and Other Electronic Media Rental (1,228)					Numerical Clerks n.f.d. (25)
Other Goods and Equipment Rental (7,832)					Accounting Clerks and Bookkeepers n.f.d. (18)
Travel Agency and Tour Arrangement Services (28,326)					Accounting Clerks (5,050)
Domestic Appliance Repair and Maintenance (5,810)					Payroll Clerks (1,911)
Other Repair and Maintenance n.e.c. (2,264)					Financial and Insurance Clerks nfd (10)
Photographic Film Processing (531)					Insurance, Money Market and Statistical Clerks (57)
					Filing and Registry Clerks (140)
					Logistics Clerks nfd (217)
					Purchasing and Supply Logistics Clerks (11,313)
					Transport and Despatch Clerks (1,498)
					Court and Legal Clerks (26)
					Human Resource Clerks (227)
Total 847,995	Total 474	Total 941	Total 1,189	Total 43,741	Total 26,975



Table 3. Summary of the Calculation of Employees Aged Under 21 Years, and Those Paid at Level 1, in General Retail Industry (Number of Employees in Brackets)

1. ANZSIC Sub-Divisions and Classes included	2. Fast Food Industry Award	3. Meat Industry Award	4. Hair and Beauty Industry Award	5. Pharmacy Award	6. Clerks	7. Level 1
Food Retailing (79,273)	Fast Food Cooks (171)	Meat Boners and Slicers, and Slaughturers (28)	Hairdressers (117)	Pharmacists (265)	General Clerks (328)	Other Clerical and Office Support Workers (75)
Other Store-Based Retailing (90,657)		Meat, Poultry and Seafood Workers (51)	Beauty Therapists (46)	Pharmacy Sales Assistants (9,539)	Inquiry Clerks n.f.d. (0)	Sales Assistants and Salesperson n.f.d. (89)
Non-Store Retailing and Retail Commission-Based Buying and/or Selling (239)					Call or Contact Centre Information Clerks n.f.d. (0)	Sales Assistants (General) (89,681)
Video and Other Electronic Media Rental (501)					Numerical Clerks n.f.d. (0)	Other Sales Assistants and Salespersons (457)
Other Goods and Equipment Rental (407)					Accounting Clerks and Bookkeepers n.f.d. (0)	Checkout Operators and Office Cashiers (34,190)
Travel Agency and Tour Arrangement Services (607)					Accounting Clerks (84)	Miscellaneous Sales Support Workers n.f.d. (0)
Domestic Appliance Repair and Maintenance (419)					Payroll Clerks (6)	Models and Sales Demonstrators (159)
Other Repair and Maintenance n.e.c. (154)					Financial and Insurance Clerks nfd (0)	Telemarketers (70)
Photographic Film Processing (18)					Insurance, Money Market and Statistical Clerks (0)	Ticket Salespersons (41)
					Filing and Registry Clerks (18)	Visual Merchandisers (131)
					Logistics Clerks nfd (10)	Delivery Drivers (221)
					Purchasing and Supply Logistics Clerks (692)	Storepersons (2,972)
					Transport and Dispatch Clerks (62)	Packers (1,124)
					Court and Legal Clerks	Product Assemblers



						(0) Human Resource Clerks (10)	(21) Food Preparation Assistants n.f.d. (20)
							Shelf Fillers (14,353)
Total	Total 171	Total 79	Total 163	Total 9,804	Total 1,210	Total 143,604	
172,275							



UNIVERSITY  
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AUSTRALIA

## References

ABS (2006a) *Australian and New Zealand Standard Industrial Classification*, ABS Catalogue Number 1292.0.

ABS (2006b) *Australian and New Zealand Standard Classification of Occupations*, ABS Catalogue Number 1220.0.

ABS (nd) Tablebuilder, available at:  
<https://www.abs.gov.au/websitedbs/D3310114.nsf/Home/2016%20TableBuilder>

Fair Work Ombudsman (nd) *Pay Calculator*, available at:  
<https://calculate.fairwork.gov.au/FindYourAward>

Fair Work Commission (nd) *Spreadsheets with modern awards & relevant ANZSIC classes listed*, available at:

<https://www.fwc.gov.au/awards-and-agreements/minimum-wages-conditions/annual-wage-reviews/previous-wage-reviews/annual-w-27>



APPENDIX 1 General Industry Award ANZSIC Class Mapping Document  
General Retail Industry Award 2010 [MA000004]

**List of ANZSIC classes where this award is the:**

Primary Modern Award	Secondary Modern Award	Specific Exclusion
<u>9421 - Domestic Appliance Repair and Maintenance</u>	<u>6932 - Accounting Services</u>	4.1 ... The award does not cover employers covered by the following awards:  the Fast Food Industry Award 2010; the Meat Industry Award 2010; the Hair and Beauty Industry Award 2010; or the Pharmacy Industry Award 2010. This award excludes clerks
<u>6632 - Video and Other Electronic Media Rental and Hiring</u> <u>6639 Other Goods and Equipment Rental and Hiring n.e.c</u>	<u>6991 - Professional Photographic Services</u>  <u>4511 - Cafes and Restaurants</u>	general retail industry 'does not include: ... • clerical functions performed away from the retail establishment; ... • fast food operations; • restaurants, cafes, hotels and motels'  The award does not cover employers covered by the following awards: • the Fast Food Industry Award 2010; • the Meat Industry Award 2010; • the Hair and Beauty Industry Award 2010; or • the Pharmacy Industry Award 2010.
<u>7220 Travel Agency and Tour Arrangement Services</u>	<u>7212 Labour Supply Services</u>	





<a href="#">9499 - Other Repair and Maintenance NEC</a>	<a href="#">7291 Office Administrative Services</a>
<a href="#">9532 - Photographic Film Processing</a>	<a href="#">7292 Document Preparation Services</a>
<a href="#">4110 Supermarket and Grocery Stores</a>	<a href="#">7311 - Building and Other Industrial Cleaning Services</a>
<a href="#">4121 Fresh Meat, Fish and Poultry Retailing</a>	<a href="#">1174 - Bakery Product Manufacturing (Non-Factory Based)</a>
<a href="#">4122 Fruit and Vegetable Retailing</a>	<a href="#">7320 Packaging Services</a>
<a href="#">4129 Other Specialised Food Retailing</a>	<a href="#">7712 - Investigation and Security Services</a>
<a href="#">4211 Furniture Retailing</a>	<a href="#">4123 Liquor Retailing</a>
<a href="#">4213 Houseware retailing</a>	<a href="#">4212 Floor coverings retailing</a>
<a href="#">4214/ Manchester and Other Textile Goods retailing</a>	<a href="#">4271 Pharmaceutical, Cosmetic and Toiletry Goods Retailing</a>
<a href="#">4221 Electrical, Electronic and Gas Appliance retailing</a>	<a href="#">4310 Non-store Retailing</a>
<a href="#">4222 Computer and computer peripheral retailing</a>	<a href="#">4320 Retail Commission-Based Buying and/or Selling</a>
<a href="#">4229 Other electrical and electronic goods retailing</a>	<a href="#">4232 Garden supplies retailing</a>
<a href="#">4231 Hardware, building and garden supplies retailing</a>	
<a href="#">4241 Sport and camping equipment goods retailing</a>	
<a href="#">4242 - Entertainment Media retailing</a>	
<a href="#">4243 Toy and game retailing</a>	
<a href="#">4244 Newspaper and Book Retailing</a>	
<a href="#">4245 Marine Equipment Retailing</a>	
<a href="#">4251 Clothing Retailing</a>	
<a href="#">4252 Footwear Retailing</a>	
<a href="#">4253 Watch and Jewellery Retailing</a>	
<a href="#">4259 Other Personal Accessory Retailing</a>	
<a href="#">4260 Department Stores</a>	
<a href="#">4272 Stationary Good Retailing</a>	
<a href="#">4273 Antique and Used Goods Retailing</a>	
<a href="#">4274 Flower Retailing</a>	
<a href="#">4279 Other Store-Based Retailing n.e.c</a>	
<a href="#">4110 Supermarket and Grocery Stores</a>	

Source: Fair Work Commission (nd)



# A. J. MACKEN & CO.

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27 May 2019

**Dr Martin O'Brien**

School of Economics and Information Systems  
University of Wollongong

By email: [martinob@uow.edu.au](mailto:martinob@uow.edu.au)

### Privileged and Confidential

Dear Dr O'Brien

### Fair Work Commission – Four Yearly Review of Modern Awards – Award Stage – Group 4 Awards – Substantive Issues – General Retail Industry Award 2010 – AM2017/60

As you would aware, the Fair Work Commission is continuing to conduct its review of the General Retail Industry Award 2010 (the **Award**) that governs the employment of workers in the general retail industry. The Shop, Distributive and Allied Employees Association (the **SDA**) represents workers in the industry. We act for the SDA in the above regard.

As part of its continuing review, the Commission is shortly to consider a range of substantive issues arising in relation to the current operation of the Award.

The SDA is seeking to vary clause 18 of the Award to limit its application to junior employees to circumstances in which those junior employees are engaged as Level 1 employees only. In other words, where a junior employee presently receives the specified percentage of the appropriate adult wage rate regardless of whether or not the junior employee is employed in higher work classifications than the Level 1 work classification, those junior employees will, if the SDA's application is successful, be entitled to be the full adult wage rate.

We enclose clause 18 of the Award for your consideration. You will note that it provides for junior employees to be paid a sliding percentage of the full adult wage rate culminating in junior employees 20 years or more of age receiving the full adult wage rate provided that they have been employed for more than 6 months.



The wages rates provided for in clause 18 apply regardless of whether or not the particular junior employee is performing Level 1 duties or equivalent or some higher Award classification duties or their equivalent.

### Engagement

We wish to engage you to:

- (a) Provide the SDA with a written report using available and relevant data containing your expert opinion in relation to following questions:
  - (i) What are the total number of employees engaged in the general retail industry?
  - (ii) What number of employees engaged in the general retail industry are under 21 years?; and
  - (ii) In respect of the number of junior employees identified by you in (a)(ii) above, what percentage of that employee cohort would be employed in classifications higher than Level 1?;
- (b) give evidence at the hearing of the review. The present expectation is that the matter will be heard on 7 and 8 October 2019.

### Duty

You are engaged by the SDA to assist the Fair Work Commission by providing your expert opinion in accordance with the terms of this and any other letter of instruction. Your overriding duty is to assist the Commission. You are not an advocate for the SDA.

Enclosed with this letter is a copy of the Federal Court of Australia's *Expert Evidence Practice Note (GPN-EXPT)* including the *Harmonised Expert Witness Code of Conduct* which is Annexure A to that Practice Note. Although you are not formally bound by the *Practice Note*, as a matter of proper practice we intend to adopt the terms of the *Practice Note* when engaging expert witnesses before the Commission. Please read the *Practice Note* carefully.

### Your Opinion

#### *Relevant Information and Assumptions*

Where we use the term 'Retail Industry' we mean that industry covered by the General Retail Industry Award 2010 and relates to ABS Division G, Retail Trade.

In providing your response to the questions posed above, please ensure you have considered and addressed the matters set out in the Federal Court Practice Note, in particular, sections 2-3 of the Harmonised Code.

### Form of Your Report

Your role is to assist the Commission by providing your expert opinion in accordance with this letter of instruction. Please address your report to the Fair Work Commission.

In order to ensure your report can be used easily at the hearing of this matter, we ask that you include the following matters in the report:

- (a) a brief summary of your opinion or opinions at the beginning of the report;





- (b) a glossary of any specialised terminology;
- (c) references to any literature or other materials cited in support of your opinions. Please use a uniform citation method throughout the report. If you use parenthetical referencing (Chicago-style citation), please provide pinpoint citations where applicable;
- (d) a bibliography;
- (e) numbered paragraphs, page numbers, and headings where appropriate; and
- (f) margins of at least 2.5 centimetres, and line spacing of at least 1.5 points, with 12 points between paragraphs, and a uniform font.

Please annexe to your report:

- (g) a detailed curriculum vitae, setting out the study, training, and experience that establishes your expertise in relation to the issues raised by these instructions; and
- (h) this letter of instruction.

At the conclusion of your report, please include a declaration to the following effect:

*I have made all the inquiries that I believe are desirable and appropriate (save for any matters identified explicitly in my Report and that no matters of significance that I regard as relevant have, to my knowledge, been withheld from the Commission.*

### **Timing**

The SDA is required to file evidence and submissions in support of its claims on or before 4.00pm on Friday, 31 May 2019. So that we may write submissions about your report, we will require your report by 30 May 2019.

### **Communications**

Please note that all communications between you, A J Macken & Co, and the SDA can, on request, be provided to the employer parties and the Commission. If you have any queries, please do not hesitate to contact Mr Dominic Macken on (03) 9614 4899.

Yours faithfully,



**A J MACKEN & CO.**

## 18. Junior rates

[18 substituted by PR549436 ppc 01Jul14]

18.1 Junior employees will be paid the following percentage of the appropriate wage rate in clause 17 from the first pay period commencing on or after 1 July 2014:

Age	% of weekly rate of pay
Under 16 years of age	45
16 years of age	50
17 years of age	60
18 years of age	70
19 years of age	80
20 years of age, employed by the employer for 6 months or less	90
20 years of age, employed by the employer for more than 6 months	95

18.2 Junior employees will be paid the following percentage of the appropriate wage rate in clause 17 from the first pay period commencing on or after 1 July 2015:

Age	% of weekly rate of pay
Under 16 years of age	45
16 years of age	50
17 years of age	60
18 years of age	70
19 years of age	80
20 years of age, employed by the employer for 6 months or less	90
20 years of age, employed by the employer for more than 6 months	100



# Expert Evidence Practice Note (GPN-EXPT)

J L B Allsop, Chief Justice 25 October 2016

## General Practice Note

### 1. Introduction

1.1 This practice note, including the *Harmonised Expert Witness Code of Conduct* ("Code") (see [Annexure A](#)) and the *Concurrent Expert Evidence Guidelines* ("Concurrent Evidence Guidelines") (see [Annexure B](#)), applies to any proceeding involving the use of expert evidence and must be read together with:

- (a) the [Central Practice Note \(CPN-1\)](#), which sets out the fundamental principles concerning the National Court Framework ("NCF") of the Federal Court and key principles of case management procedure;
- (b) the [Federal Court of Australia Act 1976 \(Cth\)](#) ("Federal Court Act");
- (c) the [Evidence Act 1995 \(Cth\)](#) ("Evidence Act"), including Part 3.3 of the Evidence Act;
- (d) Part 23 of the [Federal Court Rules 2011 \(Cth\)](#) ("Federal Court Rules"); and
- (e) where applicable, the [Survey Evidence Practice Note \(GPN-SURV\)](#).

1.2 This practice note takes effect from the date it is issued and, to the extent practicable, applies to proceedings whether filed before, or after, the date of issuing.

### 2. Approach to Expert Evidence

2.1 An expert witness may be retained to give opinion evidence in the proceeding, or, in certain circumstances, to express an opinion that may be relied upon in alternative dispute resolution procedures such as mediation or a conference of experts. In some circumstances an expert may be appointed as an independent adviser to the Court.

2.2 The purpose of the use of expert evidence in proceedings, often in relation to complex subject matter, is for the Court to receive the benefit of the objective and impartial assessment of an issue from a witness with specialised knowledge (based on training, study or experience - see generally s 79 of the [Evidence Act](#)).

2.3 However, the use or admissibility of expert evidence remains subject to the overriding requirements that:

- (a) to be admissible in a proceeding, any such evidence must be relevant (s 56 of the [Evidence Act](#));  
and
- (b) even if relevant, any such evidence, may be refused to be admitted by the Court if its probative value is outweighed by other considerations such as the evidence being unfairly prejudicial, misleading or will result in an undue waste of time (s 135 of the [Evidence Act](#)).

2.4 An expert witness' opinion evidence may have little or no value unless the assumptions adopted by the expert (ie. the facts or grounds relied upon) and his or her reasoning are expressly stated in any written report or oral evidence given.



2.5 The Court will ensure that, in the interests of justice, parties are given a reasonable opportunity to adduce and test relevant expert opinion evidence. However, the Court expects parties and any legal representatives acting on their behalf, when dealing with expert witnesses and expert evidence, to at all times comply with their duties associated with the overarching purpose in the Federal Court Act (see ss 37M and 37N).

### 3. Interaction with Expert Witnesses

3.1 Parties and their legal representatives should never view an expert witness retained (or partly retained) by them as that party's advocate or "hired gun". Equally, they should never attempt to pressure or influence an expert into conforming his or her views with the party's interests.

3.2 A party or legal representative should be cautious not to have inappropriate communications when retaining or instructing an independent expert, or assisting an independent expert in the preparation of his or her evidence. However, it is important to note that there is no principle of law or practice and there is nothing in this practice note that obliges a party to embark on the costly task of engaging a "consulting expert" in order to avoid "contamination" of the expert who will give evidence. Indeed the Court would generally discourage such costly duplication.

3.3 Any witness retained by a party for the purpose of preparing a report or giving evidence in a proceeding as to an opinion held by the witness that is wholly or substantially based in the specialised knowledge of the witness<sup>[1]</sup> should, at the earliest opportunity, be provided with:

(a) a copy of this practice note, including the Code (see Annexure A); and

(b) all relevant information (whether helpful or harmful to that party's case) so as to enable the expert to prepare a report of a truly independent nature.

3.4 Any questions or assumptions provided to an expert should be provided in an unbiased manner and in such a way that the expert is not confined to addressing selective, irrelevant or immaterial issues.

### 4. Role and Duties of the Expert Witness

4.1 The role of the expert witness is to provide relevant and impartial evidence in his or her area of expertise. An expert should never mislead the Court or become an advocate for the cause of the party that has retained the expert.

4.2 It should be emphasised that there is nothing inherently wrong with experts disagreeing or failing to reach the same conclusion. The Court will, with the assistance of the evidence of the experts, reach its own conclusion.

4.3 However, experts should willingly be prepared to change their opinion or make concessions when it is necessary or appropriate to do so, even if doing so would be contrary to any previously held or expressed view of that expert.

#### Harmonised Expert Witness Code of Conduct

4.4 Every expert witness giving evidence in this Court must read the *Harmonised Expert Witness Code of Conduct* (attached in Annexure A) and agree to be bound by it.

4.5 The Code is not intended to address all aspects of an expert witness' duties, but is intended to facilitate the admission of opinion evidence, and to assist experts to understand in general terms what the Court expects of them. Additionally, it is expected that compliance with the Code will assist individual expert witnesses to avoid criticism (rightly or wrongly) that they lack objectivity or are partisan.

### 5. Contents of an Expert's Report and Related Material

5.1 The contents of an expert's report must conform with the requirements set out in the Code (including clauses 3 to 5 of the Code).

5.2 In addition, the contents of such a report must also comply with r 23.13 of the Federal Court Rules. Given that the requirements of that rule significantly overlap with the requirements in the Code, an expert, unless otherwise directed by the Court, will be taken to have complied with the requirements of r 23.13 if that expert

has complied with the requirements in the Code and has complied with the additional following requirements. The expert shall:

- (a) acknowledge in the report that:
  - (i) the expert has read and complied with this practice note and agrees to be bound by it; and
  - (ii) the expert's opinions are based wholly or substantially on specialised knowledge arising from the expert's training, study or experience;
- (b) identify in the report the questions that the expert was asked to address;
- (c) sign the report and attach or exhibit to it copies of:
  - (i) documents that record any instructions given to the expert; and
  - (ii) documents and other materials that the expert has been instructed to consider.

5.3 Where an expert's report refers to photographs, plans, calculations, analyses, measurements, survey reports or other extrinsic matter, these must be provided to the other parties at the same time as the expert's report.

## 6. Case Management Considerations

6.1 Parties intending to rely on expert evidence at trial are expected to consider between them and inform the Court at the earliest opportunity of their views on the following:

- (a) whether a party should adduce evidence from more than one expert in any single discipline;
- (b) whether a common expert is appropriate for all or any part of the evidence;
- (c) the nature and extent of expert reports, including any in reply;
- (d) the identity of each expert witness that a party intends to call, their area(s) of expertise and availability during the proposed hearing;
- (e) the issues that it is proposed each expert will address;
- (f) the arrangements for a conference of experts to prepare a joint-report (see Part 7 of this practice note);
- (g) whether the evidence is to be given concurrently and, if so, how (see Part 8 of this practice note); and
- (h) whether any of the evidence in chief can be given orally.

6.2 It will often be desirable, before any expert is retained, for the parties to attempt to agree on the question or questions proposed to be the subject of expert evidence as well as the relevant facts and assumptions. The Court may make orders to that effect where it considers it appropriate to do so.

## 7. Conference of Experts and Joint-report



7.1 Parties, their legal representatives and experts should be familiar with aspects of the Code relating to conferences of experts and joint-reports (see clauses 6 and 7 of the Code attached in Annexure A).

7.2 In order to facilitate the proper understanding of issues arising in expert evidence and to manage expert evidence in accordance with the overarching purpose, the Court may require experts who are to give evidence or who have produced reports to meet for the purpose of identifying and addressing the issues not agreed between them with a view to reaching agreement where this is possible ("conference of experts"). In an appropriate case, the Court may appoint a registrar of the Court or some other suitably qualified person ("Conference Facilitator") to act as a facilitator at the conference of experts.

7.3 It is expected that where expert evidence may be relied on in any proceeding, at the earliest opportunity, parties will discuss and then inform the Court whether a conference of experts and/or a joint-report by the experts may be desirable to assist with or simplify the giving of expert evidence in the proceeding. The parties should discuss the necessary arrangements for any conference and/or joint-report. The arrangements discussed between the parties should address:

- (a) who should prepare any joint-report;
- (b) whether a list of issues is needed to assist the experts in the conference and, if so, whether the Court, the parties or the experts should assist in preparing such a list;
- (c) the agenda for the conference of experts; and
- (d) arrangements for the provision, to the parties and the Court, of any joint-report or any other report as to the outcomes of the conference ("**conference report**").

#### Conference of Experts

7.4 The purpose of the conference of experts is for the experts to have a comprehensive discussion of issues relating to their field of expertise, with a view to identifying matters and issues in a proceeding about which the experts agree, partly agree or disagree and why. For this reason the conference is attended only by the experts and any Conference Facilitator. Unless the Court orders otherwise, the parties' lawyers will not attend the conference but will be provided with a copy of any conference report.

7.5 The Court may order that a conference of experts occur in a variety of circumstances, depending on the views of the judge and the parties and the needs of the case, including:

- (a) while a case is in mediation. When this occurs the Court may also order that the outcome of the conference or any document disclosing or summarising the experts' opinions be confidential to the parties while the mediation is occurring;
- (b) before the experts have reached a final opinion on a relevant question or the facts involved in a case. When this occurs the Court may order that the parties exchange draft expert reports and that a conference report be prepared for the use of the experts in finalising their reports;
- (c) after the experts' reports have been provided to the Court but before the hearing of the experts' evidence. When this occurs the Court may also order that a conference report be prepared (jointly or otherwise) to ensure the efficient hearing of the experts' evidence.

7.6 Subject to any other order or direction of the Court, the parties and their lawyers must not involve themselves in the conference of experts process. In particular, they must not seek to encourage an expert not to agree with another expert or otherwise seek to influence the outcome of the conference of experts. The experts should raise any queries they may have in relation to the process with the Conference Facilitator (if one has been appointed) or in accordance with a protocol agreed between the lawyers prior to the conference of experts taking place (if no Conference Facilitator has been appointed).



7.7 Any list of issues prepared for the consideration of the experts as part of the conference of experts process should be prepared using non-tendentious language.

7.8 The timing and location of the conference of experts will be decided by the judge or a registrar who will take into account the location and availability of the experts and the Court's case management timetable. The conference may take place at the Court and will usually be conducted in-person. However, if not considered a hindrance to the process, the conference may also be conducted with the assistance of visual or audio technology (such as via the internet, video link and/or by telephone).

7.9 Experts should prepare for a conference of experts by ensuring that they are familiar with all of the material upon which they base their opinions. Where expert reports in draft or final form have been exchanged prior to the conference, experts should attend the conference familiar with the reports of the other experts. Prior to the conference, experts should also consider where they believe the differences of opinion lie between them and what processes and discussions may assist to identify and refine those areas of difference.

#### Joint-report

7.10 At the conclusion of the conference of experts, unless the Court considers it unnecessary to do so, it is expected that the experts will have narrowed the issues in respect of which they agree, partly agree or disagree in a joint-report. The joint-report should be clear, plain and concise and should summarise the views of the experts on the identified issues, including a succinct explanation for any differences of opinion, and otherwise be structured in the manner requested by the judge or registrar.

7.11 In some cases (and most particularly in some native title cases), depending on the nature, volume and complexity of the expert evidence a judge may direct a registrar to draft part, or all, of a conference report. If so, the registrar will usually provide the draft conference report to the relevant experts and seek their confirmation that the conference report accurately reflects the opinions of the experts expressed at the conference. Once that confirmation has been received the registrar will finalise the conference report and provide it to the intended recipient(s).

## 8. Concurrent Expert Evidence

8.1 The Court may determine that it is appropriate, depending on the nature of the expert evidence and the proceeding generally, for experts to give some or all of their evidence concurrently at the final (or other) hearing.

8.2 Parties should familiarise themselves with the *Concurrent Expert Evidence Guidelines* (attached in [Annexure B](#)). The Concurrent Evidence Guidelines are not intended to be exhaustive but indicate the circumstances when the Court might consider it appropriate for concurrent expert evidence to take place, outline how that process may be undertaken, and assist experts to understand in general terms what the Court expects of them.

8.3 If an order is made for concurrent expert evidence to be given at a hearing, any expert to give such evidence should be provided with the Concurrent Evidence Guidelines well in advance of the hearing and should be familiar with those guidelines before giving evidence.

## 9. Further Practice Information and Resources

9.1 Further information regarding [Expert Evidence and Expert Witnesses](#) is available on the Court's website.

9.2 Further [information to assist litigants](#), including a range of helpful [guides](#), is also available on the Court's website. This information may be particularly helpful for litigants who are representing themselves.

J L B ALLSOP  
Chief Justice  
25 October 2016

### Annexure A

## Harmonised Expert Witness Code of Conduct<sup>[2]</sup>

### Application of Code

1. This Code of Conduct applies to any expert witness engaged or appointed:

- (a) to provide an expert's report for use as evidence in proceedings or proposed proceedings; or
- (b) to give opinion evidence in proceedings or proposed proceedings.

### **General Duties to the Court**

2. An expert witness is not an advocate for a party and has a paramount duty, overriding any duty to the party to the proceedings or other person retaining the expert witness, to assist the Court impartially on matters relevant to the area of expertise of the witness.

### **Content of Report**

3. Every report prepared by an expert witness for use in Court shall clearly state the opinion or opinions of the expert and shall state, specify or provide:

- (a) the name and address of the expert;
- (b) an acknowledgment that the expert has read this code and agrees to be bound by it;
- (c) the qualifications of the expert to prepare the report;
- (d) the assumptions and material facts on which each opinion expressed in the report is based [a letter of instructions may be annexed];
- (e) the reasons for and any literature or other materials utilised in support of such opinion;
- (f) (if applicable) that a particular question, issue or matter falls outside the expert's field of expertise;
- (g) any examinations, tests or other investigations on which the expert has relied, identifying the person who carried them out and that person's qualifications;
- (h) the extent to which any opinion which the expert has expressed involves the acceptance of another person's opinion, the identification of that other person and the opinion expressed by that other person;
- (i) a declaration that the expert has made all the inquiries which the expert believes are desirable and appropriate (save for any matters identified explicitly in the report), and that no matters of significance which the expert regards as relevant have, to the knowledge of the expert, been withheld from the Court;
- (j) any qualifications on an opinion expressed in the report without which the report is or may be incomplete or inaccurate;
- (k) whether any opinion expressed in the report is not a concluded opinion because of insufficient research or insufficient data or for any other reason; and
- (l) where the report is lengthy or complex, a brief summary of the report at the beginning of the report.

### **Supplementary Report Following Change of Opinion**



4. Where an expert witness has provided to a party (or that party's legal representative) a report for use in Court, and the expert thereafter changes his or her opinion on a material matter, the expert shall forthwith provide to the party (or that party's legal representative) a supplementary report which shall state, specify or provide the information referred to in paragraphs (a), (d), (e), (g), (h), (i), (j), (k) and (l) of clause 3 of this code and, if applicable, paragraph (f) of that clause.

5. In any subsequent report (whether prepared in accordance with clause 4 or not) the expert may refer to material contained in the earlier report without repeating it.

### Duty to Comply with the Court's Directions

6. If directed to do so by the Court, an expert witness shall:

(a) confer with any other expert witness;

(b) provide the Court with a joint-report specifying (as the case requires) matters agreed and matters not agreed and the reasons for the experts not agreeing; and

(c) abide in a timely way by any direction of the Court.

### Conference of Experts

7. Each expert witness shall:

(a) exercise his or her independent judgment in relation to every conference in which the expert participates pursuant to a direction of the Court and in relation to each report thereafter provided, and shall not act on any instruction or request to withhold or avoid agreement; and

(b) endeavour to reach agreement with the other expert witness (or witnesses) on any issue in dispute between them, or failing agreement, endeavour to identify and clarify the basis of disagreement on the issues which are in dispute.

## Annexure B

# Concurrent Expert Evidence Guidelines

### Application of the Court's Guidelines

1. The Court's Concurrent Expert Evidence Guidelines ("**Concurrent Evidence Guidelines**") are intended to inform parties, practitioners and experts of the Court's general approach to concurrent expert evidence, the circumstances in which the Court might consider expert witnesses giving evidence concurrently and, if so, the procedures by which their evidence may be taken.

### Objectives of Concurrent Expert Evidence Technique

2. The use of concurrent evidence for the giving of expert evidence at hearings as a case management technique<sup>[3]</sup> will be utilised by the Court in appropriate circumstances (see r 23.15 of the Federal Court Rules 2011 (Cth)). Not all cases will suit the process. For instance, in some patent cases, where the entire case revolves around conflicts within fields of expertise, concurrent evidence may not assist a judge. However, patent cases should not be excluded from concurrent expert evidence processes.

3. In many cases the use of concurrent expert evidence is a technique that can reduce the partisan or confrontational nature of conventional hearing processes and minimises the risk that experts become



"opposing experts" rather than independent experts assisting the Court. It can elicit more precise and accurate expert evidence with greater input and assistance from the experts themselves.

4. When properly and flexibly applied, with efficiency and discipline during the hearing process, the technique may also allow the experts to more effectively focus on the critical points of disagreement between them, identify or resolve those issues more quickly, and narrow the issues in dispute. This can also allow for the key evidence to be given at the same time (rather than being spread across many days of hearing); permit the judge to assess an expert more readily, whilst allowing each party a genuine opportunity to put and test expert evidence. This can reduce the chance of the experts, lawyers and the judge misunderstanding the opinions being expressed by the experts.

5. It is essential that such a process has the full cooperation and support of all of the individuals involved, including the experts and counsel involved in the questioning process. Without that cooperation and support the process may fail in its objectives and even hinder the case management process.

### Case Management

6. Parties should expect that, the Court will give careful consideration to whether concurrent evidence is appropriate in circumstances where there is more than one expert witness having the same expertise who is to give evidence on the same or related topics. Whether experts should give evidence concurrently is a matter for the Court, and will depend on the circumstances of each individual case, including the character of the proceeding, the nature of the expert evidence, and the views of the parties.

7. Although this consideration may take place at any time, including the commencement of the hearing, if not raised earlier, parties should raise the issue of concurrent evidence at the first appropriate case management hearing, and no later than any pre-trial case management hearing, so that orders can be made in advance, if necessary. To that end, prior to the hearing at which expert evidence may be given concurrently, parties and their lawyers should confer and give general consideration as to:

(a) the agenda;

(b) the order and manner in which questions will be asked; and

(c) whether cross-examination will take place within the context of the concurrent evidence or after its conclusion.

8. At the same time, and before any hearing date is fixed, the identity of all experts proposed to be called and their areas of expertise is to be notified to the Court by all parties.

9. The lack of any concurrent evidence orders does not mean that the Court will not consider using concurrent evidence without prior notice to the parties, if appropriate.

### Conference of Experts & Joint-report or List of Issues

10. The process of giving concurrent evidence at hearings may be assisted by the preparation of a joint-report or list of issues prepared as part of a conference of experts.

11. Parties should expect that, where concurrent evidence is appropriate, the Court may make orders requiring a conference of experts to take place or for documents such as a joint-report to be prepared to facilitate the concurrent expert evidence process at a hearing (see Part 7 of the Expert Evidence Practice Note).

### Procedure at Hearing

12. Concurrent expert evidence may be taken at any convenient time during the hearing, although it will often occur at the conclusion of both parties' lay evidence.

13. At the hearing itself, the way in which concurrent expert evidence is taken must be applied flexibly and having regard to the characteristics of the case and the nature of the evidence to be given.

14. Without intending to be prescriptive of the procedure, parties should expect that, when evidence is given by experts in concurrent session:



- (a) the judge will explain to the experts the procedure that will be followed and that the nature of the process may be different to their previous experiences of giving expert evidence;
- (b) the experts will be grouped and called to give evidence together in their respective fields of expertise;
- (c) the experts will take the oath or affirmation together, as appropriate;
- (d) the experts will sit together with convenient access to their materials for their ease of reference, either in the witness box or in some other location in the courtroom, including (if necessary) at the bar table;
- (e) each expert may be given the opportunity to provide a summary overview of their current opinions and explain what they consider to be the principal issues of disagreement between the experts, as they see them, in their own words;
- (f) the judge will guide the process by which evidence is given, including, where appropriate:
  - (i) using any joint-report or list of issues as a guide for all the experts to be asked questions by the judge and counsel, about each issue on an issue-by-issue basis;
  - (ii) ensuring that each expert is given an adequate opportunity to deal with each issue and the exposition given by other experts including, where considered appropriate, each expert asking questions of other experts or supplementing the evidence given by other experts;
  - (iii) inviting legal representatives to identify the topics upon which they will cross-examine;
  - (iv) ensuring that legal representatives have an adequate opportunity to ask all experts questions about each issue. Legal representatives may also seek responses or contributions from one or more experts in response to the evidence given by a different expert; and
  - (v) allowing the experts an opportunity to summarise their views at the end of the process where opinions may have been changed or clarifications are needed.

15. The fact that the experts may have been provided with a list of issues for consideration does not confine the scope of any cross-examination of any expert. The process of cross-examination remains subject to the overall control of the judge.

16. The concurrent session should allow for a sensible and orderly series of exchanges between expert and expert, and between expert and lawyer. Where appropriate, the judge may allow for more traditional cross-examination to be pursued by a legal representative on a particular issue exclusively with one expert. Where that occurs, other experts may be asked to comment on the evidence given.

17. Where any issue involves only one expert, the party wishing to ask questions about that issue should let the judge know in advance so that consideration can be given to whether arrangements should be made for that issue to be dealt with after the completion of the concurrent session. Otherwise, as far as practicable, questions (including in the form of cross-examination) will usually be dealt with in the concurrent session.

18. Throughout the concurrent evidence process the judge will ensure that the process is fair and effective (for the parties and the experts), balanced (including not permitting one expert to overwhelm or overshadow any other expert), and does not become a protracted or inefficient process.

- [1] Such a witness includes a "Court expert" as defined in r 23.01 of the Federal Court Rules. For the definition of "expert", "expert evidence" and "expert report" see the Dictionary, in Schedule 1 of the Federal Court Rules.
- [2] Approved by the Council of Chief Justices' Rules Harmonisation Committee
- [3] Also known as the "hot tub" or as "expert panels".



# **Dr Martin John O'Brien – Curriculum Vitae**

## **Personal Details**

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Phone: 0407 271267 (mob)  
02 42214701 (work)

## **Qualifications**

PhD in Economics University of Newcastle (2004) – Thesis entitled “Older Male Labour Force Participation: An Empirical Analysis”, awarded in the Discipline of Economics.

BCom (Hons – 1<sup>st</sup> class) University of Newcastle (1995)

BCom University of Newcastle (1994)

## **Employment Positions Held**

Associate Professor 2019 to present  
MBA Director 2018 to present  
Director Centre for Human and Social Capital Research 2017 to present

Senior Lecturer 2009 to 2018  
Head of Discipline 2014  
Head of School 2013  
Associate Head of School of Economics 2010 to 2012  
Head of Postgraduate Studies 2009 to 2010  
*School/Discipline of Economics*  
*Sydney Business School*

*University of Wollongong*

Lecturer 2004 to 2008

Director of Postgraduate Studies 2005 to 2008

*School of Economics*

*University of Wollongong*

Associate Lecturer 2002 to 2003

*School of Economics and Information Systems*

*University of Wollongong*

Casual/Part-time Lecturer and Tutor 1998, 2000 to 2002

*Department of Economics / School of Policy*

*University of Newcastle*

Statistical Analyst 1996-1997, 1999

APS level 6

*Australian Bureau of Statistics*

## **RESEARCH**

### **Research Interests**

The Australian labour market, financial market volatility, older worker employment issues, workplace redundancy, ageing society policy, welfare reform, youth employment issues, hidden unemployment, economic restructuring, applied econometrics.

### **Journal Articles**

O'Brien, M.J. and Verma, R. (2019) "How Do First Year Students Utilize Different Lecture Resources?", *Higher Education* 77(1), 155-172

Markey, R., McIvor, J., O'Brien, M.J., and Wright, C.F. (2019) "Reducing carbon emissions through employee participation in Australian organisations" *Industrial Relations Journal*, 50, 155-72.

O'Brien, M.J. and Burrows, S. (2019) "Assessing the Effectiveness of Regional Policy Responses to Mass Redundancies: The Case of the Illawarra Region, Australia", *Economic Papers*, 37, 270-86. (accepted 31/1/19 DOI: 10.1111/1759-3441.12244).

Van Phan, P. and O'Brien, M.J. (2019) "Multidimensional Wellbeing Inequality in a Developing Country: A case study of Vietnam", *Social Indicators Research* (accepted 15/3/19 DOI:10.1007/s11205-019-02104-0).

Valadkhani, A., Nguyen, J. and O'Brien, M.J. (2019) "Asymmetric responses of house prices to changes in the mortgage interest rate: evidence from the Australian capital cities", *Applied Economics*, (accepted 22/4/19 DOI: 10.1080/00036846.2019.1619026)

Arjomandi, A., Seufert, J., O'Brien, M.J., and Anwar, S. (2018) "Active Teaching Strategies and Student Engagement: A Comparison of Traditional and Non-traditional Business Students" *e-Journal of Business and Scholarship of Teaching*, (accepted 8/10/18)

O'Brien, M.J. and Burrows, S. (2018) "Recycling Older Steelworkers: Post-Redundancy Job Mobility Experiences of Workers from BlueScope Steel Port Kembla", *Australian Bulletin of Labour*, 43 (1), 21-44.

O'Brien, M.J. and Freund, K. (2018) "Lessons learned from introducing social media use in undergraduate economics research", *International Journal of Education and Development*, 14 (1), 4-16.

O'Brien, M.J., Markey, R. and Pol, E. (2018) "The Short Run Impact of Penalty Rate Cuts on Employment Outcomes in Retail and Hospitality Sectors in Australia", *Economic Papers*, 37, 170-86.

Van Phan, P., O'Brien, M.J., Mendolia, S., and Paloyo, A. (2017) "National pro-poor spending programmes and their effect on income inequality and poverty", *Applied Economics*, 49 (55), 5579-5590.

Burrows, S. and O'Brien, M.J. (2016) "Youth as a Reserve Army: Australia's Regional Unemployment Conundrum", *Labour and Industry*, 26 (2), 90-102.

Jayanthakumaran, K., Sangkaew, P. and O'Brien, M.J. (2013) "Trade liberalisation and manufacturing wage premiums: evidence from Thailand", *Journal of Asian Economics* 29 (December), 15-23.

Valadkhani, A., O'Brien, M. J. and Arjomandi, A. (2013) "Measuring efficiency and productivity changes in Iran's financial institutions using the Hicks-Moorsteen TFP index", *Research in International Business and Finance*, 40 (2014), 111-125.



Valadkhani, A., Arjomandi, A. and O'Brien, M. J. (2013) "Does the interest rate for business loans respond asymmetrically to changes in the cash rate?", *Applied Economics Letters*, 20 (9), 869-874.

Valadkhani, A., O'Brien, M. J. and Arjomandi, A. (2013) "Examining the nature of the relationship between Tapis crude oil and Singapore petrol prices", *International Journal of Global Energy Issues*, 36 (1), 27-41.

Karunanayake, I., Valadkhani, A., and O'Brien, M. J. (2012) "GDP Growth and the Interdependency of Volatility Spillovers", *Australasian Accounting Business and Finance Journal*, 6 (1), 83-96.

O'Brien, M. J. (2011) "Discouraged Older Male Workers and the Discouraged Worker Effect", *Australian Journal of Labour Economics*, 14 (3), 217-35.

O'Brien, M. J. (2011) "The Asymmetric Response of Older Male Labour Force Participation Rates to Pension Reform and Labour Market Variables", *Journal of Modern Accounting and Auditing*, 7 (4), 358-67.

O'Brien, M. J. (2010) "Older male labour force participation in OECD countries: pension reform and 'the reserve army of labour'", *International Labour Review*, 149 (3), 239-259.

Karunanayake, I., Valadkhani, A. & O'Brien, M. J. (2010). Financial crises and international stock market volatility transmission. *Australian Economic Papers*, 49 (3), 209-221.

O'Brien, M.J., Valadkhani, A., & Townsend, K. (2008) "The Australian Labour Market in 2007", *Journal of Industrial Relations*, 50 (3), 383-98.

O'Brien, M.J. (2007) "The Youth Labour Market in Australia and WorkChoices Legislation", *International Employment Relations Review*, 13 (1), 33-42.

O'Brien, M. J., Valadkhani, A., Waring, P. & Denniss, R. (2007). "The Australian Labour Market in 2006", *Journal of Industrial Relations*, 49 (3), 311-26.

O'Brien, M.J., (2007) "Older Male Workers and Job Mobility in Australia", *International Journal of Employment Studies*, 15 (2), 1-26.

O'Brien, M.J., Denniss, R. and Burgess, J., (2006) "The Australian Labour Market in 2005", *Journal of Industrial Relations*, 48 (3) 305-18.

Ville, S., Valadkhani, A. and O'Brien, M.J., (2006) "The Distribution of Research Performance Across Australian Universities, 1992-2003, and Its Implications for Higher Education Funding Models" *Australian Economic Papers*, 45 (4) 343-361.

O'Brien, M.J. (2005) "Industry Representation, Structural Change and the Older Male Worker in Australia (1985 to 2005)", *Australian Bulletin of Labour*, 31(3), 270-94.

Burgess, J., Lee, J. and O'Brien, M.J., (2004) "The Australian Labour Market 2003", *The Journal of Industrial Relations*, 46(2), 141-59.

O'Brien, M.J., and Burgess, J., (2004) "Workforce Developments Affecting the Adequacy of Superannuation", *The Journal of Australian Political Economy*, No 53 June 2004, pp179-90.

Biddle, D., Burgess, J., Mitchell, W., O'Brien, M.J., (2002) "The Australian Labour Market 2001", *The Journal of Industrial Relations*, 44(2), 171-97.

O'Brien, M.J. (2001) "Older Male Labour Force Participation: the Role of Social Security and Hidden Unemployment", *Australian Journal of Labour Economics* 4 (3), 206-23.

## **Book Chapters**

O'Brien, M.J. (2001) "Older Males and Social Security Reliance", in Mitchell, W.F. and Carlson, E. (eds) *The Tip of the Iceberg*, CAER, Sydney, 135-56.

O'Brien, M.J. (1999) "Old Enough for the Scrapheap? Employment Issues for the Baby Boomers", in Lee, J., Probert, B. and Watts, R. (eds) *Work in the New Economy: Policies, Programs, Populations*, Centre for Applied Social Research, RMIT University, 207-23.

## **Research Grants**

Faculty of Business Partnership Matching Grant (2018) "Sunday Penalty Rate Reform and Job Creation in Australia: An Analysis of Labour Supply and Demand Factors in Retail and Hospitality", \$20,000.



Faculty of Business Seed Grant (2017) "Analysing the Influence of Penalty Rates Changes on Employment and Living Standards of Retail and Hospitality Sector Employees in Australia", \$25,000.

Faculty of Commerce ARC Application Support Grant (2012) "Light at the End of the Tunnel: Investigating the Economic and Social Consequences of Job Losses at BlueScope Port Kembla", \$5000.

University of Wollongong URC Small Grant (2007) "The Reserve Army of Labour: An Analysis of Older Worker Labour Markets in OECD Countries in the Context of an Ageing Society", \$5470.

University of Wollongong URC Strategic Research Development Grant (2004) "The Job Mobility of Older Workers in Australia", \$2496.

### **Consultancy Reports**

O'Brien, M.J. (2018) "Hairdressers Labour Market Statistical Profile and Analysis" prepared on behalf of the Shop, Distributed and Allied Employees' Association for the Four Yearly Review of Modern Awards – Penalty Rates, Hair and Beauty Industry 2010 (AM2017/40)

<https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201740-sub-awu-sda-220618.pdf>

O'Brien, M.J. (2016) "Appraisal of Family and Domestic Violence Leave costs" prepared on behalf of the Australia Council of Trade Unions for the Four Yearly Review of Modern Awards – Family and Domestic Violence Leave (AM2015/1)

<https://www.fwc.gov.au/documents/decisionssigned/html/2017fwcfb1133.htm>

Markey, R, O'Brien, M.J. and McIvor, J

(2016) "Second Supplementary Report: Casual and Part-Time Employment in Australia" prepared on behalf of the Australia Council of Trade Unions for the Four Yearly Review of Modern Awards – Casual employment and Part-time employment (AM2014/196 and AM2014/197)

<https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/com/am2014196-197-sub-actu-22022016.pdf>

O'Brien, M.J. (2016) "Fourth Supplementary Report: Casual and Part-Time Employment in Australia" prepared on behalf of the Australia Council of Trade Unions for the Four Yearly Review of Modern Awards – Casual employment and Part-time employment



(AM2014/196 and AM2014/197)  
<https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/common/obrien.pdf>

O'Brien, M.J. (2015) "National Fast Food Workers Report", prepared on behalf of the Australia Council of Trade Unions for the Four Yearly Review of Modern Awards- Penalty Rates AM2014/305  
<https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am2014305-obrienreport-actu-040915.pdf>

O'Brien, M.J. (2015) "Regression Analysis in section 3.2 of the Report of Lynne Pezzullo, The Effect of Pharmacy Industry Award 2010 on Community Pharmacy in Australia", prepared on behalf of the Shop, Distributed and Allied Employees' Association for the Four Yearly Review of Modern Awards- Penalty Rates AM2014/305  
<https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am2014305-experts-sda-040915.pdf>

Markey, R, McIvor, J and O'Brien, M.J. (2015) "Supplementary Expert Report" prepared on behalf of the Australia Council of Trade Unions for the Four Yearly Review of Modern Awards – Casual employment and Part-time employment (AM2014/196 and AM2014/197) <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am2014196-197-sub-actu-191015.pdf>

## **Student Supervision**

### **Completed HDR Students:**

Beatrice Lim: *The Effect of Household Appliances on Female Labour Force Participation in Malaysia* (PhD awarded 2017).

Van Phuc Phan: *Urban-Rural Income Inequality in Vietnam* (PhD awarded 2017).

Ilona Valeikaite: *Socio-economic and environmental effects of regional bioenergy production* (PhD awarded 2017)

Teerawat Charoenrat: *Measuring the Technical Efficiency of Thai Manufacturing SMEs: A comparison between the pre and post financial crisis of 1997* (PhD awarded 2013).

Piyapong Sangkaew: *Trade Liberalisation and Wage Inequality in Thai Industrial Sector* (PhD awarded 2013).

Amir Arjomandi: *Efficiency and Productivity in Iran's Financial Institutions* (PhD awarded 2011).

Indika Karunanayake: *Modelling Australian Stock Market Volatility* (PhD awarded 2011).

Chirangivi Bista: *Poverty and Inequality in Nepal: An Analysis of the Deprivation Index 2003-04* (MRes awarded 2009).

### **Completed Honours Students:**

Marthe Kinnerud (2013 2<sup>nd</sup> class 2<sup>nd</sup> division).

Nathan Kettlewell (2010 1<sup>st</sup> class and recipient of Australian Agricultural and Resource Economics Society Undergraduate Prize for NSW).

Mitchell Worsley (2008 2<sup>nd</sup> class 1<sup>st</sup> division).

Leanne van Keulan (2007 1<sup>st</sup> class and University Medal).

Simon Young (2006 1<sup>st</sup> class).

### **Research Awards**

Global Academy of Business and Economics Research International Conference Best Paper Award (2010)

Faculty Commerce Excellence in Research Award (2009)

University of Newcastle Postgraduate Research Scholarship (1998)

Ken Gordon Memorial Honours Scholarship (1995) (University of Newcastle)

### **Media Interviews, Comments and Articles**

*Canberra Times* 20/4/19 " Less workers taking Sunday shifts following penalty rate cut research shows"

<https://www.canberratimes.com.au/story/6079574/less-workers-taking-sunday-shifts-following-penalty-rate-cut-research-shows/>



*Southern Cross Austereo* 9/8/18 Comment on penalty rate research

*Canberra Times* 15/12/18 "On the down Lowe: it's workers who will experience the real penalties" <https://www.smh.com.au/opinion/on-the-down-lowe-its-workers-who-will-experience-the-real-penalties-20180614-h11dqy.html>

*Australian Financial Review* 30/1/18 "Economists fight over penalty rates" <http://www.afr.com/news/politics/national/economists-fight-over-penalty-rates-this-wouldnt-get-published-20180129-h0qbvu>

ABC The World Today 16/12/17 Comment on Penalty Rates research

*Sydney Morning Herald* 14/12/17 "Penalty rate cut fails to stimulate jobs, survey shows" <http://www.smh.com.au/federal-politics/political-news/penalty-rate-cut-fails-to-stimulate-jobs-survey-shows-20171213-h04csj.html>

*The Age* 7/4/17 "Former RBA governor Bernie Fraser says penalty rate cut will produce inequality, not jobs" <http://www.theage.com.au/federal-politics/political-news/former-rba-governor-bernie-fraser-says-penalty-rate-cut-will-produce-inequality-not-jobs-20170406-gvezd1.html>

*The Australian* 4/11/16 "Domestic violence leave to hike costs, says business" <http://www.theaustralian.com.au/national-affairs/industrial-relations/domestic-violence-leave-to-hike-costs-says-business/news-story/332168e1eec109857f429266e8d761b5>

Australia Wide ABC TV 14/11/15 "The human toll of the declining steel industry" <http://iview.abc.net.au/programs/australia-wide/NC1579H033S00>

*Sydney Morning Herald* 18/9/15 "Wollongong unites on campaign to buy local steel and save Port Kembla's steelworks" <http://www.smh.com.au/business/wollongong-unites-on-campaign-to-buy-local-steel-and-save-port-kemblas-steelworks-20150918-gjpolx.html>

ABC Radio Illawarra 8/9/15 Comment on BlueScope job losses and IRIIF.

*Australian Financial Review* 20/6/15 Does Australia's Steel Industry Have a Future? <http://www.afr.com/business/does-australias-steel-industry-have-a-future-20150619-ghs0r7>



The Conversation 5/3/15 Hockey looks to "armies" in Intergenerational report: experts react  
<http://theconversation.com/hockey-looks-to-armies-in-intergenerational-report-experts-react-38372>

Illawarra Mercury 14/4/14 "Pension age rise: job hunt harder for older Australians"

730 Report ABC TV 22/5/13, Retrenched BlueScope workers "ripped off" by Government rescue fund  
<http://www.abc.net.au/news/2013-05-21/retrenched-bluescope-workers-hit-out-at-government-rescue-fund/4704496> and  
<http://www.abc.net.au/7.30/content/2013/s3806004.htm>

2GB comment on single parent payment reform March 14 2013

Illawarra Mercury 21/6/12 "Quarter of region's population over 55"

Australian Financial Review 18/6/11 "Unemployed lost in the statistics" <http://www.afr.com/news/politics/national/unemployed-army-lost-in-the-statistics-20110618-icbpp>

The Drum (ABC) 29/9/10 "Hidden Unemployment"  
<http://www.abc.net.au/news/2009-10-08/26958>

## TEACHING

### Subjects Co-ordinated

COMM121 Statistics for Business (1<sup>st</sup> year BCOMM core 400+ students, 2002 to 2012).\*

COMM330 Applied Research Project\*\* (Capstone subject for BECONFIN, 2013 to present).

COMM980 Business Research Methods / Research Proposal (PhD, MRes and Honours, 2008, 2009, 2013).

ECON100 Economics Essential for Business (1<sup>st</sup> year BCOMM core 600+ students, 2017 to present)

ECON111 Introductory Microeconomics (2002).

ECON101 Macroeconomics Essentials for Business (2002).

ECON308 Labour Economics (2005, 2006).

ECON240 Financial Modelling (200+ students, 2011 to present).\*

ECON230 Quantitative Analysis for Decision Making (2004, 2005).\*

ECON940 Statistics for Decision Making (MPA 200+ students, 2005 to present).

ECON939 Quantitative Methods for Economists (PhD and MRes, 2005, 2006, 2012).

MBA 908 Strategic Business Project (2017 to present). \*\*\*

OPS912 Quantitative Analysis for Decision Making (MSc) (2015).  
\*\*\*

TBS902 Statistics for Decision Making (MBA 2004 to 2007).\*\*\*

TBS905 / ECON928 Economics Analysis of Business (MBA 2011 to present).\* \*\*\*

TBS910 / ECON947 Business Analytics (MBA 2015 to present). \*\*\*

TBS912 Quantitative Analysis for Decision Making (MBA 2004 to 2015).\*\*\*

TBS950 Quality in Management (MBA 2008). \*\*\*

ACCY407/907 Empirical Research Methods (PhD, MRes and honours).

\* Also delivered at Satellite campuses (Southern Sydney, Shoalhaven, Bega, Batemans Bay, Southern Highlands), PSB Singapore, INTI Malaysia and UOW Dubai

\*\* Also proposed and developed subject

\*\*\* Also delivered at Sydney Business School

## **Competitive Teaching and Learning Grants**

UIC International Links Grant Scheme (2018) "Analysing Student Engagement Diversity Across UOW Off-shore Campuses" \$10,885.

Educational Strategies Development Fund (2018) "First Year Student Engagement with Traditional and Digital Lecture Resources: Development of an Analytical Framework for Learning Diversity and Success", \$8628.



New Colombo Plan Mobility (2015, 2016 and 2018) "Applied Economics in a Developing World", \$33,000, \$49,500, \$33,000.

Faculty of Business Educational Inclusion Grant (2013) "Lecture Attendance and Study Performance", \$10,000 (with Reetu Verma).

Faculty of Business Educational Inclusion Grant (2013) "The Causal Effects of the Peer Assisted Study Sessions (PASS) on educational outcomes for students from low socio-economic, rural and indigenous backgrounds", \$8787 (with Peter Siminski).

Faculty of Business Educational Inclusion Grant (2013) "Effect of Active Teaching Strategies on Minority Students", \$2500.

Faculty of Commerce, Creating Better Futures: Teaching and Learning Grants (2013) "Enhancing the effectiveness of econometrics teaching", \$3054.50 (with Indika Karunayake).

Educational Strategies Development Fund (2013) "Developing Best Practice Support and Assessment Guidelines for the Utilisation of Social Media within a Flexible Assessment Design", \$4500 (with Katharina Freund).

Faculty of Commerce Creating Better Futures: Teaching and Learning Grant (2012) "Developing Comprehensive Assessment Tools for the Utilisation of New Technologies in an Action Based Learning Setting", \$2828 (with Katharina Freund).

Australian Learning and Teaching Council Grant (2008) "Building leadership capacity for development and sharing of mathematics learning resources across disciplines and universities", (Faculty of Commerce Leader) \$220,000.

University of Wollongong Teaching and Learning Grant (2007) "Embedding Mathematics and Statistics Learning Support across the disciplines", (Faculty of Commerce Leader) \$100,000.

## **Teaching Resources Developed**

Berenson, Levine, Krehbiel, Stephan, O'Brien, Jayne, Watson (2019) *Basic Business Statistics: Concepts and Applications* (5th Ed), Pearson Education Australia (author of 6/15 chapters).

Berenson, Levine, Krehbiel, Stephan, O'Brien, Jayne, Watson (2016) *Basic Business Statistics: Concepts and Applications* (4th Ed), Pearson Education Australia (author of 6/15 chapters).



Berenson, Levine, Krehbiel, Stephan, O'Brien, Jayne, Watson (2013) *Basic Business Statistics: Concepts and Applications* (3rd Ed), Pearson Education Australia (author of 6/15 chapters).

Berenson, Levine, Krehbiel, Stephan, O'Brien, Jayne, Watson (2013) *Business Statistics: Concepts and Applications* (2nd Ed), Pearson Education Australia (author of 8/19 chapters).

Berenson, Levine, Krehbiel, Watson, Jayne, Turner, O'Brien (2010) *Basic Business Statistics: Concepts and Applications* (2nd Ed), Pearson Education Australia (author of 5/14 chapters).

Author of Powerpoint slides to accompany *Basic Business Statistics: Concepts and Applications* (2013).

Whiteboard demonstration videos for Pearson Education to accompany *Basic Business Statistics Concepts and Applications* (2010).

Author of powerpoint slides for *Australasian Business Statistics* (1st edition) published by John Wiley and Sons Australia (2007).

## **Conference Papers**

O'Brien, M.J. (2017) "Analysing first year students' engagement with lecture resources", paper presented to the 36<sup>th</sup> First Year Experience Conference, Atlanta Georgia US, 15<sup>th</sup> February.

O'Brien, M. J. and Freund, K. (2013) "Harnessing the potential of social media and digital literacy skills for undergraduate economics research", paper presented to the 18<sup>th</sup> Australasian Teaching Economics Conference (ATEC 2013) Newcastle, Australia 1<sup>st</sup> July.

Lewis, D. E., O'Brien, M. J., Rogan, S. G. & Shorten, B. (2004). Do Students Benefit From Supplemental Instruction? Evidence From a First Year Statistics Subject for Commerce Students. *Economic Education Conference* (pp. 1-21). University of Wollongong: Centre for Health Service Development.

## **Consultation Services**

Student Services (UOW) – Analysis of Peer Assisted Study Session (PASS) for MATH141 and CHEM105 (2006)

## **Awards**

OCTAL Award Faculty of Business (2015)

Faculty of Commerce Teaching and Learning Award (2009)

UOW OCTAL Award Nominations (2009, 2011, 2014, 2017)

## **GOVERNANCE**

### **Substantive Roles**

MBA Director (2018 to present)

Head of Discipline (2014 to Jan 2015)

Head of School (2013)

Associate Head of School (November 2010 to 2012)

Head of Postgraduate Studies (2009 to 2010)

Director of Postgraduate Studies (2005 to 2008)

### **Committees**

#### **School**

Chair of Economics Teaching Committee (2010 to 2012)

Chair of Economics Examiners Committee (2010 to 2012)

#### **Faculty**

Faculty Education Committee (2010 to present)

Chair of Learning Platform Working Party (2012 to 2014)

Social Inclusion / Core Curriculum Committee (2009 to 2012)

Faculty Research Committee (2005 to 2010)

## **University**

Learning Platform Steering Group (2014 to present)

Learning Platform Reference Group (2012 to 2014)

Academic Senate (2010 to 2014)

Learning Environment and Technology Subcommittee (2012 to 2014)

Learning Platform Offshore Working Party (2013 to 2014)

# **COMMUNITY / PROFESSIONAL ACTIVITIES**

## **Professional Activities**

### **Journal Referee**

*Australian Journal of Labour Economics*

*Journal of Economic Policy Reform*

*Australian Journal of Social Issues*

*Social Policy and Society*

*The International Employment Relations Review*

*Australian Economic Review*

*Australasian Accounting Business and Finance Journal*

*Economic Analysis and Policy*

*Australian Economic Papers*

*International Journal of Manpower*

### **Book Reviewer**



For *Labour and Industry* (twice)

*Work Employment Society*

## **Membership**

International Employment Relations Association (Vice-President  
2015-2016)

The Australian Society of Labour Economists

Pacific Employment Relations Association

IZA Who's who in Labor Economics