IN THE FAIR WORK COMMISSION

Application by the United Workers' Union, Australian Education Union and Independent Education Union of Australia

Matter No: (B2023/538)

LIST OF AUTHORITIES OF THE AUSTRALIAN EDUCATION UNION

Cases

1. *Australian Nursing Federation v IPN Medical Centres Pty Limited* [2013] FWC 511
2. *Re 4 yearly review of modern awards – Award stage – General Retail Industry Award 2020* [2020] FWCFB 6301; (2020) 301 IR 296
3. *Re United Voice Low-paid Authorisation* [2011] FWAFB 2633; (2011) 207 IR 251
4. *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161; (2017) 253 FCR 368
5. *United Voice* [2014] FWC 6441
6. *United Voice v MSS Security Pty Ltd* [2013] FWC 4557

Other Authorities

1. Commonwealth, *Hansard (House of Representatives)* (27 October 2022) p 2176-2183
2. Commonwealth, *Revised Explanatory Memorandum to the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022*, p iii, xi-xii, xxiii, xlviii, 160-172

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FAIR WORK COMMISSION

DECISION

Fair Work Act 2009
s.242 - Application for a low-paid authorisation

Australian Nursing Federation
v
IPN Medical Centres Pty Limited and Others

(B2011/3940)

VICE PRESIDENT WATSON MELBOURNE, 17 JUNE 2013

Application for a low paid authorisation - practice nurses - whether employees are low-paid - access to collective bargaining or difficulty bargaining at an enterprise level - history of bargaining in the industry - relative bargaining strength - commonality in enterprises - whether improvements in productivity - whether authorisation in the public interest - Fair Work Act 2009 - ss. 171, 241, 242, 243, 284.

Introduction

[1] This decision relates to an application by the Australian Nursing Federation (ANF), lodged on 11 November 2011, for a low-paid authorisation under s.242 of the *Fair Work Act 2009* (the Act). The application is made in relation to nurses employed in general practice clinics and medical centres performing nursing work described in Schedule B of the *Nurses Award 2010* (the Award).[1] I will refer to the nurses covered by the application as 'practice nurses'. The ANF seeks an authorisation which, if granted, would permit it to bargain for a multi-enterprise agreement covering all of the employers named in the revised list of respondents dated 1 February 2013.[2]

[2] The consequences of granting a low paid authorisation include the availability of the assistance of the Fair Work Commission (the Commission) to facilitate bargaining,[3] the availability of bargaining orders in relation to the multi-employer bargaining arising from the Act's good faith bargaining requirements,[4] and the availability of a low paid workplace determination by way of arbitration by the Commission,[5] These rights are not otherwise available for a bargaining representative who seeks to bargain on a multi-employer basis.

[3] The matter was initially allocated to Commissioner Cribb and referred to me on 12 June 2012. On 19 June 2012, directions were made for the filing of outlines of submissions, witness statements and other material by any party opposing the application and by the ANF and any party supporting the application.

[4] In the week commencing 4 September 2012, I heard evidence from ANF witnesses. In the week commencing 19 November 2012, I heard evidence from witnesses of the respondents. The parties subsequently filed written submissions and the matter was listed for final closing submissions on 24 and 25 January 2013.

[5] In the proceedings Mr C Dowling, of counsel represented the ANF. Mr M Harmer appeared for Independent Medical Centres Pty Limited, Allied Medical Group Holdings Pty Ltd and Lonnex & Millenium Management Holdings Pty Ltd, collectively known as IPN. These entities operate medical practices which employ practice nurses. Mr T McDonald appeared for the Australian Medical Association (AMA) Limited, AMA Victoria Limited and AMA Tasmania Limited. AMA members are doctors who own and operate medical practices. Mr M Ritchie appeared on behalf of the Victorian Employers' Chamber of Commerce and Industry (VECCI), an employer association acting on behalf of 26 individual respondents named in the application. Mr M Follett, of counsel, appeared for the Primary Health Care Ltd, which is a group comprised of two separate employing entities; Idameneo (No 123) Pty Ltd and Sidameneo (No 456) Pty Ltd. Primary Health owns and operates 77 medical centres in Australia.

[6] Others to make submissions included Healthscope Limited and Health & Life. A number of other individual employers opposed the application. A large number of general practices on the list of employer respondents were unrepresented in the proceedings.

The Application

[7] The ANF's application seeks a low-paid authorisation with respect to nurses employed under the Award by employers listed in an amended schedule of approximately 682 respondents. The original application states that:

- The ANF is an employee organisation entitled to represent the industrial interests of the employees in relation to work to be performed under a multi enterprise agreement for the purposes of s.242 of the Act;
- The employees that are the subject of the application are low paid, have either not had access to collective bargaining or face substantial difficulty bargaining at the enterprise level;
- The history of bargaining in the industry and the relative bargaining strength of the employers and the employees supports the authorisation being made;
- The employees' current terms and conditions are inferior compared to relevant industry and community standards;
- All of the named respondents have substantial commonality in the services provided, staffing, funding and operations;
- It is in the public interest to make the authorisation.

[8] The application included a list of employers to which the authorisation would apply. The list of employers was subsequently amended and a revised list of employers was provided on 12 December 2012, with further revisions being provided on 1 February 2013. The revised list contains approximately 682 employers. The employers represented in the proceedings strongly oppose the application on both jurisdictional and merit grounds.

Statutory Provisions

[9] Section 242, under which the application is made, is in Division 9–Low-paid Bargaining, of Part 2–4 of the Act. Part 2–4 deals with Enterprise Agreements. The objects of Part 2–4 are found in s.171. Section 171 refers to the provision of a framework to provide collective bargaining for agreements that will deliver productivity benefits. It states:

> "**171 Objects of this Part**
>
> The objects of this Part are:
>
> (a) to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits; and
>
> (b) to enable FWA to facilitate good faith bargaining and the making of enterprise agreements, including through:
>
> (i) making bargaining orders; and
>
> (ii) dealing with disputes where the bargaining representatives request assistance; and
>
> (iii) ensuring that applications to FWA for approval of enterprise agreements are dealt with without delay."

[10] Division 9 contains its own objects in s.241. That section reads:

> "**241 Objects of this Division**
>
> The objects of this Division are:
>
> (a) to assist and encourage low-paid employees and their employers, who have not historically had the benefits of collective bargaining, to make an enterprise agreement that meets their needs; and
>
> (b) to assist low-paid employees and their employers to identify improvements to productivity and service delivery through bargaining for an enterprise agreement that covers 2 or more employers, while taking into account the specific needs of individual enterprises; and
>
> (c) to address constraints on the ability of low-paid employees and their employers to bargain at the enterprise level, including constraints relating to a lack of skills, resources, bargaining strength or previous bargaining experience; and
>
> (d) to enable FWA to provide assistance to low-paid employees and their employers to facilitate bargaining for enterprise agreements.

> Note: A low-paid workplace determination may be made in specified circumstances under Division 2 of Part 2-5 if the bargaining representatives for a proposed enterprise agreement in relation to which a low-paid authorisation is in operation are unable to reach agreement."

[11] As a Full Bench of Fair Work Australia has observed[6]:

> "The terms of s.241 are to be read in the context of the enterprise agreement provisions in the rest of Part 2–4. When the provisions as a whole are considered, it is apparent that the legislative policy underlying the low-paid authorisation provisions is that while bargaining on a single enterprise basis is the preferred approach, multi-enterprise bargaining is permitted "to assist and encourage low-paid employees ... to make an enterprise agreement that meets their needs". The other provisions of Division 9 set out the means by which these objects are to be carried into effect."

[12] Section 242(1) of the Act sets out who may apply for a low-paid authorisation. It states:

> "(1) The following persons may apply to the FWC for an authorisation (a ***low-paid authorisation***) under section 243 in relation to a proposed multi-enterprise agreement:
>
> (a) a bargaining representative for the agreement;
>
> (b) an employee organisation that is entitled to represent the industrial interests of an employee in relation to work to be performed under the agreement.
>
> Note: The effect of a low-paid authorisation is that the employers specified in it are subject to certain rules in relation to the agreement that would not otherwise apply (such as in relation to the availability of bargaining orders, see subsection 229(2)). "

[13] Section 243 sets out the matters that the Fair Work Commission is required to take into account in dealing with an application under s.242. It reads:

> "**243 When FWC must make a low-paid authorisation**
>
> *Low-paid authorisation*
>
> (1) FWC must make a low-paid authorisation in relation to a proposed multi-enterprise agreement if:
>
> (a) an application for the authorisation has been made; and
>
> (b) FWC is satisfied that it is in the public interest to make the authorisation, taking into account the matters specified in subsections (2) and (3).
>
> *FWC must take into account historical and current matters relating to collective bargaining*

(2) In deciding whether or not to make the authorisation, FWC must take into account the following:

(a) whether granting the authorisation would assist low-paid employees who have not had access to collective bargaining or who face substantial difficulty bargaining at the enterprise level;

(b) the history of bargaining in the industry in which the employees who will be covered by the agreement work;

(c) the relative bargaining strength of the employers and employees who will be covered by the agreement;

(d) the current terms and conditions of employment of the employees who will be covered by the agreement, as compared to relevant industry and community standards;

(e) the degree of commonality in the nature of the enterprises to which the agreement relates, and the terms and conditions of employment in those enterprises.

FWC must take into account matters relating to the likely success of collective bargaining

(3) In deciding whether or not to make the authorisation, FWC must also take into account the following:

(a) whether granting the authorisation would assist in identifying improvements to productivity and service delivery at the enterprises to which the agreement relates;

(b) the extent to which the likely number of bargaining representatives for the agreement would be consistent with a manageable collective bargaining process;

(c) the views of the employers and employees who will be covered by the agreement;

(d) the extent to which the terms and conditions of employment of the employees who will be covered by the agreement is controlled, directed or influenced by a person other than the employer, or employers, that will be covered by the agreement;

(e) the extent to which the applicant for the authorisation is prepared to consider and respond reasonably to claims, or responses to claims, that may be made by a particular employer named in the application, if that employer later proposes to bargain for an agreement that:

(i) would cover that employer; and

(ii) would not cover the other employers specified in the application.

What authorisation must specify etc.

(4) The authorisation must specify:

(a) the employers that will be covered by the agreement (which may be some or all of the employers specified in the application); and

(b) the employees who will be covered by the agreement (which may be some or all of the employees specified in the application); and

(c) any other matter prescribed by the procedural rules.

Operation of authorisation

(5) The authorisation comes into operation on the day on which it is made."

[14] By virtue of s.243(1), the Commission must make a low-paid authorisation if it is satisfied that it is in the public interest to do so, taking into account the matters in ss.243(2) and (3). Other aspects of the legislative scheme are also relevant to the application, including the provisions of the Act regarding majority support determinations, scope orders and protected industrial action.

Case Law

[15] In the only other application for a low-paid authorisation (the Aged Care Case) since these provisions were enacted, a Full Bench of Fair Work Australia said[7]:

"**[14]** Some initial observations should be made about the nature of the public interest test. The controlling criterion is satisfaction in the public interest. That criterion is a broad one and is confined only by the limits of the scope and purpose of the Act, as the following passage from the decision of the High Court of Australia in *O'Sullivan v Farrer* indicates:

"[T]he expression "in the public interest", when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only "in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be (pronounced) definitely extraneous to any objects the legislature could have had in view"" (references omitted).

[15] While the tribunal is required to take into account the matters specified in ss.243(2) and (3) in applying the public interest criterion, we do not think it was intended that those matters are the only ones capable of being relevant to the public interest. Other matters potentially affecting the public interest can also be taken into account. The public interest is distinguishable from the interests of the parties, although it is clear from the matters specified that there is a substantial overlap where these provisions are concerned."

[16] After reviewing the facts of that matter against the criteria in s.243(2) and (3) the Full Bench said:

> **"[36]** Leaving out of consideration employers and employees to whom an enterprise agreement applies, we are satisfied that the employees to whom the authorisation would apply are low-paid, that they either have not had access to enterprise bargaining or face substantial difficulty in bargaining at the enterprise level and that making an authorisation would assist them to bargain. Other matters identified in s.243(2) also point to an authorisation being in the public interest: the history of bargaining, the relative bargaining strength of the employers and employees and the high degree of commonality in the nature of residential aged care enterprises and, leaving aside employees to whom enterprise agreements apply, the conditions of the employees."

[17] It will be seen that the task of determining whether to make a low-paid authorisation is based on a broad discretionary test described as the Commission being satisfied that it is in the public interest to make the determination. The specific factors required to be taken into account and the objects and scheme of the legislation are the key considerations in applying this test.

The Evidence

[18] The application made by the ANF seeks to cover nurses employed to provide health and community services in what are generally referred to as general practice clinics or medical centres. General practice clinics and medical centres vary in size but are usually small facilities at which medical services are provided to the general public. Practices may be operated by a single doctor, a group of doctors in partnership or by a larger corporate entity that operates multiple clinics. In recent years there has been an increasing trend for medical clinics to be operated by a large corporate entity. For example IPN operates 160 medical centres Australia wide and employs more than 2400 healthcare professionals. Primary Healthcare operates 77 medical centres.

[19] Doctors are the most important professionals in general practice and medical centres and are often the owners of the business. Larger practices employ other doctors in the practice. The clinics employ a range of clerical and administrative staff performing duties such as reception duties, typing, accounts, bookkeeping, and practice management. Depending on the skills and experience of the employee and the needs of the practice an employee may perform a variety of different functions often on a multi-disciplinary basis. Nurses employed primarily to perform nursing duties are commonly referred to as practice nurses. The role of a practice nurse varies from clinic to clinic, and can range from providing general healthcare services such as vaccinations and wound care to a more educational role, such as diabetes education. Both registered nurses and enrolled nurses work as practice nurses. In some of the larger medical chains they carry titles such as Treatment Room Attendants.

[20] Practice nursing is a growing area of employment arising from changed business practices and various forms of funding assistance for the engagement of practice nurses. The number of practice nurses in Australian medical clinics has increased substantially over the last 20 years. Between 1995 and 2009, the number of registered nurses working as practice

nurses increased from 5304 to 8889. Over the same period, the number of enrolled nurses increased from 1442 to 2184.[8]

[21] The demography of practice nurses varies from that of nurses employed elsewhere. Compared to nurses employed across the health system, practice nurses tend to be older, are more likely to work part time and a lower proportion are male. The proportion of practice nurses who are degree-qualified (registered nurses) is equal to the proportion of degree-qualified nurses employed in other settings. In a 2011 survey conducted by the Australian Practice Nurses Association (APNA), 65% of respondents indicated that they held at least one postgraduate qualification, and 87% of registered nurse respondents reported a postgraduate qualification.

[22] Practice nurses are mostly employed on a part time or casual basis. Of the respondents to the 2011 APNA survey, only 23% reported that they are employed on a full time basis. 72% of respondents stated they were part time or casual employees. The responses indicated that the average hours of work per week were between 27 and 28 hours.

[23] The workplace arrangements governing the terms and conditions of practice nurses are varied. The APNA survey showed that the largest proportion of respondents (38%) are covered by individual employment contracts. A further 35% stated that they are covered by awards, and 6% by a collective agreement. This information needs to be treated with some caution as strictly speaking all employed nurses would be covered by awards and an individual contract of employment of one type or another. Approximately 17% of the practice nurse respondents were unsure or did not state the arrangements which govern their employment. Practice nurses also tended to be paid on an hourly basis (88%), and to be paid an all-up hourly rate which included loadings and allowances.

[24] The APNA survey showed that the average hourly rate of pay for enrolled nurses in 2011 was $25.17, and $31.11 for registered nurses.

[25] The employment of practice nurses is also affected by Commonwealth funding arrangements via Medicare, which provide subsidies to general practices for work done by doctors and practice nurses. When practice nurses perform work set out on the Medicare Benefits Schedule (MBS), the medical practice bills Medicare and obtains a rebate for a portion of the cost of providing the service.

[26] In the 2001/2002 financial year, the Commonwealth Government introduced a 4-year Nurses In General Practice (NIGP) scheme. This scheme included the payment of a Practice Incentive Payment (PIP) to eligible practices to encourage them to employ nurses, training and support to develop the practice nurse role and a scholarship and upskilling scheme for rural and remote nurse re-entry. The NIGP was extended for a further 4 years in 2005/2006.

[27] In addition to these arrangements, certain items were added to the MBS in 2004 relating to work performed by a practice nurse. Originally, this included immunisations and wound care. Later, pap smears, chronic disease management and antenatal care were added as MBS items.

[28] In January 2012, the Commonwealth Government introduced a Practice Nurse Incentive Program (PNIP) which forms part of the funding system for practice nurses. The PNIP provides incentive payments to medical practices which employ practice nurses,

however it also removes six billable items from the MBS in favour of these broader incentive payments. The current Medicare funding arrangements are expected to remain in place until 2015. This follows from a historical context of the government seeking to fund nurses in general practice.

[29] The ANF is a craft union covering the vocation of nursing. It is one of the unions with coverage of employees in the health sector. In 2004 it sought to engage in formal bargaining for practice nurses in Victoria by issuing a written notice of its intention to make an agreement and by serving a formal log of claims on a large number of employers. In 2010 it held a forum for practice nurse members. In 2011 it served a further log of claims on employers. No new agreements were reached as a result of the service of this log of claims.

[30] A substantial amount of evidence was led by the parties to the application. In total, 51 witnesses gave evidence during the hearing. A list of witnesses is annexed to this decision.[9] Further witness statements were provided by the parties, but were either no longer relied upon by the parties at the time of the hearing or the witnesses were not required for cross examination. Despite the extent of this evidence it only represents a small proportion of the employers and employees covered by the application.

[31] The ANF relied on the evidence of eight practice nurses, four union officials from the ANF, one union official from the NSW Nurses Association, researcher Dr Larissa Bamberry and Ms Belinda Caldwell, Chief Executive Officer from the Australian Practice Nurses Association. The ANF also relied on several collective enterprise agreements, annual reports from companies operating medical centres and pay slips issued to practice nurses.

[32] Ms Yvonne Chaperon, Assistant Federal Secretary of the ANF stated that the ANF made the application because of calls by ANF members, but also because of the ANF's broader goal of improving employment conditions for nurses. It was also her evidence that it was her belief that ANF practice nurse members generally supported the application.

[33] She gave evidence of forwarding correspondence to a large number of general practices and medical centres seeking bargaining for an enterprise agreement and the general lack of responsiveness of the employers to that request. Mr Chaperon was not, however, able to give detailed evidence about the views of individual respondents named in the application. Ms Chaperon's reason for this was that she is not a member of the Industrial Division which deals with bargaining. Mr Chaperon's evidence was that she was more involved in attempts to bargain during 2004-2005, where in her opinion the employers refused to engage in bargaining because at that time they did not have a legal obligation to bargain.

[34] Ms Chaperon conceded that many practice nurses might be paid above Award rates of pay despite the absence of an enterprise agreement made under the provisions of the Act. She said that enterprise agreements that more commonly apply to nurses in other areas of employment usually cover a broader range of matters than the terms and conditions provided by employers to practice nurses on an individual basis, and there are usually additional benefits to nurses covered by these enterprise agreements.

[35] Ms Chaperon rejected the suggestion that practice nurses might not be paid as highly as hospital nurses because their work is less demanding. Ms Chaperon said that in her professional experience, practice nurses often care for a wider range of patient needs than

those required to be addressed in hospitals, and that the same level of skill and training is required for practice nurses and hospital nurses.

[36] Ms Leonie Kelly, industrial officer at the ANF Victorian branch gave evidence relating to her professional experience as a union official. Ms Kelly's evidence was that there were approximately 1,586 practice nurse members of the ANF in Victoria, and an additional 409 ANF members who identify medical practices as their secondary place of work. Ms Kelly gave evidence that approximately 62% of all practice nurses in Victoria are also ANF members, and that each of the named respondents to the matter employed at least one practice nurse who was also an ANF member.

[37] Under cross examination, Ms Kelly stated that after the ANF log of claims had been served on the respondents, a large portion of them contacted the ANF indicating that they did not wish to bargain for an enterprise agreement. Ms Kelly's evidence was that unless ANF members employed at these clinics contacted the ANF, the ANF did not follow up on the contact from the employers.

[38] Ms Belinda Caldwell, CEO of the APNA, gave evidence that although the APNA is not an industrial organisation, she often received contact from practice nurses seeking advice about their employment conditions. APNA has a membership of approximately 3000 nurses who are predominately employed in general practices. She said that each year APNA, in accordance with testing methods created in conjunction Monash University, conducts a survey of all of its members to gather data about their employment.

[39] Ms Caldwell gave evidence that, in her experience, there are several aspects of the practice nursing environment which "inhibit negotiation of fair wages and conditions."[10] These factors include:

- The isolation of nurses from their colleagues because they often work alternate part-time hours in smaller clinics making it difficult to form a collective opinion;
- The demographics of practice nurses and associated societal and cultural norms which contribute to practice nurses finding industrial negotiations distressing;
- The less-than-optimal human resource arrangements of medical clinics which are often run by busy general practitioners; and,
- External pressure caused by Commonwealth Government funding arrangements

[40] The following practice nurses gave evidence for the ANF:

- Ms Lynda Burrell;
- Ms Monica Knobloch;
- Ms Jane Goldsmith;
- Ms Lisa Taliana;
- Ms Jennie Carr;
- Ms Julianne Badenoch;
- Ms Amy Bowler;
- Ms Deidre Morgan.

[41] But for Ms Bowler, each of the practice nurses who gave evidence for the ANF is a registered nurse. Ms Bowler is an enrolled nurse.

[42] Ms Burrell gave evidence that she has been a nurse for over 30 years. Ms Burrell is employed on a part time basis by IPN at IPN's Mermaid Beach clinic in Queensland. Ms

Burrell's evidence was that she has been paid a base rate of $25 per hour since her employment commenced in 2008, and that during that time she has had one performance appraisal. Ms Burrell's evidence also included her employment at a second medical centre, an imaging and x-ray business, where her rate of pay is $36.65 per hour. It was Ms Burrell's evidence that in her view, both of her roles require a similar level of skill and experience, and she is not sure why she is paid more for one role than the other.

[43] Ms Knobloch gave evidence that she was employed as a practice nurse at the Exeter Medical Clinic for a period of 9 months, first as a casual employee and later on a part time basis. Ms Knobloch resigned from the medical clinic to take up a permanent position at the Launceston General Hospital. Ms Knobloch's evidence was that she worked two days per week at the medical clinic, usually Mondays and Fridays, and that she was employed on a rotating 24 hour, 7 day per week roster at the hospital. Ms Knobloch stated that she was not required to work weekends at the clinic because it was not open.

[44] Ms Goldsmith is a registered nurse and midwife employed at the Gisborne Medical Centre (GMC). Ms Goldsmith gave evidence that she was first employed by GMC as a casual practice nurse in October 2009 and was paid $26 per hour. In February 2010 she was made a permanent part time employee, and was paid $23 per hour. In May 2010 Ms Goldsmith was made team leader and her salary increased to $24 per hour. Since then, her salary has increased further to $28 per hour. In addition to her work at GMC, Ms Goldsmith gave evidence that she works 8 hours per week as a midwife at the Mercy Hospital for Women, earning $32.64 per hour plus allowances under the *Nurses (Victorian Public Sector) Agreement*. In addition, Ms Goldsmith gave evidence that she is employed for a further 8 hours per week at the Kilmore and District Memorial hospital, where she works as either an Associate Nurse Unit Manager or as a Night Supervisor. As Associate Nurse Unit Manager, Ms Goldsmith earns $35.54 per hour, and as the Night Supervisor $40.43 per hour.

[45] Ms Goldsmith's evidence was that although the role she has at GMC is more varied and different from her roles in the hospitals, she does not regard it as being less complex. Under cross examination, Ms Goldsmith stated that one of the reasons she chose to work as a practice nurse at GMC was that the hours were more reasonable, and made for a better balance with her life.

[46] Ms Taliana gave evidence that at the time the application was made, she was employed as a practice nurse at Gamon Street Medical Centre, which has since closed. She was paid $28 per hour. At the time of Ms Taliana giving evidence, she was employed at Watervale Medical Centre and was paid $32 per hour. Ms Taliana also gave evidence of her experience seeking pay increases, stating that she had requested increases and been refused on three separate occasions. Ms Taliana rejected the suggestion that nurses working individually in medical practices had greater bargaining power, stating that approaching a general practitioner to seek a pay rise was intimidating and disheartening. Ms Taliana also gave evidence that she was undertaking further postgraduate study in diabetes education in order to increase her skill level.

[47] Ms Carr gave evidence that she was employed as a practice nurse at Deepdene Medical Clinic, and had been since July 2009. She gave evidence that she is employed on a part time basis, and is paid $31.20 per hour. She stated that she was not required to work nights or weekends, although at one time the clinic had considered employing her on Saturdays to run a vaccination clinic. In Ms Carr's view, the clinic decided not to because it

meant they would have to pay her more. Ms Carr's evidence included that she had previously had the assistance of the ANF in relation to dispute with her employer over an individual employment contract. Ms Carr gave evidence that it was beneficial to her to have the help of the ANF.

[48] Ms Bowler gave evidence that at the time of the application she was employed as an enrolled nurse at the Thompson Road Clinic, and was paid $25 per hour. At the time of the hearing, Ms Bowler was employed by Peninsula Health, a hospital, and paid $27 per hour. Ms Bowler stated that she had previously contacted the ANF for assistance in dealing with her employer over her terms and conditions of employment.

[49] The Australian Medical Association (AMA) relied on the evidence of eight doctors and eight practices managers, as well as a letter from a current practice nurse and one from a former practice nurse of medical centres it represents. It also relied upon a report and evidence provided by Roger Kilham, Director of Kilham Consulting.

[50] The following doctors provided evidence for the AMA:

- Dr Mark Kennedy;
- Dr Cameron Martin;
- Dr Jane Sklovsky;
- Dr Elroy Schroeder;
- Dr Annette Douglas;
- Dr Jack Lipp;
- Dr John Menzies;
- Dr Christine Longman.

[51] Dr Kennedy gave evidence of negotiations with the nurses he employs at the You Yangs Medical Clinic. His evidence was that previously, practice nurses had been paid according to the length of time they had been employed. After the three part time nurses approached him, it was agreed they would all be paid the same rate of $30 per hour. Dr Kennedy further gave evidence that the nurses at You Yangs Medical Centre work out their own roster arrangements.

[52] Dr Kennedy also operates the Corio Medical Clinic. His evidence was that nurses at the Corio clinic are paid different rates, and work nights, weekends and public holidays. In Dr Kennedy's opinion, an agreement of the type proposed by the ANF would be problematic because it would reduce the flexibility available to nurses and his clinics.

[53] Dr Martin gave evidence that in his opinion, practice nurses are in a position of power when negotiating with their employers because of a shortage of nurses. He stated that in 2010, the last time his practice advertised for a practice nurse, they received two applications and both applicants expected to be paid well above Award rates.

[54] Dr Schroeder gave evidence that at the time of the hearing, the practice nurses employed by him at the Yarra Valley Clinic were paid $33 per hour, and were entitled to five weeks' annual leave per year. He also provided a letter from a nurse at the Yarra Valley Clinic written in response to the ANF application. The nurse's letter states that the nurse is happy with the current terms and conditions of employment offered by the clinic.

[55] Dr Douglas gave evidence that she owns and runs four practices in Tasmania, and that she manages a further two. Her evidence was that the minimum rate of pay across the practices is $30 per hour, but that the roles of the various practice nurses vary significantly.

[56] Dr Lipp gave evidence that he is a general practitioner at the Bridge Street Clinic, and that the clinic employs five nurses, one on a part time basis. The pay rates of the nurses range from $23 per hour to $40 per hour. Two of the nurses perform administrative work in addition to their nursing duties.

[57] Dr Menzies gave evidence that the nurses he employs are all paid according to the Award. His evidence was that the rates of pay of his three nurses ranged from $30.15 per hour to $33.07 per hour. In addition, the nurses receive 5% of the income they generate associated with MBS items.

[58] The evidence of the practice managers largely reflected the evidence of the doctors who gave evidence for the AMA. The following practice managers gave evidence for the AMA:

- Ms Meryl Jerome;
- Ms Elaine Cotter;
- Ms Sharon Powell;
- Ms Jane Tudor;
- Ms Gail Pascoe;
- Mr Andrew Wright;
- Ms Julie Cartwright;
- Ms Jenny Ktenidis

[59] The practice managers identified the standard hours of work for the practice nurses employed at their clinics and general practices, noting that practice nurses are generally not required to undertake shift work, and that the general practices were able to accommodate flexible working hours.

[60] The evidence of the practice managers also indicated a variety of different approaches to discussions about wage rates. Ms Sharon Powell, practice administrator at LMC Lilydale said: "we do not negotiate pay, however discussions occur from time to time....Wage reviews occur annually."[11] Ms Meryl Jerome, practice manager of Benalla Church Street Surgery, said that the nurses' "pay rate is usually increased by CPI annually, which is specified in the contract."[12]

[61] The practice managers indicated strong support for conducting workplace relations within their individual enterprises and strong opposition to conducting bargaining as part of a larger group of employers.

[62] Mr Kilham has an honours degree in economics and has specialised in health economics since 1989. He provided a report analysing the wage levels of practice nurses. In Mr Kilham's assessment, practice nurses are not low-paid when compared to the Australian workforce in general.[13] Further, he states that practice nurses generally are not low-paid when compared to nurses working in other sectors, such as aged care.[14]

[63] As to the market position Mr Kilham also stated:

> *"*GP practices generally have to match or better the wage rates offered by the other sectors. Practice nurses and would-be practice nurses are well aware of the rates paid by those sectors, and, given their options for employment in them, are well placed to ensure that their earnings do not fall behind. They are empowered also because Australia has a general shortage of nurses.*"*[15]

[64] As to bargaining practices, Mr Kilham expressed the view that there is not an imbalance in the power relationship between practice nurses and their employers and that practice nurses can access enterprise-level bargaining. He said:

> *"*Practice nurses have been able to bargain effectively with doctors because they have market power. They are able to deal as a professional with a professional. Since most medical practices are small enterprises, there is no marked imbalance in power such as what might be expected, for example, where a multi-national company is operating residential aged care facilities.*"*[16]

[65] Mr Kilham also stated that there is not a great degree of commonality in the nature of the various general practices and medical clinics named as respondents. He stated that the practices operate under different structures and provide varied services to their clients. Mr Kilham also said that there are inherent differences in the work requirements for practice nurses employed in rural, regional and urban practices.

[66] VECCI relied on evidence from one doctor, three nurses and eight practice managers of the medical centres it represents. It also relied on evidence from Ms Lisa Burrell, who manages the services for workplace relations at VECCI and Mr Sean Curtain, General Manager of Human Resources of UoM Commercial Ltd, a medical centre which provides medical services to patients as well as learning opportunities for students of the University of Melbourne.

[67] Dr Peter Roessler gave evidence that he has a positive working relationship with his employed practice nurses. He stated that he pays above award rates, and that the practice nurses he employs have flexible working arrangements. Ms Leonie Dyball, a nurse employed by Dr Roessler also gave evidence for VECCI. She stated that she is currently paid above the Award, has adequate study leave and receives allowances. She also gave evidence that her employment is flexible, and that she is happy to negotiate directly with her employer.

[68] The nurses employed by VECCI members all gave evidence that they were satisfied with their terms and conditions of employment, that they are paid penalties and overtime where applicable, and that they do not support the ANF's application. The nurses also gave evidence that they feel comfortable approaching their employers to discuss their terms and conditions of employment, and that they do not require the assistance of a third party such as the ANF to do so.

[69] The practice managers called by VECCI all say that their practices pay their employed practice nurses above the relevant Award rates. Further, the practice managers all state that the practice nurses have greater flexibility and work more sociable hours than nurses employed elsewhere.

[70] Ms Burrell outlined the steps she took to identify respondents named in the initial application who were either incorrectly named or did not employ a practice nurse. Further, Ms

Burrell's statement includes the results and her analysis of surveys sent to named respondents in the ANF's application. It was Ms Burrell's evidence that she believed many of the respondents named by the ANF in its application have not been correctly identified, or do not employ a practice nurse who would be subject to any multi-enterprise agreement arising out of a low-paid authorisation, were such an authorisation to be made.

[71] Ms Mandy Harrington, acting practice manager at The Elms Family Medical Centre, gave evidence that the ANF's correspondence seeking to bargain for an enterprise agreement incorrectly named the medical centre itself as an employer of practice nurses, where a different corporate entity employs practice nurses.

[72] Mr Curtain's evidence was that the nurses employed by UoM Commercial Ltd are paid over Award rates, above $35 per hour, and that they are not required to work weekends. The salaries of the nurses are review annually, and it was Mr Curtain's evidence that interim pay reviews and increases are possible.

[73] IPN relied on evidence from Nikkie Salagiannis, State Manager of New South Wales of IPN, Mark Beckett, Chief Financial Officer and Company Secretary of IPN, Scott Beattie, Chief Business Development Officer of IPN and Claresta Hartley, IPN's solicitor.

[74] Mr Beattie gave evidence that IPN employs approximately 713 practice nurses who are covered by the Award.[17] Mr Beattie said that should the cost of employing nurses increase beyond current levels, IPN would not be able to afford to employ as many nurses in its general practices.[18]

[75] Mr Beckett's evidence covered the Award coverage and pay rates for IPN nurses. Attached to his witness statement were tables detailing the number of nurses employed by IPN in each state, and their individual rates of pay.[19] It was Mr Beckett's evidence that IPN employs 136 nurses in Queensland, 18 in Victoria, 56 in Tasmania, 44 in South Australia, 175 in New South Wales and 114 in Western Australia. The data in Mr Beckett's evidence also sets out the percentages of nurses paid above Award rates on a state-by-state basis. It shows that on average, IPN nurses working full time in Victoria earn 14.3% above their relevant Award rates, where those working in Western Australia earn 28% above their relevant Award rates.

[76] Mr Beckett gave evidence that no IPN nurses are paid below the Award rate, and that on average, across Australia IPN nurses are paid 14.6% above the applicable Award rate.[20] Mr Beckett's evidence also showed that Australia-wide, full time IPN nurses earned on average 18.6% above the Award rate, while part time nurses earned 14.3% above the Award. Nurses employed on a casual basis earned on average 9.9% above the Award rate.

[77] Ms Salagiannis gave evidence that, in her view, the practice nurses employed by IPN were employed on more favourable conditions than those who work in other environments, such as hospitals. Ms Salagiannis cited the flexible hours, lack of shift work and performing less physically demanding work as being some of the comparative advantages of working as a practice nurse rather than a hospital nurse.[21] Ms Salagiannis further stated that although to her knowledge IPN had never been involved in collective bargaining, IPN nurses had previously approached IPN management to discuss improving their terms and conditions of employment.[22]

[78] Ms Hartley gave evidence of the rates of pay of the practice nurses employed by IPN who gave evidence for the ANF. The range of salaries in Ms Hartley's evidence of the ANF nurses was between $25 and $32 per hour for full time or part time nurses, and between $26 and $32 for casual nurses. She also provided extracts of various reports and statistical analyses about average Australian salaries and salaries of employees covered by the Award.

[79] Primary Health relied on the evidence of June Wong, head of Human Resources for the medical centres division of Primary Health. Ms Wong gave evidence that Primary Health employs approximately 487 practice nurses through two separate entities. Ms Wong stated that the majority of Primary Health's nursing staff work in large scale medical centres, where instead of employing doctors, Primary Health allows doctors to pay a fee for the use of Primary Health facilities and nursing services. Approximately 60% of the medical centres employ seven or more nurses. Ms Wong's evidence was that a majority of the nursing staff are employed as Treatment Room Attendants (TRAs) with a small number being employed in supervisory roles. In Ms Wong's opinion, working as a TRA does not require the same level of skill, complexity and experience that may be required in a hospital or a small local practice.

[80] Ms Wong also gave evidence of the pay rates of Primary Health nurses. Originally, Ms Wong stated that Primary Health paid 75% of its nurses above the minimum Award rate of $18.58. During cross examination, Ms Wong conceded that she did not know if all nursing staff are paid above the Award rate.

Jurisdiction

[81] IPN submits that the Commission's power to make a low-paid authorisation is limited to employees who are 'low-paid' and that no practice nurse correctly classified under the Nurses Award would fall within the range of hourly rates considered by the Commission in other cases to be low-paid. Reliance is placed on the objects of the relevant provisions and their apparent purpose. IPN's submissions are generally supported by other employer representatives.

[82] The ANF submits that the jurisdictional objection involves a misconstruction of the statutory provisions. It submits that the task of the Commission is to consider a range of matters in determining whether it is in the public interest to make the authorisation and that there is no basis for a separate preliminary determination of whether the employees concerned fall within the description of low-paid. It submits that in any event practice nurses are low-paid by reference to nursing industry standards in the public sector.

[83] The meaning of the term 'low-paid' is subject to strongly competing submissions in this case. However s.243 of the Act requires a low-paid authorisation to be made if the Commission is satisfied that it is in the public interest to do so, having regard to matters specified in subsequent sub-sections. Only one of the subsections makes any reference to low-paid employees.

[84] There is no doubt that the extent to which the employees subject to the application can be described as 'low-paid' is an important consideration in determining whether it is in the public interest to make the authorisation. However, I do not consider that satisfaction as to the low-paid status of the employees concerned is a jurisdictional hurdle to a consideration of the statutory test or the making of an order under s.243. In my view, the argument of the employers that there is no jurisdiction to hear and determine the application is unsound. The

Commission has jurisdiction to consider the application and make an authorisation if satisfied the statutory test has been met.

[85] I turn to consider the discretionary public interest test by reference to the factors required to be considered by s.243 of the Act.

Assistance to Low-Paid Employees

[86] This consideration is expressed in s.243 as "whether granting the authorisation would assist low-paid employees who have not had access to collective bargaining or who face substantial difficulty bargaining at the enterprise level".

[87] The first aspect of the consideration involves an assessment of whether practice nurses, or any other employees in general practice medical clinics are 'low-paid'. The term is not defined in the Act. However, it is a concept that has been commonly referred to in a variety of contexts in economic and workplace relations circles, including other provisions of the Act and in decisions of this Commission and its predecessors.

[88] IPN submits that principles of statutory interpretation support the adoption of a uniform meaning to terms used in legislation. It refers to the explanatory memorandum dealing with the mention of 'low-paid' in Division 9 of Part 2-4 and sections 134 and 284 of the Act.

[89] In the Aged Care case the Full Bench said[23]:

> **"[17]** There were a number of submissions relating to the concept of low-paid employees. We have no doubt that in the context of the provisions of Division 9 the phrase is intended to be a reference to employees who are paid at or around the award rate of pay and who are paid at the lower award classification levels.
>
> ...
>
> **[19]** We do not think it can be disputed that a very significant proportion of the employees in the aged care sector are low-paid in that they are paid at or around the award rate of pay and at the lower award classification levels. The applicants also relied on a report by Dr I Watson which compared levels of pay in the aged care sector with levels of pay for workers in comparable occupations working in other industries. Although various employer parties sought to criticise the report and submitted that we should reject it, we found the report useful. The following extract from the executive summary of the report indicates that aged care employees are low-paid in a relative sense:
>
> > "3 The Census data showed that the aged-care workforce is considerably over-represented in the lower bands of the income distribution and under-represented in the higher bands. Nearly half of the aged-care workforce earns between $400 and $599 per week. The comparable figure in other industries is closer to a third.
> >
> > 4 Some 56 per cent of the aged-care workforce could be regarded as minimum wage workers, compared with just 41 per cent among other industries.

> Particular occupations stand out. Nearly 80 per cent of cleaners and laundry workers working in aged care fell into the minimum wage category. The comparable figure in other industries was less than 60 per cent. Food preparation assistants were similar: in aged care 73 per cent were in the minimum wage category; in other industries the comparable figure was 61 per cent. Among carers and aides–who make up the majority of the aged-care workforce–the percentage in the minimum wage category was 57 per cent. In other industries it was 50 per cent."

> **[20]** We accept that in general terms employees in the aged care sector are low-paid. On the other hand there are many employers who are included in the schedule of respondents to whom an enterprise agreement under the Act, or its predecessor, applies. For that reason it is not possible to conclude that employees of those employers have not had access to collective bargaining. We consider that the existence of enterprise agreements is a matter to be taken into account in deciding the scope of any authorisation we decide to make. (references omitted)

[90] A Full Bench in the 2010 Annual Wage Review considered the term in the context of s.284 of the Act. It said[24]:

> **"[237]** There is no consensus among the parties and other commentators with respect to a definition of the low paid. Because there is a continuous distribution of wages, there is no wage threshold just below which people are clearly low paid and just above which people are clearly not low paid. Rather, the lower the wage, the more "low paid" is the employee. People earning above or near median earnings are clearly not low paid in an absolute sense. In considering relative living standards and the needs of the low paid, we have focussed mainly on those receiving less than two-thirds of median adult ordinary-time earnings (currently about $700 per week) and its equivalent hourly rate (about $18.50). We have also had regard in particular to those paid at the C10 rate, in recognition of past practice, on the C14 rate, which is equivalent to the minimum wage, and on those whose full-time equivalent wages put them in the bottom quintile of the wage distribution. Employees on award wages that are above these rates can be considered to be low paid in a different sense. The comparison here is between the award rate and the bargained rate for similar work."

[91] This approach has been applied in annual wage reviews since that time. In the June 2013 case the Full bench said[25]:

> **"[362]** There is a level of support for the proposition that the low paid are those employees who earn less than two-thirds of median full-time wages. This group was the focus of many of the submissions. The Panel has addressed this issue previously in considering the needs of the low paid, and has paid particular regard to those receiving less than two-thirds of median adult ordinary-time earnings and to those paid at or below the C10 rate in the Manufacturing Award. Nothing put in these proceedings has persuaded us to depart from this approach."

[92] Counsel for IPN submits that the case before me provides an opportunity to provide clarity on the meaning of the term by aligning the approaches adopted in the Aged Care case and Annual Wage Review decisions. IPN submits that this would result in considering low-

paid employees as those on rates between the C14 and C10 classifications in the Manufacturing Award.

[93] The ANF submits that the term is one that should be applied in the relevant industry under consideration, that industry is the vocation of nursing and that as practice nurses are paid less than public sector hospital nurses, practice nurses are low-paid. It submits in the alternative that practice nurses are low paid because they are often paid at or around the award rate of pay.

[94] There are a number of problems with the ANF approach, not least of which is the comparison made with different industries in the health sector. I consider that the term low-paid used in the legislation is intended to have a consistent meaning, albeit one that cannot be defined by reference to a strict cut off point. The Aged Care decision and the approach in Annual Wage reviews involve a consistent approach. In my view that is the correct approach to adopt in this case. However the notion that the concept is a matter of degree involves an element of imprecision which in my view must be borne in mind. I propose to adopt a broad view to the term in the context of the evidence of pay of the employees concerned.

[95] The relevant reference points in line with this approach are as follows:

Low-paid Reference Points	Hourly Rates $
C14	15.96
Lowest Quintile	16.18
C10	18.58
Two-thirds median AWOTE	19.30
Range	15.96-19.30

[96] The rates of pay in the Nurses Award are as follows:

"14.2 Enrolled nurses

(a) Student enrolled nurse

	Per week $
Less than 21 years of age	612.90
21 years of age and over	644.80

(b) Enrolled nurse

	Per week $
Pay point 1	719.30
Pay point 2	728.80

Pay point 3	738.40
Pay point 4	749.00
Pay point 5	756.50

14.3 Registered nurses

Minimum entry rate for a:

(a) four year degree is $803.30 per week;

(b) masters degree is $831.00 per week.

Progression from these entry rates will be to level 1—Registered nurse pay point 4 and 5 respectively.

	Per week $
Registered nurse—level 1	
Pay point 1	769.30
Pay point 2	785.20
Pay point 3	804.40
Pay point 4	825.70
Pay point 5	851.20
Pay point 6	875.70
Pay point 7	901.20
Pay point 8 and thereafter	924.60
Registered nurse—level 2	
Pay point 1	949.00
Pay point 2	964.00
Pay point 3	980.90
Pay point 4 and thereafter	997.00
Registered nurse—level	

3	
Pay point 1	1028.90
Pay point 2	1048.00
Pay point 3	1066.10
Pay point 4 and thereafter	1085.30
Registered nurse—level 4	
Grade 1	1174.60
Grade 2	1258.70
Grade 3	1332.10
Registered nurse—level 5	
Grade 1	1185.30
Grade 2	1248.10
Grade 3	1332.10
Grade 4	1415.10
Grade 5	1560.90
Grade 6	1707.70

14.4 Nurse practitioner

	Per week $
1st year	1184.20
2nd year	1219.40

14.5 Occupational health nurses

	Per week $
Occupational health nurse—level 1	
Pay point 1	825.70
Pay point 2	851.20

Pay point 3	875.70
Pay point 4	901.20
Pay point 5	924.60
Occupational health nurse—level 2	
Pay point 1	949.00
Pay point 2	964.00
Pay point 3	980.90
Pay point 4	997.00
Senior occupational health clinical nurse	997.00
Occupational health nurse—level 3	
Pay point 1	1028.90
Pay point 2	1048.00
Pay point 3	1066.10
Pay point 4 and thereafter	1085.30

[97] The hourly rates for enrolled nurses derived from these weekly amounts range from $18.92 to $19.91. For student enrolled nurses, the hourly rates range from $16.13 to $16.97. The hourly rates for registered nurses range from $20.24 to $44.94.

[98] This comparison shows that only student enrolled nurses and enrolled nurses on the lower pay points who are paid at the award rates of pay could fall within the description of low-paid applied in other cases. The evidence indicates however that a very high proportion of practice nurses are registered nurses, they are classified above the lowest pay point for registered nurses, and they are commonly paid above award rates of pay. The evidence shows that enrolled nurses require considerable experience before they can be employed within a general practice and would therefore be entitled to a rate under the award greater than the lowest pay points.

[99] IPN submits that the registered nurses employed as practice nurses do not fall within the description of low paid and the enrolled nurses specified by the ANF also fall outside of that description.

[100] The ANF submits that even ignoring other terms and conditions, the relevant employees should be described as employees paid at or around the award rate of pay and at the lower award classification levels and this is more so if the employees are presently incorrectly classified.

[101] There was a considerable amount of evidence about the appropriate classification for certain employees. The evidence on those matters did not enable a finding as to under classification. However I do not consider that the question whether employees are correctly classified necessarily determines the question of whether the employees are low-paid.

[102] In my view the evidence reveals that very few of the employees subject to the application are paid below $19.30. The evidence of the rates of pay paid by witnesses called by the AMA ranged from $23 per hour to about $45 per hour. Most were paid around the $30 per hour level. A survey conducted by VECCI indicated that the average rate paid to 60 enrolled nurses is $25.91. The average pay rate for 202 Registered nurses in the survey is $32.05. IPN's evidence suggests a range of $18.59 - 35.63 for enrolled nurses and $19.67 - $50.00 for registered nurses. Healthscope's evidence indicates an average of $23.45 for enrolled nurses and $29.37 for registered nurses.

[103] On the basis of the evidence led in the proceedings I find that very few of the employees subject to the application fall within the definition of low-paid applied by the Aged Care and Annual Wage Review Full Benches.

[104] The second element of this criterion is whether the low paid employees have had access to collective bargaining or face substantial difficulty bargaining at the enterprise level. The first point that must be made about this element is that the provisions of the Fair Work Act regarding enterprise agreements apply to all employees and employers covered by the national system. The rights and obligations in the Act include appointing a bargaining representative, rights for default bargaining representatives, the right to take protected industrial action, and good faith bargaining obligations. Some of these rights are conditional on an employer agreeing to bargain or a bargaining representative obtaining a Majority Support Determination or Scope Order from the Commission. While these legal rights show that the employees have had legal access to bargaining, I am of the view that the criterion is referable to practical access and practical difficulties. Nevertheless the extent to which the legal options have sought to be utilised is a relevant consideration.

[105] The evidence led in this matter has been extensive. However given the very large scope of the application affecting approximately 682 employers and a much larger number of employees, that evidence can only be a snapshot of the position across the group as a whole. It is also clear on the evidence that circumstances vary considerably between different medical practices and the snapshot provided by the evidence does not demonstrate a uniform picture. The evidence gives an indication of the range of different circumstances but not a reliable indication of the overall situation or the extent to which the circumstances described in the evidence are common.

[106] It appears that the approach of the ANF to bargaining has been to seek to negotiate on a vocational basis by reference to the terms and conditions of nurses in the public hospital system. Nurses are not the largest group of employees in general practice clinics. Their roles vary considerably. Their duties often overlap with those performed by doctors, clerical and administrative staff. There is no evidence of any attempts at bargaining at the enterprise level across the range of employees employed in the general practice. There is no evidence of any attempts to access enhanced bargaining rights by way of a majority support determination or to engage in protected industrial action.

[107] There is evidence of many employers of practice nurses refusing to bargain with the ANF for an enterprise agreement for practice nurses arising from the approaches made by the ANF over recent years. There is also some evidence of practice nurses facing difficulties in raising issues with their employers over revised terms and conditions of employment and their formalisation in an enterprise agreement. There is evidence of a variety of reasons for the employers' refusal to bargain. There is also evidence of examples of successful dialogue between employers and their employees and expressions of satisfaction with the terms and conditions of employment and the existing arrangements by both employers and employees. There is some evidence of lack of employee support for the ANF efforts to bargain and any disturbance of the current situation. The evidence of difficulties in bargaining at the enterprise level extended to practical difficulties the ANF has encountered in participating in such processes compared to the convenience of participating in multi-employer bargaining.

[108] In my view the notion of assisting employees must involve an element of speculation as to the likely scenarios if an authorisation is given. Nevertheless it is important that an assessment be made of such matters because potential assistance to low paid employees is integral to this factor. If an authorisation is made and the ANF seeks to initiate multi-employer bargaining with all of the respondents, it will clearly not be a simple process. The employers will be drawn to the bargaining table against their will. The process of arranging participation, even with extensive rationalisation of employer representatives will be cumbersome.

[109] If the evidence of the positions of parties towards the content of an agreement in the matter before me is any indication, there will be substantial differences between the parties. The ANF will generally advance the position that the terms and conditions of practice nurses should more closely reflect those in the public hospital sector because of the similarities in the work of the nurses. The concept of terms and conditions that suit the needs and capacities of the general practices concerned appears to be absent from the ANF's approach.

[110] The employers will advance the position that the economics of their practices and the employee preferences for work in practice clinics should be primary considerations - as they have been to date. In my view these likely positions strongly suggest that the process will be very difficult and somewhat fractious. I propose to consider this matter further in the context of broader public interest considerations.

[111] Taking all of these matters into account I am of the view that granting an authorisation may provide some assistance to some low-paid employees. However it will affect many others and will not necessarily lead to a simple, amicable bargaining process. The difficulties with the process may detract from any genuine attention to employees who clearly fall within the category of low-paid, as they are a minority of those represented in the proposed multi-employer bargaining. On balance I consider that any assistance will be marginal and this consideration is not a strong factor in support of a finding that it is in the public interest to make the authorisation.

History of Bargaining

[112] This consideration is expressed in s.243(2)(b) as "the history of bargaining in the industry in which the employees who will be covered by the agreement work"

[113] A consideration of the history may indicate the desirability of providing an alternative avenue of multi-employer bargaining compared to the current availability of enterprise bargaining. I have referred to the history of bargaining above. The ANF has made attempts to bargain with employers primarily by forwarding correspondence and logs of claims seeking terms and conditions in line with the public sector hospital sector. Those attempts have not led to agreements with the respondents. No agreements were reached as a result of the service of a log of claims in 2011. There have not been any attempts at obtaining majority support determinations.

[114] Support by employees for bargaining by the ANF is variable. Support by employers has been minimal.

[115] The common existing practice is one-on-one discussions between the practice nurse and the owner of the practice. From time to time this leads to changes in terms and conditions. The employers submit that they have not sought to modify Award obligations through formalised bargaining under the Act and that existing arrangements are therefore at or above the award level.

[116] The ANF submits that the history supports the making of the authorisation. The AMA submits that superimposing a multi-employer enterprise agreement on top of existing above Award arrangements with terms akin to Victorian public hospital nurses has the potential to unnecessarily interfere with, or upset, single enterprise bargaining that has occurred.

[117] I will have regard to this history in considering the overall public interest. In my view it is descriptive of the current situation but given the widely divergent views about the current arrangements, the history is not a strong factor either in support or against the application.

Relative Bargaining Strength

[118] This consideration is expressed in s.243(2)(c) as "the relative bargaining strength of the employers and employees who will be covered by the agreement".

[119] The ANF submits that its members rely on the assistance of the ANF in bargaining, and this is acknowledged by the AMA, yet the AMA and other employers have refused to approach the ANF to collectively bargain on behalf of its members.

[120] The AMA and other employer representatives dispute the assertion that practice nurses have a weak bargaining position. They point to the professional-to-professional discussions that can be engaged in - with or without assistance. They point to the significant over-Award arrangements as an indicator of bargaining strength and the availability of mutual benefits that arise from the current arrangements. The acute shortage of nurses is also raised as a factor that enhances the bargaining strength of practice nurses.

[121] There is no doubt that a multi employer bargaining process will be more convenient to the ANF than the current enterprise based bargaining that is available. However this criterion requires a consideration of the respective bargaining strength of the employers and employees concerned. I do not consider that convenience to a bargaining representative is the same thing, although the availability of representation is part of the legislative consideration.

[122] The difficulties that have been experienced by the ANF to date are not supported by the fact that significant overaward payments are made. In my view the approach of the ANF to terms and conditions of employment is a reason for this discrepancy.

[123] The assertions about relative bargaining strengths are strongly contested. I conclude on the evidence that the employers are in a slightly better bargaining position, but that the ANF has not demonstrated that this is a significant factor giving rise to a finding that it is in the public interest to make an authorisation.

Current terms and conditions

[124] This consideration is expressed in s.243(2)(d) as "the current terms and conditions of employment of the employees who will be covered by the agreement, as compared to relevant industry and community standards".

[125] There is a significant amount of evidence about the terms and conditions of employment of practice nurses. The ANF submits that general practice nurses are paid at or around the Nurses Award at the lower classification level. The employers point to the average pay being well above the award. I do not consider on the evidence that the rates of pay can be described as at or around the Award level.

[126] The parties are also divided on the identification of the relevant industry and community standards for general practice medical clinics. The ANF points to public hospital nurses' conditions and other areas of nursing. The employers submit that these are not relevant industry or community standards.

[127] Predecessor legislation to the Act defined the concept of 'industry' as either an industry of an employer or the vocation of employees.[26] The current Act does not do so. I am therefore of the view that a relevant industry or relevant industry standard is one derived from a comparison of the industry of the employers, not vocations of employees.

[128] The ANF does not contend that the wages and conditions of practice nurses subject to the application are out of step with practice nurses generally. Rather, it relies significantly on a comparison with public hospital nursing rates. In my view its approach does not deal with the type of comparisons intended by the legislation, except in a very marginal way. It is of course not unusual for employees who perform similar work to be paid different wages and conditions depending on the industry in which they are employed. That is inherent in the enterprise bargaining system established by the Act and the different economic conditions of different industries. The ANF has not established that this factor lends strong support for an authorisation.

Commonality in Enterprises

[129] This factor is expressed in s.243(2)(e) as "the degree of commonality in the nature of the enterprises to which the agreement relates, and the terms and conditions of employment in those enterprises".

[130] The ANF submits that the evidence establishes that a significant majority of general practices provide a commonality of service and a commonality in the manner in which they provide that service.

[131] The employers submit that doctors set their own fees and patients are subsidised to defray the costs of those fees, but it would be wrong to equate general practices with publically funded industries such as the aged care sector. The employers point to the differences in practice delivery and capacity arising from the differences in scale, labour markets and variable amounts of multi-disciplinary responsibilities. The evidence also establishes the development of new practice models arising from new technology and the entry of large medical clinics and large corporate providers while more traditional approaches in many smaller clinics continue to exist. Specialisation in areas such as occupational health and chronic disease management also give rise to differences.

[132] I am satisfied on the evidence that the various employers covered by the application are substantially similar and a significant proportion of them do not have relevant differences between them. I consider therefore that the nature of their operations does not present a barrier to effective multi employer bargaining.

Identifying Improvements in Productivity

[133] The consideration is defined in s.243(3)(a) of the Act as "whether granting the authorisation would assist in identifying improvements to productivity and service delivery at the enterprises to which the agreement relates". This factor is clearly intended to ensure that consideration is given to the inherent notion of bargaining that improved terms and conditions may be available in return for improved business efficiencies.

[134] The ANF submits that the career structure it intends to negotiate for practice nurses will provide improvements in service delivery. The employers generally dispute the value of such a claim. They point to the specific local flexibilities relevant to each practice as the major source of productivity improvement.

[135] In my view the ANF has failed to establish that multi employer bargaining will assist in identifying improvements in productivity. Indeed, from the positions advanced by the parties in the proceedings, there is likely to be more disagreement over flexibilities and efficiencies through large scale multi-employer bargaining than there would be if bargaining is confined to the individual enterprises. In my view this factor does not support the granting of an authorisation.

Manageable Collective Bargaining Process

[136] This consideration is expressed in s.243(3)(b) as "the extent to which the likely number of bargaining representatives for the agreement would be consistent with a manageable collective bargaining process".

[137] In the proceedings before the Commission eight employer representatives represented about 40% of the employer respondents. The other respondents were unrepresented. Healthscope submits that an authorisation would make the negotiations manageable. The other employer representatives submit that it cannot be assumed that representation in the proceedings and in relation to award matters would be the same for bargaining. They submit that there could be a wide range of representatives who will attempt to represent the diversity of practices and the individuality of employment arrangements in those practices. The

employers also point to the evidence that some nurses have written to the ANF or otherwise indicated that they do not wish to be represented by the ANF.

[138] On the evidence led in this matter I find that the process of multi-employer bargaining envisaged by the ANF will be very cumbersome. With a large amount of good-will and effort by all parties it may be manageable, but from the positions advanced by the parties I doubt that this will be achieved. I also consider that even if the process were to become manageable, it is likely to be inefficient. There will be a need to consult with many individual employers and represent a position on their behalf. Any significant disagreements on either the employer or employee side will be likely to lead to further dispersion of representation. In my view it cannot be safely concluded that the multi-employer bargaining process will be manageable.

Views of Employers and Employees

[139] This consideration is expressed in s.243(3)(c) of the Act as "the views of the employers and employees who will be covered by the agreement".

[140] The ANF refers to the consultation it has had with its practice nurse members and submits that its application has the support of its members. There is some direct evidence of employee support. The employers rely on some evidence that the application was not authorised by the practice nurses employed by some respondents and led direct evidence that some practice nurses oppose the application.

[141] The employers represented in the proceedings advanced strong grounds for opposing the application. I conclude that the overwhelming employer view is against the concept of multi-employer bargaining.

External Control, Direction or Influence

[142] This consideration is expressed in s.243(3)(d) as "the extent to which the terms and conditions of employment of the employees who will be covered by the agreement is controlled, directed or influenced by a person other than the employer, or employers, that will be covered by the agreement".

[143] The employers point to the uneven funding arrangements applying to general practices and specialist practices and the capping of the Practice Nurse Incentive Program. No party suggests that the terms and conditions are controlled or directed by persons other than the employers. I do not consider that this consideration has any significance in this case.

ANF's Preparedness to Consider Claim and Single Enterprise Agreements

[144] This consideration is expressed in s.243(3)(e) as "the extent to which the applicant for the authorisation is prepared to consider and respond reasonably to claims, or responses to claims, that may be made by a particular employer named in the application, if that employer later proposes to bargain for an agreement that (i) would cover that employer and (ii) would not cover the other employers specified in the application."

[145] The ANF led direct evidence that it is prepared to consider and respond reasonably to claims, or responses to claims, that may be made by a particular employer if that employer chooses to bargain for a single enterprise agreement.

[146] The employers submit that there is no reasonable basis to accept that the ANF will adopt a reasonable approach to such matters given the circumstances of making this application and the objective of obtaining terms and conditions based on public sector hospital terms and conditions. The employers submit that the approach of the NSW Nurses Association to small workplaces was far more reasonable than the approach being advanced by the ANF in the proceedings.

[147] I acknowledge the bargaining difficulties envisaged by the employers. However I consider that the direct evidence of the ANF in this matter suggests a preparedness to consider alternative forms of agreement. To conclude that its bargaining position is unreasonable involves the adoption of a value judgment that I do consider is appropriate in the circumstances of this matter.

[148] This consideration appears to encourage the applicant to be flexible in its approach and not rule out the legislatively preferred approach of enterprise bargaining. I am of the view that its position adds support to its application.

Other factors

[149] The ANF and the employers have raised other matters relating to the context of general practices and other circumstances that they submit is relevant to an overall assessment of the public interest. IPN submits that any concession to the ANF's objectives will be contrary to the public interest because of its potential to significantly escalate costs, create pressure in other sectors and exacerbate nursing shortages in other sectors. It is also critical of what it terms "me-tooism" inherent in the ANF's approach. IPN submits that other objectives of a sector wide classification structure and reclassification of nurses are best pursued through other avenues rather than by this application.

[150] The most relevant object of the Act is contained in s.3(f) which provides:

> "**3** The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:
>
> ...
>
> (f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action;"

Public Interest

[151] The task of the Commission is to determine whether it is in the public interest to make the low paid authorisation taking into account all of the matters dealt with above. Having regard to the history of negotiations and the circumstances involved I have concluded that granting the application may provide some assistance to some low paid employees. However I have also noted that the authorisation will affect many others who do not fall within established notions of being 'low-paid' and the assistance that may be provided is likely to be minimal.

[152] Clearly the making of formal agreements under the Act is a key object of the Act and this is a factor that I should take into account. However "emphasis" is given to enterprise level collective bargaining. This has been described as a legislative preference for enterprise level collective bargaining.[27] It is clear on the evidence in this matter that the ANF has not sought to utilise other forms of assistance provided in the Act for enterprise level collective bargaining. Further, its approach has a clear vocational element. It seeks to make an agreement or agreements relating only to practice nurses, notwithstanding the overlap in duties with other employees engaged in general practices.

[153] The method the ANF has adopted to try to reach an agreement has been to serve a uniform log of claims on a large number of employers seeking terms and conditions based on those applicable to public sector hospital nurses. The ANF's approach is not consistent with a willingness to negotiate a package of benefits relating to the particular needs of each enterprise covering a wide range of award covered employees within the enterprise.

[154] In my view there is limited support for the application arising from a consideration of the possible assistance to some low paid employees, the objects of the Act, the bargaining strengths of the parties, the com0monality of the enterprises and the views of some employees. Factors that detract from the application are the prospect of less attention to improvements in enterprise service delivery and productivity, the highly adversarial and cumbersome nature of the process that is likely to be involved and the strong opposition from employers and some employees. Factors which are essentially neutral are the history of bargaining, the current terms and conditions, the influence of third parties and the willingness to consider enterprise agreements.

[155] The consistent employer opposition to the notion of multi-enterprise bargaining combined with the diverse negotiation positions of the parties does not auger well for a possible multi-employer bargaining process. Indeed it is inevitable that such a process will face significant logistical difficulties. In my view there is a greater prospect of agreements being reached if negotiations are conducted at the enterprise level with appropriate utilisation of the facilitative provisions of the Act. Further, there is a greater prospect of meaningful enterprise improvements being negotiated if the negotiations are conducted at the enterprise level. The factors in support of making a low-paid authorisation are not strong. On balance I am not satisfied that it is in the public interest to make a low-paid authorisation.

Summary and Conclusion

[156] Practice nurses are a rapidly growing class of employees who expand the capability and efficiency of medical services provided by general practice medical clinics. It is estimated that over 11,000 nurses are currently employed as practice nurses. General practices range from small traditional partnerships to large corporate chains. Most practice nurses are employed on a part time or casual basis on day work. They are generally paid higher than the relevant Award rate as a result of individual negotiations between the employer and the practice nurses and the operation of the labour market.

[157] For several years the ANF has attempted to negotiate an improved package of terms and conditions based on the benefits provided to nurses in the public hospital sector. Its attempts have been met with strong opposition by general practice employers.

[158] In these proceedings the ANF seeks a 'low-paid' authorisation to bargain with employers on a multi-employer basis. Such authorisations are intended to assist low paid employees who may be disadvantaged by enterprise bargaining. The ANF's revised application covers 682 employers in Victoria and Tasmania. The effect of an authorisation is to extend rights under the Act to the multi-employer negotiations in which the ANF now proposes to engage, in lieu of the preferred mode of bargaining under the Act - enterprise bargaining.

[159] The Commission must grant a low-paid authorisation if it is satisfied that it is in the public interest to do so. In applying that test the Commission must have regard to a non-exhaustive set of considerations specified in the Act.

[160] Approximately 80 witnesses were initially proposed to be called to give evidence in the proceedings. Ultimately, 51 witnesses gave evidence. I have concluded on the evidence presented by the parties in this matter that a low-paid authorisation may provide some assistance to some low paid employees. However most practice nurses do not fall within established definitions of 'low-paid' employees. In my view the assistance to low paid employees is likely to be marginal. Because of the dispersion of the practice nurses in small general practices, the ANF has faced difficulty bargaining on behalf of its members. It has not however accessed all rights available under the Act to advance the interests of its members by way of enterprise-based negotiations. The ANF has sought to negotiate on behalf of nurses alone rather than participate in processes covering a wider group of award covered employees within general practices. Its claims are based on the benefits provided to nurses in the public hospital sector rather than the needs and capabilities of the relevant employers. The current terms and conditions provided by the Victorian and Tasmanian respondents are not out of step with general practices elsewhere. They are probably less than the public hospital sector, although the different requirements of employees and lifestyle factors would need to be factored into such an analysis.

[161] Multi-employer bargaining is less likely to identify improvements in productivity and service delivery than enterprise bargaining. Multi-employer bargaining covering several hundred general practice employers is likely to be cumbersome. There are considerable doubts that the process will be manageable, even though there is substantial commonality in the general practices involved. Multi-employer bargaining is supported by a large proportion of employees. It is strongly opposed by most employers and some employees.

[162] In all of the circumstances I conclude that the case for the authorisation is not strong and several important factors indicate that multi-employer bargaining may be undesirable or less appropriate than genuine enterprise-based bargaining. For the above reasons, which are explained in more detail in the body of this decision, I am not satisfied that it is in the public interest to make the authorisation. The application is therefore dismissed.

VICE PRESIDENT WATSON

Appearances:

Mr C Dowling, of counsel, for the Australian Nursing Federation.

Mr M Follett, of counsel, for Primary Health Care Ltd.

Mr M Harmer for Independent medical Centres Pty Limited, Allied Medical Group Holdings Pty Ltd and Lonnex & Millenium Management Holdings Pty Ltd.

Mr T McDonald for the Australian Medical Association (AMA) Limited, AMA Victoria Limited and AMA Tasmania Limited.

Mr M Ritchie for the Victorian Employers' Chamber of Commerce and Industry

Hearing details:

2012.
Melbourne.
June 1
August 21
September 3, 4, 5, 6, 7
November 19, 20, 21, 22, 23
December 13, 14.

2013.
Melbourne.
January 24, 25.

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[1] [MA000034]

[2] Exhibit D70

[3] Section 246.

[4] Section 230(2)(d)

[5] Section 260.

[6] [2011] FWAFB 2633 at [11]

[7] [2011] FWAFB 2633

[8] Bamberry L & Bridgen C, Australian Nursing Federation, *Practice Nurses, Salaries, Wages and Conditions*

[9] Annexure 1

[10] Exhibit D12, para 16.

[11] Exhibit M7, para 7.

[12] Exhibit M8, para 5.

[13] Exhibit M3, page 3

[14] Exhibit M3

[15] Exhibit M3, page 2

[16] Exhibit M3, page 4.

[17] Exhibit H13

[18] Exhibit H13, para 16.

[19] Exhibit H12, schedules B1-B7.

[20] Exhibit H12, para 23.

[21] Exhibit H10, para 19.

[22] Exhibit H10, para 44.

[23] [2011] FWAFB 2633

[24] *Annual Wage Review 2009-10* [2010] FWAFB 4000.

[25] *Annual Wage Review 2012-13* [2013] FWCFB 4000.

[26] See, for example *Industrial Relations Act 1988* s.4.

[27] [2011] FWAFB 2633 at [11]

ANNEXURE 1 - WITNESS LIST

ANF
Yvonne Chaperon
Lynda Burrell
Monica Knobloch
Belinda Caldwell
Jane Goldsmith
Leonie Kelly
Lisa Taliana
Jennie Carr
Julianne Badenoch
Agnes Stanislaus-Large
Patricia O'Hara
Amy Bowler
Larissa Bamberry
Deirdre Morgan
Elizabeth Robinson
Primary Health
June Wong
AMA
Roger Kilham
Mark Kennedy
Cameron Martin
Meryl Jerome
Sharon Powell
Jane Sklovsky
Elroy Schroeder
Jane Tudor
Elaine Cotter
Gail Pascoe
Annette Douglas
Andrew Wright
Jack Lipp
Julie Cartwright
John Menzies

Christine Longman
Jenny Ktenidis
VECCI
Danielle Harrison
Bernadette Szwaja
Mandy Harrington
Kath Streete
Emma Thompson
Christine Ziegler
Lisa Burrell
Peter Roessler
Leonie Dyball
Sean Curtain
Patricia McLeod
Stephen Ross
Jenny Yeo
Sharon Street
IPN
Nikki Saligianis
Mark Beckett
Scott Beattie
Jun Lei Hartley

FAIR WORK COMMISSION

Re 4 Yearly Review of Modern Awards — Award Stage — General Retail Industry Award 2020

[2020] FWCFB 6301

Ross J, President, Hatcher VP and Lee C

18, 24 November 2020

Awards — Award modernisation — 4 yearly review of General Retail Industry Award 2020 — Application for variation to junior rates — Fixation of minimum wages in modern awards — Underpinning concepts — Reason for and extent of variation permitted — Focus of Fair Work Commission's consideration in assessing proposed variations — Relevance of State pre-reform awards — Whether link between competence and promotion of above level 1 junior employees proven — Whether competence alone sufficient work value reason to support receipt of adult wages — Removal of junior rates for employees classified as level 4 and above — Factors relevant to determining impact on business of variation — No significant impact — Legislative framework for review of modern awards by Commission — Principles relevant to conduct of review — Fair Work Act 2009 (Cth), ss 134, 138, 156.

The remaining outstanding claim made in the 4 yearly review of the *General Retail Industry Award 2020* (the Award) was that cl 17.2 of the Award be varied so as to confine the payment of junior rates to level 1 employees only. There were eight classification levels in the Award, ranging from shop assistant to store manager. The proposed variation meant that employees engaged at levels higher than level 1 would be paid the full adult rate. It was submitted that employees performing work at a higher classification than level 1 were recognised as having the necessary skills and competences applicable for the higher classification so that the full adult rate should apply to the rate paid to them, irrespective of age.

The modern awards objective set out in s 134 of the *Fair Work Act 2009* (Cth) (the Act) was that the modern awards, together with the National Employment Standards, provided a fair and relevant minimum safety net of terms and conditions, taking into account the various matters set out in that provision.

Section 138 of the Act provided that a modern award could include terms that it was permitted to include, and had to include terms that it was required to include, but only to the extent necessary to achieve the modern awards objective.

Section 156(3) of the Act stated that the Commission had to be satisfied that any proposed variation to modern award minimum wages was justified by work value reasons. Section 156(4) set out those reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to the nature of the work, or the level of skill or responsibility involved in doing the work or the conditions under which the work was done.

The majority of junior employees covered by the Award were employed at level 1.

There was no consistent treatment of the application of junior rates across the modern awards system.

Held (varying the Award in part): (1) The concepts of uniformity and consistency underpinned the fixation of minimum wages in modern awards.

Re Annual Wage Review 2012-13 (2013) 235 IR 332 at [76]-[79], considered.

(2) If a modern award was not achieving the modern awards objective, then it was to be varied, but only so as to include terms that were necessary to achieve that objective. In such circumstances regard could be had to the terms of any proposed variation, but the focal point of the Commission's consideration was upon the terms of that modern award, as varied.

(3) The Award Modernisation Full Bench did not err in applying junior rates to all classifications just because the relevant Victoria, New South Wales and Australian Capital Territory pre-reform awards did not provide for junior rates above level 1. The award modernisation process was a broad balancing exercise which necessarily involved striking a balance as to appropriate safety net terms and conditions in light of diverse award arrangements that currently applied.

Re Request from the Minister for Employment and Workplace Relations — 28 March 2008 (2009) 187 IR 146, considered.

(4) No evidence supported the proposition that a junior employee would not be promoted above level 1 unless he or she were competent so that, on the basis of that competence, they would be doing work equivalent to that of an adult employee and thus entitled to adult wages. Moreover such an assertion, of itself, was insufficient to satisfy s 156(3) of the Act.

(5) A fundamental feature of the minimum wage objective was the requirement to establish and maintain a safety net of fair minimum wages. A necessary element of that was that the level of those wages bore a proper relationship to the value of work performed. Work value reasons justified removing junior rates for employees at level 4 and above, in keeping with the application of the concepts of uniformity and consistency which underpinned the fixation of minimum wages in modern awards.

(6) Section 134(1)(f) of the Act, which obliged the Commission, when ensuring that modern awards provided a fair and relevant minimum safety net of terms and conditions, to take account of the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden, was not confined to those three matters. The provision was concerned with the impact of the exercise of those powers "on business".

(7) Applying that provision told against the proposed variation of cl 17.2 of the Award for level 4 to 8 junior employees since employment costs would increase, but that increase would not be significant as it was likely that very few junior employees would be employed at such classification levels.

Consideration of the legislative framework for the review of modern awards by the Commission and principles relevant to carrying out such review.

Cases Cited

4 Yearly Review of Modern Awards — Award Stage — General Retail Industry Award 2020, Re [2020] FWCFB 5371.

4 Yearly Review of Modern Awards — Penalty Rates, Re (2017) 265 IR 1.

4 Yearly Review of Modern Awards — Pharmacy Industry Award 2010, Re [2017] FWCFB 3540.

4 Yearly Review of Modern Awards — Preliminary Jurisdictional Issues, Re (2014) 241 IR 189.

Aboriginal Affairs, Minister for v Peko-Wallsend Ltd (1986) 162 CLR 24.

Annual Wage Review 2012-13, Re (2013) 235 IR 332.

Annual Wage Review 2016-17, Re (2017) 267 IR 241.

Annual Wage Review 2017-18, Re (2018) 279 IR 215.

Annual Wage Review 2019-20, Re (2020) 297 IR 1.

Australian Competition and Consumer Commission v Leelee Pty Ltd [2000] ATPR 41-742.

Clerks (Breweries) Consolidated Award 1985, Re (unreported, AIRC, Ross VP, R9120, 14 September 1999).

Construction, Forestry, Mining and Energy Union v Anglo American Metallurgical Coal Pty Ltd (2017) 252 FCR 337.

Edwards v Giudice (1999) 94 FCR 561.

Employment and Workplace Relations — 28 March 2008, Re Request from Minister for ([2008] AIRCFB 1000) (2008) 177 IR 364.

Employment and Workplace Relations — 28 March 2008, Re Request from Minister for ([2009] AIRCFB 800) (2009) 187 IR 146.

General Retail Industry Award 2010, Re (2010) 192 IR 9.

Modern Awards Review 2012 — General Retail Industry Award 2010 — Junior Rates, Re (2014) 241 IR 243.

National Retail Association v Fair Work Commission (2014) 225 FCR 154; 244 IR 461.

National Wage Case August 1988 (1988) 25 IR 170.

National Wage Case February 1989 Review (1989) 27 IR 196.

O'Sullivan v Farrer (1989) 168 CLR 210.

Paid Rates Review, Re (1998) 123 IR 240.

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355.

Shop, Distributive and Allied Employees Association v Australian Industry Group (2017) 253 FCR 368; 272 IR 88.

Shop, Distributive and Allied Employees Association v National Retail Association (No 2) (2012) 205 FCR 227; 219 IR 382.

Application to vary the General Retail Industry Award 2020

J Arndt, for the Australian Business Industrial and the New South Wales Business Chamber.

I Booth, for the Newsagents Association of NSW and ACT; the Australian Newsagents Federation Ltd (t/as Australian Lottery and Newsagents Association) and its members.

W Friend, of counsel, for the Shop, Distributive and Allied Employees Association.

A Millman, for the National Retail Association.

Cur adv vult

Fair Work Commission

1. Background

1 The plain language review of this award has been finalised and the *General Retail Industry Award 2020* (the Retail Award) came into operation on 1 October 2020. This decision deals with the remaining outstanding claim made in the 4 yearly review of the Retail Award.

2 The SDA seeks to vary what is now cl 17.2 of the Retail Award to limit the application of junior rates. The Retail Award currently applies junior percentages to all 8 classification levels. This means junior percentage rates apply from the shop assistant through to the store manager classifications levels. The proposed variation seeks to confine the payment of junior rates to level 1 employees only; with the consequence that employees engaged at higher levels would be paid the full adult rate. Level 1 is the general shop assistant classification.

3 On 8 October 2020 we issued a Statement[1] (the *October 2020 Statement*) in which we summarised the evidence and submissions filed and posed a series of questions to interested parties.

4 On 5 November 2020 the Commission published an information note, (the 5 November Junior rates information note) which sets out the awards containing a junior rates clause, and whether such terms limit the application of those rates.

5 A hearing was held on 18 November 2020. The transcript of that hearing is available here (<https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/181120_am201760.htm>).

6 Prior to the 18 November 2020 hearing the Commission published an information note summarising the responses of interested parties to some questions posed in the *October 2020 Statement* and posed a series of additional questions which the parties were asked to respond to during the course of the hearing.

7 Before turning to the evidence and submissions advanced, we set out a summary of the legislative framework that applies to the 4 yearly review of modern awards (the Review).

2. Legislative framework

8 Section 156 of the *Fair Work Act 2009* (Cth) (the Act) deals with the conduct of the Review and s 156(2) provides that the Commission *must* review all modern awards and *may*, among other things, make determinations varying modern awards. In this context "review" has its ordinary and natural meaning of "survey, inspect, re-examine or look back upon".[2] The discretion in s 156(2)(b)(i) to make determinations varying modern awards in a Review, is expressed in general, unqualified, terms.

9 The *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018* (Cth) (the 2018 Amendment Act) was assented to on 11 December 2018. The 2018 Amendment Act repealed the parts of the Act providing for the conduct of 4 yearly reviews of modern awards. However, Sch 4, Application and transitional provisions, of the 2018 Amendment Act preserved the operation

1 *Re 4 Yearly Review of Modern Awards — Award Stage — General Retail Industry Award 2020* [2020] FWCFB 5371.

2 *Shop, Distributive and Allied Employees Association v Australian Industry Group* (2017) 253 FCR 368; 272 IR 88 at [38].

of the relevant provisions in the Act in respect of reviews of modern awards conducted as part of 4 yearly reviews of modern awards, if such review was commenced, but not completed, prior to 1 January 2018.

10 The review of the Retail Award commenced prior to 1 January 2018. Accordingly, the Review may continue pursuant to the provisions of the Act despite their repeal.

11 If a power to decide is conferred by a statute and the context (including the subject matter to be decided) provides no positive indication of the considerations by reference to which a decision is to be made, a general discretion confined only by the subject matter, scope and purposes of the legislation will ordinarily be implied.[3] However, a number of provisions of the Act which are relevant to the Review operate to constrain the breadth of the discretion in s 156(2)(b)(i). In particular, the Review function in Pt 2-3 of the Act involves the performance or exercise of the Commission's "modern award powers" (see s 134(2)(a)). It follows that the "modern awards objective" in s 134 applies to the Review.

12 Section 138 (achieving the modern awards objective) and a range of other provisions of the Act are also relevant to the Review: s 3 (object of the Act); s 55 (interaction with the National Employment Standards (the NES)); Pt 2-2 (the NES); s 135 (special provisions relating to modern award minimum wages); Div 3 (terms of modern awards) and Div 6 (general provisions relating to modern award powers) of Pt 2-3; s 284 (the minimum wages objective); s 577 (performance of functions etc by the Commission); s 578 (matters the Commission must take into account in performing functions etc); and Div 3 of Pt 5-1 (conduct of matters before the Commission).

13 The modern awards objective is in s 134 of the Act:

> 134 The modern awards objective
>
> What is the modern awards objective?
>
> (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

3 *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216 per Mason CJ, Brennan, Dawson and Gaudron JJ.

(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

(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*.

When does the modern awards objective apply?

(2) The modern awards objective applies to the performance or exercise of the FWC's *modern award powers*, which are:

(a) the FWC's functions or powers under this Part; and

(b) the FWC's functions or powers under Part 2-6, so far as they relate to modern award minimum wages.

Note: The FWC must also take into account the objects of this Act and any other applicable provisions. For example, if the FWC is setting, varying or revoking modern award minimum wages, the minimum wages objective also applies (see section 284).

14 The modern awards objective is to "ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions", taking into account the particular considerations identified in s 134(1)(a)-(h) of the Act (the s 134 considerations).

15 The modern awards objective is very broadly expressed.[4] It is a composite expression which requires that modern awards, together with the NES, provide "a fair and relevant minimum safety net of terms and conditions", taking into account s 134 considerations.[5] "Fairness" in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question.[6]

16 The obligation to take into account the s 134 considerations means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision-making process.[7] No particular primacy is attached to any of the s 134 considerations[8] and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.

17 It is not necessary to make a finding that the modern award fails to satisfy one or more of the s 134 considerations as a prerequisite to the variation of a modern award.[9] Generally speaking, the s 134 considerations do not set a particular standard against which a modern award can be evaluated; many of

4 *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227; 219 IR 382 at [35].

5 *Re 4 Yearly Review of Modern Awards — Penalty Rates* (2017) 265 IR 1 at [128]; *Shop, Distributive and Allied Employees Association v Australian Industry Group* (2017) 253 FCR 368; 272 IR 88 at [41]-[44].

6 *Re Annual Wage Review 2017-18* (2018) 279 IR 215 at [21]-[24].

7 *Edwards v Giudice* (1999) 94 FCR 561 at [5]; *Australian Competition and Consumer Commission v Leelee Pty Ltd* [2000] ATPR 41-742 at [81]-[84]; *National Retail Association v Fair Work Commission* (2014) 225 FCR 154; 244 IR 461 at [56].

8 *Shop, Distributive and Allied Employees Association v Australian Industry Group* (2017) 253 FCR 368; 272 IR 88 at [33].

9 *National Retail Association v Fair Work Commission* (2014) 225 FCR 154; 244 IR 461 at [105]-[106].

them may be characterised as broad social objectives.[10] In giving effect to the modern awards objective the Commission is performing an evaluative function taking into account the matters in s 134(1)(a)-(h) of the Act and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance.

18 Further, the matters which may be taken into account are not confined to the s 134 considerations. As the Full Court observed in *Shop, Distributive and Allied Employees Association v Australian Industry Group*[11] (the *Penalty Rates Review*):

> What must be recognised, however, is that the duty of ensuring that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions itself involves an evaluative exercise. While the considerations in s 134(a)-(h) inform the evaluation of what might constitute a "fair and relevant minimum safety net of terms and conditions", they do not necessarily exhaust the matters which the FWC might properly consider to be relevant to that standard, of a fair and relevant minimum safety net of terms and conditions, in the particular circumstances of a review. The range of such matters "must be determined by implication from the subject matter, scope and purpose of the Fair Work Act" (*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24 at 39-40).[12]

19 Section 138 of the Act emphasises the importance of the modern awards objective:

> 138 Achieving the modern awards objective
>
> A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.

20 What is "necessary" to achieve the modern awards objective in a particular case is a value judgment, taking into account the s 134 considerations to the extent that they are relevant having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence.[13]

21 In *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)*[14] Tracey J considered what it meant for the Commission to be satisfied that making a determination varying a modern award (outside a 4 yearly review) was "necessary to achieve the modern awards objective" for the purposes of s 157(1). His Honour held:

> The statutory foundation for the exercise of FWA's power to vary modern awards is to be found in s 157(1) of the Act. The power is discretionary in nature.

---

10 See *National Retail Association v Fair Work Commission* (2014) 225 FCR 154; 244 IR 461 at [109]-[110]; albeit the Court was considering a different statutory context, this observation is applicable to the Commission's task in the Review.

11 *Shop, Distributive and Allied Employees Association v Australian Industry Group* (2017) 253 FCR 368; 272 IR 88 at [161].

12 *Shop, Distributive and Allied Employees Association v Australian Industry Group* (2017) 253 FCR 368; 272 IR 88 at [48].

13 See generally: *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227; 219 IR 382.

14 *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227; 219 IR 382.

> Its exercise is conditioned upon FWA being satisfied that the variation is "necessary" in order "to achieve the modern awards objective". That objective is very broadly expressed: FWA must "provide a fair and relevant minimum safety net of terms and conditions" which govern employment in various industries. In determining appropriate terms and conditions regard must be had to matters such as the promotion of social inclusion through increased workforce participation and the need to promote flexible working practices.
>
> …
>
> The question under this ground then becomes whether there was material before the Vice President upon which he could reasonably be satisfied that a variation to the Award was necessary, at the time at which it was made, in order to achieve the statutory objective.
>
> …
>
> In reaching my conclusion on this ground I have not overlooked the SDA's subsidiary contention that a distinction must be drawn between that which is necessary and that which is desirable. That which is necessary must be done. That which is desirable does not carry the same imperative for action. Whilst this distinction may be accepted it must also be acknowledged that reasonable minds may differ as to whether particular action is necessary or merely desirable. It was open to the Vice President to form the opinion that a variation was necessary.[15]

22 The above observation — in particular the distinction between that which is "necessary" and that which is merely "desirable" — is apposite to s 138, including the observation that reasonable minds may differ as to whether a particular award term or proposed variation is necessary, as opposed to merely desirable. What is "necessary" to achieve the modern awards objective in a particular case is a value judgment, taking into account the s 134 considerations to the extent that they are relevant having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence.[16]

23 In *Re 4 Yearly Review of Modern Awards — Penalty Rates*[17] (the *Penalty Rates Case*) the Full Bench summarised the general propositions applying to the Commission's task in the Review, as follows:

> 1. The Commission's task in the Review is to determine whether a particular modern award achieves the modern awards objective. If a modern award is not achieving the modern awards objective then it is to be varied such that it only includes terms that are "necessary to achieve the modern awards objective" (s 138). In such circumstances regard may be had to the terms of any proposed variation, but the focal point of the Commission's consideration is upon the terms of the modern award, as varied.
> 2. Variations to modern awards must be justified on their merits. The extent of the merit argument required will depend on the circumstances. Some proposed changes are obvious as a matter of industrial merit and in such circumstances it is unnecessary to advance probative evidence in support of the proposed variation. Significant changes where merit is reasonably contestable should be supported by an analysis of the relevant legislative provisions and, where feasible, probative evidence.

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15 *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227; 219 IR 382 at [35]-[37] and [46].

16 See generally: *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227; 219 IR 382.

17 *Re 4 Yearly Review of Modern Awards — Penalty Rates* (2017) 265 IR 1.

3. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. For example, 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. The particular context in which those decisions were made will also need to be considered.
4. The particular context may be a cogent reason for not following a previous Full Bench decision, for example:
    - the legislative context which pertained at that time may be materially different from the *Fair Work Act 2009* (Cth);
    - the extent to which the relevant issue was contested and, in particular, the extent of the evidence and submissions put in the previous proceeding will bear on the weight to be accorded to the previous decision; or
    - the extent of the previous Full Bench's consideration of the contested issue. The absence of detailed reasons in a previous decision may be a factor in considering the weight to be accorded to the decision.[18]

24 Where an interested party applies for a variation to a modern award as part of the Review, the proper approach to the assessment of that application was described by a Full Court of the Federal Court in *Construction, Forestry, Mining and Energy Union v Anglo American Metallurgical Coal Pty Ltd*[19] as follows:

> [28] The terms of s 156(2)(a) require the Commission to review all modern awards every four years. That is the task upon which the Commission was engaged. The statutory task is, in this context, not limited to focusing upon any posited variation as necessary to achieve the modern awards objective, as it is under s 157(1)(a). Rather, it is a review of the modern award as a whole. The review is at large, to ensure that the modern awards objective is being met: that the award, together with the National Employment Standards, provides a fair and relevant minimum safety net of terms and conditions. This is to be achieved by s 138 — terms may and must be included only to the extent necessary to achieve such an objective.
>
> [29] Viewing the statutory task in this way reveals that it is not necessary for the Commission to conclude that the award, or a term of it as it currently stands, does not meet the modern award objective. Rather, it is necessary for the Commission to review the award and, by reference to the matters in s 134(1) and any other consideration consistent with the purpose of the objective, come to an evaluative judgment about the objective and what terms should be included only to the extent necessary to achieve the objective of a fair and relevant minimum safety net.

25 In the same decision the Full Court also said: "… the task was not to address a jurisdictional fact about the need for change, but to review the award and evaluate whether the posited terms with a variation met the objective".[20]

26 The above summary of the legislative framework formed part of the *October 2020 Statement* and no party took issue with it. Further, it is common

18 *Re 4 Yearly Review of Modern Awards — Penalty Rates* (2017) 265 IR 1 at [269].

19 *Construction, Forestry, Mining and Energy Union v Anglo American Metallurgical Coal Pty Ltd* (2017) 252 FCR 337.

20 *Construction, Forestry, Mining and Energy Union v Anglo American Metallurgical Coal Pty Ltd* (2017) 252 FCR 337 at [46].

ground that the application seeks to vary modern award minimum wages and that the Commission must be satisfied that such a variation is justified by work value reasons. Section 156 relevantly provides:

> (3) In a 4 yearly review of modern awards, the FWC may make a determination varying modern award minimum wages only if the FWC is satisfied that the variation of modern award minimum wages is justified by work value reasons.
>
> (4) *Work value reasons* are reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:
>
> (a) the nature of the work;
>
> (b) the level of skill or responsibility involved in doing the work;
>
> (c) the conditions under which the work is done.

27 The NRA submits that "in assessing whether the work value reasons 'relate to' any of the matters set out in section 157(2A)(a) to (c), the words are themselves reasonably broad but nevertheless require 'the existence of a connection or association'".[21] This proposition was not contested by counsel for the SDA, who emphasised that "relate to" is an expression of broad import. We agree with both the NRA's submission and the point made by the SDA.

28 We make one further observation relevant to the fixation of modern award minimum wages; namely that concepts of uniformity and consistency underpin the fixation of minimum wages in modern awards. As the Expert Panel observed in *Re Annual Wage Review 2012-13*[22] (footnotes omitted):

> At the outset it is important to appreciate that the Act was legislated against the background of a long-standing approach to minimum wage fixation. Parliament may be presumed to have known of the historical approach taken to such claims. The concepts of uniformity and consistency of treatment have underpinned the fixation of minimum wages in modern awards and date back to the establishment of consistent minimum rates within and across awards endorsed in the *National Wage Case February 1989 Review* and implemented in the *National Wage Case August 1988* decision. The principle of consistent minimum rates across awards was maintained through the award simplification process; the *Paid Rates Review*; and award modernisation.
>
> As to the current legislative framework, the minimum wages objective requires us to establish and maintain "a safety net of fair minimum wages" and the modern awards objective requires us to ensure that modern awards (together with the National Employment Standards) provide a fair and relevant minimum safety net of terms and conditions. The modern awards objective also speaks of the need to ensure a "stable and sustainable modern award system". In our view, considerations of fairness and stability tell against an award-by-award approach to minimum wage fixation. If differential treatment was afforded to particular industries this would distort award relativities and lead to disparate wage outcomes for award-reliant employees with similar or comparable levels of skill. In this regard, we note that in its submission, Australian Business Industrial (ABI) "fully accepts that there is a presumption of uniformity in the *Fair Work Act* and compelling reasons for the system of modern awards for awards to be treated equally in Division 3 Part 2-6 reviews" … The maintenance of consistent minimum wages in modern awards and the need to ensure a stable and sustainable

21 NRA submission, 11 November 2020 at 1.10, citing *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [87].

22 *Re Annual Wage Review 2012-13* (2013) 235 IR 332 at [76]-[79].

> modern award system would be undermined if the Panel too readily acceded to requests for differential treatment.
>
> At a broader, conceptual, level it is important to appreciate that the framework for workplace relations established by the Act is predicated on a guaranteed safety net which underpins enterprise level collective bargaining. The safety net of fair, relevant and enforceable minimum wages and conditions is provided through modern awards, national minimum wage orders and the National Employment Standards. Collective bargaining at the enterprise level is underpinned by that safety net. This is evident from the fact that enterprise agreements must pass the "better off overall test" in s 193 of the Act and the terms of an enterprise agreement may supplement, but cannot exclude, any provision of the National Employment Standards (ss 55 and 186(2)(c)).
>
> The award-by-award approach to minimum wage fixation, based on sectoral considerations, advocated by some parties in these proceedings is inimicable to the safety net nature of modern award minimum wages. Enterprise level collective bargaining is the primary means by which the statutory framework envisages differential treatment based on the circumstances in particular enterprises, which would be influenced by relevant sectoral considerations. That the system functions in this way is evidenced by the sectoral variation in actual wage outcomes.

29 We will apply the above principles to the matter before us. We now turn to the evidence.

3. The evidence

3.1 Expert report of Dr O'Brien

30 The SDA filed an Expert Report in support of its claim. The Expert Report was prepared by Dr Martin O'Brien, Associate Professor of Economics, University of Wollongong. Dr O'Brien's report was marked as Exhibit SDA 1 and was the subject of oral evidence on 8 October 2019. The transcript of that proceeding is available here (<https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/081019-am201760.htm>).

31 In essence, the purpose of the report was to establish the number of junior employees employed in classifications higher than Level 1; thus, identifying the number of employees affected by the claim. Using data from the 2016 Census Dr O'Brien concluded 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 of age was 160 848
- of these junior employees, 17 244 or 11%, were employed in classifications higher than Level 1.

32 Dr O'Brien's methodology is set out in his report, and, in short, involved the following steps:

1. The number of employees covered by the Retail Award is calculated from ABS ANZSIC data using the ANZSIC classes "mapped" to the Retail Award contained in *Research Report 2/2012: Analysing modern award coverage using the Australian and New Zealand Standard Industrial Classification 2006: Phase 1 Report*.[23] The 2016 Census data

23 See Preston M, Pung A, Leung E, Casey C, Dunn A and Richter O, "Research Report 2/2012: Analysing modern award coverage using the Australian and New Zealand Standard Industrial Classification 2006: Phase 1 Report", February 2012; Spreadsheets with modern awards and relevant ANZSIC classes listed, *Re Annual Wage Review 2012-13* (2013) 235 IR 332.

was used as it is the only source of the 4 digit level ANZSIC data. In step 1 Dr O'Brien excluded, among other things, 4 digit ANZSCO unit groups with "clerk" in their descriptions on the basis that the Retail Award "excludes clerks".[24]

2. Employee totals covered by the Retail Award are compiled for those aged 15 to 20 years (junior employees), using the 2016 Census data.
3. The number of Level 1 junior employees is identified using the Fair Work Ombudsman's list of job descriptions and aligning them with ANZSCO descriptions.

33 In the course of cross examination Dr O'Brien was taken to the Retail Award and the description of the "general retail industry". Dr O'Brien acknowledged that the exclusion of clerical functions from the Retail Award only operates to exclude clerical functions performed *away from* the retail establishment and not functions performed *at* the retail establishment.[25] Dr O'Brien also conceded that by excluding clerks at classification levels 4, 6, 7 and 8, the number of employees included in his calculation "is less than it might have been".[26] Dr O'Brien's evidence is that the extent of the underestimation would not be more than 1210 employees as that is the number of clerical employees excluded from his calculation.[27] Further, Dr O'Brien conceded that:

- under classification level 3 an employee may not have to do supervision[28] and on that basis it is possible that some of the employees included in calculating the number of level 1 employees could actually be level 3 employees;[29]
- it is possible that some employees who identified themselves as "store persons", and who Dr O'Brien classified as level 1 employees, operate forklifts and hence should have been classified as level 2 employees;[30] and
- the data used does not include employees aged *under* 15 years.[31]

34 ABI submits that to the extent that the O'Brien Report is relied upon to demonstrate the number of junior employees engaged at levels 2 and above (the Relevant Figure), the report underestimates the Relevant Figure on a number of bases including that:

(a) it excludes junior employees performing clerical functions at the retail establishment and clerks at levels 4-8;
(b) it is possible that some of those junior employees who identified themselves as "store persons" operate forklifts (and are level 2) and have been improperly excluded;
(c) junior employees engaged as senior salespersons not performing supervisory duties have not been included; and
(d) it does not include junior employees under 15.[32]

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24 See Exhibit SDA 1 at [4].

25 Transcript, 8 October 2019 at PN95-PN103.

26 Transcript, 8 October 2019 at PN120.

27 Transcript, 8 October 2019 at PN206.

28 Transcript, 8 October 2019 at PN183.

29 Transcript, 8 October 2019 at PN195.

30 Transcript, 8 October 2019 at PN163.

31 Transcript, 8 October 2019 at PN203.

32 ABI submission, 11 November 2020 at [9.1]-[9.2].

35 The NRA also notes that:

(a) when asked if there was any way of knowing whether some employees who identified themselves as "store persons" (Retail Employee Level 1) operated forklifts (Retail Employee Level 2), Dr O'Brien's evidence was that:

(i) this was impossible to determine "without asking the individuals filling out the form"; and

(ii) "(he) couldn't get into the thought process of the person filling out the census form to be able to say that a forklift driver would not have filled out that they were a store person".[33]

36 The SDA submits that the following findings should be made on the basis of Dr O'Brien's evidence:

- The total number of employees in the general retail industry in 2016 was 774,675.
- The number of employees under 21 years of age was 160,848.
- Of those junior employees, 17,244 or 11% were employed in classifications higher than Level 1 although that figure could be increased by not more than 1,210 employees employed in retail establishments in clerical positions.
- Some (but a small number) of the employees which Dr O'Brien classified as Level 1 may be Level 3 employees.
- Some (but a small number) of the employees who identified themselves as store persons may be Level 2 employees not Level 1 employees.

37 ABI submits that it is not possible to identify with any certainty the precise effect these issues have on the Relevant Figure but concedes that a minority of junior employees are engaged above Level 1. A similar submission is advanced by the NRA.[34]

38 We acknowledge that a consequence of the limitations in the O'Brien Report which have been identified at [33] and [35] is that we are not able to precisely identify the proportion of junior employees employed in classifications higher than level 1; but we think it is likely to be in the order of 10 to 15 per cent.

3.2 Survey Report

39 In addition to Dr O'Brien's evidence, a survey was administered via an online platform. A link to the survey document was sent by the Commission to each party and the email was then forwarded by each employer party to their members. The survey was open for a period of 5 weeks from 11 February 2020 until 13 March 2020.

40 Participation in the survey was limited to the membership of parties in matter AM2017/60 (or enterprises represented in the proceedings). As a result, the total sample of enterprises surveyed is difficult to quantify.

41 A Survey Report analysing the results of the survey was published on the Commission's website on 8 October 2020. There were a limited number of responses to the survey and the report is based on the 125 responses received. As noted in the report: "Due to the small sample size, results should be viewed as indicative only and cannot be extrapolated across the industry as a whole".

33 NRA submission, 11 November 2020 at [1.16], citing Transcript, 8 October 2019 at PN163-PN164.

34 NRA submission, 11 November 2020 at [43].

42 A relevant finding from the Report is as follows:

> Enterprises were asked to provide the number of junior employees covered by the Retail Award. A total of 146 junior employees were covered by the Retail Award among the enterprises. The majority (88.4 per cent or 129 junior employees) were employed at Level 1, 9.5 per cent were employed at Level 2 and around 2.0 per cent were employed at Level 3.

43 As ABI and the SDA both observe, the survey analysis is based on very few responses and should receive little, or no, weight. To the extent that the survey provides some anecdotal evidence it supports findings which are in any event uncontroversial, namely:

- the majority of junior employees are employed at Level 1;
- there is a minority of junior employees at Levels 2 and above.

3.3 Information note — junior rates

44 On 5 November 2020 an information note on junior rates, prepared by Commission staff, was published. That information note sets out the results of research into which awards contain a junior rates clause, and whether a clause dealing with junior rates limits the application of those rates.

45 The SDA and ABI made detailed submissions in response to the information note. We do not find it necessary to canvass the range of matters raised in those submissions. It is sufficient to note that there is no consistent treatment of the application of junior rates across the modern awards system.

4. The submissions

46 Initial submissions were received from the SDA (submission and expert report) on 5 June 2019 and the ARA (submission) on 19 June 2019. ABI filed a submission in reply on 27 August 2019. These submissions were summarised in our Statement of 8 October 2020[35] and we need not repeat them here. Submissions in response to the *October 2020 Statement* and the 5 November Junior rates information note were received from:

- SDA (11 November 2020, amended 13 November 2020);
- NRA (11 November 2020);
- ABI and NSWBC (11 November 2020); and
- ABI and SDA Joint Report (11 November 2020).

47 The SDA's submission can be distilled into seven points:

1. The SDA contends that the award modernisation process did not address the merits of what is now clause 17.2 but rather adopted the "limited objective" of providing a uniform set of rates based on the terms of the relevant predecessor awards and NAPSA's.[36]
2. Prior to the making of the modern award a number of "significant" pre reform awards provided that junior employees employed above level 1 were paid the full adult rate, including the *Shop, Distributive and Allied Employees Association — Victorian Shops Award*, the *Shop Employees (State) Award (NSW)* and the *Retail and Wholesale Industry — Shop*

35 *Re 4 Yearly Review of Modern Awards — Award Stage — General Retail Industry Award 2020* [2020] FWCFB 5371.

36 See SDA submission at [19]-[22] and [31] citing *Re Request from the Minister for Employment and Workplace Relations — 28 March 2008* (2008) 177 IR 364 at [71].

Employees — ACT Award 2000.[37] The SDA submits that the underpinning awards did *not* support the outcome in the award modernisation process and did support the SDA's proposal.

3. Applying the junior percentages to levels above level 1 is said to diminish the additional monetary compensation which is provided in recognition of higher skills, competencies and responsibility.
4. The retention of junior rates in their current form is inconsistent with the principle of equal remuneration for work of equal value.[38]
5. The variation proposed is sustainable and affordable and will not have a detrimental impact on employers or the broader economy. The SDA relies on Dr O'Brien's report as to the number of employees who could be impacted by the variation, submitting that:

> 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.[39]

We note that of the 168 848 Retail Award employees under 21 years of age some 34 774 (21 per cent) were aged 20 years.[40]

6. In its current form clause 17.2 fails to meet the object of the Act (in particular s 3(a) and (b) and does not provide a "fair and relevant safety net", as required by s 134(1).
7. The proposed variation is consistent with 2017 decision to vary junior rates in the Retail Award[41] and with the variation of the Pharmacy Industry Award to provide that junior rates only apply to levels 1 and 2 in that award.[42]

48 As to point 7 above, cl 16.2 of the Pharmacy Award provides:

> 16.2 Junior rates (pharmacy assistants levels 1 and 2 only)
>
> An employer must pay an employee, who is classified as a pharmacy assistant level 1 or level 2 and aged as specified in column 1 of Table 4 — Junior rates (pharmacy assistants levels 1 and 2 only), at least at the percentage specified in column 2 of the minimum rate that would otherwise be applicable under Table 3 — Minimum rates:

37 SDA submission at [50].

38 We note that this submission was qualified in the SDA's submission of 11 November 2020.

39 SDA submission at [90].

40 Exhibit SDA 1 at [13]-[14].

41 See *Re Modern Awards Review 2012 — General Retail Industry Award 2010 — Junior Rates* (2014) 241 IR 243.

42 *Re 4 Yearly Review of Modern Awards — Pharmacy Industry Award 2010* [2017] FWCFB 3540.

Table 4 — Junior rates (pharmacy assistants levels 1 and 2 only)

Column 1 Age	Column 2 % of minimum rate
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	90%

49 The classification definitions are set out in Schedule A of the Pharmacy Award:

> A.1 *Pharmacy assistant level 1* is an employee working as a pharmacy assistant in a community pharmacy who has not acquired the competencies required to hold a qualification in Community Pharmacy and is not covered by any other classification in this Schedule.
>
> A.2 *Pharmacy assistant level 2* is an employee who has acquired the competencies required to be the holder of a Certificate II in Community Pharmacy, as determined by the National Quality Council or a successor body.

50 The variation to cl 16.2 which confined the application of junior rates to pharmacy assistants levels 1 and 2 only was made with the consent of the interested parties. The decision approving those changes states:

> [66] In relation to the other variations sought by the interested parties by consent (as set out in Annexure A), those variations are agreed, straightforward and uncontroversial. The interested parties made submissions at the hearing on 31 March 2017 in support of the variations.[43]
>
> [67] Having regard to the requirements set out in s 134(1) of the Act, and the consent submissions of the interested parties to support the making of the variations in Annexure A, as stated, the variations sought are necessary to achieve the modern awards objective.
>
> [68] These variations are therefore, considered appropriate. Determinations to give effect to the variations will separately be issued. The variations will take effect on 7 August 2017.[44]

51 The essence of the SDA's case is that employees performing work at a higher classification than Level 1 are recognised as having the necessary skills and competencies applicable for the higher classification and the full adult rate should apply to the rates paid to these employees, irrespective of age.

52 The SDA advances the following submission in relation to the consideration of work value:

> the position the SDA takes is that it is axiomatic that an employee promoted or appointed above the base level is promoted or appointed to perform the tasks at that level and that there is no room for the existence of junior rates in those circumstances. When it is recalled that the junior rates were established in the

43 *Re 4 Yearly Review of Modern Awards — Preliminary Jurisdictional Issues* (2014) 241 IR 189 at [32], [38]-[39].

44 *Re 4 Yearly Review of Modern Awards — Pharmacy Industry Award 2010* [2017] FWCFB 3540 at [66]-[68].

> GRIA against a background of their non-existence in the major awards from which the GRIA was drawn it can be readily seen that there is a very strong work value argument for an abolition of the reduction which was imposed in the 2010 award at levels above Level 1.[45]

53 We deal later with the relevant award history.

54 ABI, the NRA and the Newsagents Association of NSW and ACT oppose the claim.

55 ABI opposes the SDA claim on 4 primary grounds:

1. There is insufficient evidence to support the SDA claim.
    - the SDA Claim seeks to vary modern award minimum wages, requiring the Full Bench to be satisfied that such variation is justified by work value reasons — no evidence whatsoever has been filed establishing that work value reasons exist; and
    - the SDA Claim seeks a significant change which is required to 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. The evidence as filed (such as it is) does not demonstrate the facts supporting the proposed variation, only establishing the number of employees that the proposed variation may affect.
2. The SDA's reliance on s 134(1)(e) is entirely misconceived as that provision is irrelevant to the SDA Claim.
3. The SDA's contestation that the Award prima facie met the modern award objective when made appears to take issue with a matter already determined by the Full Bench.
4. There are strong merit arguments that arise against the claim.

56 Similar arguments are advanced by the other employer interests.

5. Consideration

57 As we have mentioned, the Commission's task in the Review is to determine whether a particular modern award achieves the modern awards objective. If a modern award is not achieving the modern awards objective then it is to be varied such that it only includes terms that are "necessary to achieve the modern awards objective" (s 138). In such circumstances regard may be had to the terms of any proposed variation, but the focal point of the Commission's consideration is upon the terms of the modern award, as varied.

58 Variations to modern awards must be justified on their merits. Significant changes where merit is reasonably contestable should be supported by an analysis of the relevant legislative provisions and, where feasible, probative evidence. The variation proposed by the SDA constitutes a significant change, the merits of which are reasonably contestable.

59 It is convenient to deal first with the SDA's contention that in making the Retail Award, the Award Modernisation Full Bench gave no consideration of the merits of junior rates and, further, insofar as the Retail Award was based on

45 SDA submission, 11 November 2020 at [16].

pre-reform instruments the insertion of junior rates for *all* classification levels was an error because the relevant Victorian, NSW and ACT pre-reform awards did not provide for junior rates above level one.

60 The Award Modernisation Full Bench decisions, submission, transcripts and relevant pe-reform instruments are set out in the Joint Report filed by ABI and the SDA and we need not recite all that material here We propose to briefly canvass some of the background and then make some observations about the award history and the SDA's contention that the application of junior rates to all classification levels was an error.

61 We use the term "award modernisation" to refer to the processes under Pt 10A of the *Workplace Relations Act 1996* (Cth) (the WR Act). The current 122 modern awards[46] were made during 2008-09 because of that process and came into operation on 1 January 2010. The awards were the subject of further variations during the award modernisation process, in some cases before they commenced operation. A further "Transitional Review" commenced in 2012 under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (the TPCA Act).

62 In determining the final provisions in each modern award the Award Modernisation Full Bench generally adopted the terms and conditions in the pre-reform instruments with the widest application:

> The consolidated request also provides that the process is not intended to disadvantage employees or increase costs for employers — objectives which are potentially competing. *The content of the awards we have formulated is a combination of existing terms and conditions in relevant awards and existing community standards.* In order to minimise disadvantage to employees and increases in costs for employers *we have generally adopted terms and conditions which have wide application in the existing awards in the relevant industry or occupation.* However the introduction of modern awards applying across the private sector in place of the variety of different provisions in the Federal and State awards inevitably means that some conditions will change in some States. Some wages and conditions will increase as a result of moving to the terms which apply elsewhere in the industry. Equally some existing award entitlements will not be reflected in the applicable modern award because they do not currently have general application.
>
> *The creation of modern awards which will constitute the award elements of the safety net necessarily involves striking a balance as to appropriate safety net terms and conditions in light of diverse award arrangements that currently apply*. It is in that context that the formulation of appropriate transitional provisions arises.[47]

63 As the SDA correctly observes, the current application of junior rates to all classification levels in the Retail Award was principally set in the award modernisation process and that the Award Modernisation Full Bench did *not* specifically consider the merits of junior rates but, rather, adopted the limited objective of establishing a fair safety net based on the terms of relevant pre-reform instruments:

> 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

46 There are now 121 modern awards.

47 Award modernisation — Stage 2 modern awards, 2 September 2009, *Re Request from the Minister for Employment and Workplace Relations — 28 March 2008* (2009) 187 IR 146.

> 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*.[48]

64 The award modernisation process which led to the making of the Retail Award is canvassed in the decision of *Re Modern Awards Review 2012 — General Retail Industry Award 2010 — Junior Rates*[49] at [10]-[27]. In those proceedings the SDA submitted that the substance of their application was not considered by the Full Bench during the award modernisation process. Although the issue of junior rates for employees under the proposed retail industry award was agitated by the SDA at that time, it submitted that the issues were limited in scope to two matters: that employees under the age of 16 years be paid at least 50% of the adult rate of pay and that the applicability of junior rates be limited to employees engaged under the classifications of Retail Worker Level 1 and Level 2. The Full Bench accepted the SDA's submission:

> [41] We agree with the SDA's submission that the issues raised in the award making process which concerned junior rates were confined and specific. They related to the percentage of the adult rate below which no employee should be paid and to the rates for employees who worked in higher classifications and those with trade skills.
>
> [42] There was no specific consideration given to the percentage of the adult rate which should be paid to a 20 year old. From its first draft, the SDA had proposed that retail workers at the first two classification levels should be paid 90% of the relevant adult rate. In those circumstances, and given the employers also proposed that same percentage for these workers, there was no need for the Full Bench in the Statement accompanying the exposure draft (or at any later time) to comment about appropriate percentages for these workers. It was not in contest.[50]

65 We also note that on 9 November 2009 the SDA made an application which sought to vary cl 18 of the *General Retail Industry Award 2010* to confine the junior rate percentages to classification levels 1, 2 and 3 (AM2009/77). The SDA's application states:

> 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 aged 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.[51]

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48 *Re Request from the Minister for Employment and Workplace Relations — 28 March 2008* (2008) 177 IR 364 at [71].

49 *Re Modern Awards Review 2012 — General Retail Industry Award 2010 — Junior Rates* (2014) 241 IR 243.

50 *Re Modern Awards Review 2012 — General Retail Industry Award 2010 — Junior Rates* (2014) 241 IR 243 at [41]-[42].

51 Form R59, Application to vary the General Retail Industry Award 2010, at p 2.

66 The application was made pursuant to s 576H of the WR Act, which states:

> 576H Commission may vary modern awards
>
> The Commission may make an order varying a modern award if the variation is consistent with the award modernisation request to which the modern award relates.

67 As the application was not determined by 31 December 2009 it was determined by Fair Work Australia pursuant to item 14 of Sch 5 to the TPCA Act.

68 In a decision published on 29 January 2010[52] a Full Bench dismissed the application:

> [3] In general terms we have considered the applications in line with our general approach in establishing the terms of modern awards. We have had particular regard to the terms of existing instruments. Where there is significant disparity in those terms and conditions we have attached weight to the critical mass of provisions and terms which are clearly supported by arbitrated decisions and industrial merit. We have considered the impact of the provisions based on the information provided by the parties as to current practices. It is convenient to deal with the variations by subject matter.
>
> …
>
> Junior rates
>
> [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.

69 So, what is to be made of the award history?

70 It seems to us that three observations can be made:

1. It may be accepted that the Award Modernisation Full Bench did *not* give any consideration to the merits of junior rates in the Retail Award, but, rather, adopted the limited objective of establishing a fair safety net for each modern award based on the terms of relevant pre-reform instruments.
2. In making a modern award — including the Retail Award — the Award Modernisation Full Bench sought to strike a balance as to appropriate safety net terms and conditions considering the diverse pre-reform instruments in support of that draft award. It is fair to say that the Award Modernisation Full Bench adopted a broad "swings and roundabouts" approach, having regard to the relevant pre-reform instruments.[53]
3. The SDA's position in respect of the application of junior rates to particular classification levels has fluctuated over time. The draft award initially submitted by the SDA during the award modernisation process confined junior rates to classification levels 1 *and* 2. In its submission of 1 August 2008 the SDA says:

> The SDA has approached the issue of rates of pay for junior employees in a pragmatic manner.

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52 *Re General Retail Industry Award 2010* (2010) 192 IR 9.

53 *Re Request from the Minister for Employment and Workplace Relations — 28 March 2008* (2008) 177 IR 364 at [28].

> Clearly employers have built cost structures around the significant use of junior employees on existing junior rates of pay.
>
> This is not to say that such use is either fair or reasonable, but rather it is a reflection of the manipulation of junior rates provisions by the retail industry that junior employment on junior rates is a significant feature of the retail industry and that junior rates of pay play a significant role in determining the cost structure for employers.
>
> The SDA has examined the various junior rates of pay appearing in the several federal awards and NAPSAs relating to the retail industry.[54]

Notably the SDA did not then advance the argument that it now advances — namely that the major pre-reform awards only applied junior rates to classification level 1. Indeed one could draw the inference from the SDA's submission to the Award Modernisation Full Bench that the relevant pre-reform instruments supported the application of junior rates to levels 1 *and* 2. Later, in November 2009, the SDA sought to confine junior rates to levels 1, 2 and 3.

71 These observations lead us to reject the SDA's contention that the Award Modernisation Full Bench erred in applying junior rates to all classifications because the relevant Victorian, NSW and ACT pre-reform awards did not provide for junior rates above level one. The award modernisation process was a broad balancing exercise and the SDA has failed to persuade us that that exercise miscarried in the manner suggested. The SDA's case is not assisted by the fact that in the award modernisation proceedings it manifestly failed to advance the case it now puts. We now turn to whether the variation sought is warranted on work value grounds.

72 As we have mentioned, the application seeks to vary modern award minimum wages and as such we must be satisfied that such a variation is justified by work value reasons.

73 The principles applied by the Commission to the adoption of properly fixed award minimum rates were set out in *Re Paid Rates Review*.[55] The *Paid Rates Review* principles require a three step process:

1. The key classification rate in the award is to be fixed by reference to the minimum rate for a fitter in the *Metal Industry Award 1998* (i.e. $477.20);
2. Once the key classification rate has been properly fixed the other rates in the award are adjusted by applying the internal award relativities which have been established, agreed or maintained; or
3. Any residual component above the identified minimum rate is to be separately identified and not subject to future increases.[56]

74 We return later to the central role of the C10 rate in the *Manufacturing and Associated Industries and Occupations Award 2020*.

75 The SDA's merit argument places considerable importance on the assertion that a junior employee would not be promoted above Level 1 unless they were competent and therefore, on the basis of that competence, they would be doing work equivalent to that of an adult employee and are therefore entitled to adult rates. This assertion is unsupported by evidence and is, of itself, insufficient to

54 SDA Submission — AM2008/10 (1 August 2008), pp 12-16.

55 *Re Paid Rates Review* (1998) 123 IR 240.

56 See generally *Re Clerks (Breweries) Consolidated Award 1985* (unreported, AIRC, Ross VP, R9120, 14 September 1999) at [28]-[61].

satisfy s 156(3). Indeed, the SDA has advanced *no* evidence regarding the work value of junior employees employed in the various classification levels in the Retail Award.

76 It is instructive to compare the case put by the SDA in these proceedings with the case run by the SDA in *Re Modern Awards Review 2012 — General Retail Industry Award 2010 — Junior Rates*[57] (the *2012 Junior Rates* case).

77 In the *2012 Junior Rates* case, in support of a relatively modest (relative to the current claim) claim to provide adult rates to 20 year old employees, the SDA filed 20 witness statements, and the employer parties filed 7 witnesses statements. That evidence provided a basis for that Full Bench to make findings as to:

(a) the difference in the work and duties performed by a 20 year old retail employee as compared to a 21 year old retail employee; and

(b) the time required for most retail employees to reach a satisfactory level of proficiency in relation to Level 1.

78 No such evidence exists in this case. The current application is supported by a single expert report, by Dr O'Brien, which does little more than identify the cohort of employees who would stand to benefit from the application if granted.

79 The SDA also advances the argument that the level 2 classifications in the Retail and Pharmacy Awards are equivalent and that in the *Pharmacy Industry Award 2010* (the Pharmacy Award) junior rates only apply to levels 1 and 2. It is only at the Retail Employee level 4 classification that any reference is made to a qualification requirement:

> A.4.1 *Retail Employee Level 4* means an employee performing work at a retail establishment at a higher level than a Retail Employee Level 3. This may include an employee who has completed an appropriate trades course or holds an appropriate Certificate III and is required to use their qualifications in the course of their work.

80 This somewhat facile argument is largely based on a submission made by the SDA in the award modernisation proceedings and the fact that the relevant wage rates are the same. But the proposition put finds no support in the relevant classification definition for a level 2 Retail Employee; that definition makes no mention of the requirement for a certificate II qualification.

81 The SDA also relies on the fact that a similar claim has recently been dealt with in relation to the Pharmacy Award;[58] but that variation was made with the consent of the relevant parties and without any detailed consideration by the Full Bench. The variation of the Pharmacy Award does not provide a basis to grant the SDA's claim in this matter.

82 In short, the SDA has failed to establish a sufficiently cogent case to warrant the variation it seeks. That said, the proceedings have raised an anomaly which we believe requires rectification.

83 A fundamental feature of the minimum wage objective is the requirement to

57 *Re Modern Awards Review 2012 — General Retail Industry Award 2010 — Junior Rates* (2014) 241 IR 243.

58 *Re 4 Yearly Review of Modern Awards — Pharmacy Industry Award 2010* [2017] FWCFB 3540.

establish and maintain "a safety net of fair minimum wages", and a necessary element of this is that the level of those wages bears a proper relationship to the value of the worked performed.[59]

84 It seems to us that the application of junior rates to level 4 classification employees gives rise to an anomaly. It is conceivable that, depending on their age and service with their employer, a 20 year old tradesperson may only receive 90 per cent of the level 4 minimum rate. Such an outcome is inconsistent with the general approach adopted by the Commission to the proper fixation of minimum rates. As mentioned earlier, the tradespersons rate (level 4 in the Retail Award) should align with the C10 rate in the *Manufacturing and Associated Industries and Occupations Award 2020*; but that is not presently the case for junior employees under the Retail Award. As mentioned earlier, the concepts of uniformity and consistency underpin the fixation of minimum wages in modern awards. In a practical sense this means that the minimum wage rate for a tradesperson should be set consistently across the modern award system; this is not the case in the Retail Award because of the application of junior rates to level 4 employees.

85 Further, the classification definitions associated with classification levels 5, 6, 7 and 8 all envisage the performance of work at a higher level than that performed by a level 4 employee. Accordingly, if junior rates are not applicable to level 4 employees it makes no sense to apply them to higher classification levels.

86 To rectify the identified anomaly, we propose to vary clause 18.2 of the Retail Award to provide that junior rates only apply to classification levels 1, 2 and 3. A number of the hourly rates of pay schedules in Schedule B will also require amendment. We are satisfied that the variation we propose is justified by work value reasons, in particular the level of skill involved in doing the work when compared to equivalent classification levels in other modern awards.

87 We now turn to deal with the s 134 considerations.

88 Section 134(1)(a) requires that we take into account "relative living standards and the needs of the low paid". A threshold of two-thirds of median full-time wages provides a suitable benchmark for identifying who is "low paid", within the meaning of s 134(1)(a). The most recent data for median earnings is for August 2019 from the Australian Bureau of Statistics (ABS) Characteristics of Employment (CoE) survey. On these measures the two thirds threshold is $920 and $973.33 respectively.

89 The full-time weekly wage for most classifications in the Retail Award is below the EEH measure of two-thirds of median full-time earnings except for Retail Employee Level 8 classification. Most classifications are also below the CoE measure of two-thirds of median full-time earnings except for Retail Employee Levels 7 and 8.

90 A significant proportion of employees covered by the Retail Award may be regarded as "low paid" within the meaning of s 134(1)(a). The "needs of the low paid" is a consideration which weighs in favour of the variations we propose to make.

91 Section 134(1)(b) requires that we take into account "the need to encourage collective bargaining". It is also likely that employee and employer decision-making about whether to bargain is influenced by a complex mix of

59 *Re Annual Wage Review 2016-17* (2017) 267 IR 241 at [99].

factors, not just the content of the application of junior rates to classification levels 4 to 8. Section 134(1)(b) speaks of "the need to *encourage* collective bargaining". We are not persuaded that the variations we propose to make would "*encourage* collective bargaining", it follows that this consideration does not provide any support for the proposed variation.

92 Section 134(1)(c) requires that we take into account "the need to promote social inclusion through increased workforce participation". Obtaining employment is the focus of s 134(1)(c). It seems to us that the impact of the variation proposed on total employment is likely to be insignificant. We regard this consideration as neutral.

93 It is convenient to deal with the considerations s 134(1)(d) and (f) together.

94 Section 134(1)(f) is not confined to a consideration of the impact of the exercise of modern award powers on "productivity, employment costs and the regulatory burden". It is concerned with the impact of the exercise of those powers "on business".

95 If the variation we propose is made then employment costs would increase, but not significantly as it is likely that very few junior employees will be employed at classification levels 4 and above. Nevertheless this consideration tells against the variations proposed.

96 The considerations in s 134(1)(e), (g) and (h) are not relevant in the present context.

97 The modern awards objective is to "ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions", taking into account the particular considerations identified in s 134(1)(a)-(h). We have taken into account those considerations, insofar as they are relevant to the matter before us, and have decided to vary the Retail Award in the manner proposed above.

98 During the hearing on 18 November 2020 we invited the parties to make oral submissions in relation to the operative date of any variation we decided to make. The SDA submitted that any such variation should take effect "as soon as possible". The various employer parties proposed a delayed operative date.

99 The NRA submitted that from a "practical perspective" alignment with the increases resulting from *Re Annual Wage Review 2019-20*[60] would reduce the administrative burden associated with the implementation of payroll changes. Mr Booth, on behalf of the Newsagents Association, submitted that an operative date of 1 July 2021 would be appropriate.

100 The majority decision in the 2019-20 Annual Wage Review decided to increase minimum wages by 1.75 per cent and different operative dates for different groups of awards, as follows:

Award group	**Operative date**
Group 1 Awards	1 July 2020
Group 2 Awards	1 November 2020
Group 3 Awards	1 February 2021

101 The Retail Award is in Group 3.

102 It seems to us that the proposal advanced by the NRA is a sensible one, but we acknowledge that the parties have had a limited opportunity to consider this

60 *Re Annual Wage Review 2019-20* (2020) 297 IR 1.

issue. It is our *provisional* view that the variation we have decided to make will operate from 1 February 2021. In accordance with s 165(3) of the Act the variation determination will not take effect in relation to a particular employee until the start of the employee's first full pay period that starts on or after 1 February 2021.

103 Any party opposed to our *provisional* view in respect of the operative date of the variation determination is to file a short written submission setting out their opposition by *4 pm Tuesday, 1 December 2020*. Any submissions in reply are to be filed by *4 pm Thursday, 3 December 2020*. In the event that there are no submissions opposing our *provisional* view we will issue the variation determination, operative 1 February 2021. If the matter is contested we will determine the operative date on the papers.

Award varied in part

DR RJ DESIATNIK

FAIR WORK AUSTRALIA

United Voice v Australian Workers' Union of Employees, Queensland

[2011] FWAFB 2633

Giudice P, Watson VP and Gay C

28 May, 15 June, 16 July, 22-26 November 2010, 5 May 2011

Enterprise Agreement — Low Paid Authorisation — Aged care sector — Whether in public interest to grant low paid authorisation — Fair Work Act 2009 (Cth), ss 241, 242, 243.

Words and Phrases — "Low-paid".

The two applicants sought one low-paid authorisation under s 242 of the *Fair Work Act 2009* (Cth) (the Act), which, if granted, would permit the applicants to bargain for a multi-enterprise agreement covering all of the employers named in the two applications. The applications related to employees in the aged care sector.

Held (granting the application): (1) In general terms employees in the aged care sector are low paid. "Low-paid" is intended to be a reference to employees who are paid at or around the award rate of pay and who are paid at the lower award classification levels. It is not appropriate to take into account salary packaging when assessing the level of pay in the aged care sector.

(2) However there are many employer respondents to whom an enterprise agreement under the Act, or its predecessor, applies. For that reason it is not possible to conclude that employees of those employers have not had access to collective bargaining. Therefore the existence of enterprise agreements is a matter to be taken into account in deciding the scope of any authorisation.

(3) Many employees in the aged care sector have not had access to collective bargaining or face substantial difficulty in bargaining at the enterprise level, or both. Granting the authorisation would assist those employees by providing a framework for negotiation across the sector, which will enable the applicants, and potentially other bargaining representatives to make better use of resources and will simplify the bargaining process.

(4) It is in the public interest to make a low-paid authorisation. Leaving out of consideration employers and employees to whom an enterprise agreement applies, the employees to whom the authorisation would apply are low-paid; they either have not had access to enterprise bargaining or face substantial difficulty in bargaining at the enterprise level and making an authorisation would assist them to bargain. Other relevant matters include the history of bargaining, the relative bargaining strength of the employers and employees and the high degree of commonality in the nature of residential aged care enterprises and, leaving aside employees to whom enterprise agreements apply, the conditions of the employees.

(5) The employers to whom an enterprise agreement already applies should not be included in the list of employers pursuant to the authorisation.

Cases Cited

O'Sullivan v Farrer (1989) 168 CLR 210.

Application for low paid authorisation

J Nolan and *W Ash*, for United Voice.

D Broanda and *Z Angus*, for the Australian Workers' Union of Employees, Queensland.

G Boyce and *R LeQuesne*, for the Aged Care Employers and the Catholic Commission for Employment Relations.

T Longwill, for the Aged and Disabled Persons Hostel and Welfare Association.

B Gee, for Bupa Care Services Pty Ltd.

G McCorry, for the Raykon Group.

P Harris and *P Reid*, for the Bethanie Group Inc.

J Auerbach, for the Chamber of Commerce and Industry Western Australia.

J Lawrence, for Australian Federation of Employers and Industries.

D Mammone, for the Australian Chamber of Commerce and Industry.

T Shipstone and *J Fetter*, for the Australian Council of Trade Union.

N Blake, for the Australian Nursing Federation.

D King, for Buffalo Memorial Homes for the Aged.

S Lucas, for Woombye CARE Inc, Cabanda Care Inc and Clanwilliam Aged Care.

Cur adv vult

Fair Work Australia

1 This decision relates to applications by United Voice (UV) and the Australian Workers' Union — Queensland Branch (AWUQ) (jointly the applicants), lodged on 10 May 2010 and 17 June 2010 respectively, for a low-paid authorisation under s 242 of the *Fair Work Act 2009* (Cth) (the Act). The applications are made in relation to employees in the residential aged care sector in specified areas of Australia performing work described in the *Aged Care Award 2010* and enrolled nurses in the aged care sector in Western Australia.[1] As we understand the position, the applicants seek one authorisation which, if granted, would permit the applicants to bargain for a multi-enterprise agreement covering all of the employers named in the two applications.

2 On 29 June 2010 the President directed that the applications be dealt with by a Full Bench, pursuant to s 615 of the Act. On 21 July 2010 directions were made for the filing of outlines of submissions, witness statements and other material. In the week commencing 22 November 2010 we sat to hear evidence from a number of witnesses and to deal with other evidentiary matters. The parties subsequently filed written submissions and the applications were listed for final oral argument on 3 March 2011. We reserved our decision on that day.

1 MA000018.

The Proceedings

3 The UV application, as amended, is in the following terms:

> The LHMU seeks a low-paid authorisation that the Respondents and their employees (whose industrial interests the LHMU is able to represent) performing work described and classified in Schedule B — Classification Definitions in the *Aged Care Award 2010*, regardless of whether they are currently covered by that modern award or not, may bargain for the proposed multi-enterprise agreement. The LHMU seeks the authorisation in relation to those employees performing that work in Western Australia, South Australia, South-East Queensland, the Australia Capital Territory and the Northern Territory only. The LHMU also seeks the before mentioned authorisation for any "Enrolled nurse" described and classified in B.3 — Student enrolled nurse and B.4 — Enrolled nurses in the *Nurses Award 2010* employed in Western Australia by the Respondents. To avoid any doubt, the LHMU does not seek the low-paid authorisation in respect of employees covered by the *Aged Care Award 2010* who are classified as clerical and administrative employees.

4 At the time the application was lodged UV was known as the Liquor, Hospitality and Miscellaneous Union (LHMU). The AWUQ application for an order is in similar terms but restricted to employees in Queensland. The AWUQ adopted and relied upon the case put by UV.

5 In each case the application includes a list of employers to which the authorisation would apply. We were told that the list is comprised of all of the employers funded by the Australian Government for the provision of residential aged care in the area covered by the applications.

6 A large number of witness statements were relied upon by UV. These included statements from 7 union officials, 17 employees in the aged care industry, an academic and researcher, Dr I Watson, and the Managing Director of Lonergan Research, Mr C Lonergan. UV also relied on a range of awards, agreements and other documents.

7 Many employer bodies and individual employers opposed the application. Aged Care Employers (ACE) relied upon 12 witness statements from employers in the residential aged care industry and persons involved in the provision of advice to such employers. The Chamber of Commerce and Industry Western Australia (CCIWA) relied upon witness statements by the chief executive officer of Aged and Community Services WA and employers engaged in the provision of residential aged care services in Western Australia. The Aged and Disabled Persons Hostel and Welfare Association (ADPA), representing 20 employers in Queensland, relied on statements from three of those employers and a statement by Mr Shonhan in relation to an annual national aged care survey. A number of other individual employers opposed the application.

8 Others to make submissions included the Australian Council of Trade Unions (ACTU), the Australian Nursing Federation (ANF), the Health Services Union (HSU), the Australian Chamber of Commerce and Industry (ACCI), the Australian Federation of Employers & Industries (AFEI), the Catholic Commission for Employment Relations (CCER) and the Combined Pensioners and Superannuants Association of NSW Inc.

The statutory provisions

9 At the outset it is important to describe the low-paid authorisation provisions and their statutory context. Section 242, under which these applications are

made, is in Div 9 — Low-paid bargaining, of Pt 2-4 of the Act. Part 2-4 deals with enterprise agreements. The objects of Pt 2-4 are found in s 171. It reads:

> 171 Objects of this Part
>
> The objects of this Part are:
>
> (a) to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits; and
>
> (b) to enable FWA to facilitate good faith bargaining and the making of enterprise agreements, including through:
>
> (i) making bargaining orders; and
>
> (ii) dealing with disputes where the bargaining representatives request assistance; and
>
> (iii) ensuring that applications to FWA for approval of enterprise agreements are dealt with without delay.

10 Section 171(a) refers to the provision of a framework for collective bargaining for agreements that deliver productivity benefits. While there is no specific reference to low-paid authorisations, Div 9 contains its own objects in s 241. That section reads:

> 241 Objects of this Division
>
> The objects of this Division are:
>
> (a) to assist and encourage low-paid employees and their employers, who have not historically had the benefits of collective bargaining, to make an enterprise agreement that meets their needs; and
>
> (b) to assist low-paid employees and their employers to identify improvements to productivity and service delivery through bargaining for an enterprise agreement that covers 2 or more employers, while taking into account the specific needs of individual enterprises; and
>
> (c) to address constraints on the ability of low-paid employees and their employers to bargain at the enterprise level, including constraints relating to a lack of skills, resources, bargaining strength or previous bargaining experience; and
>
> (d) to enable FWA to provide assistance to low-paid employees and their employers to facilitate bargaining for enterprise agreements.Note: A low-paid workplace determination may be made in specified circumstances under Division 2 of Part 2-5 if the bargaining representatives for a proposed enterprise agreement in relation to which a low-paid authorisation is in operation are unable to reach agreement.

11 It can be seen that these objects include the encouragement of enterprise bargaining for low-paid employees which improves productivity and service delivery and which also takes account of the needs of individual enterprises. The term enterprise bargaining is extended to include bargaining for an enterprise agreement which covers more than one employer — referred to in s 242 as a "multi-enterprise agreement". The terms of s 241 are to be read in the context of the enterprise agreement provisions in the rest of Pt 2-4. When the provisions as a whole are considered, it is apparent that the legislative policy underlying the low-paid authorisation provisions is that while bargaining on a single enterprise basis is the preferred approach, multi-enterprise bargaining is permitted "to assist and encourage low-paid employees … to make an enterprise agreement that meets their needs". The other provisions of Div 9 set out the means by which these objects are to be carried into effect. In particular, s 243

specifies the matters which the tribunal is to take into account in dealing with an application under s 242. Because s 243 is critical to our task, but also quite lengthy, we have set it out in full as Attachment A.

12 Section 243(1) provides that if an application of the required kind has been made Fair Work Australia must make a low-paid authorisation if it is satisfied that it is in the public interest to do so taking into account the matters in ss 243(2) and (3).

Should an authorisation be made?

13 It is not disputed that the applicants are capable of making the applications under s 242(1). Subject to some definitional issues, the applications specify the employers and employees that will be covered by the proposed multi-employer agreement, as required by s 242(2). The applications are consistent with s 242. We next deal with the public interest, referred to in s 243(1)(b).

14 Some initial observations should be made about the nature of the public interest test. The controlling criterion is satisfaction in the public interest. That criterion is a broad one and is confined only by the limits of the scope and purpose of the Act, as the following passage from the decision of the High Court of Australia in *O'Sullivan v Farrer* indicates:

> [T]he expression "in the public interest", when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only "in so far as the subject matter and the scope and purpose of the statutory enactments may enable … given reasons to be (pronounced) definitely extraneous to any objects the legislature could have had in view".[2]

(References omitted)

15 While the tribunal is required to take into account the matters specified in ss 243(2) and (3) in applying the public interest criterion, we do not think it was intended that those matters are the only ones capable of being relevant to the public interest. Other matters potentially affecting the public interest can also be taken into account. The public interest is distinguishable from the interests of the parties, although it is clear from the matters specified that there is a substantial overlap where these provisions are concerned.

16 We turn now to a consideration of each of the matters specified in ss 243(2) and (3) including some questions of interpretation.

s 243(2)(a)	whether granting the authorisation would assist low-paid employees who have not had access to collective bargaining or who face substantial difficulty bargaining at the enterprise level;

17 There were a number of submissions relating to the concept of low-paid employees. We have no doubt that in the context of the provisions of Div 9 the phrase is intended to be a reference to employees who are paid at or around the award rate of pay and who are paid at the lower award classification levels. The combined employers (ACE, ADPA, CCIWA, ACCI and AFEI) submitted, however, that we should take account of salary packaging arrangements which are widely available to employees in the aged care sector. The term salary packaging refers to methods of reducing after tax income which are legitimately available to employees of charitable or not-for-profit employers. The combined

2 *O'Sullivan v Farrer* (1989) 168 CLR 210 at [13].

employers submitted that, even where employees are paid at the award rate, salary packaging can result in a level of after tax income much higher than enjoyed by employees in other areas of employment. Many employees in the residential aged care sector have access to salary packaging.

18 It is apparent that after tax income varies on an individual basis depending on the prevailing taxation regime and the personal circumstances of the taxpayer. It is not clear how the benefit of salary packaging could be taken into account on an aggregate basis. And, if we were to take it into account, it might equally be argued that other matters which have a bearing on after tax income should also be taken into account in deciding whether employees are low-paid. Furthermore, as the applicants pointed out, there is no indication in Div 9 that we should interpret references to low pay as equivalent to low income. For these reasons we do not think that our assessment of the level of pay in the aged care sector should take salary packaging into account.

19 We do not think it can be disputed that a very significant proportion of the employees in the aged care sector are low-paid in that they are paid at or around the award rate of pay and at the lower award classification levels. The applicants also relied on a report by Dr I Watson which compared levels of pay in the aged care sector with levels of pay for workers in comparable occupations working in other industries. Although various employer parties sought to criticise the report and submitted that we should reject it, we found the report useful. The following extract from the executive summary of the report indicates that aged care employees are low-paid in a relative sense:

> 3 The Census data showed that the aged-care workforce is considerably over-represented in the lower bands of the income distribution and under-represented in the higher bands. Nearly half of the aged-care workforce earns between $400 and $599 per week. The comparable figure in other industries is closer to a third.
>
> 4 Some 56 per cent of the aged-care workforce could be regarded as minimum wage workers, compared with just 41 per cent among other industries. Particular occupations stand out. Nearly 80 per cent of cleaners and laundry workers working in aged care fell into the minimum wage category. The comparable figure in other industries was less than 60 per cent. Food preparation assistants were similar: in aged care 73 per cent were in the minimum wage category; in other industries the comparable figure was 61 per cent. Among carers and aides-who make up the majority of the aged-care workforce-the percentage in the minimum wage category was 57 per cent. In other industries it was 50 per cent.[3]

20 We accept that in general terms employees in the aged care sector are low-paid. On the other hand there are many employers who are included in the schedule of respondents to whom an enterprise agreement under the Act, or its predecessor, applies. For that reason it is not possible to conclude that employees of those employers have not had access to collective bargaining. We consider that the existence of enterprise agreements is a matter to be taken into account in deciding the scope of any authorisation we decide to make.

21 There was a deal of evidence from employers that the applicants and other unions had not been particularly active in pursuing enterprise bargaining. On the other hand the evidence of the applicants' witnesses was that bargaining is hampered by a number of factors. The main factor appears to be the commonly

3 Exhibit No. LHMU 5.

held employer position that wage increases cannot be granted without government funding and that the level of government funding does not permit bargained increases. Other factors are that the nature of residential aged care makes it difficult for employees to take protected industrial action, the existence of a large number of small enterprises and that wage increases have been offset with changes in other wages and conditions leading to only marginal outcomes. It was also submitted, relying on evidence from Dr Cooper, Equity Research Fellow, Work and Organisational Studies, Faculty of Business and Economics, The University of Sydney, that employees in the aged care sector are in a weak bargaining position for a number of reasons including structural factors in the labour market, the nature of the work and the characteristics of the workforce.

22 It is clear from the aggregate data concerning the level of aged care employees' pay, the evidence from union officials about difficulties in bargaining and the evidence and submissions concerning funding arrangements, that many employees in the aged care sector have not had access to collective bargaining or face substantial difficulty in bargaining at the enterprise level, or both. We have no doubt that granting the authorisation would assist those employees by providing a framework for negotiation across the sector which will enable the applicants and potentially other bargaining representatives to make better use of resources and will simplify the bargaining process. We deal with some related issues later in considering the matters to be taken into account under s 243(3).

> s 243(2)(b) the history of bargaining in the industry in which the employees who will be covered by the agreement work;

23 In dealing with s 243(2)(a) we expressed some conclusions about bargaining in the aged care sector all of which are also relevant under s 243(2)(b). The applicants' final submission included a survey of wages in approximately 20 agreements. The survey showed that on average the agreement rates are 4% above the relevant award rates. The combined employers disputed the validity of the survey. They submitted that when comparisons are made at the appropriate level the margin above the award rates is closer to 10%. The applicants' case is that even where enterprise agreements are made which increase wages, they also contain trade-offs in conditions which can counterbalance the wage increase.

24 Although there does not appear to be any measure of the proportion of the employers and employees in the sector covered by enterprise agreements, we have concluded that where agreements do exist they result in margins somewhere between 5% and 10% over the award rate but that in many cases there are negotiated alterations in other award conditions which have an offsetting effect on the agreement rates.

> s 243(2)(c) the relative bargaining strength of the employers and employees who will be covered by the agreement;

25 It might be concluded from pay levels in the sector that the employees have relatively low bargaining power. Employees may have low tolerance for negotiation and industrial action for a range of reasons such as: a high commitment to those in their care, they may work part-time, they may be conflict averse or they may not be disposed to challenge the commonly held

view that the funding arrangements do not leave their employers any room for discretionary increases above the award rates. Most of the indications are that, as a general rule, employers in the sector are in a stronger position than employees when it comes to negotiations on pay and conditions.

> s 243(2)(d) the current terms and conditions of employment of the employees who will be covered by the agreement, as compared to relevant industry and community standards;

26 The minimum terms and conditions of employees in the sector are in most respects no less beneficial than the minimum terms and conditions applying in other sectors. They are covered by a modern award and protected by the NES in Pt 2-2 of the Act. When it comes to actual terms and conditions it is clear that with the exception of employees to whom an enterprise agreement applies, the minimum terms and conditions generally constitute the actual terms and conditions. It follows that earnings in the sector tend to be below earnings in the sectors in which enterprise bargaining is more prevalent, as indicated by Dr Watson's evidence.

> s 243(2)(e) the degree of commonality in the nature of the enterprises to which the agreement relates, and the terms and conditions of employment in those enterprises.

27 It appears that the list of respondents has been compiled from the residential aged care provider list maintained by the Australian Government. The respondents therefore have common characteristics in terms of operations, service and care provision and employee functions and duties. Although the details of funding arrangements may differ we assume that funding is administered in a consistent manner across the sector. Terms and conditions of employment may differ where enterprise agreements operate, but otherwise there is a high degree of commonality.

28 We deal now with the matters which we must take into account under s 243(3).

> 243(3)(a) whether granting the application would assist in identifying improvements to productivity and service delivery at the enterprises to which the agreement relates.

29 There was not a great deal of evidence relevant to this matter. It involves a prediction about the likely course of events with reference to one of the objects in s 241. If the prediction is positive, clearly that favours the granting of the application. The applicants submitted that opportunities for improvements in labour productivity are very limited. It was also noted that the Productivity Commission is currently considering funding and other arrangements in the aged care sector with a view to making recommendations for improvement. The combined employers submitted that it could not be in the public interest to grant the application where the applicants have failed to identify potential productivity improvements, particularly when granting the application might have a negative impact on productivity because of some of the claims, including various "union privileges", which are sought.

30 The applicants' submissions may suggest that they are positioning themselves in relation to the negotiations which will occur should the application be

granted. The employers, being opposed to the application, were themselves predictably reluctant to express optimism that the identification of productivity and service delivery improvements would be assisted by multi-enterprise bargaining. It seems likely that where enterprise agreements have been reached in the sector they may have included improvements in productivity and service delivery, although enterprise bargaining has been limited. It may be that if negotiations are conducted in one forum opportunities to identify the relevant changes will be greater, but given the submissions we are unable to reach any firm conclusion.

> s 243(3)(b) the extent to which the likely number of bargaining representatives for the agreement would be consistent with a manageable collective bargaining process.

31 This matter also involves a prediction. It requires some assessment of the likely behaviour of many employers and employees in a bargaining process spread, potentially, across many enterprises in a number of States and Territories. Viewed from the employee perspective, we have no reason to doubt that one or two unions would take the lead in the negotiations and would devote sufficient resources to the task. There is always the possibility of a multiplicity of bargaining representatives being appointed, as there sometimes are in bargaining for enterprise agreements involving large employers operating in more than one State. Whatever issues of this kind do arise, we are confident that solutions can be found if all representatives are committed to reaching a positive outcome. The tribunal also has the ability to assist.[4] From the employer perspective, the degree of coordination between employers exhibited during these proceedings is encouraging. Video-conferencing and web-based communications can be used to reduce travel and other costs.

> s 243(3)(c) the views of the employers and employees who will be covered by the agreement

32 Employers represented in the proceedings generally oppose the applications, although the applicants pointed to a handful who appear to support the applications. We take the case put by the applicants to be generally representative of the views of the employees. Given our findings about relative bargaining power it is not surprising that employers generally oppose the application and employees generally support it.

> s 243(3)(d) the extent to which the terms and conditions of employment of the employees who will be covered by the agreement is controlled, directed or influenced by a person other than the employer, or employers, who will be covered by the agreement

33 There is no doubt that funding plays a pervasive role in workplace relations in the sector. The level of funding is a significant consideration when employers make decisions in relation to wages and conditions to be afforded to their employees. The Australian Government plays a dominant role in the provision of funds. The combined employers submitted that while the tribunal could direct the Government to attend a conference, the Government cannot be compelled to make more funds available and that it is unlikely to do so. While this

4 See s 246 of *Fair Work Act 2009* (Cth).

submission raises relevant considerations, in the present situation s 243(3)(d) requires an examination of the extent to which a person, which is not the employer, has control over the terms and conditions of the employees of the employers who will be covered by the agreement. The dominant role of the Australian Government through the funding arrangements makes it such a person. That fact favours the grant of the application. Whether funding might increase if the authorisation were granted is an important question, but it would not be appropriate to make a finding about it even if we were in a position to do so. Equally, bargaining might identify circumstances in which the overall effect of any improvements in wages might be minimised through improvements in productivity and service delivery.

s 243(3)(e)	the extent to which the applicant for the authorisation is prepared to consider and respond reasonably to claims, or responses to claims, that may be made by a particular employer named in the application, if that employer later proposes to bargain for an agreement that: (i) would cover that employer; and (ii) would not cover the other employers named in the application.

34 This paragraph reinforces the importance of single enterprise bargaining in the statutory scheme, even where a low-paid authorisation has been made. While the applicants have submitted that they are prepared to respond reasonably to proposals for single enterprise agreements, the combined employers have submitted that the applicants' position is "questionable". We note some evidence that UV has declined to bargain on a single enterprise basis pending the outcome of these applications, nevertheless we are prepared to accept the applicants' indications of intention. We expect them to be honoured.

35 The combined employers submitted that, contrary to the applicants' submission, the purpose of the provisions of Div 9 is not to "lift employees out of low pay", but to facilitate access to bargaining "where the conventional bargaining mechanisms are ineffective at the single enterprise level." They referred to a Productivity Commission report which suggested that competitive wages could not be achieved for aged care workers unless the costs and prices for aged care are independently assessed and fixed. They also submitted that the wage rates claimed by the applicants are based on invalid comparisons with manufacturing and other industries. We are not in a position to evaluate the significance of these submissions for the prospects of successful bargaining should the authorisation be made. They clearly raise matters which may be relevant in the bargaining process. In the circumstances overall there is some prospect of bargaining being successful.

Conclusions

36 Leaving out of consideration employers and employees to whom an enterprise agreement applies, we are satisfied that the employees to whom the authorisation would apply are low-paid, that they either have not had access to enterprise bargaining or face substantial difficulty in bargaining at the enterprise level and that making an authorisation would assist them to bargain. Other matters identified in s 243(2) also point to an authorisation being in the public interest: the history of bargaining, the relative bargaining strength of the

employers and employees and the high degree of commonality in the nature of residential aged care enterprises and, leaving aside employees to whom enterprise agreements apply, the conditions of the employees.

37 It is unnecessary to repeat the conclusions in relation to the matters specified in s 243(3). We are satisfied that it is in the public interest to make a low-paid authorisation and intend to do so. Before finalising the authorisation a number of things require attention.

38 We have made it clear that a number of our conclusions do not extend to employers and employees to whom an enterprise agreement applies. Any employers in that category should be deleted from the list of employers. It appears likely that a number of enterprise agreements do not result on balance in a great improvement in terms and conditions for the employees to whom they apply. In one sense those employees may still be "low-paid" We consider, however, that it would be very difficult to analyse the terms of the agreements operating in the sector and the circumstances in which they were made with a view to deciding whether, despite the agreement, the authorisation should extend to the enterprise concerned. We have decided that employers to whom an enterprise agreement applies should be excluded from the authorisation because of the particular circumstances of the applications we are considering. There may be other cases in which a different approach could be followed consistent with the legislative provisions.

39 We request the applicants to prepare a draft list, circulate it to the other parties who have appeared and then file the list together with a draft authorisation within 30 days. Should it be necessary to do so we shall seek submissions on the draft prior to making the authorisation.

40 In conclusion there are two additional observations. The first is that application may be made to delete an employer's name from the authorisation and an employer's name is taken to have been deleted if an enterprise agreement applying to the employer comes into operation.[5] These provisions indicate, among other things, that an employer wishing to pursue a single enterprise agreement in bargaining may still do so and, if successful, will not be covered by the multi-enterprise agreement. The terms of s 243(3)(e) reinforce that conclusion. Secondly, Fair Work Australia may provide assistance in relation to a proposed multi-enterprise agreement on its own motion or on application.[6] We direct UV to provide a confidential written report to Vice President Watson outlining progress in bargaining by 30 September 2011 with a copy provided to each employer covered by the authorisation and each bargaining representative.

Orders accordingly

ALEX LAZAREVICH

Attachment A to the Full Bench decision of 5 May 2011

243 When FWA must make a low-paid authorisation

Low-paid authorisation

(1) FWA must make a low-paid authorisation in relation to a proposed multi-enterprise agreement if:

5 See ss 244-245.

6 See s 246.

(a) an application for the authorisation has been made; and
(b) FWA is satisfied that it is in the public interest to make the authorisation, taking into account the matters specified in subsections (2) and (3).

FWA must take into account historical and current matters relating to collective bargaining

(2) In deciding whether or not to make the authorisation, FWA must take into account the following:
(a) whether granting the authorisation would assist low-paid employees who have not had access to collective bargaining or who face substantial difficulty bargaining at the enterprise level;
(b) the history of bargaining in the industry in which the employees who will be covered by the agreement work;
(c) the relative bargaining strength of the employers and employees who will be covered by the agreement;
(d) the current terms and conditions of employment of the employees who will be covered by the agreement, as compared to relevant industry and community standards;
(e) the degree of commonality in the nature of the enterprises to which the agreement relates, and the terms and conditions of employment in those enterprises.

FWA must take into account matters relating to the likely success of collective bargaining

(3) In deciding whether or not to make the authorisation, FWA must also take into account the following:
(a) whether granting the authorisation would assist in identifying improvements to productivity and service delivery at the enterprises to which the agreement relates;
(b) the extent to which the likely number of bargaining representatives for the agreement would be consistent with a manageable collective bargaining process;
(c) the views of the employers and employees who will be covered by the agreement;
(d) the extent to which the terms and conditions of employment of the employees who will be covered by the agreement is controlled, directed or influenced by a person other than the employer, or employers, that will be covered by the agreement;
(e) the extent to which the applicant for the authorisation is prepared to consider and respond reasonably to claims, or responses to claims, that may be made by a particular employer named in the application, if that employer later proposes to bargain for an agreement that:
(i) would cover that employer; and
(ii) would not cover the other employers specified in the application.

What authorisation must specify etc.

(4) The authorisation must specify:
(a) the employers that will be covered by the agreement (which may be some or all of the employers specified in the application); and
(b) the employees who will be covered by the agreement (which may be some or all of the employees specified in the application); and
(c) any other matter prescribed by the procedural rules.

Operation of authorisation

(5) The authorisation comes into operation on the day on which it is made.

FEDERAL COURT OF AUSTRALIA

Shop, Distributive and Allied Employees Association and Another v Australian Industry Group and Others

[2017] FCAFC 161

North, Tracey, Flick, Jagot and Bromberg JJ

26-28 September, 11 October 2017

Industrial Law — Modern awards — Determinations to vary — Where Fair Work Commission (FWC) made determinations varying five modern awards — Where effect of determinations was to reduce Sunday and public holiday penalty rates and other employee entitlements — Where FWC had to ensure that modern awards met modern awards objective — Whether prerequisite to making determinations was satisfaction of material change in circumstances — Whether matters that FWC was required to consider were exhaustive — Meaning of "fair and relevant minimum safety net of terms and conditions" — Whether FWC failed to consider relative living standards and needs of the low paid — Whether determinations unreasonable — Fair Work Act 2009 (Cth), ss 134, (1)(a), (b), (c), (d), (da), (e), (f), (g), (h), 156.

Section 156 of the *Fair Work Act 2009* (Cth) (the Act) provided that the Fair Work Commission (FWC) had to conduct a four yearly review of modern awards, and could make determinations varying modern awards. Section 134(1) of the Act provided that the FWC had to ensure that modern awards, together with the National Employment Standards, provided a fair and relevant minimum safety net of terms and conditions, taking into account the factors listed in paras (a) to (h) (the modern awards objective). One factor, in s 134(1)(a) of the Act, was the relative living standards and the needs of the low paid. By s 134(2) of the Act, the modern awards objective applied to the FWC's function of reviewing and varying modern awards.

On 21 June 2017, the FWC made determinations varying five modern awards under s 156 of the Act. The effect of the determinations was to reduce Sunday and public holiday penalty rates and other entitlements for employees to whom the awards applied. Prior to making the determinations, the FWC published three decisions explaining its reasons.

In the Federal Court, the applicant unions sought writs of certiorari quashing each of the determinations and mandamus requiring the FWC to conduct a review of the awards under s 156 of the Act according to law.

The applicants' first ground was that the FWC had no power to make a determination to vary an award under s 156 of the Act without first satisfying itself that, since the making of the relevant awards, there had been a material change in circumstances such that the awards no longer met the modern awards objective.

The applicants' second ground was that the FWC, in applying the modern awards objective to its four yearly review, was required to consider all of the matters in s 134(1)(a) to (h) of the Act but was precluded from considering any other matter, including the historical and contemporary circumstances in which the awards operated. The applicants also said that the words "fair and relevant" in s 134(1) of the Act qualified the considerations in s 134(1)(a) to (h) but not the minimum safety net of terms and conditions.

In their third to sixth grounds, the applicants contended that the FWC wrongly decided that it was not necessary to take into account the relative living standards and the needs of the low paid, wrongly decided that these matters were best addressed by the setting and adjustment of the modern award minimum rates of pay, misconceived the limits and functions of the annual wage review, and failed to take into account the relative living standards and the needs of the low paid.

Finally, the applicants contended that the FWC's determinations were plainly unjust or legally unreasonable.

Held, dismissing the applications: (1) A determination made under s 156(2)(b) of the Act varying an award may be warranted if it is established that there has been a material change in circumstances since the making of the award under review. However, the FWC's power to make a determination varying an award is not conditioned on it being satisfied that there has been such a change in circumstances. [23]-[24], [39]

Consideration of the meaning of "review" in s 156 of the Act. [25]-[28], [31]-[32], [35]-[38]

(2) While the considerations in s 134(1)(a) to (h) of the Act inform the evaluation of what might constitute a "fair and relevant minimum safety net of terms and conditions", they do not necessarily exhaust the matters which the FWC might properly consider to be relevant in the particular circumstances of a review. The FWC did not misapply the statutory provisions by taking into account the perspectives of employers and employees, the historical context, and the contemporary circumstances in which the awards operated. [48], [53], [65]

(3) The statutory criteria of "fair and relevant" in s 134(1) of the Act qualify the nature of the minimum safety net of terms and conditions to which the FWC's duty relates. They also inform the taking into account of the matters in s 134(1)(a) to (h) but are not confined by those matters. They are confined only by implication from the subject matter, scope and purpose of the Act. [50]

(4) The FWC appreciated that it needed to consider, and did actually consider, the relative living standards and needs of the low paid in accordance with s 134(1)(a). It understood the negative effect that a reduction of penalty rates would impose on the relative living standards and needs of the low paid, considered that some part of that negative impact could be ameliorated by phasing the implementation to accord with wage rises, but accepted that, one way or another, reducing penalty rates would have a negative impact on the living standards and needs of the low paid. However, this conclusion could not of itself dictate any particular outcome. [92]-[94]

(5) The fact that the FWC did not explain the relative weight it gave to the competing considerations in s 134(1)(a) to (h) of the Act in reaching its overall conclusions is immaterial. Provided the relevant matters were considered, the relative weight it gave to each matter was wholly a matter for the FWC. [95], [98]

(6) The FWC's determinations were not plainly unjust or legally unreasonable. [103]

Cases Cited

4 Yearly Review of Modern Awards – Penalty Rates, Re (2017) 265 IR 1.

4 Yearly Review of Modern Awards – Penalty Rates – Late Night Penalties, Re [2017] FWCFB 1551.

4 Yearly Review of Modern Awards – Penalty Rates – Transitional Arrangements, Re (2017) 272 IR 1.

4 Yearly Review of Modern Awards – Preliminary Jurisdictional Issues, Re (2014) 241 IR 189.

Aboriginal Affairs, Minister for v Peko-Wallsend Ltd (1986) 162 CLR 24.

Alexandra Private Geriatric Hospital Pty Ltd v Blewett (1985) 7 FCR 341.

Annual Wage Review 2015-16, Re (2016) 258 IR 201.

Attorney-General (NSW) v XY [2014] NSWCA 466.

Australian and International Pilots Association v Fair Work Australia (2012) 202 FCR 200.

Australian Education Union v Lawler (2008) 169 FCR 327.

Bannister v See (1982) 63 FLR 74.

Bodruddaza v Minister for Immigration and Multicultural Affairs (2007) 228 CLR 651.

Central Queensland Services Pty Ltd v Construction, Forestry, Mining and Energy Union (2017) 249 FCR 154.

Colpitts v Australian Telecommunications Commission (1986) 9 FCR 52.

Competition Policy and Consumer Affairs, Assistant Treasurer and Minister for v Cathay Pacific Airways Ltd (2009) 179 FCR 323.

Construction, Forestry, Mining and Energy Union v Anglo American Metallurgical Coal Pty Ltd (2017) 252 FCR 337.

Craig v South Australia (1995) 184 CLR 163.

Dinsdale v The Queen (2000) 202 CLR 321.

Enfield City Corporation v Development Assessment Commission (2000) 199 CLR 135.

Immigration and Border Protection, Minister for v Singh (2014) 231 FCR 437.

Immigration and Citizenship, Minister for v Li (2013) 249 CLR 332.

Immigration and Citizenship, Minister for v SZJSS (2010) 243 CLR 164.

Immigration and Multicultural Affairs, Minister for v Yusuf (2001) 206 CLR 323.

Immigration and Multicultural and Indigenous Affairs, Re Minister for; Ex parte Palme (2003) 216 CLR 212.

JJ Richards & Sons Pty Ltd v Fair Work Australia (2012) 201 FCR 297.

Legal Services Commissioner v Turner [2012] VSC 394.

Lu v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 141 FCR 346.

National Retail Association v Fair Work Commission (2014) 225 FCR 154.

Patterson, Re; Ex parte Taylor (2001) 207 CLR 391.

R v Alley; Ex parte New South Wales Plumbers and Gasfitters Employees' Union (1981) 153 CLR 376.

R v Williams; Ex parte Australian Building Construction Employees' and Builders Labourers' Federation (1982) 153 CLR 402.

Saville v Health Care Complaints Commission [2006] NSWCA 298.

Sevdalis v Director of Professional Services Review [2017] FCAFC 9.

Sevdalis v Director of Professional Services Review (No 2) [2016] FCA 433.

Taulahi v Minister for Immigration and Border Protection (2016) 246 FCR 146.

Teys Australia Beenleigh Pty Ltd v Australasian Meat Industry Employees' Union (2015) 230 FCR 565.

UnitedGlobalcom Inc v Industrial Relations Commission (NSW) (2005) 142 IR 204.

Wolanski's Registered Design, Re (1953) 88 CLR 278.

Application

H Borenstein QC with *S Moore* QC, for the applicant (Shop, Distributive and Allied Employees Association) in VID 684 of 2017.

H Dixon SC with *A Gotting*, for the first respondent (Australian Industry Group) in VID 684 of 2017.

Y Shariff, for the second respondent (Australian Business Industrial) and third respondent (NSW Business Chamber Ltd) in VID 684 of 2017.

A Duc, for the fourth respondent (Restaurant & Catering Industrial) in VID 684 of 2017.

S Wood QC with *P Wheelahan* and *B Jellis*, for the fifth respondent (Australian Retailers Association) and seventh respondent (Master Grocers Australia Ltd) in VID 684 of 2017.

A Herbert, for the sixth respondent (National Retail Association Ltd) in VID 684 of 2017.

M Seck, for the eighth respondent (Pharmacy Guild of Australia) in VID 684 of 2017.

H Borenstein QC with *C Dowling*, for the applicant (United Voice) in VID 685 of 2017.

M Seck, for the first respondent (Australian Hotels Association) and second respondent (Accommodation Association of Australia Pty Ltd) in VID 685 of 2017.

A Duc, for the third respondent (Restaurant & Catering Industrial) in VID 685 of 2017.

Y Shariff, for the fourth respondent (Australian Business Industrial) and fifth respondent (NSW Business Chamber Ltd) in VID 685 of 2017.

Court issued summary

In accordance with the practice of the Federal Court in cases of public interest, importance or complexity, the following summary has been prepared to accompany the orders made today. This summary is intended to assist in understanding the outcome of this proceeding and is not a complete statement of the conclusions reached by the Court. The only authoritative statement of the Court's reasons is that contained in the published reasons for judgment which will be available on the internet at the Court's website. This summary is also available there.

There are two applications before the Court in which the applicant unions seek judicial review of determinations made by the Fair Work Commission (FWC). Those determinations reduced Sunday and holiday penalty rates and

other employee entitlements in various awards which cover employees and employers operating in the hospitality and retail industries. In the view of the FWC the awards in question were inconsistent with the "modern awards objective" specified by s 134(1) of the *Fair Work Act 2009* (Cth) by reason of the rate of those entitlements. The determinations made by the FWC were made as part of the four yearly review of awards required by s 156 of the *Fair Work Act*.

Whatever the unquestionable importance of the determinations made by the FWC to a large number of people, the applications for judicial review before the Court must be resolved according to established principles which limit the role of courts in reviewing for administrative error. The FWC alone was vested with the responsibility for assessing all relevant matters and reaching all of the conclusions necessary to decide whether or not to make the determinations that it did. The Court's task does not entail reviewing the correctness of the FWC's conclusions. The Court's task is restricted to reviewing the process by which the FWC arrived at those conclusions to ensure that in performing its statutory task the FWC did so free of jurisdictional error. The Court may not enter into the merits of the determinations made by the FWC.

Broadly speaking, there are two categories of challenge made in relation to the task performed by the FWC. *First*, the unions contended that the FWC's task miscarried because it failed to appreciate that "the review" of awards required by s 156 of the *Fair Work Act* is conditional on there being a material change in circumstances since the conduct of an earlier review. That challenge is rejected. There is no warrant in either the text of s 156 or its context to confine the meaning of "review" in the manner contended for by the unions. *Second*, the unions contended that the FWC had not properly understood the nature of the inquiry required under s 134 of the *Fair Work Act* which specifies the "modern awards objective". It was contended that the various factors specified at s 134(1)(a) to (h) were exhaustive and that the FWC had misconstrued "relevant" in the phrase "fair and relevant minimum safety net". It was also contended that the FWC had failed to take into account relative living standards and the needs of the low paid as required under s 134(1)(a). Further, it was contended that the FWC's decision was legally unreasonable. Each of those contentions is rejected. In the view of the Court, the FWC's decision read as a whole reveals no jurisdictional error in its construction or application of s 134 of the *Fair Work Act*.

For the reasons given in the Court's reasons for judgment, each of the applications must be dismissed.

11 October 2017

The Court

The applications

1 These reasons for judgment explain why the applicants' case that various determinations of the Fair Work Commission (FWC) are invalid must be rejected.

2 On 21 June 2017 the Full Bench of the FWC made determinations varying five modern awards (the Fast Food Industry Award 2010, the General Retail Industry Award 2010, the Pharmacy Industry Award 2010, the Hospitality

Industry (General) Award 2010, and the Restaurant Industry Award 2010) under s 156(2)(b)(i) of the *Fair Work Act 2009* (Cth). The effect of the determinations was to reduce Sunday and public holiday penalty rates and other entitlements for employees to whom the awards applied.

3 By originating applications filed on 23 June 2017 the applicants seek writs of certiorari quashing each of the determinations and mandamus requiring the FWC to conduct a review of the awards under s 156 according to law.

4 Before the determinations were made the FWC published three decisions. Each determination was said to be "[f]urther to the decisions issued by the Fair Work Commission". Those decisions were:

- a decision published on 23 February 2017: *Re 4 Yearly Review of Modern Awards – Penalty Rates* (2017) 265 IR 1 (referred to below as the "primary reasons");
- a decision published on 17 March 2017: *Re 4 Yearly Review of Modern Awards – Penalty Rates – Late Night Penalties* [2017] FWCFB 1551; and
- a decision published on 5 June 2017: *Re 4 Yearly Review of Modern Awards – Penalty Rates – Transitional Arrangements* (2017) 272 IR 1 (referred to below as the "further reasons").

5 The so-called decisions are not subject to challenge in this proceeding. It is the determinations which the FWC made on 21 June 2017 varying the awards which alone are the subject of the challenges. This reflected the applicants' acceptance of the fact that none of the decisions affected any immediate right or interest of the applicants; the determinations alone had that effect.

The Court's role

6 There is no dispute that to obtain relief the applicants must establish that the determinations are affected by jurisdictional error (*Central Queensland Services Pty Ltd v Construction, Forestry, Mining and Energy Union* (2017) 249 FCR 154 at [2] per Jessup J, at [44] per Tracey and Reeves JJ). This also follows from the nature of the relief sought by the applicants, namely an order in the nature of certiorari (*Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at [61]-[64]). And it is the party seeking a writ in the nature of certiorari and who asserts an absence or excess of jurisdiction who bears the onus of proof (*R v Alley; Ex parte New South Wales Plumbers and Gasfitters Employees' Union* (1981) 153 CLR 376 (*Alley*) at 392 per Mason J, *Unitedglobalcom Inc v Industrial Relations Commission (NSW)* (2005) 142 IR 204 at [2] per Handley JA, and *Australian Education Union v Lawler* (2008) 169 FCR 327 at [219] per Jessup J (Moore and Lander JJ agreeing)).

7 It was common ground that jurisdictional error need not be exposed on the face of the determinations, as may have been the case in respect of an error of law, but could be exposed by reference to the reasons for the decisions as identified above.

8 Accordingly, whatever the unquestionable importance of the determinations to a large number of people, the applications must be resolved according to established principles which limit the role of the courts in reviewing for administrative error. The Court may not enter into the merits of the determinations. The FWC alone was vested with the responsibility for assessing all relevant matters and reaching all of the conclusions necessary to decide whether or not to make the determinations. The Court's task is confined to the

ascertainment or not of jurisdictional error. This does not entail reviewing the correctness of the FWC's conclusions. The Court's task is restricted to reviewing the process by which the FWC arrived at those conclusions (*Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164 at [36]). In this case, the process was provided for by the *Fair Work Act* including the terms of s 134(1).

9 No exhaustive definition can be provided as to what constitutes jurisdictional error. In *Craig v South Australia* (1995) 184 CLR 163 at 179 the High Court said:

> If … an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.

10 But this list is not exhaustive. In *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [82] McHugh, Gummow and Hayne JJ observed:

> "Jurisdictional error" can thus be seen to embrace a number of different kinds of error, the list of which, in the passage cited from *Craig*, is not exhaustive. Those different kinds of error may well overlap. The circumstances of a particular case may permit more than one characterisation of the error identified, for example, as the decision-maker both asking the wrong question and ignoring relevant material. What is important, however, is that identifying a wrong issue, asking a wrong question, ignoring relevant material or relying on irrelevant material in a way that affects the exercise of power is to make an error of law. Further, doing so results in the decision-maker exceeding the authority or powers given by the relevant statute. In other words, if an error of those types is made, the decision-maker did not have authority to make the decision that was made; he or she did not have jurisdiction to make it. Nothing in the Act suggests that the Tribunal is given authority to authoritatively determine questions of law or to make a decision otherwise than in accordance with the law.

(Citations omitted.)

11 An administrative decision which lacks "an evident and intelligible justification" may also be vitiated for jurisdictional error (*Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437 (*Singh*) at [44] per Allsop CJ, Robertson and Mortimer JJ citing *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 (*Li*) at [76] per Hayne, Kiefel and Bell JJ). The test of unreasonableness is an objective one (*Alexandra Private Geriatric Hospital Pty Ltd v Blewett* (1985) 7 FCR 341 at 357 per Sheppard J).

12 Accordingly there remains vested in the decision-maker an "area of decisional freedom" or an "area within which a decision-maker has a genuinely free discretion". In *Li* French CJ stated the principle at [28] as:

> After all the requirements of administrative justice have been met in the process and reasoning leading to the point of decision in the exercise of a discretion, there is generally an area of decisional freedom. Within that area reasonable minds may reach different conclusions about the correct or preferable decision. However, the freedom thus left by the statute cannot be construed as attracting a legislative sanction to be arbitrary or capricious or to abandon common sense.

13 Hayne, Kiefel and Bell JJ in *Li* expressed the required approach at [63] and [66] in the following terms:

> [63] Because s 363(1)(b) contains a statutory discretionary power, the standard to be applied to the exercise of that power is not derived only from s 357A(3), but also from a presumption of the law. The legislature is taken to intend that a discretionary power, statutorily conferred, will be exercised reasonably.
>
> …
>
> [66] This approach does not deny that there is an area within which a decision-maker has a genuinely free discretion. That area resides within the bounds of legal reasonableness. The courts are conscious of not exceeding their supervisory role by undertaking a review of the merits of an exercise of discretionary power. Properly applied, a standard of legal reasonableness does not involve substituting a court's view as to how a discretion should be exercised for that of a decision-maker. Accepting that the standard of reasonableness is not applied in this way does not, however, explain how it is to be applied and how it is to be tested.

14 The applicants contend that the determinations are affected by jurisdictional error on seven grounds. Both proceedings were heard together. The grounds relied upon by each of the applicants in the two proceedings are the same.

15 It is convenient to identify the statutory provisions which governed the making of the determinations and the reasoning of the FWC in the context of each ground, as relevant. Before doing so, however, some other observations should be made as a result of the fact that the FWC published its reasons over a period of four months, gave the parties the opportunity to make further submissions arising from its primary reasons, and did not make any determinations until 21 June 2017. Until the decision-making process was complete by the making of the determinations, it remained open to the FWC to consider further submissions and review any conclusions earlier reached.

Ground 1

16 The applicants contend that the FWC misconstrued its powers under s 156(1) and (2) of the *Fair Work Act* by exercising the power to make a determination to vary the awards without having satisfied itself that, since the making of the awards the subject of the review or the last review of them, there had been a material change in circumstances such that the award, in each case, no longer met the "modern awards objective".

17 Section 156 provided that:

> (1) The FWC must conduct a ***4 yearly review of modern awards*** starting as soon as practicable after each 4th anniversary of the commencement of this Part.
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> (2) In a 4 yearly review of modern awards, the FWC:
>
> (a) must review all modern awards; and
>
> (b) may make:
>
> (i) one or more determinations varying modern awards; and
>
> (ii) one or more modern awards; and
>
> (iii) one or more determinations revoking modern awards; and
>
> (c) must not review, or make a determination to vary, a default fund term of a modern award.

(3) In a 4 yearly review of modern awards, the FWC may make a determination varying modern award minimum wages only if the FWC is satisfied that the variation of modern award minimum wages is justified by work value reasons.

(4) ***Work value reasons*** are reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:

(a) the nature of the work;

(b) the level of skill or responsibility involved in doing the work;

(c) the conditions under which the work is done.

(5) A 4 yearly review of modern awards must be such that each modern award is reviewed in its own right. However, this does not prevent the FWC from reviewing 2 or more modern awards at the same time.

18 Section 134, which describes the "modern awards objective", was in these terms:

(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

(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***.

(2) The modern awards objective applies to the performance or exercise of the FWC's ***modern award powers***, which are:

(a) the FWC's functions or powers under this Part; and

(b) the FWC's functions or powers under Part 2-6, so far as they relate to modern award minimum wages.

19 Sections 134 and 156 are in Pt 2-3 of Ch 2 of the *Fair Work Act* and thus the modern awards objective applies to the FWC exercising its functions to make a determination to vary an award under s 156(2)(b)(i) of the *Fair Work Act*.

20 Section 138 is also relevant. It provided that:

A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.

21 Section 157 is also relevant to ground 1. It too is in Pt 2-3 of Ch 2 and thus is subject to the modern awards objective. Section 157 provided that:

(1) The FWC may:
(a) make a determination varying a modern award, otherwise than to vary modern award minimum wages or to vary a default fund term of the award; or
(b) make a modern award; or
(c) make a determination revoking a modern award;
if the FWC is satisfied that making the determination or modern award outside the system of 4 yearly reviews of modern awards is necessary to achieve the modern awards objective.
(2) The FWC may make a determination varying modern award minimum wages if the FWC is satisfied that:
(a) the variation of modern award minimum wages is justified by work value reasons; and
(b) making the determination outside the system of annual wage reviews and the system of 4 yearly reviews of modern awards is necessary to achieve the modern awards objective.
(3) The FWC may make a determination or modern award under this section:
(a) on its own initiative; or
(b) on application under section 158.

22 Section 284 should be noted. It is in Pt 2-6 dealing with minimum wages. It provided that:

(1) The FWC must establish and maintain a safety net of fair minimum wages, taking into account:
(a) the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth; and
(b) promoting social inclusion through increased workforce participation; and
(c) relative living standards and the needs of the low paid; and
(d) the principle of equal remuneration for work of equal or comparable value; and
(e) providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability.
This is the ***minimum wages objective***.
(2) The minimum wages objective applies to the performance or exercise of:
(a) the FWC's functions or powers under this Part; and
(b) the FWC's functions or powers under Part 2-3, so far as they relate to setting, varying or revoking modern award minimum wages.

23 The applicants put the same argument to the FWC, that is, the FWC had no power to make a determination to vary the awards without having satisfied itself that there had been a material change in circumstances such that the award in each case no longer met the "modern awards objective". The FWC rejected the argument in the primary reasons at [230]-[268]. In short, the FWC considered

that a determination varying an award may be warranted if it is established that there has been a material change in circumstances since the making of the award under review, but the FWC's power to do so is not conditioned on it being satisfied that there has been such a change in circumstances.

24 The FWC's conclusion in this regard is correct.

25 *First*, it may be accepted that the word "review" takes its meaning from its context and may mean merely "reconsideration in the light of changed circumstances" (*Bannister v See* (1982) 63 FLR 74 at 78-79; 42 ALR 78 at 81). This, however, is not the natural and ordinary meaning of the word which is simply "survey, inspect, re-examine or look back upon" (*Macquarie Concise Dictionary* (3rd ed)). In *Colpitts v Australian Telecommunications Commission* (1986) 9 FCR 52 at 63 Burchett J considered the meaning of "review" and noted at 63-64 that:

> In the Shorter Oxford English Dictionary the first meaning given of the word "review" is "the act of looking over something (again), with a view to correction or improvement", but the meaning in law is also given: "Revision of a sentence, etc., by some other court or authority."
>
> …
>
> It may be conceded that, in an appropriate context, the word "review" could have a quite amorphous meaning; but the word is here used in an Act to describe a challenge, to be brought by "application", to administrative action, provision for which is to be made by regulations. In such a setting a legal signification is suggested.

26 The present context is different. The FWC is not called upon to consider or reconsider the decision of another body by s 156. It is reviewing modern awards. The modern awards provisions of the *Fair Work Act* commenced on 1 January 2010. By Item 4 of Sch 5 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (the TPCA Act) awards made under Pt 10A of the *Workplace Relations Act 1996* (Cth) were deemed to be modern awards. By Item 6 of Sch 5 to the TPCA Act, Fair Work Australia was required to conduct a review of all modern awards and, in so doing, was required to consider whether modern awards achieved the modern awards objective. This review was to be conducted as soon as practicable after the second anniversary of the commencement of the modern award provisions (that is, after 1 January 2012).

27 It is apparent from s 156(1) that the next review was required to start as soon as reasonably practicable after each fourth anniversary of the commencement of Pt 2-3 of Ch 2. Thus, the statutory scheme required a review starting in 2012 and again in 2014 (followed by another review starting on 1 January 2018 and so on).

28 In other words, under s 156 the FWC is necessarily reviewing awards that it (or its predecessor) had already reviewed. In this context, it is the FWC which is in control of every review as required. There is nothing in this context to justify giving "review" a more confined meaning than its natural and ordinary meaning given that the review process is always controlled by the FWC.

29 *Second*, nothing in the text of s 156 supports the meaning which the applicants give to "review". The word appears as part of a composite phrase in s 156(1) (4 yearly review of modern awards) and in s 156(2). By s 156(1) a duty is imposed on the FWC to conduct a 4 yearly review. Section 156(2) prescribes what must, may and must not be done in conducting the 4 yearly review which

s 156(1) requires. The applicants' case is that the powers under s 156(2) are conditioned on the FWC having complied with s 156(2)(a) ("must review all modern awards"). So much may be accepted. The relevant point for present purposes is that the powers in s 156(2)(b) are not expressed to be conditional on the FWC having reached any state of satisfaction. Nor does s 156(2)(a) impose any obligation on the FWC to reach a particular state of satisfaction in the conduct of the review.

30 *Third*, no other provisions of the *Fair Work Act* indicate that the FWC must be satisfied that there has been a material change in circumstances since the award under review was made or reviewed before the power under s 156(2)(b)(i) is engaged. The modern awards objective in s 134(1) applies to any such exercise of power (by s 134(2)(a)) but s 134(1) also does not identify any state of mind the FWC must hold. Rather, it imposes a function on the FWC to ensure that modern awards satisfy the requirements of that provision (that is, together with National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions taking into account (a) to (h)).

31 *Fourth*, the context otherwise provides but scant support for the applicants' case. The applicants contend that it is highly unlikely that, a review having been conducted in 2012, Parliament intended a *de novo* review in 2014. This, the applicants said, would be inconsistent with the element of the modern awards objective in s 134(1)(g) insofar as it refers to the need for a stable modern award system. Section 157, according to the applicants, supports this unlikelihood. Section 157(1) enables the FWC to vary, make or revoke a modern award outside of the 4 yearly review if the FWC is satisfied that making such a determination "is necessary to achieve the modern awards objective". If "review" in s 156(2) does not take the meaning for which the applicants contend then, it was submitted, there is no difference between the two provisions. It is apparent, however, that the four yearly review under s 156 has a more confined role to play, as the applicants put it, because it is required to be carried out on a four yearly basis. Otherwise, it was said the system for modern awards would be in "a constant state of flux with one review running into the next", as has occurred in the present case, which is an incongruous and inconvenient result.

32 The problem with this analysis is that it attributes an intention to Parliament (to confine the circumstances in which a power to make a determination may be exercised under s 156(2)) based on context in circumstances where the context is equally capable of supporting a contrary imputed intention. It is a fundamental tenet of statutory construction that the intention of Parliament is to be discerned from the statutory provisions, not from pre-conceived value judgments including those about the potential inconvenience of awards being subject to repeated or overlapping reviews. The fact that the statutory scheme required reviews commencing in 2012 and 2014 (and on a four yearly cycle thereafter) does not suggest that "review" should be given a more confined meaning than its natural and ordinary meaning. The requirement is equally explicable by an imputed Parliamentary intention to require two reviews, in effect, to commence within the first four years of the commencement of the new statutory scheme. It is also equally explicable by an imputed Parliamentary intention to ensure that awards are subject to regular and frequent review. None of these imputed intentions have any greater validity than the other because they are not founded in the language of the statutory provisions.

33 The reference in s 134(1)(g) to the "need to ensure a simple, easy to

understand, stable and sustainable modern award system" does not support the applicants. That is a matter which the FWC must take into account as part of the modern awards objective. It is thus a matter for the FWC to determine the weight to be given to the value of stability in the particular review it is conducting, along with the weight to be given to all other matters it must take into account, cognisant of its duty (which itself involves an evaluative assessment of potentially competing considerations) to ensure that modern awards, together with the National Employment Standards, provide the required fair and relevant minimum safety net. It is not legitimate to take one element in the overall suite of potentially relevant considerations to the discharge of the FWC's functions, such as stability, and discern from that one matter a Parliamentary intention that the scheme as a whole is to be construed with that end alone in mind.

34 Further, there is no basis for imputing to Parliament an intent to give stability, a consideration that the FWC must take into account, priority over the FWC's ultimate task of ensuring that "modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions". The applicants' contention would constrain the capacity of the FWC to maintain an award's compliance with the modern awards objective. That could only be done if a material change of circumstance was first established. It should not be readily presumed that Parliament intended to impose constraints upon the achievement of an objective that it has mandated. A modern award may be found to be non-compliant for reasons other than changed circumstances, including where considerations, which were extant but unappreciated or not fully appreciated on a prior review, are properly brought to account.

35 Accordingly, it is neither legitimate nor possible by reference to anything in the text or context to divine some intention on the part of Parliament to confine the powers of the FWC in the manner for which the applicants intend. Further, the fact that ss 156(2)(b) and 157(1) enable the same determinations to be made in two different circumstances also does not support any such conclusion. There is no incongruity or disharmony in the statutory scheme even if "review" in s 156(2)(a) is given its natural and ordinary meaning.

36 *Fifth*, the applicants' approach may itself be seen as introducing incongruity and disharmony into the statutory scheme. By s 156(1) and (2)(a) the FWC must conduct a review. The applicants' argument is said to depend on the meaning of the word "review". That word appears as part of a composite phrase (4 yearly review) in s 156(1) and as an obligation which the FWC must fulfil in s 156(2)(a) in conducting the 4 yearly review. If the applicants' argument, in truth, turned on the meaning of "review" it ought to be possible to substitute that meaning in the statutory provisions for the word "review". If this is done, however, s 156(2)(a) becomes unintelligible unless it is re-drafted. This is because the applicants' argument is not simply giving one possible meaning to the word "review" as it appears in s 156(2)(a). In that provision "review" is simply the action the FWC must carry out. The applicants' argument is not directed to the action the FWC must carry out. It is not about the meaning of the verb "review" at all. It is that, the review having been carried out, the power under s 156(2) may be exercised only if the result of the review is a conclusion by the FWC that there has been a material change in circumstances since the award was made or last reviewed.

37 For these reasons the applicants' denial that their argument depends on reading words into s 156(2) is unsustainable. The argument depends on reading a qualification into the power provision which is in s 156(2)(b) by reference to the result or outcome of the review. In common with the applicants' approach to intentions imputed to Parliament in purported reliance on text and context, this too is an impermissible approach to statutory interpretation (*JJ Richards & Sons Pty Ltd v Fair Work Australia* (2012) 201 FCR 297 at [51] per Flick J).

38 The meaning of s 156(2) is clear. The FWC must review all modern awards under s 156(2)(a). In that context "review" takes its ordinary and natural meaning of "survey, inspect, re-examine or look back upon". Consequential upon a review the FWC may exercise the powers in s 156(2)(b). In performing both functions the FWC must apply the modern awards objective as provided for in s 134(2)(a).

39 The FWC was correct to reject the applicants' argument below that it could not exercise its powers under s 156(2)(b)(i) unless it was satisfied that there had been a material change in circumstances since the previous review.

40 Ground 1 must be rejected for these reasons.

Ground 2

41 Ground 2 contains two sub-grounds. The first may readily be dismissed. It is that the FWC wrongly bifurcated the modern awards objective so that it discharged its duty to ensure that "modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions" separately from the taking into account of the matters in s 134(1)(a) to (h).

42 The short answer to this contention is that the FWC's reasons do not indicate that it conducted the review in the manner which the applicants suggest. The applicants rely particularly on [128] of the FWC's primary reasons which stated that:

> The proposition advanced relies on dictionary definitions of some individual words within s.134(1). But the argument advanced pays scant regard to the fact the modern awards objective is a composite expression which requires that modern awards, together with the NES, provide "a fair and relevant minimum safety net of terms and conditions". The joint employer reply submission gives insufficient weight to the statutory directive that the minimum safety net be "fair and relevant". Further, in giving effect to the modern awards objective the Commission is required to take into account the s.134 considerations, one of which is "relative living standards and the needs of the low paid" (s.134(1)(a)). The matters identified tell against the proposition advanced in the joint employer reply submission.

43 The contention fails to recognise that in [128] the FWC is rejecting a submission put to it. In rejecting the submission the FWC expressly recognised that the modern awards objective is a composite expression. The FWC's description of its functions in [128] does not separate the duty of ensuring the provision of the minimum safety net from consideration of the matters to be taken into account. The applicants place more weight on the sentence "in giving effect to the modern awards objective the Commission is required to take into account the s 134 considerations" to support the contention of error than it can possibly bear. It is true that the modern awards objective includes the taking into account of the matters in s 134(1)(a) to (h). As such, strictly speaking it is correct that, in discharging its duty to "ensure that modern awards, together with

the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions", the matters in s 134(1)(a) to (h) must be taken into account and together these functions constitute the modern awards objective. At worst, however, the statement in [128] of the FWC's reasons involves some imprecise syntax. Even from [128] alone it is apparent that the FWC understood that it had to take into account the matters in s 134(1)(a) to (h) in giving effect to the duty to "ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions". Many other parts of the reasons support the conclusion that the FWC did not commit the error alleged including:

(1) at [37]: "[t]he modern awards objective in s.134(1) of the FW Act is central to the Review. The modern awards objective is 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 particular considerations identified in sections 134(1)(a) to (h)";

(2) at [115]: "[t]he modern awards objective is to '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 the particular considerations identified in sections 134(1)(a) to (h) (the s.134 considerations). The objective is very broadly expressed. The obligation to take into account the s.134 considerations means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision making process. No particular primacy is attached to any of the s.134 considerations and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award"; and

(3) at [116]: "[w]hile the Commission must take into account the s.134 considerations, the relevant question is whether the modern award, together with the NES, provides a fair and relevant minimum safety net of terms and conditions".

44 Other parts of the primary reasons on which the applicants rely must be considered in context. For example, at [816] the FWC did say that it proposed to deal with the s 134 considerations "first". But the FWC had to structure its reasons in some form. It did not mean that the consideration was to be disengaged from the overall functions which the FWC was performing under s 134(1) as a whole. Further, the FWC did say at [1689] that the "central issue in these proceedings is whether the existing Sunday penalty rate provides a 'fair and relevant minimum safety net'". But the FWC did not say that this was to be assessed without regard to the s 134(1)(a) to (h) matters. Nor did it proceed to do so, as the applicants submit. For example, at [1701], the FWC refers to the "reasons given", which must include all of the reasons given to that point (which includes the taking into account of the s 134(1) matters) and at [1702] it refers to the "evidence before us and taking into account the particular considerations identified in paragraphs 134(1)(a) to (h)". Both [1701] and [1702] appear in the FWC's conclusions about the General Retail Industry Award 2010. Faced with this, the submission that the reasons expose the asserted error is unpersuasive. The same conclusion applies to each of the other awards in respect of which the FWC's reasons adopt a similar structure.

45 As explained in *Construction, Forestry, Mining and Energy Union v Anglo American Metallurgical Coal Pty Ltd* (2017) 252 FCR 337 (*Anglo American*) at [28]-[29] by Allsop CJ, North and O'Callaghan JJ:

> [28] The terms of s 156(2)(a) require the Commission to review all modern awards every four years. That is the task upon which the Commission was engaged. The statutory task is, in this context, not limited to focusing upon any posited variation as necessary to achieve the modern awards objective, as it is under s 157(1)(a). Rather, it is a review of the modern award as a whole. The review is at large, to ensure that the modern awards objective is being met: that the award, together with the National Employment Standards, provides a fair and relevant minimum safety net of terms and conditions. This is to be achieved by s 138 — terms may and must be included only to the extent necessary to achieve such an objective.
>
> [29] Viewing the statutory task in this way reveals that it is not necessary for the Commission to conclude that the award, or a term of it as it currently stands, does not meet the modern award objective. Rather, it is necessary for the Commission to review the award and, by reference to the matters in s 134(1) and any other consideration consistent with the purpose of the objective, come to an evaluative judgment about the objective and what terms should be included only to the extent necessary to achieve the objective of a fair and relevant minimum safety net.

46 With this in mind, the second aspect of ground 2 requires more detailed consideration. To the extent that the applicants contended that the FWC was required to but did not consider whether there had been a material change in circumstances, we have already explained above that the FWC's power was not conditioned on any such finding. In any event, it is apparent from the FWC's reasons that it was aware of the potential relevance of changing circumstances, as one of its key findings at [689] was that the disutility associated with weekend work which is "much less than in times past".

47 Otherwise, the applicants contend that s 134(1)(a) to (h) is a code so that the FWC, in applying the modern awards objective to the review (as required by s 134(2)(a)), was required to consider all of the s 134(1)(a) to (h) matters and was precluded from considering any other matter. This was said to be supported by the fact that, in contrast to other provisions of the *Fair Work Act*, s 134(1) does not refer to the FWC being able to consider any other matter it considers relevant.

48 This submission should be rejected. It fails to recognise that the modern awards objective requires the FWC to perform two different kinds of functions, albeit that the modern awards objective embraces both kinds of function. 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" and in so doing, must take into account the s 134(1)(a) to (h) matters. What must be recognised, however, is that the duty of ensuring that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions itself involves an evaluative exercise. While the considerations in s 134(1)(a) to (h) inform the evaluation of what might constitute a "fair and relevant minimum safety net of terms and conditions", they do not necessarily exhaust the matters which the FWC might properly consider to be relevant to that standard, of a fair and relevant minimum safety net of terms and conditions, in the particular circumstances of a review. The range of such matters "must be determined by

implication from the subject matter, scope and purpose of the" *Fair Work Act* (*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40).

49 This construction of s 134(1) necessarily rejects the applicants' argument that the words "fair and relevant" qualify the considerations in s 134(1)(a) to (h) and not the minimum safety net of terms and conditions. This submission is untenable. It is apparent that "a fair and relevant minimum safety net of terms and conditions" is itself a composite phrase within which "fair and relevant" are adjectives describing the qualities of the minimum safety net of terms and conditions to which the FWC's duty relates. Those qualities are broadly conceived and will often involve competing value judgments about broad questions of social and economic policy. As such, the FWC is to perform the required evaluative function taking into account the s 134(1)(a) to (h) matters and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance. It is entitled to conceptualise those criteria by reference to the potential universe of relevant facts, relevance being determined by implication from the subject matter, scope and purpose of the *Fair Work Act*.

50 Accordingly, the applicants' submissions that what is fair and relevant is to be determined by weighing the matters in s 134(1)(a) to (h), with no other facts, matters or circumstances being permitted to be taken into account, should not be accepted. The statutory criteria of "fair and relevant" qualify the nature of the safety net which is the subject of the duty. They inform the taking into account of the matters in s 134(1)(a) to (h) but are not confined by those matters. They are confined only by implication from the subject matter, scope and purpose of the *Fair Work Act*.

51 These conclusions also necessarily reject the applicants' submission that there is "no statutory text from which a 'contemporary circumstances' criterion can be derived". The applicants' submission to this effect fails at all levels. For one thing, many, perhaps all, of the s 134(1)(a) to (h) matters themselves permit, indeed require, consideration of "contemporary circumstances"; the range of "needs" and "impacts" these matters identify necessarily include needs and impacts assessed by reference to contemporary circumstances. This is not to say that contemporary circumstances exhaust the universe of considerations mandated by s 134(1)(a) to (h). But it is to say that a consideration of those matters without having in mind the circumstances as they exist at the time the function is performed is likely to miscarry. The matters in s 134(1)(a) to (h) embrace this criterion. The objects of the *Fair Work Act* in s 3 implicitly embrace this criterion. Indeed, it is inconceivable that contemporary circumstances are immaterial to those objects being achieved. It could hardly be otherwise given that the operation of the objects is ambulatory. Thus, it is also the case that the "fair and relevant" safety net criteria which dictate the quality of any modern award embrace the concept of "fair and relevant" having regard to contemporary circumstances, that conception being within the subject matter, scope and purpose of the *Fair Work Act*.

52 The real issue which emerged during the course of the hearing is that the FWC said this:

> [116] As to the proper construction of the expression "a fair and relevant minimum safety net of terms and conditions" we would make three observations.

> [117] First, fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question …
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> …
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> [120] Second, the word "relevant" is defined in the Macquarie Dictionary (6th Edition) to mean "bearing upon or connected with the matter in hand; to the purpose; pertinent". In the context of s.134(1) *we think the word* "*relevant*" *is intended to convey that a modern award should be suited to contemporary circumstances*. As stated in the Explanatory Memorandum to what is now s.138:
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> > 527 … the scope and effect of permitted and mandatory terms of a modern award must be directed at achieving the modern awards objective of a fair and relevant safety net that accords with community standards and expectations. …
>
> [121] Finally, as to the expression "minimum safety net of terms and conditions", the conception of awards as "safety net" instruments was introduced by the *Industrial Relations Reform Act 1993* (Cth) (the **1993 Reform Act**) …

(Emphasis added.)

53 For the reasons already given it cannot be doubted that the perspectives of employers and employees and the contemporary circumstances in which an award operates are circumstances within a permissible conception of a "fair and relevant" safety net taking into account the s 134(1)(a) to (h) matters. The issue is this: did the FWC confine its conception of a fair and relevant safety net to one that was suited to contemporary circumstances having regard to the perspective of employers and employees and, if so, was that an impermissible approach to the performance of its functions?

54 The FWC's primary reasons consist of 462 pages of text. It follows that a focus on individual paragraphs, in isolation from the reasons as a whole, would be improper. It is necessary to consider the reasons as a whole. It is apparent that the FWC carefully structured its reasons which are divided into 12 chapters. Chapter 1 is an introduction. Chapter 2 identifies the decision. In Chapter 3 the FWC identified the statutory context. The statements at [116]-[121] are within Chapter 3. Within this part also the FWC considered the historical rationale for weekend penalty rates and the continuing relevance of that rationale. It may be inferred to have done so because at [111] the FWC expressly adopted an approach specified in earlier reasons in these terms:

> The scope of the Review was considered in the *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues Decision* [[2014] FWCFB 1788 at [19]-[24]]. We adopt and apply that decision and in particular the following propositions:
>
> (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.

55 The FWC thus expressly accepted that it was required to have regard to "the historical context applicable to each modern award".

56 The historical rationale for penalty rates was described as compensating employees for working outside normal hours and deterring employers from scheduling work outside normal hours (at [143]). The FWC's assessment of the rationale preceded reference to the statutory criteria of a "fair and relevant" safety net and the s 134(1) matters. It is also apparent that, although it referred to its conception of a "fair and relevant" safety net in this context, it not only considered contemporary circumstances, but also had regard to the s 134(1) matters and noted at [270] that, as the parties were in dispute about the significance of the historical context, the issue would be dealt with later in its reasons. In the course of its reasons the FWC said:

(1) at [173]: "the variation of a modern award which has the effect of reducing the earnings of low-paid employees will have a *negative* impact on their relative living standards and on their capacity to meet their needs";

(2) at [180]: "the level of penalty rates in a modern award may impact upon an employee's remuneration and hence their capacity to engage in community life and the extent of their social participation";

(3) at [191]: "the extent of the disutility of working at such times or on such days … includes an assessment of the impact of such work on employee health and work-life balance, taking into account the preferences of the employees for working at those times"; and

(4) at [195]: "s.134(1)(da) is a relevant consideration, it is *not* a statutory directive that additional remuneration must be paid to employees working in the circumstances mentioned in paragraphs 134(1)(da)(i), (ii), (iii) or (iv)".

57 The FWC then set out in Chapter 4 the background to modern awards including that the transitional review commenced in 2012. In Chapter 5 of its reasons the FWC moved to the submissions of the parties. Chapter 6 sets out an overview of weekend work. On the basis of its consideration of this material the FWC concluded at [689] that there is a disutility associated with weekend work and a reduction in penalty rates is likely to have some positive employment effects which were difficult to quantify.

58 In Chapter 7 the FWC dealt with the hospitality sector. In so doing the FWC again considered the s 134(1)(a) to (h) matters both by reference to its earlier assessment and the specific context of the hospitality sector. The FWC, having done so, said that:

> [866] The modern awards objective is to "ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions", taking into account the particular considerations identified in paragraphs 134(1)(a) to (h). We have taken into account those considerations insofar as they are relevant to the matter before us.
>
> [867] The central issue in these proceedings is whether the existing Sunday penalty rate provides a "fair and relevant minimum safety net".
>
> [868] The Hospitality Employers' principal contention is that the existing penalty rate acts as a deterrent to employment and as such the current penalty rates are neither fair nor relevant. In short, the existing Sunday penalty rate is not "proportional to the disability". In this context the

Hospitality Employers point to the fact that the existing Sunday loading (75 per cent) is three times the loading for Saturday work (25 per cent).

[869] As set out earlier, the Hospitality Employers propose that the Sunday penalty rate be reduced from 175 per cent to 150 per cent for all employees (inclusive of the 25 per cent loading for casual employees). No change is proposed to Saturday penalty rates.

[870] The change proposed by the Hospitality Employers is said to be fair and relevant for the contemporary hospitality industry, having regard to the following matters:

(a) the availability of labour;

(b) the willingness of employees to work and a preference for Sunday, especially from amongst casual employees;

(c) consumer activity on weekends;

(d) workforce composition;

(e) hospitality industry business trading hours; and

(f) the frequency of work on weekends and public holidays.

…

[883] As set out in Chapter 6, there is a disutility associated with weekend work, above that applicable to work performed from Monday to Friday. Further, generally speaking, for many workers Sunday work has a higher level of disutility than Saturday work, though the extent of that disutility is much less than in times past.

[884] We are satisfied that the existing Saturday penalty rates in the Hospitality Award achieve the modern awards objective — they provide a fair and relevant minimum safety net.

59 As to the Sunday penalty rate the FWC said that:

[885] For the reasons given we have concluded that the existing Sunday penalty rate is neither fair nor relevant. As mentioned earlier, fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question. The word "relevant", in the context of s.134(1), is intended to convey that a modern award should be suited to contemporary circumstances.

[886] Based on the evidence before us and taking into account the particular considerations identified in paragraphs 134(1)(a) to (h), insofar as they are relevant, we have decided to reduce the Sunday penalty rate for full-time and part-time employees, from 175 per cent to 150 per cent.

60 It might be concluded that this expression of its reasons indicates that the FWC decided that Sunday penalty rates were not suited to contemporary circumstances and thus had to be varied, the extent of the variation alone being decided by reference to the s 134(1)(a) to (h) matters. This, however, is not a fair reading of the reasons. The "reasons given" as referred to at the start of [885] are all of the reasons which precede that paragraph. Those reasons include the historical context, the contemporary context, the competing submissions, the evidence, and the s 134(1)(a) to (h) matters. The conclusion that Sunday penalty rates were not "fair and relevant" is necessarily understood as one reached for all of the reasons given before [885]. It is also to be understood as a shorthand reference to the FWC's conclusion that existing Sunday penalty rates did not 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" the s 134(1)(a) to (h) matters which, given the FWC's stated approach, necessarily included the historical context of those rates.

61 Given this, it cannot be said that the FWC gave to the concept of "contemporary circumstances" a role not permitted by the statutory scheme. The FWC did not merely decide whether existing rates were suitable for contemporary circumstances and then vary the rate by reference to the s 134(1)(a) to (h) matters. By reference to a wide range of matters it considered were relevant, the FWC concluded that the existing Sunday rates did not ensure the provision of a fair and relevant safety net taking into account the s 134(1)(a) to (h) matters. This is what the FWC was required to do.

62 This analysis demonstrates why it would be wrong to read, for example, [885] and [886] of the primary reasons in isolation and without regard to the opening words "[f]or the reasons given" with which [885] commences. It must be recognised that these (and similar paragraphs dealing with the other sectors) record a mental process which the FWC has carried out explaining the conclusions reached. The mental process is explained by everything which precedes the conclusions. The conclusions are the outcomes or results of that mental process. The outcomes are expressed in separate paragraphs referring to "fair and relevant" in [885] and the s 134(1)(a) to (h) matters in [886]. But this is to ensure that the conclusions are logically structured. Read in context, it is apparent that having regard to all factors it considered relevant (all of which were permissible and which included the historical context) the FWC considered that, as to Sunday penalty rates, the application of the modern awards objective as a whole required a variation of the rate in the Hospitality Industry (General) Award 2010 in the amount identified.

63 The FWC thereafter dealt with the other awards in the same permissible manner.

64 Accordingly, the FWC did not confine its conception of a fair and relevant safety net to one that was suited to contemporary circumstances having regard to the perspective of employers and employees. While it said at [120] that "the word 'relevant' is intended to convey that a modern award should be suited to contemporary circumstances" and repeated that (for example at [885]) its actual application of the modern awards objective was not so confined. Had the FWC, in substance, done nothing more than decide that Sunday penalty rates were not suited to contemporary circumstances and thus had to be varied then, no doubt, its discharge of its functions would have miscarried. It would have given too narrow a meaning to "fair and relevant" which embraces a broad universe of considerations confined only by the particular function being performed in the context of the subject matter, scope and purpose of the *Fair Work Act*. It also would have failed to take into account the s 134(1)(a) to (h) matters in the task of ensuring that "modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions". For the reasons given, however, it is apparent the FWC did no such thing.

65 As such, this is not a case in which the FWC misapplied the statutory provisions. Its description of "relevant" as meaning "suited to contemporary circumstances" at [120] and elsewhere is too narrow if it is to be read literally as meaning suited to modern circumstances. As discussed "fair and relevant", which are best approached as a composite phrase, are broad concepts to be evaluated by the FWC taking into account the s 134(1)(a) to (h) matters and such other facts, matters and circumstances as are within the subject matter, scope and purpose of the *Fair Work Act*. Contemporary circumstances are called

up for consideration in both respects, but do not exhaust the universe of potentially relevant facts, matters and circumstances. But, as we have tried to demonstrate, the primary reasons when read as a whole amply demonstrate that the function, as in fact performed by the FWC, was not confined by reference to the criterion of contemporary circumstances. Nor, do the reasons demonstrate that, as a criterion, contemporary circumstances were elevated or given undue priority. This suggests that by "contemporary circumstances" the FWC may have simply meant "present circumstances" or, in other words, the circumstances at hand.

66 It follows that this is not a case which discloses a decision-maker applying the wrong test (at least on this ground), with the consequence that relief should follow unless there was no possibility of a different result. This line of authority (for example, *Lu v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 141 FCR 346) simply does not arise.

67 Ground 2 should be rejected for these reasons.

Grounds 3 to 6

68 These grounds concern the way in which the FWC treated the relative living standards and the needs of the low paid, which is a matter the FWC must take into account as part of the modern awards objective as specified in s 134(1)(a).

69 The high point of the applicants' case is the FWC's statement at [823] in relation to its consideration of the Hospitality Industry (General) Award (which is repeated elsewhere in the primary reasons in relation to the other awards) that:

> The "needs of the low paid" is a consideration which weighs against a reduction in Sunday penalty rates. But it needs to be borne in mind that the primary purpose of such penalty rates is to compensate employees for the disutility associated with working on Sundays rather than to address the needs of the low paid. The needs of the low paid are best addressed by the setting and adjustment of modern award minimum rates of pay (independent of penalty rates).

70 The applicants contend that, as a result, the FWC wrongly decided that it was not necessary to take into account the relative living standards and the needs of the low paid, wrongly decided that these matters were best addressed by the setting and adjustment of modern award minimum rates of pay, misconceived the limits and functions of the annual wage review under Div 3 of Pt 2-6 of the *Fair Work Act*, and failed to take into account the relative living standards and the needs of the low paid.

71 The first matter which must be appreciated is that the primary reasons themselves do not stand alone. The FWC gave other reasons for the making of the determinations including on 5 June 2017 in the further reasons. As noted, the determinations were made on 21 June 2017. The primary reasons given on 23 February 2017 cannot be read in isolation from the further reasons given on 5 June 2017, both of which (along with another set of reasons dealing with late night penalties) informed the making of the determinations on 21 June 2017.

72 The applicants contend that the primary reasons must stand or fall on their own, as they are the reasons for the decision to vary penalty rates and when it gave the further reasons the FWC knew that the applicants alleged that it had failed to consider the s 134(1)(a) matter and of a foreshadowed judicial review proceeding to quash the decision.

73 However, the function which the FWC was performing was the 4 yearly

review, as a result of which the FWC had a power under s 156(2)(b), relevantly, to "make one or more determinations varying modern awards". The FWC did not make any determination on 23 February 2017 when it published its primary reasons. It is true that the reasons, on the title page, bear the title "DECISION". It is also true that at [53] of the primary reasons the FWC said:

> We have decided that the existing Sunday penalty rates in 4 of the modern awards before us (the *Hospitality, Fast Food, Retail and Pharmacy Awards*) do not achieve the modern awards objective, as they do not provide a fair and relevant minimum safety net.

74 But it is equally true that the so-called decision on 23 February 2017 had no operative effect of any kind.

75 Relevantly, s 601 provided:

> (1) The following decisions of the FWC must be in writing:
>
> (a) a decision of the FWC made under a Part of this Act other than this Part;
>
> (b) an interim decision that relates to a decision to be made under a Part of this Act other than this Part;
>
> (c) a decision in relation to an appeal or review.
>
> (2) The FWC may give written reasons for any decision that it makes.

76 Section 601 draws a clear distinction between the "reasons" for a decision and the "decision" itself (*Teys Australia Beenleigh Pty Ltd v Australasian Meat Industry Employees' Union* (2015) 230 FCR 565 at [35]-[36]). In commenting upon s 601 in *Anglo American*, Allsop CJ, North and O'Callaghan JJ observed at [30]:

> … It is important to appreciate that by s 601, the Commission was not required to give written reasons, though under s 601(2) it may do so. Naturally, to the extent that reasons given display a misunderstanding of the statutory task, that may ground a conclusion of jurisdictional error. If, however, such reasons as are given do not completely explain the conclusion reached, jurisdictional error is not demonstrated by such inadequacy.

77 In its further reasons (also described as a "decision"), at [31], the FWC proceeded on the basis that its decision of 23 February 2017 was a decision under Pt 2-3 of the *Fair Work Act* and that it could not vary or revoke its decision having regard to the terms of s 603(3)(a). Section 603 provided that:

> (1) The FWC may vary or revoke a decision of the FWC that is made under this Act (other than a decision referred to in subsection (3)).
>
> …
>
> (3) The FWC must not vary or revoke any of the following decisions of the FWC under this section:
>
> (a) a decision under Part 2-3 (which deals with modern awards);

78 If the decision of 23 February 2017 was a decision within the meaning of s 603 (about which we received no submissions), it is nevertheless the case that the applicants' challenge is to the determinations. The primary and the further reasons are the reasons for the determinations. Accordingly, the principle that a decision-maker is bound by the reasons it gives for its decision applies, in the present case, to the operative exercises of power, which are the determinations. It is the primary reasons and the further reasons which explain the making of the determinations. It would be wrong to disregard the further reasons in these circumstances.

79 Nor can the applicants' submissions that what was put to the FWC after the primary reasons were published means that little weight can be given to the further reasons be accepted. The FWC had not exercised the relevant power to make any determination as at 5 June 2017. It sought further submissions, which were made and taken into account. The notion that the reasons reflecting this process are not entitled to any real weight is misconceived. The applicants' approach fails to appreciate that it is the determinations which are subject to challenge, not what the FWC described as its decision on 23 February 2017. That decision was a step along the way to the determinations but it had no operative effect in and of itself.

80 This said, how is [823] to be understood given that it is one paragraph amongst 2084 paragraphs in the primary reasons and another 281 in the further reasons?

81 *First*, considerable care must be exercised in seeking to discern error in but one paragraph of lengthy reasons for decision. Although error may be exposed in a single paragraph, it would be wrong for a reviewing court to construe that one paragraph in isolation and divorced from the much broader scope of consideration being undertaken by the decision-maker.

82 *Second*, the FWC knew it had to consider the s 134(1)(a) matter and made extensive findings about the impact of a reduction of penalty rates on the low paid including as follows in the primary reasons (citations omitted):

(1) at [84]: "A substantial proportion of award-reliant employees covered by these modern awards are low paid and the reductions in Sunday penalty rates we have determined are likely to reduce the earnings of those employees who currently work on Sundays";

(2) at [128]: "in giving effect to the modern awards objective the Commission is required to take into account the s.134 considerations, one of which is 'relative living standards and the needs of the low paid' (s.134(1)(a))";

(3) at [165]: "[s]ection 134(1)(a) requires that we take into account 'relative living standards and the needs of the low paid'. This consideration incorporates two related, but different, concepts";

(4) at [173]: "[i]n the 2015-16 *Annual Wage Review* decision the Expert Panel also observed that increases in modern award minimum wages have a *positive* impact on the relative living standards of the low paid and on their capacity to meet their needs. It seems to us that the converse also applies, that is, the variation of a modern award which has the effect of reducing the earnings of low-paid employees will have a *negative* impact on their relative living standards and on their capacity to meet their needs";

(5) at [180]: "we also accept that the level of penalty rates in a modern award may impact upon an employee's remuneration and hence their capacity to engage in community life and the extent of their social participation. The broader notion of promoting social inclusion is a matter that can be appropriately taken into account in our consideration of the legislative requirement to 'provide a fair and relevant minimum safety net of terms and conditions' and to take into account 'the needs of the low paid' (s.134(1)(a))";

(6) at [817]: "[s]ection 134(1)(a) of the FW Act requires that we take into account 'relative living standards and the needs of the low paid'. A

threshold of two-thirds of median full-time wages provides a suitable benchmark for identifying who is 'low paid', within the meaning of s.134(1)(a). As shown in Chart 24 (see paragraph [735]) a substantial proportion of award-reliant employees covered by the *Hospitality Award* are 'low paid'";

(7) at [818]: "[a]s stated in the PC Final Report, a reduction in Sunday penalty rates will have an adverse impact on the earnings of those hospitality industry employees who usually work on a Sunday. It is likely to reduce the earnings of those employees, who are already low paid, and to have a negative effect on their relative living standards and on their capacity to meet their needs";

(8) at [823] as set out above at [69];

(9) at [1136]: "[i]n deciding to vary clause 34.2(a)(ii) in the manner set out above, we have taken into account the s.134 considerations and note that:

- a substantial proportion of award-reliant employees covered by the *Restaurant Award* are low paid and the variation will reduce the earnings of those employees, but not to a significant extent. The variation will only apply to those employees who work between 6.00 am and 7.00 am and will only reduce their earnings for that hour of work (s.134(1)(a))";

(10) at [1356]: "[o]n the basis of the O'Brien Report and Chart 27 (see [738] above) we are satisfied that a substantial proportion of Fast Food industry employees are 'low paid'; are more likely to reside in a lower income households and are more likely to experience financial difficulties";

(11) at [1357]: "[a] reduction in Sunday penalty rates will have an adverse impact on those Fast Food industry employees who usually work on a Sunday. It is likely to reduce the earnings of those employees, who are already low paid and to have a negative effect on their relative living standards and on their capacity to meet their needs";

(12) at [1358]: "[w]hile s.134(1)(a) is a consideration against the reduction in Sunday penalty rates, it needs to be borne in mind that the primary purpose of such penalty rates is to compensate employees for the disutility associated with working on Sundays, it is not designed to address the needs of the low paid. As we have mentioned, the needs of the low paid are best addressed by the setting and adjustment of modern award minimum rates of pay (independent of penalty rates)";

(13) at [1656]: "[a]s shown in Chart 54 (see [1458]) a substantial proportion of award-reliant employees covered by the *Retail Award* are 'low paid'. Further, retail households face greater difficulties in raising emergency funds. This suggests that their financial resources are more limited than those of other industry households";

(14) at [1660]: "[t]he 'needs of the low paid' is a consideration which weighs against a reduction in Sunday penalty rates. But it needs to be borne in mind that the primary purpose of such penalty rates is to compensate employees for the disutility associated with working on Sundays rather than to address the needs of the low paid. The needs of

the low paid are best addressed by the setting and adjustment of modern award minimum rates of pay (independent of penalty rates)";

(15) at [1826]: "[a]s shown in Chart 55 (see [1459]) a substantial proportion of award-reliant employees covered by the *Pharmacy Award* are 'low paid'";

(16) at [1927]: "[a]s mentioned earlier, a substantial proportion of award-reliant employees covered by the *Hospitality and Retail Awards* are 'low paid'";

(17) at [1928]: "[t]he extent to which lower wages induce a greater demand for labour on public holidays (and hence more hours for low-paid employees) will somewhat ameliorate the reduction in income, albeit by working more hours. But it is improbable that, as a group, existing workers' hours would rise sufficiently to offset the income effects of the penalty rate reduction";

(18) at [1929]: "[t]he 'needs of the low paid' is a consideration which weighs against a reduction in public holiday penalty rates. However, the primary purpose of such penalty rates is to compensate employees for the disutility associated with working on public holidays rather than to address the needs of the low paid";

(19) at [1998]: "[a] substantial proportion of the employees covered by the modern awards which are the subject of these proceedings are 'low paid' (within the meaning of s.134(1)(a)). The award variations we propose to make are likely to reduce the earnings of those employees and have a negative effect on their relative living standards and on their capacity to meet their needs";

(20) at [2003]: "[a] substantial proportion of award-reliant employees covered by these modern awards are low paid and the reductions in Sunday penalty rates are likely to reduce the earnings of those employees who currently work on Sundays. As observed in the PC Final Report, the extent of the reduction in earnings depends on the …";

(21) at [2028]: "[a] substantial proportion of award-reliant employees covered by the *Fast Food and Restaurant Awards* are low paid and the variations to the late night penalty provisions will reduce the earnings of those employees, but not to a significant extent. The variations will only effect those *Fast Food and Restaurant Award* employees who work between 6.00 am and 7.00 am, and those *Fast Food Award* employees who work between 9.00 pm and 10.00 pm Further, the variations will only reduce the earnings of those employees for the hours worked between 9.00 pm and 10.00 pm, and between 6.00 am and 7.00 am"; and

(22) at [2040]: "[w]e have not reached a concluded view on the form of these transitional arrangements but have expressed the following *provisional* views:

(i) …

> The Productivity Commission suggests that a 12 month delay would allow the affected employees to "review their circumstances" so that they "can seek other jobs, increase their training and make other labour market adjustments".

> As we have mentioned, the employees affected by these changes are low paid and have limited financial resources. It is unlikely that they will be able to afford the costs associated with increasing their training.
>
> …
>
> (iii) The reductions in Sunday penalty rates should take place in a series of annual adjustments on 1 July each year (commencing 1 July 2017) to coincide with any increases in modern award minimum wages arising from Annual Wage Review decisions …".

83 These findings make it plain that the s 134(1)(a) considerations were brought into account. They weighed against a decision to reduce penalty rates but, on balance, did not prevail.

84 *Third*, the FWC at [2041], in respect of its provisional views about transitional arrangements as set out in [2040], said:

> We seek submissions from interested parties in respect of the above provisional views. Further, as mentioned at [2019] it is unclear whether "take home pay orders" are an available option to mitigate the impact of the reductions in Sunday penalty rates we propose. We would be assisted by submissions from interested parties in respect of this issue and, in particular, the Commonwealth (given that the issue raises a question as to the proper construction of the statutory framework).

85 *Fourth*, in its further reasons the FWC repeated its conclusion that a substantial proportion of employees covered by the awards are low paid and a reduction in penalty rates would likely reduce the earnings of some of these employees and have a negative effect on their relative living standards and capacity to meet their needs (at [9]).

86 The FWC noted at [10] that the submissions before it at the time of the primary reasons gave little attention to the implementation of any variations to penalty rates which is why it invited further submissions. The FWC considered the further submissions including one from United Voice to the effect that the reductions to penalty rates should not be implemented given that the FWC had found that a substantial proportion of employees covered by the awards are low paid and a reduction in penalty rates would likely reduce the earnings of some of these employees and have a negative effect on their relative living standards and capacity to meet their needs (at [16]). The FWC rejected the submission and the proposition that it had not taken into account the relative living standards and needs of the low paid as required by s 134(1)(a) (at [34]).

87 In so doing, the FWC identified those parts of its primary reasons which considered the s 134(1)(a) matter, some but not all of which are set out above. It said:

> [34] The first proposition is that the *Penalty Rates decision* gave either no weight or insufficient weight to the impact on the affected employees of cutting penalty rates. In essence, it is said that the Full Bench failed to take into account the "relative living standards and the needs of the low paid", as it was required to do by s.134(1)(a). In our view, there is no substance to this proposition.
>
> [35] Chapter 3.2 of the *Penalty Rates decision* deals with the statutory framework and, relevantly, the Full Bench observes that:
>
> • the modern awards objective applies to the Review (at [113]); and

- s.134(1)(a) requires that the Commission take into account "relative living standards and the needs of the low paid" (at [165]).

[36] Further, the impact of the proposed reductions in penalty rates upon affected employees was expressly considered in the context of each of the relevant modern awards:

- the *Hospitality Award*
  - United Voice's lay witness evidence: [784]-[815];
  - s.134(1)(a): [817]-[824] and [886].
- the *Fast Food Award*
  - the SDA called no lay witness evidence in respect of the impact upon employees of the proposed reduction in penalty rates;
  - s.134(1)(a): [1356]-[1359].
- the *Pharmacy Award*
  - SDA and APESMA lay witness evidence: [1815]-[1821];
  - s.134(1)(a): [1826]-[1830].
- the *Retail Award*
  - SDA lay witness evidence: [1623]-[1654];
  - s.134(1)(a): [1656]-[1661].

88 At [37] the FWC said this:

> In addition to the fact that s.134(1)(a) was expressly considered and taken into account, it needs to be borne in mind that the Act accords no particular primacy to any one of the s.134 considerations and, further, while the Commission must take into account the matters set out at s.134(1)(a)-(h), the relevant question is whether the modern award, together with the NES, provides a fair and relevant minimum safety net of terms and conditions. In respect of the *Hospitality, Fast Food, Retail and Pharmacy Awards*, the *Penalty Rates decision* determined that the existing Sunday penalty rates did not achieve the modern awards objective, as they did not provide a fair and relevant minimum safety net.

89 The FWC continued in these terms:

> [42] The third line of argument is that there are no transitional arrangements which could ameliorate the impact of the penalty rates reductions so as to prevent significant disadvantage to the employees affected.
>
> [43] We accept that while the transitional arrangements determined in this decision will ameliorate the adverse impact of our decision upon the employees affected, it will not remove that impact and the implementation of the variations we propose (albeit over an extended time period) are still likely to reduce the earnings of the employees affected. The phased reductions in Sunday penalty rates that we intend to make will be implemented at the same time as the implementation of any increases arising from the Annual Wage Review decision. This will usually mean that the affected employees will receive an increase in their base hourly rate of pay at the same time as they are affected by a reduction in Sunday penalty rates. As such, the take home pay of the employees concerned may not reduce to the same extent as it otherwise would — but it is also important to acknowledge that they will receive a reduction in the earnings they would have received but for the implementation of the *Penalty Rates decision*. Accordingly, any Annual Wage Review increase cannot be said to ameliorate the impact of our decision. It is the phased implementation of the Sunday penalty rate cuts which provides a degree of amelioration.
>
> [44] However, while we accept that the reductions we have determined will adversely impact employees, that is a matter that we have already

> considered and balanced in the *Penalty Rates decision* and it is not a basis upon which we would propose to "set aside" or "not implement" the *Penalty Rates decision*. Nor are we persuaded that the range of other considerations advanced in support of the general proposition provide a sufficiently cogent basis for adopting the course proposed. Each of these matters was considered in the *Penalty Rates decision*.

90 How are these aspects of the further reasons (particularly the observations made at [43] of the further reasons) to be understood given what is said in [823] (and elsewhere) in the primary reasons that "[t]he needs of the low paid are best addressed by the setting and adjustment of modern award minimum rates of pay (independent of penalty rates)"? It may be accepted that tension exists between the statements. But, in reasons which must be read together because the determinations were not made until 21 June 2017, and which were prepared some three months apart and extend over thousands of paragraphs, the existence of potential tension is not a cause for criticism, let alone a source of error. The inescapable fact is this — before it made the determinations the FWC was invited to and did reconsider its decisions as recorded in the primary reasons including on the basis that its approach meant that it had not taken into account the s 134(1)(a) matter. In so doing, it accepted that its decision to reduce penalty rates would negatively impact on the low paid in terms of their relative living standards and capacity to meet their needs. As explained at [43] it considered this negative impact would be ameliorated to some extent but not completely by transitional arrangements because the earnings of the affected employees would still be affected. It also accepted that any annual wage review cannot be said to have an ameliorative effect despite the fact that affected employees will likely receive an increase in their minimum rates of pay from an annual wage review at the same time that the reductions to penalty rates are implemented.

91 At one level, the FWC's ultimate overall analysis acknowledges that, contrary to [823] of the primary reasons, the needs of the low paid are not best addressed by the setting and adjustment of modern award minimum rates of pay. At another level, the analysis merely recognises that there is a relevant interaction between the extent of the impact its decision will involve when implemented and adjustments to minimum wages. The recognition is accurate. Contrary to the applicants' submissions, [44] of the FWC's reasons does not indicate that the FWC, as at 23 February 2017, had decided to reduce penalty rates and, by reason of such, had closed its mind to any further consideration. Read as a whole and in context, [44] records the fact that the FWC had considered the issue of s 134(1)(a) again but saw no reason to alter the view it had reached in the primary reasons despite recognising that the adverse impacts a reduction of penalty rates would have on the relative living standards and needs of the low paid would not be fully ameliorated by the phased implementation.

92 In the face of this consideration, ground 3, which asserts that the FWC found that it was not necessary to take into account the relative living standards and needs of the low paid, cannot be sustained. The FWC appreciated at all times it was necessary to take that matter into account. It is also apparent that the FWC did not confine its consideration of the needs of the low paid; it also focused upon the relative living standards of the low paid as required by s 134(1)(a).

93 The answer to ground 4, that the FWC erred by deciding that the needs of the low paid are best addressed by the setting and adjustment of modern award

minimum rates of pay (independent of penalty rates), is that this proposition in [823] and elsewhere of the primary reasons cannot be read in isolation from the further reasons. When the reasons are read as a whole, as they must be, it is apparent that the FWC's analysis was more nuanced than [823], read alone, would suggest. When read as a whole, it is apparent that the FWC understood the negative effect that a reduction of penalty rates would impose on the relative living standards and needs of the low paid, considered that some part of that negative impact could be ameliorated by phasing the implementation to accord with wage rises, but accepted that, one way or another, reducing penalty rates necessarily reduced earnings of the affected employees. Once the whole of the FWC's analysis is considered, the submission that, by the statement at [823] and elsewhere in the primary reasons, it impermissibly delegated its function to the expert panel responsible for conducting an annual wage review, as provided for in s 285(1) of the *Fair Work Act*, is unsustainable. There is no meaningful analogy to a case such as *Legal Services Commissioner v Turner* [2012] VSC 394 in which a disciplinary body decided that the requirement of general deterrence was satisfied by other circumstances.

94 It must also be appreciated that the FWC had found that the purpose of weekend penalty rates was compensatory (at [143]-[160] of the primary reasons) and that the disutility associated with working on weekends "is much less than in times past" (for example, at [689] of the primary reasons). Those findings were also relevant to the application of the modern awards objective. In other words, the fact the FWC found negative impacts on the living standards and needs of the low paid from any reduction in penalty rates could not of itself dictate any particular outcome. Section 134(1)(a) was one relevant factor but, as discussed, there were other factors. The FWC was cognisant of this, having stated at [115] of the primary reasons and elsewhere:

> The obligation to take into account the s.134 considerations means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision making process. No particular primacy is attached to any of the s.134 considerations and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.

(Citations omitted.)

95 The fact that the FWC did not attempt to explain the relative weight it gave to the competing considerations in reaching its overall conclusions is immaterial. It is difficult to know how the FWC might meaningfully have done so given the nature of the decisions it was making and the broad scope of facts, matters and circumstances which fed into the conclusions (*National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [109]). Nothing in the statutory scheme or otherwise required the FWC to attempt to explain the relative weight it gave to the competing considerations in reaching its overall conclusions. What is apparent is that the FWC found that the relevant considerations did not all point in the same direction. They pulled in different directions, which is to be expected given the nature of the task. Provided the relevant matters were considered, the attribution of weight was wholly a matter for the FWC. That the FWC may be taken from the determinations to have given more weight to matters other than the relative living standards and needs of the low paid does not mean the FWC abdicated its responsibility for considering those matters or failed to consider them. Ground 4 thus fails.

96 One answer to ground 5, that the FWC misunderstood the annual wage review under Div 3 of Pt 2-6 of the *Fair Work Act*, is that given the FWC's overall analysis, any such misunderstanding was immaterial. Another answer is that the further reasons, as discussed above, disclose no such misunderstanding. It is also relevant that the FWC in [823] of its primary reasons did not refer to the annual wage review under Div 3 of Pt 2-6 (which, by s 617(1), is to be conducted "by an Expert Panel constituted for the purposes of the review"). It referred more generally to "setting and adjustment of modern award minimum rates of pay" which can occur through an annual wage review, a 4 yearly review under s 156, or at any time under s 157. It cannot be gainsaid that the FWC's finding at [43] of the further reasons, that the adverse impacts of any reduction of penalty rates on the low paid could be ameliorated to some extent by phased implementation matched to increases to wages arising from the annual wage review, was reasonably open. The applicants' attempt to rely only on [823] of the primary reasons in support of ground 5 should not be accepted.

97 For these reasons no analogy may be drawn with *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391. The FWC, having regard to the reasons as a whole, did not rely on a misunderstanding of the operation of the *Fair Work Act* as part of its decision-making process. To the contrary, the FWC correctly understood that its determinations would have adverse impacts on the low paid. It correctly understood that there was no way to completely ameliorate such impacts, but that phased implementation could provide some ameliorating effect. And the FWC nevertheless made the determinations. It did so not because it misunderstood the annual wage review but because taking into account the s 134(1)(a) matters it considered the variations necessary to ensure the awards, "together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions". Ground 5 thus fails.

98 Ground 6, for the same reasons, cannot succeed. The notion that the FWC did not take into account the s 134(1)(a) matter cannot be sustained. The argument appears to depend on the asserted impermissible abdication of the FWC's functions, rejected above. The FWC did not merely record the competing submissions about the issue or merely advert to or pay lip service to it. To discharge its function the FWC did not have to expressly attribute relative weight to any or every relevant fact, matter or circumstance. Its reasons disclose that it considered the s 134(1)(a) matter. The relative weight it gave to that matter, compared to other matters, was a matter for the FWC alone. For the reasons already given it is also apparent that the submission that the FWC failed to consider relative living standards is unpersuasive. This was part of its overall consideration as the discussion above discloses. The suggestion that the FWC did not genuinely engage with the s 134(1)(a) matter cannot survive a fair reading of the reasons as a whole.

99 To the extent that ground 6 was intended to give rise to a separate argument as to the adequacy of the reasons provided by the FWC, this argument is also rejected. Such an argument must necessarily start from the proposition that there is no generally applicable legislative mandate to the FWC that it must publish "reasons" for its decision (*Fair Work Act*, s 601). And, in the absence of any requirement to provide reasons, there is no statutory imperative for the FWC to set forth its "findings on material questions of fact and refer to the evidence or other material on which those findings were based" (s 25D of the *Acts Interpretation Act 1901* (Cth)). This does not mean that the reasons, having been

given, are immune from scrutiny. Reasons volunteered can be scrutinised by this Court to determine if they expose error (*Assistant Treasurer and Minister for Competition Policy and Consumer Affairs v Cathay Pacific Airways Ltd* (2009) 179 FCR 323 at [51], *Taulahi v Minister for Immigration and Border Protection* (2016) 246 FCR 146 at [72]). However, the mere fact that the reasons do not completely explain the conclusion reached does not expose jurisdictional error (*Anglo American* at [30]). Even reasoning which is "almost entirely conclusory and does little to enlighten the reader at anything but the most general level" may not disclose error (*Sevdalis v Director of Professional Services Review (No 2)* [2016] FCA 433 at [157] per Mortimer J, an appeal from which was dismissed in *Sevdalis v Director of Professional Services Review* [2017] FCAFC 9).

100 It is also pertinent in the present case to keep in mind the task which the FWC was performing, involving the application of a standard "fair and relevant minimum safety net" which, as discussed, necessarily involves broad questions of social and economic policy. In this context, the observations of Basten JA in *Saville v Health Care Complaints Commission* [2006] NSWCA 298 at [52] are apt:

> It has been said on more than one occasions, and in more than one context, that matters of evaluation and judgment are not readily explained in rational terms. Various imprecise and amorphous, but relevant, considerations may need to be weighed in the balance in determining where, across a range of possibilities, the appropriate result should be found. In the joint judgment in *Ex parte Palme* 216 CLR 212 at [40] Gleeson CJ, Gummow and Heydon JJ stated:
>
> > There are some issues for decision which are of such a nature that, as Kitto J put it [in *Re Wolanski's Registered Design* (1953) 88 CLR 278 at 281), with reference to statements by Lord Herschell and Eve J:
> >
> > > [I]t is not to be expected that [the judge] will be able, at any rate satisfactorily to the litigants or to one of the litigants, to indicate in detail the grounds which have led him to the conclusion.
>
> In a footnote to that passage, their Honours also referred to the passage in *Dinsdale v The Queen* (2000) 202 CLR 321 at [9] where Gleeson CJ and Hayne J noted that "the ground of appeal which was agitated before the Court of Criminal Appeal (manifest inadequacy) was a ground which did not require, or even admit of, expansive elaboration of a process of reasoning which leads to its acceptance or rejection". The purpose underlying the obligation to give reasons is in part the discipline of rationality, being the antithesis of arbitrariness, which follows from the exercise of justifying a conclusion, together with the transparency of decision-making, which permits the parties and the public to understand the result reached. However, this purpose must be given practical effect in particular circumstances.

101 Ground 6, accordingly, must also be rejected.

Ground 7

102 The applicants contend that, in dealing with the s 134(1)(a) matter in the way that it did, the FWC made determinations which are plainly unjust or unreasonable.

103 Given that the applicants' submissions about s 134(1)(a) have been rejected, this ground cannot be sustained. It simply cannot be said that the determinations lacked "an evident and intelligible justification" (*Li* at [76]).

104 The applicants' challenge on this ground strays into impermissible merits review. The applicants' characterisation of the FWC's reasoning as providing a

"meagre" foundation for the determinations varying the awards discloses this impermissible approach. From beginning to end, the FWC alone was responsible for the attribution of weight to the relevant considerations. Given the broadly evaluative nature of the task, and the fact that the weight to be given to the range of relevant facts, matters and circumstances will be contestable of its nature, characterising the foundation for the determinations as "meagre" does not advance the applicants' challenge which is confined to jurisdictional error.

105 Each determination remained within that area of "decisional freedom" or within that area of decision-making where the FWC had "a genuinely free discretion" as referred to in *Li* at [66].

Another observation

106 In *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 (*Enfield*) Gleeson CJ, Gummow, Kirby and Hayne JJ observed at [47]:

> The weight to be given to the opinion of the tribunal in a particular case will depend upon the circumstances. These will include such matters as the field in which the tribunal operates, the criteria for appointment of its members, the materials upon which it acts in exercising its functions and the extent to which its decisions are supported by disclosed processes of reasoning. A similar view appears to be taken by the Supreme Court of Canada.

(Citations omitted.)

107 Gaudron J, in a concurring judgment, concluded at [59]:

> Once it is appreciated that it is the rule of law that requires the courts to grant whatever remedies are available and appropriate to ensure that those possessed of executive and administrative powers exercise them only in accordance with the laws which govern their exercise, it follows that there is very limited scope for the notion of "judicial deference" with respect to findings by an administrative body of jurisdictional facts. Of course, other considerations apply with respect to non-jurisdictional facts for there is no legal error involved if an administrative body simply makes a wrong finding of fact. And, again, different considerations apply where what is in issue is not a jurisdictional fact, but the decision-maker's opinion as to the existence of that fact …

(Citations omitted.)

108 In *Attorney-General (NSW) v XY* [2014] NSWCA 466 at [159] Basten JA concluded that a "restrained approach" should be exercised when reviewing findings made by a tribunal "having expertise in making assessments in relation to psychiatric conditions". This did not involve deferring to the tribunal's understanding of its statutory mandate but to "accord deference to the legislative intention" to entrust to the tribunal the task of being "satisfied" of certain matters (at [160]).

109 This general acknowledgment that a statutory context may indicate a legislative intention that the assessment of an expert decision-maker may be accorded "greater weight" upon an application for judicial review has been embraced in the industrial law context (for example, *Alley* at 390). When referring to a decision of the Commission established under the former *Conciliation and Arbitration Act 1904* (Cth), Mason J observed:

> The weight to be given to the Commission's decision will depend on the circumstances. If the evidence remains the same, if the Full Bench on appeal has confirmed the decision at first instance and if the issue of fact is one in the

> resolution of which the Commission's knowledge of industry specially equips it to provide an answer, greater weight will be accorded than in cases in which one or more of these factors is absent.

110 This passage was subsequently endorsed by Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ in *R v Williams; Ex parte Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 153 CLR 402 at 411. Subject to a qualification as to the evidence being "in all significant respects … substantially the same", the passage was also endorsed by Gleeson CJ, Gummow, Kirby and Hayne JJ in *Enfield* at [49]. See also to the same effect *Australian and International Pilots Association v Fair Work Australia* (2012) 202 FCR 200 at [126] per Buchanan J.

111 In the context of the present decision-making statutory regime, judicial recognition can be given to the expertise of the FWC, especially in circumstances where the legislature has expressly left to the FWC the task (for example) of "ensur[ing] that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions" (s 134(1)). The task of ensuring that modern awards comply with the standards set by s 134(1) and the task of making a judgment as to what is "fair and relevant" is not entrusted by the legislature to this Court.

112 Whilst retaining ultimate judicial oversight of decisions of statutory decision-makers, "great weight" can be given to the factual assessments made by the Full Bench in the present matter.

Conclusions

113 The applicants' grounds of challenge must all be rejected. The originating applications should be dismissed.

Orders accordingly

Solicitors for the applicant (Shop, Distributive and Allied Employees Association) in VID 684 of 2017: *AJ Macken & Co*.

Solicitors for the first respondent (Australian Industry Group) in VID 684 of 2017: *Ai Group Workplace Lawyers*.

Solicitors for the second respondent (Australian Business Industrial) and third respondent (NSW Business Chamber Ltd) in VID 684 of 2017: *Australian Business Lawyers & Advisors*.

Solicitors for the fifth respondent (Australian Retailers Association) and seventh respondent (Master Grocers Australia Ltd) in VID 684 of 2017: *FCB Workplace Lawyers*.

Solicitors for the sixth respondent (National Retail Association Ltd) in VID 684 of 2017: *NRA Legal*.

Solicitors for the eighth respondent (Pharmacy Guild of Australia) in VID 684 of 2017: *Meridian Lawyers*.

Solicitors for the applicant (United Voice) in VID 685 of 2017: *United Voice*.

Solicitors for the first respondent (Australian Hotels Association) and second respondent (Accommodation Association of Australia Pty Ltd) in VID 685 of 2017: *Meridian Lawyers*.

Solicitors for the fourth respondent (Australian Business Industrial) and fifth respondent (NSW Business Chamber Ltd) in VID 685 of 2017: *Australian Business Lawyers & Advisors*.

LAUREN BOURKE

DECISION

Fair Work Act 2009
s.242—Low-paid authorisation

United Voice
(B2013/1264)

DEPUTY PRESIDENT GOSTENCNIK MELBOURNE, 29 SEPTEMBER 2014

Application by United Voice for low-paid authorisation

Introduction

[1] United Voice is an organisation registered under the *Fair Work (Registered Organisations) Act 2009*. It is, relevantly, entitled to represent the industrial interests of certain employees employed by private security providers performing security services in the Australian Capital Territory. By amended application to the Fair Work Commission (Commission) dated 28 April 2014, United Voice seeks a low-paid authorisation in relation to a proposed multi-enterprise agreement. The proposed multi-enterprise agreement, in relation to which the low-paid authorisation is sought, will cover five security industry employers (Respondent Employers) which operate private security businesses in the ACT and employees of the Respondent Employers performing security services work in those businesses that is described and classified in Schedule C – Classifications of the *Security Services Industry Award 2010* (Security Award). Two of the Respondent Employers are related entities, and for convenience are referred to in this decision collectively as Secom Security.

[2] The form of the low-paid authorisation sought by United Voice is in the following terms:

> . . . the employers listed in Appendix 'A'[1] [of the amended application] and their employees performing work described and classified in Schedule C – Classifications, in the *Security Services Industry Award 2010*, regardless of whether they are currently covered by that modern award or not, may bargain for the proposed multi-enterprise agreement.
> . . . in relation to those employees performing that work in the Australian Capital Territory where that work is subject to contracts between the employers listed in Appendix 'A' [of the amended application] and Australian Government agencies, Commonwealth authorities or Commonwealth companies or the Australian Capital Territory Government and its agencies.

[3] The Respondent Employers in relation to which the low-paid authorisation is sought oppose the making of the authorisation. There is no dispute about the capacity of United

[1] The employers listed in appendix A to the amended application dated 28 April 2014 are: MSS Security Pty Limited, Wilson Security Pty Limited, The Trustee for the Secom Australia (ACT) Unit Trust , Secom Australia Pty Limited and Sydney Night Patrol and Inquiry Co Pty Ltd

Voice to make this application or that the application was otherwise properly made and I accept that to be the case.

[4] I am not satisfied that it is in the public interest to make the low-paid authorisation sought by United Voice. These are my reasons for coming to that conclusion.

Relevant statutory provisions and context

[5] It is important first to set out and consider the low-paid authorisation provisions in their statutory context. Division 9 of Part 2–4 of Chapter 2 of the *Fair Work Act 2009* (Cth) (the Act) deals with low-paid bargaining. Part 2–4 deals with enterprise agreements. The objects of Part 2–4 are found in s.171 which provides:

> 171 Objects of this Part
>
> The objects of this Part are:
>
> (a) to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits; and
>
> (b) to enable FWC to facilitate good faith bargaining and the making of enterprise agreements, including through:
>
> (i) making bargaining orders; and
>
> (ii) dealing with disputes where the bargaining representatives request assistance; and
>
> (iii) ensuring that applications to FWC for approval of enterprise agreements are dealt with without delay.

[6] Section 171(a) refers to providing a fair and flexible framework for collective bargaining for agreements that deliver productivity benefits. While there is no specific reference to low-paid authorisations other than in the statutory note, s. 241 in Division 9 sets out the objects of the division as follows:

> 241 Objects of this Division
>
> The objects of this Division are:
>
> (a) to assist and encourage low-paid employees and their employers, who have not historically had the benefits of collective bargaining, to make an enterprise agreement that meets their needs; and
>
> (b) to assist low-paid employees and their employers to identify improvements to productivity and service delivery through bargaining for an enterprise agreement that covers 2 or more employers, while taking into account the specific needs of individual enterprises; and
>
> (c) to address constraints on the ability of low-paid employees and their employers to bargain at the enterprise level, including constraints relating to a lack of skills, resources, bargaining strength or previous bargaining experience; and
>
> (d) to enable FWC to provide assistance to low-paid employees and their employers to facilitate bargaining for enterprise agreements.
>
> Note: A low-paid workplace determination may be made in specified circumstances under Division 2 of Part 2-5 if the bargaining representatives for a proposed enterprise agreement in relation to which a low-paid authorisation is in operation are unable to reach agreement.

[7] These objects include encouraging bargaining for and making of an enterprise agreement for low-paid employees who have not historically had the benefits of collective bargaining, and assisting those employees and their employers, through multi-enterprise bargaining, to identify improvements in productivity and service delivery which also takes account of the needs of individual enterprises. Bargaining for an enterprise agreement is

extended to include bargaining for an agreement that covers more than one employer.[2] The objects in s.241 are not to be read in isolation but in the context of the entirety of the enterprise agreement provisions of Part 2–4. As a Full Bench of Fair Work Australia in *United Voice v The Australian Workers' Union of Employees, Queensland*[3] (*Aged Care case*) observed:

> When the provisions as a whole are considered, it is apparent that the legislative policy underlying the low-paid authorisation provisions is that while bargaining on a single enterprise basis is the preferred approach, multi-enterprise bargaining is permitted "to assist and encourage low-paid employees ... to make an enterprise agreement that meets their needs". The other provisions of Division 9 set out the means by which these objects are to be carried into effect. In particular, s.243 specifies the matters which the tribunal is to take into account in dealing with an application under s.242.[4]

[8] The persons having standing to make an application are set out in section 242(1) of the Act as follows:

> (1) The following persons may apply to the FWC for an authorisation (a low-paid authorisation) under section 243 in relation to a proposed multi-enterprise agreement:
>
> (a) a bargaining representative for the agreement;
>
> (b) an employee organisation that is entitled to represent the industrial interests of an employee in relation to work to be performed under the agreement.
>
> Note: The effect of a low-paid authorisation is that the employers specified in it are subject to certain rules in relation to the agreement that would not otherwise apply (such as in relation to the availability of bargaining orders, see subsection 229(2)).

[9] Section 243 contains matters the Commission is required to take into account in determining whether or not to make a low-paid authorisation and provides:

> **243 When FWC must make a low-paid authorisation**
>
> *Low-paid authorisation*
>
> (1) FWC must make a low-paid authorisation in relation to a proposed multi-enterprise agreement if:
>
> (a) an application for the authorisation has been made; and
>
> (b) FWC is satisfied that it is in the public interest to make the authorisation, taking into account the matters specified in subsections (2) and (3).
>
> *FWC must take into account historical and current matters relating to collective bargaining*
>
> (2) In deciding whether or not to make the authorisation, FWC must take into account the following:
>
> (a) whether granting the authorisation would assist low-paid employees who have not had access to collective bargaining or who face substantial difficulty bargaining at the enterprise level;
>
> (b) the history of bargaining in the industry in which the employees who will be covered by the agreement work;
>
> (c) the relative bargaining strength of the employers and employees who will be covered by the agreement;

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[2] Referred to in s.242 as a "multi-enterprise agreement"

[3] [2011] FWAFB 2633

[4] Ibid at [11]

> (d) the current terms and conditions of employment of the employees who will be covered by the agreement, as compared to relevant industry and community standards;
>
> (e) the degree of commonality in the nature of the enterprises to which the agreement relates, and the terms and conditions of employment in those enterprises.
>
> *FWC must take into account matters relating to the likely success of collective bargaining*
>
> (3) In deciding whether or not to make the authorisation, FWC must also take into account the following:
>
> (a) whether granting the authorisation would assist in identifying improvements to productivity and service delivery at the enterprises to which the agreement relates;
>
> (b) the extent to which the likely number of bargaining representatives for the agreement would be consistent with a manageable collective bargaining process;
>
> (c) the views of the employers and employees who will be covered by the agreement;
>
> (d) the extent to which the terms and conditions of employment of the employees who will be covered by the agreement is controlled, directed or influenced by a person other than the employer, or employers, that will be covered by the agreement;
>
> (e) the extent to which the applicant for the authorisation is prepared to consider and respond reasonably to claims, or responses to claims, that may be made by a particular employer named in the application, if that employer later proposes to bargain for an agreement that:
>
> (i) would cover that employer; and
>
> (ii) would not cover the other employers specified in the application.

[10] The low-paid bargaining provisions in Division 9 of Part 2–4 relate only to bargaining for a proposed multi-enterprise agreement, although one or more single-interest enterprise agreements may nonetheless result from multi-enterprise bargaining under cover of an authorisation. There are however a number of important differences between bargaining for a proposed multi-enterprise agreement generally and bargaining for such an agreement under the authority of a low-paid bargaining authorisation. First, bargaining orders are available in relation to the latter but not the former.[5] Secondly, the Commission is empowered to intervene on its own initiative to facilitate bargaining in relation to a low-paid bargaining authorisation proposed multi-enterprise agreement whereas otherwise it may only intervene on application, and such an application may only be made if all of the bargaining representatives for the proposed agreement agree to make the application.[6]

[11] Thirdly, bargaining representatives may by consent have one or more of the terms that should be included in the proposed low-paid multi-enterprise agreement determined by the Commission by arbitration by making a consent low-paid workplace determination.[7] Fourthly, if bargaining representatives for the proposed low-paid authorisation multi-enterprise agreement are genuinely unable to agree on the terms included in the proposed agreement and there is no reasonable prospect for an agreement being reached, the Commission is empowered to determine the dispute about the terms by arbitration by making a special low-paid workplace determination.[8]

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[5] See s.229(2)

[6] See s.246(2); c/f s.240

[7] See s.260; the Commission is empowered to arbitrate a dispute about a proposed enterprise agreement by consent under s.240, however this does not result in a binding workplace determination and there is a serious question whether the outcome of a consent arbitration under s.240(4) must be replicated or included in a proposed agreement.

[8] See s.262

[12] There are also differences between bargaining for a low-paid authorisation multi-enterprise agreement and bargaining for a proposed agreement more generally. These include that disputes about scope of a proposed low-paid authorisation multi-enterprise agreement cannot be resolved by obtaining a scope order as scope orders are only available in relation to a proposed single-interest enterprise agreement[9]. Indeed it seems the Commission does not have power to determine disputes about scope in relation to a proposed low-paid authorisation multi-enterprise agreement through a low-paid workplace determination as coverage of such a determination is determined by the coverage specified in the application for a determination.[10] Recourse to protected industrial action by bargaining representatives and employees to be covered by a proposed low-paid authorisation multi-enterprise agreement is not available because bargaining representatives cannot apply for a protected action ballot order,[11] which is a necessary precondition to organising or engaging in protected industrial action.

[13] It is apparent from this review that the legislative scheme establishing special provisions for low-paid bargaining seeks to strike a balance between the emphasis of the enterprise bargaining provisions generally on collective bargaining particularly or primarily at an enterprise level for agreements that deliver productivity benefits on the one hand, and a recognition of the need and perhaps desirability of providing some additional assistance to certain classes of employees who are low-paid who have historically not had access to collective bargaining or who face substantial difficulty in collectively bargaining at the enterprise level on the other.

[14] Section 243(1) enlivens the public interest in providing the Commission must make a low-paid authorisation if it is satisfied that it is in the public interest to do so, taking into account the matters in ss.243(2) and (3).

[15] In the *Aged Care case* the Full Bench made the following observations about the nature of the public interest test in s.243(1) of the Act:

> Some initial observations should be made about the nature of the public interest test. The controlling criterion is satisfaction in the public interest. That criterion is a broad one and is confined only by the limits of the scope and purpose of the Act, as the following passage from the decision of the High Court of Australia in *O'Sullivan v Farrer* indicates:
>
> > "[T]he expression "in the public interest", when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only "in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be (pronounced) definitely extraneous to any objects the legislature could have had in view"" (references omitted).
>
> While the tribunal is required to take into account the matters specified in ss.243(2) and (3) in applying the public interest criterion, we do not think it was intended that those matters are the only ones capable of being relevant to the public interest. Other matters potentially affecting the public interest can also be taken into account. The public interest is distinguishable from the interests of the parties, although it is clear from the matters specified that there is a substantial overlap where these provisions are concerned.[12] [Endnote omitted]

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[9] See s.238

[10] See ss.260(3), 260(5) and 264(4)

[11] See s.437(2)

[12] [2011] FWAFB 2633 at [14] – [15]

[16] To this his Honour Vice President Watson, in Australian Nursing Federation v IPN Medical Centres Pty Limited and Others[13], (Practice Nurses case) added:

> It will be seen that the task of determining whether to make a low-paid authorisation is based on a broad discretionary test described as the Commission being satisfied that it is in the public interest to make the determination. The specific factors required to be taken into account and the objects and scheme of the legislation are the key considerations in applying this test.[14]

[17] I respectfully concur.

Whether a low-paid authorisation must be made

[18] As is apparent from the above, the question of whether a low-paid authorisation must be made in relation to this application turns on whether I am satisfied that it is in the public interest to make the authorisation taking into account the matters in ss.243(2) and (3), having regard to the objects of Division 9 and the legislative scheme understood in the context of the broader scheme of enterprise bargaining established by the Act. I therefore now turn to consider each of the matters specified in ss.243(2) and (3) of the Act in the context of the evidence led and submissions made by the parties in this matter.

s.243(2)(a) - whether granting the authorisation would assist low-paid employees who have not had access to collective bargaining or who face substantial difficulty bargaining at the enterprise level

[19] There are several matters that require determination under this consideration. First there is the question of what is meant by the phrase "low-paid employees"? Perhaps more precisely, how is the Commission to identify whether some or all of the employees the subject of this application are "low-paid employees"? Secondly, whether some or all of the employees would be covered by the proposed enterprise agreement are low-paid employees. Thirdly there is a question of what is meant by "assist"? Fourthly, it is necessary to determine whether the identified low-paid employees have not had access to collective bargaining or face substantial difficulty bargaining at the enterprise level.

Low-paid employees

[20] The Act does not contain a definition of "low-paid". Reference to low-paid in the Act is however not confined to the low-paid bargaining provision in Division 9. It also appears in the minimum wage objective.[15] It is well established that a word that is or words that are used consistently in legislation should be given the same meaning consistently[16] unless there is reason to do otherwise.[17] Although I note that reference to "low paid" in the minimum wage objective does not contain a hyphen, that omission is not a sufficient reason to ascribe a

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[13] [2013] FWC 511

[14] Ibid at [17]

[15] See s.284

[16] See for example *Craig Williamson Pty Ltd v Barrowcliff* [1915] VLR 450 at 452

[17] See *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611 at 687

different meaning to that term in that part of the Act. It seems to me clear that when "low paid" is hyphenated in relation to the low-paid bargaining authorisation provisions it is used as a compound modifier intended to alter the meaning of the word that follows, usually "employee", "bargaining" or "authorisation". The use of a hyphen as a compound modifier is unnecessary for the reference to "low paid" in the minimum wage objective because of the grammatical structure of the sentence in which the reference appears. There are no words that follow in relation to which an altered meaning need be ascribed. I therefore agree with the observations of his Honour the Vice President in the *Practice Nurses case* that "the term low-paid used in the legislation is intended to have a consistent meaning, albeit one that cannot be defined by reference to a strict cut-off point"[18].

[21] In the *Aged Care case* the Full Bench considered the meaning of low-paid employees in the context of a low-paid bargaining authorisation application and concluded that "in the context of the provisions of Division 9 the phrase is intended to be a reference to employees who are paid at or around the award rate of pay and who are paid at the lower award classification levels."[19]

[22] In the *Annual Wage Review 2009–10*[20] decision, the Expert panel said, about the meaning and identification of low-paid employees, the following:

> There is no consensus among the parties and other commentators with respect to a definition of the low paid. Because there is a continuous distribution of wages, there is no wage threshold just below which people are clearly low paid and just above which people are clearly not low paid. Rather, the lower the wage, the more "low paid" is the employee. People earning above or near median earnings are clearly not low paid in an absolute sense. In considering relative living standards and the needs of the low paid, we have focussed mainly on those receiving less than two-thirds of median adult ordinary-time earnings (currently about $700 per week) and its equivalent hourly rate (about $18.50). We have also had regard in particular to those paid at the C10 rate, in recognition of past practice, on the C14 rate, which is equivalent to the minimum wage, and on those whose full-time equivalent wages put them in the bottom quintile of the wage distribution. Employees on award wages that are above these rates can be considered to be low paid in a different sense. The comparison here is between the award rate and the bargained rate for similar work.[21]

[23] In the *Annual Wage Review 2012–13* decision[22] the Expert Panel observed the following about the meaning and identification of low-paid employees:

> There is a level of support for the proposition that the low paid are those employees who earn less than two-thirds of median full-time wages. This group was the focus of many of the submissions. The Panel has addressed this issue previously in considering the needs of the low paid, and has paid particular regard to those receiving less than two-thirds of median adult ordinary-time earnings and to those paid at or below the C10 rate in the Manufacturing Award. Nothing put in these proceedings has persuaded us to depart from this approach.[23] [Endnotes omitted]

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[18] [2013] FWC 511 at [19]

[19] [2011] FWAFB 2633 at [17]

[20] [2010] FWAFB 4000

[21] Ibid at [237]

[22] [2013] FWCFB 4000

[23] Ibid at [362]

[24] In the *Annual Wage Review 2013–14* decision[24] the Expert Panel again considered the meaning and identification of low-paid employees and said:

> **[310]** . . . we remain of the view stated by the Panel in the 2012–13 Review decision that a threshold of two-thirds of median full-time wages provides a suitable and operational benchmark for identifying who is low paid. Submissions on this topic mostly supported, and utilised, this benchmark.
>
> **[311]** The Australian Government provided two definitions of low paid. The first is "less than two-thirds of median hourly earnings (including those on junior rates)", as measured by the EEH data—a figure of $17.35 per hour. The second defines low pay as equal to or less than two-thirds of median hourly earnings in their main job, using Household Income and Labour Dynamics in Australia (HILDA) Survey data for 2012—a figure of $17.60 for adults. Both the Australian Government figures are lower than the more usual measure of two-thirds of median adult ordinary time earnings ($18.60 in May 2012, as calculated by the ACTU from the EEH data), or between $19.17 (on the assumption of a 40 hour week) and $20.18 (on the assumption of a 38 hour week), based on the median earnings data for August 2012 contained in Table 8.1 of the *Statistical Report—Annual Wage Review 2013–14* (Statistical Report).
>
> **[312]** On the basis of the EEH data and their threshold of $17.35, the Australian Government estimated that there were around 1 058 000 low-paid employees in mid-2012. The survey found that 461 900 of the low paid were award-reliant employees, 292 600 employees were on individual arrangements and 303 500 employees were on collective agreements. Of these, an estimated 104 000 (1.1 per cent of all employees) were paid the NMW. They also provided a chart that showed that 1 544 100 employees were award reliant in 2012. These two sets of information imply that 30 per cent of award-reliant employees were low paid.
>
> **[313]** The Australian Government also used HILDA data to identify the extent and nature of the low-paid workforce. Using the adult low-paid threshold of $19.00 per hour (based on median earnings as reported in the Statistical Report for this Review, Table 8.1), the Australian Government estimates that there were about 2.0 million low-paid employees in 2012, comprising 22.7 per cent of all employees, 38.7 per cent of whom were aged under 25. The higher number reflects the use of a higher value for median earnings (one which includes only adults in its estimation).
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> **[314]** ACCI argued that "[m]any award-reliant employees may not be low paid, although the data is mixed". ACCI referred to the ACTU submission to the 2012–13 Review which used unpublished EEH data to show that just over 50 per cent of award-reliant employees earn more than the C10 rate. ACCI submitted that the C8 rate should be used as a proxy for two-thirds of median full-time earnings, and this leads to a proportion of low-paid award-reliant employees of just over 40 per cent.
>
> **[315]** Using unpublished data from the EEH survey and imputing classifications based on average hourly ordinary time cash earnings, the ACTU matched the EEH data to classifications and wage rates in the *Manufacturing and Associated Industries and Occupations Award 2010* to provide a distribution of award-reliant employees. They concluded that just under half of award-reliant workers are employed at or below the C10 level, with a clustering around the C10 to C12 level. On their calculations, these workers earned below two-thirds of the median hourly ordinary time cash earnings of non-managerial adult employees. Their estimates included juniors, apprentices and those on a supported wage.
>
> **[316]** While there is widespread agreement that "less than two-thirds of the median" is a good working definition of being low paid, it is clear that the practical application of this measure is not straightforward. First, the surveys that provide the information about the distribution of earnings from which a median is derived vary in their sources, coverage and definitions in ways that affect the absolute values of average and median wages (and hence the calculation of two-thirds of these values). To illustrate this point, Table 6.1 contains estimates of two-thirds of median weekly earnings based on data from the two main ABS surveys of the distribution of earnings, the Employee Earnings, Benefits and Trade Union Membership (EEBTUM) and the EEH.

Table 6.1: Two-thirds of median weekly earnings

Year	EEBTUM	EEH
2008	$666.67	$705.33
2009	$666.67	n/a

[24] [2014] FWCFB 3500

2010	$700.00	$743.33
2011	$733.33	n/a
2012	$766.67	$808.00

Note: Weekly earnings from the EEBTUM survey are earnings in the main job for full-time employees. The figure is for August of each year. Weekly earnings from the EEH survey are weekly total cash earnings for full-time non-managerial employees. The figures for 2008 are for August and for 2010 and 2012 for May.
n/a = not available.
Source: ABS, *employee Earnings, Benefits and Trade Union Membership, Australia*, *various*, Catalogue No. 6310.0; ABS, *Employee Earnings and Hours, Australia*, *various*, Catalogue No. 6306.0.

[317] On this data, two-thirds of median full-time wages differs by about 6 per cent, or $41 on the most recent measures, even when provided by the same (high quality) statistical agency. On both measures, the value of two-thirds of median earnings was above the C8 rate at the relevant time. We note that two-thirds of AWOTE equated to approximately the C3 rate in May 2012.

[318] The calculation of the median will also be affected by whether or not juniors are included in the population from which the median is derived.

[319] Research Report 6/2013 found that around 75 per cent of adult award-reliant employees in the non-public sector were found to be on the equivalent of the C10 rate of $18.60 per hour or below.

[320] Whilst caution is required in drawing conclusions as to the precise extent of low pay among the award reliant, the ACTU's analysis based on unpublished EEH data, the Research Report 6/2013 and the estimates of the Australian Government all suggest that a sizeable proportion—perhaps half—of employees who are award reliant are also low paid. Many of these are people under the age of 21.

[321] The definition of low paid by reference to employees on award wages that are below two-thirds of median adult ordinary-time earnings excludes a substantial proportion of workers who are paid at the higher levels of award rates.[25] [Endnotes omitted]

[25] United Voice submitted that the notion of low-paid is a relative concept that is not settled and therefore should not be strictly defined.[26] It submitted that the Commission need only consider the particular circumstances of security workers that are the subject of the application, their relative position to comparable workers and community standards in order to satisfy itself that those employees are low-paid.[27] This proposition is overly simplistic, imprecise and will likely yield variable results depending on the comparator used to identify comparable workers and the value ascribed to their relative positions. Accordingly the proposition is rejected.

[26] United Voice also submitted that the Full Bench in the *Aged Care case* essentially adopted the approach to the identification of low-paid workers of the Expert Panel in annual wage reviews, and in consequence it suggested the appropriate low-paid reference point for determining whether employees the subject of the application are low-paid is whether the employees or some of them are paid at or around the rates of pay in, and classified at, a lower classification under the Security Award.[28] I accept that this is a useful reference point. United Voice submitted that the Respondent Employers' suggestion that overtime earnings of the employees the subject of this application be taken into account in assessing whether the employees are low-paid should be rejected.[29] It submitted that a similar suggestion made by

[25] Ibid at [310] - [321]

[26] United Voice Outline of submissions at [9]

[27] Ibid at [10]

[28] Ibid at [16] – [19]

[29] Transcript PN 4445

employers in the *Aged Care case* was rejected and it would be illogical to take such earnings into account.[30]

[27] The Respondent Employers submitted that in the *Practice Nurses case* Vice President Watson said that the approach in the *Aged Care case* and in the annual wage reviews involved a consistent approach and that this was the correct approach to adopt in the case before him.[31] The Respondent Employers did not in terms suggest or accept that this was the correct approach. The Respondent Employers further submitted that an assessment of whether employees are low-paid requires a broad approach to be taken to the meaning and identification of "low-paid" and that the word "paid" should be given its ordinary meaning so that all payments received from an employer for work performed by an employee would fall within the meaning of "paid" and would therefore include such things as overtime payments, penalty payments and over-award payments.[32]

[28] It seems to me that the appropriate starting point, based on the decisions in the *Aged Care case*, the *Practice Nurses case* and the recent decisions of the Expert Panel in the annual wage reviews, in determining the meaning and identification of low-paid employees is to use the measure of those employees receiving less than two-thirds of median adult ordinary-time earnings and to those paid at or below the C10 rate in the *Manufacturing and Associated Industries and Occupations Award 2010* (Manufacturing Award).

[29] Ultimately in determining whether the employees the subject of this application are low-paid employees, the above measures are merely reference points. The utility of measures used to identify low-paid employees will depend upon the data and the data source that are used. As the Expert Panel in the most recent annual wage review clearly illustrated, the practical application of any measure of low-paid, including the two-thirds of median measure, is not straightforward. This is because surveys providing information about the distribution of earnings from which a median is derived vary in their sources, coverage and definitions in ways that affect the absolute values of average and median wages. Consequently the calculation of two-thirds of these values is also affected[33].

[30] It is for this reason that I also accept the view expressed by his Honour the Vice President in the *Practice Nurses case* that the question of whether an employee is low-paid is a question of degree and necessarily involves some imprecision. His Honour thus proposed a range of low-paid reference points beginning at the C14 Manufacturing Award rate and ending at the two-thirds median adult weekly ordinary time earnings. In my view, that approach is sound.

[31] Whether one takes into account overtime earnings in an assessment of low-paid depends on the measure against which the comparison is made. In some cases including overtime and penalty earnings would distort the outcome if measured against benchmark comparators used by the Expert Panel in the annual wage reviews (i.e less than two-thirds of median adult ordinary-time earnings and to those paid at or at or below the C10 rate in the Manufacturing Award) in assessing low-paid. It might also be contrary to the observations of

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[30] Ibid

[31] Respondents' Outline of submissions at [26]

[32] Ibid and respondents' Outline of final submissions at [37] – [41]

[33] [2014] FWCFB 3500 at [316]

the Full Bench in the *Aged Care case* that "there is no indication in Division 9 that we should interpret references to low-paid as equivalent to low income".

[32] The submission of the Respondent Employers that in assessing low-paid, account should be taken of all payments, including overtime, that are made to employees in the security industry is a submission that I should measure the total wage income received from the employer by the employees. Adopting such an approach without adjusting the data set that is used as the comparator would mean comparing, for example, a measure of less than two-thirds of median adult ordinary-time earnings or less than the C10 Manufacturing Award rate, both of which are ordinary time earning measures, and to the total pay of an employee, which is made up of more than simply ordinary time earnings. This is not in my view an appropriate approach. A different comparative measure such as two-thirds of median full-time weekly cash earnings[34] would need to be used if total wage income is to be taken into account. This simply serves to underscore the desirability of not ascribing a narrow meaning to or measure of low-paid and instead adopting a broad view of the term in the context of the evidence of the pay of the employees the subject of this application.

[33] I would note that in the *Aged Care case* the Full Bench conducted its analysis of whether nurses working in aged care are low-paid by reference to the ordinary rates of pay payable to nurses notwithstanding that the residential aged care sector operates on a 24-hour seven day a week shift arrangement and that under those arrangements employees would accrue weekend and shift penalty payments. The issue of including earnings other than ordinary time earnings in the assessment did not arise in the *Practice Nurses case* as practice nurses work in an industry that operates predominantly without shift work.

Are employees the subject of this application low-paid?

[34] United Voice submitted that the employees the subject of this application are low-paid employees and fall broadly within the low-paid reference points used by his Honour in the *Practice Nurses case*.[35] In support of this proposition United Voice relied on the evidence of a number of security guards[36] employed or formerly employed as security officers by several of the Respondent Employers. Without reproducing the totality of the evidence, collectively the evidence discloses the following. The security guards who gave evidence were employed in various capacities ranging from supervisors to security officers and were relevantly classified under the Security Award at levels ranging from security officer level 2 to security officer level 5. Some of the employees who gave evidence occupied supervisory positions and were engaged under differently negotiated remuneration arrangements. The rates of pay received ranged as follows: $18.74 per hour,[37] $19.06 per hour,[38] $19.89 per hour[39] and $21 per hour[40]

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[34] See ABS - Data Set 6306.0 – Employee Earnings and Hours, Australia, May 2012

[35] United Voice Final submissions at [2.1]

[36] The security officers who gave evidence were Lisiate Lupeitu'u (Wilson Security) [Exhibit UV 1, Transcript PN 29 – PN 363], David Sankey (MSS Security) [Exhibit UV 2, Transcript PN 369 – PN 591], Sami Abs (SNP Security) [Exhibit UV 3, Transcript PN 593 – PN 722], Adrian McClusky (SNP Security) [Exhibit UV 4, Transcript PN 733 – PN 797, Jeremy Stewart (SNP Security) [Exhibit UV 5, Transcript PN 820 – PN 909], Daniel Finley (MSS Security) [Exhibit UV 6, Transcript PN 910 – PN 978], Trevor Bennett (SNP Security) [Exhibit UV 7, Transcript PN 979 – PN 1057], Lorenzo D'Alessandro (SNP Security) [Exhibit UV 8, Transcript PN 1062 – PN 1179] and Jason MacDonald (Wilson Security) [Exhibit UV 9, Transcript PN 1187 – PN 1295]

[37] See for example Exhibit UV 7

[38] See for example Exhibit UV 1

in the case of security officers at the various levels, and $25 per hour[41] and $26.40 per hour[42] in the case of supervisors.

[35] It is not in dispute that many of the employees who are subject of this application, including those that gave evidence, work or have available to be worked overtime and hours which attract a shift penalty or premium. It is apparent from the evidence that the employees who gave evidence did work overtime and/or shifts attracting a shift penalty or premium. These employees earned, variously, amounts ranging from about $49,000 per annum at the lower end to about $62,400 per annum at the higher end.[43] These per annum income ranges do not take into account the effect (if any) of the most recent annual wage review decision on minimum rates of pay. These annual amounts are obviously higher than the base rate of pay per hour described in the previous paragraph.

[36] United Voice also relied on a petition[44] which purports to be signed by a large number of security guards employed by various of the Respondent Employers. The petition is in a pro forma format and asserts that the signatory is "a low-paid worker", amongst other things. I do not find pro forma evidence of this kind particularly useful or helpful. Pro forma surveys or petitions of this kind lack rigour. Apart from the few security guards who were called who also tendered a copy of the pro forma survey signed by them, none of the multitude of other signatories of the petition was called to give evidence. The Expert Panel in the most recent annual wage review had cause to criticise the retail industry's repeated reliance on member surveys to argue its case for exceptional circumstances. The Expert Panel observed that:

> If the surveys of members are to be relied upon to support exceptional circumstances in an industry, they would need to be conducted with the rigour, and the disclosure of the detailed methodology and parameters.[45]

[37] Much the same may be said about the United Voice members' petition. I am not inclined to give the petition any significant weight and certainly not on the question whether the employees the subject of this application are low-paid. The petition itself does not explain to the signatory or to anybody else what is meant by, or how it measures, a low-paid worker. Moreover the Respondent Employers are not given an opportunity to cross-examine the petition signatories and in the circumstances rightly objected to its admission. Ultimately I allowed the petition to be admitted in evidence but for the reasons given I have given it no weight.

[38] United Voice also relied on a report titled *Profile of Security Workers in the ACT* (UV Report) prepared by Dr Kim Houghton of Strategic Economic Solutions in December 2013.[46] The UV Report was prepared on the basis of a combination of analysis undertaken of statistical data that is publicly available and a survey of members conducted by United Voice

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[39] See for example Exhibit UV 8

[40] See transcript PN 627 – PN 628

[41] See Exhibit UV 2

[42] See transcript PN 1192

[43] See transcript PN171, PN398, PN931, PN1025 and PN1234

[44] Exhibit UV 10

[45] [2014] FWCFB 3500 at [553]

[46] See exhibit UV21

in Canberra in November 2013.[47] The UV Report concludes relevantly that as a class security workers in the ACT are paid less than comparable occupations and less than the national average wage for the occupation.[48] The UV Report also concludes that ACT security workers employed in the private sector are paid considerably less ($51,283 per annum on average) than those employed directly by government ($76,895 per annum on average).[49]

[39] The UV Report is helpful at a general level but has its limitations. The most significant of which is that it does not address the pay profile of private sector security workers in comparison with any of the measures identified above which will have a bearing on determining whether the employees the subject of this application are low-paid. Short of creating yet another potential measure of low-paid based on the UV Report, the report provides little assistance in making the assessment that I need to make. Moreover it was accepted by Dr Horton that his conclusion that ACT security workers are paid on average $51,283 per annum was based on data as at August 2011 and did not take into account subsequent wage increases, although the relative comparison with government-employed security workers would likely be unaffected[50], as those workers would also have benefited from increases in their wages.

[40] The Respondent Employers submitted that taking into account the increases in award wages since August 2013, the average annual wage for private sector security workers in the ACT would now be $57,539.53.[51]

[41] The range of annual wages earned by the employees who gave evidence in these proceedings is approximately 20% lower than this figure at the bottom end, and approximately 8% higher than this figure at the top end of the range.

[42] It would seem that a significant majority of the employees who are the subject of this application are employed at the security officer level 3 grade.[52] The current minimum weekly rate of pay for that classification under the Security Award is $753.30. The classification is the midpoint in a 5 level classification structure but in weekly wage terms is closer to the bottom ($33.20 per week higher than level 1) than the top ($37.30 lower than level 5). The pattern of work is also variable amongst the employees with, in some cases, the regular pattern of full-time work comprising shifts of four on and four off, with each shift comprising 12 hours.[53] The hours of work in each week may vary under this cycle, however for example if an employee worked the four on and four off pattern during the month of September 2014, with the first shift commencing on 1 September 2014, during that month the employee working to such pattern will have worked a total of 192 for the month or 48 hours in each week. Some of that work will have been performed on weekends and outside of normal operating hours of the premises to which the employee is assigned. In other cases full-time employees work a pattern which involves an average of between 87 hours and 89 hours per

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[47] 100 members were invited to participate with 21 responding to the survey. The respondents were employed in the ACT as security offices in both the private and public sectors – UV 21 at 16

[48] Exhibit UV 21 at page 3

[49] Ibid

[50] Transcript PN 3984 – 3986

[51] Respondents' Outline of final submissions at [47]

[52] See transcript PN 2506, PN 3275 – PN 3277 and PN 4391

[53] Transcript PN 4334 – PN 4337

fortnight (43.5 hours or 44.4 hours per week).[54] The occurrence of overtime will result in an additional payment for the additional hours worked in some cases,[55] and in others the roster pattern includes some overtime with the annual salary received including overtime payments.[56]

[43] It also seems clear from the evidence that employees employed at the security officer level 3 classification by the various Respondent Employers are paid at or about the equivalent of the corresponding rate for that classification in the Security Award. As indicated above the current minimum weekly rate for a security officer level 3 is $753.30 per week or $19.82 per hour calculated on a 38 hour week. The current minimum weekly wage for the C10 classification under the Manufacturing Award is $746.20 per week or $19.64 per hour calculated on a 38 hour week. The differential is less than 1% in favour of the Security Award.

[44] It is not necessary for me to determine that all of the employees the subject of the application are low-paid, it will be sufficient that some of them are. On this measure of low-paid, some of the employees the subject of this application are paid only marginally above the rate of pay for the C10 classification under the Manufacturing Award, and on this measure they are paid at about that rate. On this measure such employees are in my view low-paid.

[45] The most recently available data from the ABS on full-time median earnings in main job is as at August 2013.[57] The latest annual wage review used the previous year's corresponding ABS data set. The currently available data shows that median weekly earnings of full-time employees in their main job was as at August 2013, $1152.00. Two-thirds of the median is therefore $768.00. This is higher than the minimum weekly wage for the Level 3 security officer under the Security Award. It follows that on this measure some of the employees the subject of this application are low-paid.

[46] Turning then to the actual income earned by employees the subject of this application. As I have earlier indicated, the total salary received by employees who gave evidence ranged between $49,000 per annum at the lower end and about $62,400 per annum at the higher end. In my view a relevant comparator for the purposes of making an assessment of whether the employees or some of them are low-paid would be to examine the weekly total cash earnings by sector data published by the Australian Bureau of Statistics[58]. Relevantly, the comparator should be the full-time non-managerial adult employee distribution of weekly total cash earnings by sector[59]. Under this measure the median weekly cash earnings of a non-managerial adult employee in the private sector was $1140 per week. This translates to median annual cash earnings of $59,280. This figure represents median annual cash earnings as at May 2012. In order to make an appropriate comparison it is therefore necessary to adjust the range of earnings noted above of employees the subject of this application downwards by at least the increases to the minimum wage determined by the annual wage reviews of 2012–

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[54] Transcript PN 3512 – PN 3517

[55] Transcript PN 3277 – PN 3278

[56] Transcript PN 4338 – PN 4339

[57] ABS – 6310.0

[58] ABS – 6306.0 – Employee Earnings and Hours, Australia, May 2012 - Summary (this is the latest data concerning this subject available and was be published on 21 January 2013)

[59] Ibid at p 14 – 15

13 (2.6%) and 2011–2012 (2.9%). It is not necessary to make an adjustment for the most recent minimum wage adjustment because the range of earnings indicated above were given before those adjustments took effect. The adjusted range therefore is $46,342 per annum at the lower end and $59,015 per annum at the higher end.

[47] Two-thirds of the median annual cash earnings of full-time non-managerial adult employees in the private sector is $39,520. On this comparison the lower end range employees are earning approximately 14.7% more than the two-thirds median. However when examining annual cash earnings for all full-time non-managerial adult employees the two-thirds median annual cash earnings is $41,974[60] or approximately 10.4% lower than the lower end range of earnings of employees the subject of this application. When account is taken of the median annual cash earnings of all full-time adult employees in the private sector the two-thirds medium average cash earnings is $43,671[61] or approximately 5.8% lower than the lower end range of earnings of the employees the subject of this application.

[48] It needs to be borne in mind that the data relating to full-time non-managerial employees is founded on hours of work which on average are 39.4 per week[62]. This is between 10.5% and 18% lower than the number of hours worked by many of the employees the subject of this application. When account is taken of the differential number of hours worked by full-time employees the subject of this application and the corresponding two-thirds median annual cash earnings of full-time non managerial employees for average hours of 39.4, it can readily be concluded that employees who are at the lower end of the range of earnings are paid below or at or about two-thirds median annual cash earnings for full-time non-managerial adult employees on a comparable hours comparison.

[49] The Respondent Employers submitted that private sector security employees the subject of this application are typically engaged on a four on and four off roster and most of these employees are security officer level 3 under the Security Award[63]. They submitted that most full-time non-supervisory employees who gave evidence for United Voice worked on this basis and that the annual salary of this typical employee would before the most recent minimum wage adjustment, be $54,334.32 per annum[64]. When an adjustment is made for the increases to minimum wages by the 2012 – 2013 and 2011- 2012 annual wage reviews, the "typical" annual salary is $51,387 per annum. Employees working a four on and four off roster would work hours per week of 18% higher than the average number of hours worked by full-time adult non-managerial employees. Making an adjustment for an hours worked differential, the adjusted annual salary rate for a level 3 security officer working on a typical four on four off roster is $42,137 per annum. This annual rate is higher than the two-thirds median annual cash earnings of a full-time non-managerial adult employee in the private sector ($39,520), but it is lower than the two-thirds median annual cash earnings of all full-time adult employees ($43,671). On this analysis the "typical" employees fall between two stools, but the comparison demonstrates that the employees are earning at about the median and in my view are low-paid.

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[60] Ibid

[61] Ibid at p 8

[62] Ibid

[63] Respondents' Outline of final submissions at [48]

[64] Ibid at [48] – [49]

[50] Because of the absence of particular wage data for all of the employees the subject of this application, it is not possible to conclude with any precision whether all or a significant proportion of employees are low-paid. Nevertheless on the evidence available it seems to me clear that some of the employees the subject of this application are low-paid based on the measures discussed above and based on the low-paid reference points discussed by his Honour in the *Practice Nurses Case*.

Assist low-paid employees who have not had access to collective bargaining or face substantial difficulty is bargaining at the enterprise level?

[51] In assessing whether granting a low-paid authorisation would assist low-paid employees who have not had access to collective bargaining or face substantial difficulty bargaining at an enterprise level it is necessary first to identify the assistance that might be provided by an authorisation. It seems to me that the assistance that might be provided to low-paid employees must relate to engaging in collective bargaining with their employer albeit on a multi-enterprise basis. Assistance will also relate to making an enterprise agreement albeit a multi-enterprise agreement that meets the needs of the employees and their employers.[65] Assistance may be in the form of enabling the identification of improvements to productivity and service delivery through bargaining for a multi-enterprise agreement but taking into account the specific needs of the individual enterprises that will be covered by the multi-enterprise agreement.[66] The assistance may also be directed at addressing constraints on the ability of the employees and their employers to bargain at the enterprise level, such as those relating to a lack of skills, resources, bargaining strength or previous bargaining experience.[67] Assistance might also be in the form of Commission involvement in the bargaining process to facilitate bargaining for an enterprise agreement albeit a multi-enterprise agreement,[68] though that need not necessarily be the result.

[52] The class of low-paid employees to whom assistance might be rendered by a low-paid authorisation is twofold. First, there are those who have not had access to collective bargaining. Secondly, there are those who face substantial difficulty bargaining at an enterprise level. I agree with the submissions of United Voice that the consideration in s.243(2)(a) might involve a group of low-paid employees who have had access to collective bargaining but who nonetheless face substantial difficulty in bargaining at an enterprise level.[69]

[53] Turning then to the first class of low-paid employees, those who have not had access to collective bargaining. It seems to me that low-paid employees who have not collectively bargained are not necessarily and automatically within its class. This is apparent from the reference to "access to" in s.243(2)(a). The word "access" should be given its ordinary meaning and in the context of s.243(2)(a), it connotes having the ability, right or permission, or the way, means or opportunity, to collectively bargain. Low-paid employees, who do not wish to collectively bargain, will not have collectively bargained though they have access to collective bargaining. As a minimum, it seems to me that assessing whether a group of

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[65] See s.241(a)

[66] See s.241(b)

[67] See s.241(c)

[68] See s.241(d)

[69] United Voice Outline of submissions at [23]

persons has not had access to collective bargaining requires an assessment of whether there was some attempt or desire to collectively bargain which was denied, refused or somehow frustrated. Evidence that a group of employees has not collectively bargained by itself is not evidence that the group has not had access to collective bargaining. It is only evidence that there has been no collective bargaining for that group.

[54] Identifying low-paid employees who might come within the second class, namely those facing substantial difficulty bargaining at the enterprise level first requires an identification of the difficulties faced. Secondly, it requires an assessment of whether the identified difficulties are substantial. Thirdly it requires an assessment of whether the difficulties impact on the capacity to bargain at the enterprise level.

[55] I do not accept as submitted by United Voice that the measure of substantial difficulty bargaining at an enterprise level is the existence of "unsatisfactory" bargains or "substandard agreements".[70] Apart from the obvious subjective and value judgement based measures of that which is unsatisfactory or substandard, there is no basis, having regard to the text of s.243(2)(a), for that submission. The provision is concerned with access to collective bargaining or substantial difficulty in bargaining. It is not concerned with outcome. That a group of employees has access to collective bargaining or does not face any difficulty in bargaining at an enterprise level does not mean that an enterprise agreement will be made at all or that an enterprise agreement of a particular kind or standard will be made. It would be strange therefore if an assessment of whether a particular group of low-paid employees faced substantial difficulty bargaining at the enterprise level would be made by reference to the nature or content of a collective agreement previously made which applied to that group.

[56] I also do not accept the submission of United Voice that the reference to "collective bargaining" in s.241 of the Act means collective bargaining under the Act.[71] By necessary implication, this would extend to use of that term and the word "bargaining" in s.243. First, in s.241 the words "collective bargaining" are preceded by the words "who have not historically had the benefits of". This is suggestive of a measure of collective bargaining dating back beyond the commencement of the Act. Secondly, had the Parliament intended such a narrow construction it would have either inserted a definition of "collective bargaining" to that effect, or added to the words "collective bargaining" in s.241, the words "under this Act". Neither course has been adopted. Thirdly, the meaning of "collective bargaining" is well understood. Collective bargaining is not the offspring of the Act. Its statutory lineage can be traced back through the *Workplace Relations Act 1996* and before it the *Industrial Relations Act 1988.* Given this, it would be a strange result to so narrowly construe its meaning.

[57] Turning then to the evidence relevant to the assessment of whether the low-paid employees fall within either of the two classes. In my view insufficient attention was paid to this consideration by United Voice in the evidentiary case it sought to advance. The evidence so far as is relevant to this consideration section established the following:

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[70] Ibid at [23] – [26]

[71] Ibid at [27]

(a) Secom Security

- Employees of Secom Security are covered by Secom Security Employee Collective Agreement 2009–2014, the nominal expiry date of which has only recently passed on 30 May 2014;[72]
- Secom Security has proposed a further enterprise agreement in relation to which it sought approval from employees and in relation to which there had been bargaining beginning in November 2012 through to August 2013 at which United Voice was represented and involved in bargaining discussions; the proposed agreement is a national agreement and there seems to be a dispute or disagreement between the National Office and the ACT branch of United Voice; bargaining is being supervised by the Commission pursuant to a bargaining dispute notified to the Commission by United Voice on 5 May 2014[73].

[58] On the evidence it can hardly be said that low-paid employees of Secom Security have not had access to collective bargaining. The recent history discussed above shows otherwise. Nor can it be said that those employees face substantial difficulty bargaining at an enterprise level. This is because, first there is little by way of probative evidence to show that low-paid employees of Secom Security face particular and identifiable substantial difficulty. Second, such evidence as was available was generalised and did not identify particular difficulties. The evidence concerned outcome. For example; evidence that "no-one has ever come to us with an enterprise agreement that would lift wages...if Secom...came to us with a proposition to lift wages...",[74] is not evidence that identifies any difficulty faced by low-paid employees. It is only evidence that Secom has not made an offer on wages that is acceptable to United Voice. It seems clear that such employees have had access to collective bargaining and continue to do so in relation to the current bargaining round. The only difficulty faced by the employees seems to be the desire of the ACT Branch of United Voice to have a territory-based agreement covering the employees in the ACT rather than a national agreement. This is not a substantial difficulty bargaining at an enterprise level faced by low-paid employees. Such coverage and scope disputes are common to collective bargaining.

(b) MSS Security

- Employees of MSS Security are covered by the *Chubb Protective Services and Liquor, Hospitality and Miscellaneous Union, Australian Capital Territory Security Employees Certified Agreement 2004*. As is evident this is a transitional instrument which has long passed its nominal expiry date;[75]
- In late 2010 MSS Security agreed, following an approach from United Voice, to commence bargaining a new enterprise agreement and subsequently issued to employees who would be covered by the proposed agreement a Notice of Employee Representational Rights in or about November 2010;[76]

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[72] Exhibit R6 at [4] and Annexure B at clause 1.3.2

[73] Exhibit R6 at the supplementary statement of Gillani and Attachment A

[74] Transcript PN 2075

[75] Exhibit R3 at [8] and Attachment A thereto

[76] Ibid at [10]; see clarification of dates in Attachment D thereto

- Bargaining for a new agreement has been the subject of proceedings in the Commission and the statement prepared for that purpose by Mr Cheatham shows that there has been a substantial period of bargaining for the proposed agreement;[77]
- Ultimately approval for the proposed agreement was sought from employees by ballot conducted between 12 April 2013 and 10 May 2013, the result of which was a valid majority of employees approving the proposed agreement;[78]
- The proposed agreement was ultimately not approved by the Commission because the Commission was not satisfied that the agreement passed the better off overall test;[79]
- Neither United Voice nor MSS security employees have taken any further step since the Commission's decision not to approve the proposed agreement to bargain with MSS Security for a single-employer enterprise agreement.[80]

[59] It seems to me on the evidence that low-paid employees of MSS Security have had access to collective bargaining and that access to collective bargaining resulted in an agreement that was approved by a valid majority of employees and one that was supported by United Voice. That the proposed agreement was ultimately assessed as not passing the better off overall test is not in my view a substantial difficulty to bargaining at the enterprise level faced by the low-paid employees. Rather it is simply evidence that the agreement arrived at as a product of bargaining at the enterprise level was one that did not meet the statutory criteria. No other evidence of any particular difficulty faced by low-paid employees of MSS Security was given.

(c) Wilson Security

- The terms and conditions of employment of security employees employed by Wilson Security in the ACT are determined by the Security Award;[81]
- In or about September 2010 United Voice (then known as Liquor, Hospitality and Miscellaneous Union (LHMU)), corresponded with Wilson Security in the ACT along with the other Respondent Employers in pro forma style setting out a proposal to negotiate a collective agreement;[82]
- It seems clear that the correspondence together with the discussions that occurred with Wilson Security and other Respondent Employers in or about April 2011 was part of a campaign by United Voice to secure "an industry-wide agreement";[83]
- Wilson Security is bound by a number of collective agreements operating in various states including agreements covering work performed at sites controlled by Commonwealth government entities;[84]
- Apart from the assertions that "we have faced substantial difficulty trying to bargain in the past" and "we have very little bargaining power to try to negotiate an enterprise agreement" as set out in the pro forma questionnaires completed by

[77] Ibid at [13] and Attachment D thereto

[78] Attachment D to Exhibit R3 at [26] – [27]

[79] Transcript PN 2322 – PN 2334; Exhibit UV 12 at [32]

[80] Exhibit R4 at [40] – [41]

[81] Exhibit R7 at [18]

[82] Exhibit UV 12 at [19] and Attachment B thereto

[83] Exhibit UV 12 at [14], [16] – [22]

[84] Exhibit R7 at [12] – [13]

persons purporting to be employed by Wilson Security[85] there is no evidence of either;

- The evidence given by Mr MacDonald as Security supervisor employed by Wilson Security was that it was difficult to bargain "as rates are set before staff start at a job" because of the price determined by the contract for the provision of security services.[86] Mr Macdonald's evidence did not address the question of whether he or his colleagues at Wilson Security did not have access to collective bargaining or faced substantial difficulty in bargaining at the enterprise level. Mr Lupeitu'u's evidence was that "it is difficult to bargain with our employers"[87] which says nothing about access to collective bargaining or any identifiable substantial difficulties. Like Mr McDonald, Mr Lupeitu'u's evidence asserted that contractual conditions under which security services are provided make bargaining for higher wages difficult.[88]

[60] There is an insufficient evidentiary basis from which it might be reasonably concluded that low-paid employees of Wilson Security have not had access to collective bargaining or that they face substantial difficulty in bargaining at the enterprise level. Such evidence as was adduced in the proceeding points the other way. From the evidence an inference can be drawn that Wilson Security does not oppose collective bargaining or making enterprise agreements. It clearly has bargained for and made agreements covering its employees in other states. Apart from attempts in 2010 and 2011 by United Voice to pursue an industry-wide agreement in the ACT with employers including Wilson Security, there seems little activity on the part of United Voice or employees of Wilson Security to seek to collectively bargain. There is no evidence that United Voice for example took steps such as seeking a majority support determination, if as alleged by it, Wilson Security and some other Respondent Employers were not prepared to enter into formal negotiations.[89] In the present circumstances it cannot be said that a group of persons has not had access to collective bargaining or faces substantial difficulty in bargaining at an enterprise level. No relevant significant difficulty has been identified and on the evidence neither the employees nor the default bargaining representative, United Voice, has taken any significant step to collectively bargain with Wilson Security so as to bring the state of affairs about.

(d) SNP

- Evidence of the kind summarised in the first, second, third and fifth dot points under the Wilson security heading above was also given in relation to SNP;[90]
- There is no history of collective bargaining with SNP in the ACT but SNP is covered by an enterprise agreement in relation to its contract at Sydney airport;[91]
- The evidence of employees of SNP that it is "difficult to bargain with security employers";[92] "really hard to bargain security industry in the ACT";[93] "really hard to

[85] Exhibit UV 10

[86] Exhibit UV 9 at [9]

[87] Exhibit UV 1 at [11]

[88] Ibid at [12]

[89] See Exhibit UV 12 at [19]

[90] See in addition Exhibit R 10 at [4] – [5]

[91] Exhibit R 10 at [6]

[92] Exhibit UV 3 at [10]

[93] Exhibit UV 8 at [11]

> bargain in the security industry";[94] and "difficult to bargain for an agreement because my employer has to compete for contracts and the clients pick the lowest price"[95] is evidence of a very superficial kind and does not speak to either the question of access to collective bargaining or to any substantial difficulty in bargaining at an enterprise level.

[61] As in the case of Wilson Security, there is an insufficient evidentiary basis from which it might reasonably be concluded that low-paid employees of SNP have not had access to collective bargaining or that they face substantial difficulty in bargaining at the enterprise level. There is no evidence that United Voice took steps such as seeking a majority support determination, if as alleged by it, SNP and some other Respondent Employers were not prepared to enter into formal negotiations.[96] There is no evidence of any attempt at collective bargaining with SNP at the enterprise level.

[62] At a more general level, United Voice relied on the evidence of Ms Lyndal Ryan, the ACT Branch Secretary of United Voice, to support its proposition that low-paid employees the subject of this application face substantial difficulty bargaining at an enterprise level. In particular United Voice relied on the following evidence given by Ms Ryan variously set out in the transcript:[97]

> It seems to me as though the only bargaining that's going on seems to be at Secom and you're opposing it happening in the ACT?---Look, I would like you to look at the Secom agreement. You would disagree with it, as well.
>
> But Secom were seeking to bargain with its employees in the ACT, including you, and you're seeking to stop that; but then you're coming along and saying, "Oh, isn't it terrible that there isn't enterprise bargaining in the ACT"?---No-one has ever come to us with an enterprise agreement that would lift wages and improve productivity. That hasn't been put to us. If Secom or any other company came to us with a proposition that actually lifted wages and improved productivity, then we would certainly put that to our members. The only bargaining, if you like, that has taken place, is one to the employees' disadvantage.[98]
>
> . . .
>
> That's the effect of your application, isn't it? To the extent that enterprise bargaining has occurred on a single basis in the ACT, if you're successful you'll be able to stamp it out?---I think to characterise it as stamping it out is not the case. If we were able to successfully bargain individually with employers to lift wages, then we would do that. It's just that we haven't been able to do that and we haven't been able to do it, you know, in any - you know, in any form of agreement that we've put to them, we haven't been able to lift the wages.[99]
>
> . . .
>
> Is it fair to say that you found the biggest barrier to you being able to get your industrywide campaign up is that the employers who are subject to the low-paid authorisation in your claims aren't prepared to agree to them?---No, they wouldn't even respond to them. The first difficulty is that we couldn't get them to respond to them and then the second difficulty is that when we did try and negotiate a single-enterprise agreement with MSS, their best offer couldn't meet the BOOT.

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[94] Exhibit UV 7 at [7]

[95] Exhibit UV 5 at [10]

[96] See Exhibit UV 12 at [19]

[97] Final submissions of United Voice at pp 3-4

[98] Transcript PN 2074 – PN 2075

[99] Transcript PN 2110

> You just couldn't get any agreement for a multi-employer agreement from any of the companies that you sought it with?---That's right. Well, they wouldn't respond.
>
> You couldn't even get a response to the - - -?---We couldn't get a response.
>
> I suppose if you're not getting a response to your multi-employer bargaining proposal, it's hard to have any negotiations?---There was the multi-employer proposal that I had discussions with and got some early feedback to say, "We don't want a multi-employer agreement," so then we proposed a single template agreement and we couldn't get any response to that, and then later on following a dispute that we had with MSS, MSS proposed a single agreement and we negotiated that. It took months and months to try and negotiate; and then we went to put it through the Commission and then that became quite a complicated exercise, and so that failed, as well.[100]

[63] This evidence is not sufficiently probative of the issue of substantial difficulty bargaining at the enterprise level. The evidence demonstrates only that United Voice takes one position on wages, Secom Security takes another, and other employers also have different positions. Differing positions in bargaining is hardly indicative of a substantial difficulty. The evidence also shows that to the extent the Respondent Employers were not responsive to propositions of United Voice, this was in the context of multi-enterprise bargaining or template single employer agreement proposals put to the various Respondent Employers, which is likely to amount same thing. This is not evidence of any substantial difficulty to bargain at an enterprise level since it shows no attempt to so bargain. Ms Ryan's evidence that in respect of MSS Security, there was an agreement reached which ultimately was not approved is also not in and of itself evidence of a substantial difficulty. There is no evidence that any further attempt has been made by United Voice to bargain with MSS Security for an agreement that can be approved by the Commission.

[64] Furthermore, the Act contains mechanisms which deal with a failure to respond to proposals during the course of bargaining in a timely fashion. There is no evidence that United Voice has sought to have recourse to any of the mechanisms available under the Act to ensure that the Respondent Employers meet their good faith bargaining obligations, if it is said, as suggested by Ms Ryan's evidence, that they have not done so. That an employer is not bargaining in good faith is not, in and of itself, evidence that there is substantial difficulty in bargaining at an enterprise level. However if the failure is to be relied upon for that purpose, it seems to me at the very least, mechanisms available under the Act to rectify non-compliance with good faith bargaining obligations should first be accessed, before failure to respond to proposals is put as a substantial difficulty to bargaining at the enterprise level.

[65] For the differing reasons given above in relation to each of the Respondent Employers, I am not persuaded on the evidence that low-paid employees of the Respondent Employers have not had access to collective bargaining or that they face substantial difficulty bargaining at the enterprise level. Given that conclusion it is unnecessary for me to give consideration to whether the making of a low-paid authorisation would assist in the relevant sense, as on the basis of my conclusion, although some of the employees the subject of this application are low-paid employees, none of those employees are low-paid employees who have not had access to collective bargaining or who face substantial difficulty bargaining at the enterprise level.

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[100] Transcript PN 2039 – PN 2042

[66] Difficulties or barriers to bargaining at the enterprise level will usually only be realised once bargaining for an agreement at that level has been attempted. Only then will it be known whether those difficulties are substantial. As I have earlier indicated, in relation to some of the Respondent Employers there is no evidence of any attempt to bargain at the enterprise level. The "substantial difficulty" must be real not just imagined or even just anticipated. Imagined difficulties might prove to be just that, and anticipated difficulties might prove to be not so substantial or insurmountable, once the reality of bargaining begins.

[67] In the circumstances this is not a factor that weighs in favour of making an authorisation.

s.243(2)(b) - the history of bargaining in the industry in which the employees who will be covered by the agreement work

[68] The consideration in s.243(2)(b) requires first, that the industry in which the relevant employees work be identified. For the reasons given later in this decision, the industry is determined by reference to the industry of the employers not the vocation of the employees.

[69] The evidence about the history of bargaining in the industry is, to say the lease, scant. Both United Voice and the Respondent Employers focussed attention on the history of bargaining as it related to the Respondent Employers.[101] While this is relevant to the overall history of bargaining in the industry, it only goes to that part of the industry represented by the Respondent Employers. It seems clear that outside of the ACT there is some history of bargaining as is evident from the operative collective agreements covering Wilson Security in several states, SNP at Sydney Airport and negotiations for a national agreement involving Secom Security and United Voice. Beyond that evidence however there is no evidence from which conclusions about the history of bargaining in the industry might be drawn.

[70] United Voice relied upon the evidence of Ms Ryan[102] to establish a history of bargaining in the industry. Apart from the generalised statement at [3] of Ms Ryan's witness statement, her evidence was largely confined to the history as it related to the Respondent Employers.

[71] United Voice submitted that based on Ms Ryan's evidence the following represents that history:

- Many attempts at bargaining have been made by United voice with the Respondent Employers but without success;
- The Respondent Employers are reluctant to bargain because they perceive higher wages would make them non-competitive;
- One of the employer respondents (MSS security) has attempted to bargain with United voice in the ACT but the resultant proposed agreement was not approved by the Commission;
- Security guards in the ACT remain low-paid.[103]

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[101] See United Voice Outline of submissions at [33] – [34]; Exhibit UV 12 at [3] – [4]; Outline of submissions of Respondents at [50] – [54] and Respondent's Outline of final submissions at [82] – [87]

[102] Exhibit UV 12

[103] United Voice Outline of submissions at [34]

[72] In my view that this is not what Ms Ryan's evidence establishes. The recent history of bargaining set out at [13] – [32] of her witness statement and in the documents attached thereto[104] establishes that initial attempts at bargaining by United Voice occurred on a multi-enterprise basis and not a single-enterprise basis. As indicated above, the evidence shows that United Voice has been bargaining with MSS Security and had reached agreement with it, albeit that agreement was not approved by the Commission.

[73] Furthermore, and as discussed above, the evidence also shows that employees of Secom Security are covered by the *Secom Security Employee Collective Agreement 2009–2014*, the nominal expiry date of which has only recently passed on 30 May 2014;[105] that Secom Security has proposed a further enterprise agreement for which it sought approval from employees and in relation to which there had been bargaining from November 2012 through to August 2013 and at which United Voice were represented and involved in bargaining discussions; that the proposed agreement is a national agreement; that there seems to be a dispute or disagreement between the National Office and the ACT branch of United Voice; and that bargaining is being supervised by the Commission pursuant to a bargaining dispute notified to the Commission by United Voice on 5 May 2014.[106]

[74] There is at the very least an opportunity to continue bargaining between United Voice and each of MSS Security and Secom Security at an enterprise level for an agreement. Although there is no recent history of bargaining in the ACT with the other Respondent Employers, there is no evidence of any unwillingness of the other Respondent Employers to bargain at an enterprise level for an agreement. Indeed that those employers have operational enterprise agreements elsewhere in their businesses is suggestive that there is a preparedness to bargain and reach agreement. That those employers have not agreed to the claims made by United Voice in the ACT is not suggestive of the contrary. Little or no effort has been made by United Voice in relation to Wilson Security and SNP to bargain at an enterprise level.

[75] In the circumstances, the history of bargaining in the industry, so far as it relates to the Respondent Employers, in which the employees who will be covered by the proposed multi-employer agreement work, is not a factor that weighs in favour of granting an authorisation.

s.243(2)(c) - the relative bargaining strength of the employers and employees who will be covered by the agreement

[76] It cannot seriously be doubted that relative bargaining strength or power relationships will have an impact on outcomes in collective bargaining. Relative bargaining strength or bargaining power will likely determine the share of resources available for allocation in bargaining framework. The concept of bargaining strength and its measure is however elusive.

[77] In order to make an assessment of relative bargaining strength of the Respondent Employers on the one hand and the employees who will be covered by the multi-employer agreement on the other, it is perhaps first useful to outline some possible determinants of

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[104] Exhibit UV 12

[105] Exhibit R6 at [4] and Annexure B at clause 1.3.2

[106] Exhibit R6 at the supplementary statement of Gillani and Attachment A

bargaining strength. It seems to me that bargaining strength in the context of collective bargaining for an agreement is derived from multiple legal, economic, social, and structural sources that are able to be controlled to varying degrees by an employer on the one hand and employees on the other. Within this rubric arises questions of the degree of control over the resources that are available for allocation in bargaining that one party has compared to the other; the influences that one party can use to influence the bargaining process compared to the other; the capacity of one party to organise, mobilise and deploy the resources available to that party to maximise their influence over the bargaining; and intangible considerations such as attitudinal attributes.

[78] The dependence of one party on the other will also play a role in determining relative bargaining strength and so the more dependent one party is on the other, the lesser is that party's bargaining strength. The skills possessed by a party, the level of demand for those skills, the commitment to the bargaining relationship and information available to the parties will all play a role in determining bargaining strength and in measuring relative bargaining strength.

[79] United Voice submitted that the employees who will be covered by the multi-enterprise agreement are low skilled workers and that the level of skill bears, "as a matter of logic" an immediate relationship to their bargaining strength.[107] This proposition is overly simplistic and I do not accept that it follows as a matter of logic or otherwise. Whilst the level of skills possessed by a group of employees will doubtless be a factor in determining relative bargaining strength, it is more likely to be the case that this will arise because of demand for the skills possessed rather than the skills themselves. Just as there can be an oversupply of highly skilled workers of a particular class, so too there can be more demand for low skilled workers than the number of workers willing to supply labour to perform the low skilled work. The geographic location where the demand for particular skills is required will also be a factor, as will the mobility of members of the particular group between employers each competing for the skills required.

[80] Furthermore the notion of "low skilled" workers is in itself imprecise. As the Respondent Employers have rightly pointed out the great majority of the employees who are the subject of this application are classified at level 3 of the Security Award. The rate attached to that classification is slightly higher than the rate of pay attached to the C10 classification in the Manufacturing Award, which itself is a tradesperson or "skilled" classification. The evidence of the level of skill possessed by employees the subject of this application was by way of assertion rather than fact. No evidence was led to identify how skills are to be measured and once particular skills are identified how they are to be assessed and classified. Merely asserting that because the employees are not required to have a tertiary qualification means that they are low skilled[108] is in my view an inadequate basis for so concluding and pays no attention to the actual skills that are possessed by and required of the relevant employees.

[81] United Voice also submitted that the absence of industrial action taken in support of bargaining for an agreement in relation to the Respondent Employers is a basis from which an

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[107] Final submissions of United Voice at [4.1]

[108] Ibid at [4.3] – [4.4]

inference may be drawn as to relative bargaining strength.[109] Recourse to protected industrial action to support or advance claims made by employees in bargaining for an agreement is a legitimate mechanism recognised by the Act. However before the inference as suggested by United Voice could or should be drawn, it must first be shown that the organising or taking of industrial action was attempted. Alternatively it must be shown that there is some reluctance, inability or other impediment to taking industrial action. In this case there is no evidence that employees or United Voice sought a protected action ballot order in relation to any bargaining. United Voice has for example engaged in bargaining with MSS Security, yet there is no evidence that it sought to advance its bargaining position by seeking a protected action ballot order. Nor is there any probative evidence that there is a particular inability or impediment to employees the subject of this application taking industrial action. All that can be said presently is that no industrial action has been taken. It cannot be concluded from that fact that the absence of industrial action is indicative of low bargaining strength.

[82] Furthermore there are a number of other avenues available to United Voice and the employees the subject of this application under the Act to have bargaining commenced, facilitated or further progressed. That these avenues are available is a factor going to relative bargaining strength. There is little in the evidence that would suggest that these avenues have been properly utilised or utilised at all by United Voice or the employees the subject of this application, and so the extent to which that factor may affect an assessment of relative bargaining strength cannot presently be determined.

[83] On the whole the quality of evidence available in this proceeding from which a sensible assessment of the relative bargaining strength of the relevant employees and Respondent Employers might be made is poor, but I am prepared to assume on the basis of the material before me that on a relative basis the Respondent Employers are in a stronger bargaining position than the employees the subject of this application. On the evidence however I am unable to make any proper assessment of just how wide the gap in bargaining strength might be.

[84] In the circumstances of this case this factor lends some, although not significant, weight in support of the grant of an authorisation.

s.243(2)(d) - the current terms and conditions of employment of the employees who will be covered by the agreement, as compared to relevant industry and community standards

[85] It seems clear from the evidence that the current terms and conditions of the employees who will be covered by the multi-enterprise agreement as far as it relates to base pay, are consistent with and not generally higher than the rates of pay provided for in the Security Award. The majority of the employees are classified at the level 3 security officer classification prescribed in that award. The four on and four off roster and arrangements that seems the predominant shift pattern means that many full-time employees work in excess of 38 hours per week on a systematic and regular basis. By reason of overtime and penalty payments inherent in the roster arrangement, the actual pay received by these employees will be higher than the minimum weekly wage for the classification under the Security Award. The minimum terms and conditions set out in the National Employment Standards will also apply to these employees.

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[109] Ibid at [4.7] – [4.8]

[86] The Security Award is an industry award as is made clear by clause 4.1 of that Award. There is little by way of evidence in the proceedings concerning terms and conditions of employment other than wages but it seems clear that two of the Respondent Employers employ their employees pursuant to the terms and conditions of the Security Award whilst the other two Respondent Employers have in place agreements, which on review provide similar terms and conditions of employment to those found in the Security Award. There was no evidence about the terms and conditions of other employees in the industry who are not subject of this application, although it is noted that outside of the ACT some of the Respondent Employers are covered by operative enterprise agreements.

[87] On the basis of the evidence it seems to me that when compared to the relevant industry standards, namely the ACT security industry, there is an insufficient evidentiary basis on which any meaningful conclusion about the comparison could be reached. On the assumption that other employers in the security industry in the ACT also employ security officers pursuant to the Security Award, then all that can be said is that the employees the subject of this application are employed on terms and conditions of employment that are comparable.

[88] United Voice sought to rely upon comparisons with the terms and conditions of security officers employed directly by government as a basis for comparing the terms and conditions in the relevant industry. It relied on the UV Report prepared by Dr Houghton to make good the submission[110] that employees the subject of this application are in receipt of terms and conditions of employment that are less favourable than government employed security personnel. Although the submission may well be correct, the comparison which underpins the submissions is not the appropriate comparison to which the consideration in s. 243(2)(d) is directed.

[89] I do not accept that security officers employed by government in the ACT are employed in the security industry. Such employees are government employees and are employed in the public sector. The comparison required is not as between employees performing similar vocational functions regardless of the industry in which they are employed. Comparison is of employment conditions of the relevant employees with the employment conditions in "the relevant industry". I agree with the conclusion of his Honour the Vice President in the *Practice Nurses case* that for the purposes of making an assessment of the matters set out in s.243(2)(d) "a relevant industry or relevant industry standard is one derived from a comparison of the industry of the employers, not the vocation of the employees."[111]

[90] As to a comparison of the terms and conditions of employment of the employees the subject of this application to community standards, United Voice relied upon the excess hours worked by security officers employed by the Respondent Employers as indicative of terms and conditions of these employees that were out of kilter with community standards.[112] There can be little doubt that the regularity with which full-time employees the subject of this

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[110] United Voice outline of submissions at [42] – [43] and Exhibit UV 21

[111] [2013] FWC511 at [127]

[112] Final submissions of United Voice at [5.1] – [5.2]

application work in excess of 38 hours per week puts them beyond the maximum number of weekly hours of work prescribed by the NES.

[91] The Respondent Employers submitted that the community standard for hours of work is established by the NES, which by s.62 of the Act provides for an average of 38 hours per week plus reasonable additional hours. This is not precisely correct. The question of averaging hours of work is to be determined by the applicable modern award or enterprise agreement if that instrument so provides,[113] or in the case of award- or agreement-free employees, by agreement in writing with the employer.[114] On its face s.62 of the Act prohibits hours of work in excess of 38 unless those additional hours are reasonable. On this basis the community standards is a maximum of 38 hours per week unless additional hours are reasonable, or if there is an averaging of hours arrangement in place pursuant to an applicable award or enterprise agreement, or absent such an instrument an agreement in writing between the employer and employee, it is the applicable averaging scheme or a combination of each.

[92] The Security Award provides for an averaging of hours as follows:

> **21.1 Ordinary hours and roster cycles**
>
> **(a)** The ordinary hours of work are 38 hours per week or, where the employer chooses to operate a roster, an average of 38 hours per week to be worked on one of the following bases at the discretion of the employer:
>
> **(i)** 76 hours within a roster cycle not exceeding two weeks;
>
> **(ii)** 114 hours within a roster cycle not exceeding three weeks;
>
> **(iii)** 152 hours within a roster cycle not exceeding four weeks; or
>
> **(iv)** 304 hours within a roster cycle not exceeding eight weeks.

[93] That said there is no evidence before me on which I could properly rely to form a view one way or the other whether the additional hours worked by full-time employees the subject of this application in excess of an average of 38 hours per week are reasonable.

[94] The comparisons made in the UV Report to comparable occupations provides no assistance to the consideration required by s. 243(2)(d) as the comparisons do not speak to the terms and conditions of employment in the relevant industry nor to terms and conditions of employment by reference to community standards.

[95] As to the comparisons sought to be drawn by United Voice with the terms and conditions of employment of security officers elsewhere in Australia I accept the submission of the Respondent Employers that whilst the award rates of pay of security officers in the ACT have been less than the rate of pay received by security officers elsewhere in Australia, this was a result of transitional arrangements under the Security Award. The transition has now been completed, so there is no differential in the award rates of pay.[115]

[96] It seems to me that the minimum terms and conditions of the employees the subject of this application are in most respects no less beneficial than the minimum terms and conditions

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[113] s.63

[114] s.64

[115] Respondents' Outline of final submissions at [100]

that apply elsewhere and are the community standards. These community standards comprise the minimum terms and conditions set out in the relevant modern award and the minimum terms and conditions set out in the NES. There is nothing in the evidence from which it can be concluded that on a minimum terms and conditions comparison the employees the subject of this application are disadvantaged when compared to community standards. Furthermore there is no probative evidence, which would assist in a conclusion that the actual terms and conditions of those employees compare less favourably to the actual terms and conditions by reference to community standards.

[97] At best this consideration is neutral on the question whether an authorisation should be made.

s.243(2)(e) - the degree of commonality in the nature of the enterprises to which the agreement relates, and the terms and conditions of employment in those enterprises

[98] It is accepted by the Respondent Employers that there is a degree of commonality between their respective enterprises. That is, each operates in the security industry and provides security services as contractors to clients.[116] In the ACT the clients are mainly government clients. The legislative framework which overarches the industry applies to the enterprises.[117] In this regard, and noting that there will be differences, the Respondent Employers provide substantially similar services to clients. The Respondent Employers' enterprises do however compete both with each other and with other operators in the industry.[118] It is not in dispute that the employees employed in these enterprises carry out essentially the same kind of work.

[99] It seems to me that the major variable as between enterprises will be the operating environments in which services are delivered and work is performed and the contractual conditions under which that work is performed. So much is apparent from the variety of different locations at which employees who gave evidence in these proceedings worked,[119] and the fact that procurement of security services is determined by individual department procurement practices rather than through any central or all of government approach.[120]

[100] As is evident from my earlier discussion in this decision, the terms and conditions of employment of employees employed in the enterprises are similar but not the same. There is a mix of agreement and Security Award terms and conditions as well as variable rostering patterns and hours of work.

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[116] Ibid at [102]

[117] United Voice Outline of submissions at [47]

[118] Respondents' Outline of final submissions at [102] – [105]

[119] The security officers who gave evidence were Lisiate Lupeitu'u (Wilson Security) [exhibit U V1, transcript PN 29 – PN 363], David Sankey (MSS Security) [exhibit UV 2, transcript PN 369 – PN 591], Sami Abs (SNP Security) [exhibit UV 3, the transcripts PN 593 – PN 722], Adrian McClusky (SNP Security) [exhibit UV 4, transcript PN 733 – PN 797, Jeremy Stewart (SNP Security) [exhibit UV 5, transcript PN 820 – PN 909], Daniel Finley (MSS Security) [exhibit UV 6, transcript PN 910 – PN 978], Trevor Bennett (SNP Security) [exhibit UV 7, transcript PN 979 – PN 1057], Lorenzo D'Alessandro (SNP Security) [exhibit UV 8, transcript PN 1062 – PN 1179] and Jason MacDonald (Wilson Security) [exhibit UV 9, transcript PN 1187 – PN 1295]

[120] Respondents' Outline of final submissions at [113]

[101] The degree of commonality between enterprises the subject of this application is a factor that weighs in favour of the grant of an authorisation, however as a counterbalance appropriate regard must be had to the fact that ultimately the enterprises compete for contracts and for work. In the circumstances of this case I regard this consideration to be essentially neutral.

s.243(3)(a) - whether granting the application would assist in identifying improvements to productivity and service delivery at the enterprises to which the agreement relates

[102] This consideration requires an assessment to be made as to whether a low-paid authorisation would assist in identifying improvements to productivity and service delivery at the enterprises operated by the Respondent Employers.

[103] United Voice submitted that the Act is structured in a way to encourage productivity improvements through collective bargaining and that collective bargaining has a positive impact on productivity.[121] This submission misses the point. The consideration is not about whether collective bargaining would so assist; rather it is concerned with whether the granting of an authorisation would so assist.

[104] United Voice also submits that a reduction of staff turnover has already been identified as a productivity improvement by senior security industry managers.[122] This submission also misses the point. If that measure has been identified, it is difficult to see how the grant of an authorisation would assist in identifying that which is already apparent.

[105] United Voice also rely on the evidence of Ms Ryan who said she believes "that any resulting bargaining assists in identifying improvements to productivity and service delivery at the enterprises of the Respondents".[123] Ms Ryan does not say how this will occur or how the authorisation would assist. Her evidence is no more than a statement of belief.

[106] Moreover it seems to me that Ms Ryan's evidence is that her belief is that bargaining (not an authorisation) will achieve this result as is evident from the following evidence:

> We believe that if our application is successful we will be able to develop through bargaining, and through dialogue with clients if necessary, a number of measures to increase productivity and professionalism in the industry.[124]

[107] Ms Ryan and United Voice have presently available to them collective bargaining opportunities in respect of Secom Security and MSS Security. If bargaining is to be the vehicle through which improvements to productivity and service delivery are identified, that vehicle seems to me to be ready and waiting in respect of these two Respondent Employers. An authorisation would at best be premature. As to the remaining Respondent Employers, as I have earlier indicated there is little evidence of any effort by United Voice to collectively bargain or to use the existing mechanisms under the Act to enable bargaining to begin or to be facilitated. If, as Ms Ryan suggests, bargaining will achieve (or assist in) the identification of productivity and service delivery improvements, then that should be done. It seems to me in

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[121] United Voice Outline of submissions at [52]

[122] Ibid at [53]

[123] Ibid at [54]; Exhibit UV 12 at [50]

[124] Exhibit UV 12 at [51]

the circumstances if this case that it would be premature to issue an authorisation in order to achieve that end.

[108] In any event United Voice has failed to establish any basis upon which it could be said that the grant of an authorisation would assist in identifying improvements to productivity and service delivery in the enterprises operated by the Respondent Employers.

[109] In the circumstances this consideration weighs against the grant of an authorisation.

s.243(3)(b) - the extent to which the likely number of bargaining representatives for the agreement would be consistent with a manageable collective bargaining process.

[110] United Voice submitted that if an authorisation is granted, the resulting bargaining process would be manageable because United Voice is the only union that is able to be a bargaining representative of employees of the Respondent Employers. Furthermore, based on the number of petitions signed by security officers it is likely that United Voice will be the principal bargaining representative of the employees.[125] It also submitted that it was likely that the Respondent Employers would be represented collectively by an industry Association.[126] This last submission is contrary to the evidence.[127]

[111] It cannot be assumed that United Voice will be the only employee bargaining representative in negotiations for a multi-enterprise agreement. Ms Martha Travis, the HR/IR Manager NSW/ACT for MSS Security, suggested in her evidence that employees will likely be represented by other employee bargaining representatives and that viewed as a whole, multi-enterprise bargaining is likely to become unmanageable.[128]

[112] I do not accept that this necessarily follows. The number of employers that will be involved in bargaining for a multi-enterprise employer agreement is relatively low. It is the case that United Voice will be the only union employee bargaining representative. That other employees may wish to become involved in the bargaining through the appointment of one or more bargaining representatives is to be anticipated but I do not accept, on its own, that this will result in unmanageability of the bargaining. Any difficulties that might be encountered can be dealt with in accordance with the Act.

[113] I accept the evidence of Ms Travis that during the most recent bargaining for the MSS Security agreement there were nine employee bargaining representatives and United Voice involved in bargaining.[129] However she did not give any evidence that this led to unmanageability other than a suggestion that some employees raised an objection to the approval of the agreement.[130] This does not speak to the manageability of bargaining, and in any event, the objection taken arose after bargaining had concluded.

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[125] United Voice Outline of submissions at [55] – [56]

[126] Ibid at [57]

[127] Exhibit R4 at [60]

[128] Ibid

[129] Ibid

[130] Ibid at [40]

[114] On the whole I am not satisfied that the likely number of bargaining representatives for the multi-employer agreement would unduly impact on the manageability of bargaining. Consequently this factor weighs in favour of the grant of an authorisation.

s.243(3)(c) - the views of the employers and employees who will be covered by the agreement

[115] It is clear that the Respondent Employers oppose the grant of an authorisation and oppose becoming involved in multi-enterprise bargaining.

[116] United Voice relied upon the evidence given by employees called by it[131] as well as the petition of employees it tendered in evidence[132] as evidence that overwhelmingly employees of the Employer Respondents support the making of the authorisation in support of bargaining for a multi-enterprise agreement. For the reasons given earlier, the extent to which the petition of employees is of any probative value is to be seriously doubted. That said I am prepared to assume that the employees who signed the petition support the United Voice application for a low-paid bargaining authorisation, albeit that I cannot be satisfied that they understood what that entailed. The employees who were called to give evidence by United Voice in support of the application showed variable levels of understanding, as is evident in the cross examination, of the purpose and effect of an authorisation or of multi-enterprise bargaining.

[117] I also note that no employee from Secom Security was called to give evidence. The Respondent Employers submitted that I should draw an inference that Secom Security employees are not supportive of the application for a low-paid bargaining authorisation. I am not prepared to draw such an inference particularly as Mr Gillani, the Human Resources Manager of Secom Security, did not assert that to be the case. The closest he came was the suggestion that "Secom ACT employees had never expressed any interest in bargaining with Secom ACT"[133] and that he was not aware of any of these employees being members of United Voice.[134]

[118] On the whole I am inclined to the view, at a very general level, that a not insignificant number of employees the subject of this application support United Voice's application for a low-paid bargaining authorisation. The strength and level of that support amongst employees is not known. It must be borne in mind that very recently a significant number of employees of MSS Security voted to approve a single-interest enterprise agreement,[135] although I note that the vote was undertaken in an environment where United Voice supported the approval.[136] Beyond the very general level, the evidence would not allow me to move.

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[131] Listiate Lupeitu's (Wilson Security) [exhibit UV 1, transcript PN 29 – PN 363], David Sankey (MSS Security) [exhibit UV 2, transcript PN 369 – PN 591], Sami Abs (SNP Security) [exhibit UV 3, the transcripts PN 593 – PN 722], Adrian McClusky (SNP Security) [exhibit UV 4, transcript PN 733 – PN 797, Jeremy Stewart (SNP Security) [exhibit UV 5, transcript PN 820 – PN 909], Daniel Finlay (MSS Security) [exhibit UV 6, transcript PN 910 – PN 978], Trevor Bennett (SNP Security) [exhibit UV 7, transcript PN 979 – PN 1057], Lorenzo D'Alessandro (SNP Security) [exhibit UV 8, transcript PN 1062 – PN 1179] and Jason MacDonald (Wilson Security) [exhibit UV 9, transcript PN 1187 – PN 1295]

[132] Exhibit UV10

[133] Exhibit R6 at [16]

[134] Ibid at [15]

[135] Transcript PN 2114

[136] Ibid

[119] In the circumstances of this case I regard this consideration as neutral.

s.243(3)(d) - the extent to which the terms and conditions of employment of the employees who will be covered by the agreement is controlled, directed or influenced by a person other than the employer, or employers, who will be covered by the agreement

[120] United Voice submitted that as the security industry in the ACT in which the Respondent Employers operate is a competitive contract industry, the terms and conditions of the employment of the employees the subject of this application are influenced by the client, relevantly government clients.[137] It submitted that the value for money principal which underpins government procurement results in a determination of the successful contractor to be predominantly reliant on price.[138] It relied on the following evidence given by Professor Robyn Hardy, a retired public servant and currently Adjunct Professor at the University of Canberra with substantial experience in government procurement[139] and Peter Georgiou, the ACT Branch Manager of SNP,[140]to make good its propositions:

> 7.1 The value for money principle controls government procurement. United Voice submits that the evidence shows that value for money principle creates a confected style of competition which does not mirror the free market:
>
> Professor Hardy:
> *Is this different from how it would work in the private sector?---In the private sector they would tend not to tender, they are not compelled to tender. They would often probably ring around for a couple of quotations, that's maybe how they would do it, they might also have a set of criteria against which they would seek quotations, depending on the size of the service required. But in all probability they just would seek quotations on price.* PN 1433
>
> 7.2 When the principle is applied in service tenders to distinguish between companies of the same size, experience and knowledge the focus is placed on price (see PN1506).
>
> Professor Hardy:
> *Can I ask you just in terms of your long experience in government tenders, are you aware of any security contract that hasn't been awarded to the lowest price tenderer?---Not a security, but certainly of other tenders*. PN 1505
> *If it's the case that [two] companies get seven out of 10 in the first process, and one company is say 10 per cent cheaper on price, in all likelihood that company is going to win the contract?---Absolutely.* PN 1506
>
> Peter Georgiou:
> *Would you accept this process puts downwards pressure on the price which you can tender for?---I'm not sure if it would put the process but what I can tell you is that probably the trend for the last several years has been that tenders are being won based on price, not necessarily in one's ability, one's reference. But most contracts are won based on price.* PN 4379
>
> 7.3 Government is the largest industry in the ACT so the value for money principle controls the preponderance of the market.
>
> Professor Hardy:
> *Do you think the tender system results in government, be it the state government or ACT government or the Commonwealth, essentially controlling the wages of these types of contract workers?---Not directly,*

[137] United Voice Outline of submissions at [61]

[138] Final submissions of United Voice at [7.1]

[139] Exhibit UV 11

[140] Exhibit R 10

> *but indirectly perhaps. In places where there are large government establishments and a security requirement, it would be that the market can be set of course by very large clients always. Certainly governments tend to be very large clients for these kinds of services, and they are the ones who are commonly seeking tenders. If in Canberra we had other kinds of industries requiring security it might be different, but in Canberra, for instance, the largest industry is government, the second-largest is construction. So in that it is the largest client, it perhaps does that indirectly.* PN1439[141]

[121] United Voice also pointed to some of the evidence given by witnesses for the Respondent Employers which it was suggested was to the effect that it is not easy to pass on increases in costs to clients and so increases in costs of operations will need to be absorbed by the Respondent Employers.[142]

[122] In essence United Voice submitted that the application of the value for money principal by government in the procurement of security services in a locality such as the ACT, where government has an effective monopoly on the procurement of security services amounts to an influence on the terms and conditions of the employees the subject of this application for the purposes of this consideration.[143]

[123] The Respondent Employers submitted that simply because government clients pay a fee for services and undertake a tender process in order to obtain security services does not mean that government directs, controls, or influences the terms and conditions of employment of the employees the subject of this application.[144] The Respondent Employers also relied on correspondence from the Honourable Senator Abetz in which the Senator indicated that the Commonwealth does not exercise control over the terms and conditions of the relevant employees.[145] I have found it unnecessary to have regard to the correspondence. No witness called by the Respondent Employers suggested that government exercised any degree of control or influence or directed the Respondent Employers as to the terms and conditions of employment of the employees.

[124] There is in my view little doubt that government exercises price pressure on those wishing to tender for government work. This is not only proper but something that would be expected of government decisions, which involve the expenditure of taxpayer funds. But that fact alone is not a sufficient basis to conclude that the government or government agencies, which procure security services, control, direct or influence the terms and conditions of employment of the employees of those from whose services are procured. The government's role in procuring certain security services through a competitive tendering process is not the same as its role in the provision of funding, as in the *Aged Care case*.

[125] Furthermore there is no evidence that the government through its procurement processes or the contracts that arise requires particular terms and conditions of employment or standards of employment to be met, other than perhaps ensuring compliance with legal obligations. No evidence was led about the particular terms and conditions of the contractual arrangements governing the services provided by the Respondent Employers or how such

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[141] Final submissions of United Voice at [7.1] - [7.3]

[142] UV referred to the evidence at transcript PN 2964- PN 2965 and PN 2524 – PN 2535

[143] Final submissions of United Voice at [7.9]

[144] Respondents Outline of final submissions at [143]

[145] Exhibit R5

terms have the capacity to control, direct or influence terms and conditions of employment of employees performing those services.

[126] I am not prepared to assume without more that a competitive tendering process, even in a market where the dominant player is government, results in control, direction or influence over terms of conditions of employment. More importantly even if such an assumption would be made, without more, it is not possible to determine the extent of the control, direction or influence, or of its impact upon the actual wages and conditions of the employees concerned.

[127] In the circumstances of this case this consideration does not weigh in favour of an authorisation being granted.

s.243(3)(e) - the extent to which the applicant for the authorisation is prepared to consider and respond reasonably to claims, or responses to claims, that may be made by a particular employer named in the application, if that employer later proposes to bargain for an agreement that:

(i) would cover that employer; and

(ii) would not cover the other employers named in the application

[128] United Voice submits that it is prepared to consider all claims and that it will bargain in good faith. United Voice also submitted that it will consider all and any claims put by the Respondent Employers whether individually or as a collective.[146] There is some evidence that United Voice is prepared to do so which can be reference to its conduct in bargaining with MSS Security. That said, as I indicated earlier in these reasons, the evidence given by Ms Ryan is suggestive of a campaign by United Voice in the ACT over some significant period to engage in multi-enterprise bargaining. This does not fill me with confidence that United Voice would readily consider proposals from particular Respondent Employers that would result in a single-interest enterprise agreement.

[129] However, for present purposes, I am prepared to accept that United Voice will, if an authorisation is granted, behave in the manner suggested by this consideration. Therefore in the circumstances this consideration weighs in favour of the grant of an authorisation.

Conclusion

[130] Having taken into account each of the matters set out in ss.243(2) and (3) I am not satisfied that it is in the public interest to make the authorisation sought by United Voice. Neither party advanced any other ground on which it might be said that the public interest is enlivened so as to compel the making of a low-paid authorisation. Although I have concluded that some of the employees the subject of this application are low-paid a case has not been made out that the employees have either not had access to collective bargaining or that they face substantial difficulty bargaining at the enterprise level. For the reasons given earlier, the

[146] United Voice Outline of submissions at [66]

preponderance of the matters of which account must be taken weigh against making the authorisation sought by United Voice. Some of the considerations are neutral and those few that weigh in favour are not so significant as to result in an authorisation being warranted, much less mandated, in the public interest.

[131] It seems to me that the application is premature in that there exist opportunities to continue to bargain collectively with MSS Security and Secom Security, and real efforts to bargain with the other Respondent Employers have not been made. Moreover the case for authorisation made out by United Voice was weak. That the explanatory memorandum to the *Fair Work Bill 2008* cites the security industry, amongst others, as an example of the industries to which the low-paid bargaining provisions might be directed does not mean that a low-paid bargaining authorisation will be made in a given case. The statutory criteria must still be met. For the reasons given earlier the evidence led by United Voice in support of its application and that specifically directed to the considerations to which I must have regard fell well short of a persuasive case.

[132] I have little doubt that bargaining in the security industry in the ACT is difficult. But as the evidence in this case discloses single interest enterprise bargaining with the individual Respondent Employers is both possible and available to United Voice and the employees the subject of this application.

[133] For completeness I would observe that s.243(1) compels the making of a low-paid authorisation if I am satisfied that it is in the public interest to make the authorisation taking into account the matters in ss.243(2) and (3). It seems to me arguable on the face of s.243 that I am not precluded from making an authorisation if the public interest test is not satisfied but as the point was not argued before me it is not appropriate that I express a concluded view.

[134] The application for a low-paid authorisation is dismissed. An order giving effect to this decision is issued separately in PR555981.

DEPUTY PRESIDENT

Appearances:
E. Cresshull and S. Russell-Uren for United Voice
T. McDonald for the Respondents

Hearing details:
Canberra
2014
19, 20, 21, 22 May
15 July

Final written submissions:
United Voice 13 June 2014
Respondents 27 June 2014

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DECISION
AND
REASONS FOR DECISION

Fair Work Act 2009
s.423 - Application to suspend or terminate protected industrial action - significant economic harm etc

United Voice

v

MSS Security Pty Ltd
(B2013/1005)

COMMISSIONER CLOGHAN PERTH, 17 JULY 2013

Application to suspend or terminate protected industrial action - significant economic harm etc.

[1] On 1 July 2013, United Voice (**United Voice** or **Applicant**) made application to the Fair Work Commission (**Commission**) to terminate protected industrial action.

[2] The protected industrial action is being taken by MSS Security Pty Ltd (**Employer**).

[3] The application is made pursuant to s.423 of the *Fair Work Act 2009* (**FW Act**).

[4] The application was the subject of a hearing on 8 July 2013.

[5] The Applicant was represented by Mr Ash, Director Legal and Bargaining and evidence given on behalf of United Voice by:

- Mr P O'Donnell, Assistant Secretary, Western Australian Branch of United Voice;
- Ms C Greer, Screener, MSS Security Pty Ltd;
- Ms R Litsoev, Aviation Protection Officer, MSS Security Pty Ltd;
- Mr C Jones, Aviation Screening Officer, MSS Security Pty Ltd.

[6] The Employer was represented by Mr R Levin of Counsel and evidence given on behalf of the Employer by Mr M Cachia, General Manager Aviation, Ms R Smart, Aviation Services Manager (WA) and Ms S Pedlow, Manager Human Resources, Western Australia.

[7] At the conclusion of the hearing, I reserved my decision. This is my decision and reasons for decision.

RELEVANT BACKGROUND

[8] United Voice and the Employer are bargaining representatives for a replacement enterprise agreement to the *MSS Security Pty Limited-LHMU-Perth Airport (WA) Enterprise Agreement 2010-2012* (**2010 Agreement**).

[9] This is the fourth application by the parties since 23 May 2013. The Employer made a s.240 application to deal with a bargaining dispute. United Voice has made applications for an order that industrial action by the Employer stop ([2013] FWC 4087), for a bargaining order ([2013] FWC 4431), and this current application to terminate protected industrial action.

[10] Formal negotiations for a replacement agreement commenced on 13 December 2012. Prior to United Voice seeking a protected action ballot order on 1 May 2013, there had been seven (7) formal meetings.

[11] In support of the application for a protected action ballot order, Mr O'Donnell gave the following evidence:

> "Our members are seeking to take protected action to advance their claims with regard to a number of outstanding issues, in particular the Respondent's proposed wage increases".[1]

[12] The Commission granted a protected action ballot order on 1 May 2013 (PR536074). On 20 May 2013, the Australian Electoral Commission declared the results of the protected action ballot in which a majority of voters approved the taking of protected industrial action.

[13] On 22 May 2013, United Voice gave the Employer notice of employee claim action by its member commencing on 28 May 2013.

[14] Protected industrial action for a replacement enterprise agreement to the 2010 Agreement began on 28 May 2013.

[15] On 28 May 2013, the Employer gave notice to United Voice of employer response action commencing at the time each employee was to be given notice on 28/29 May 2013.

[16] While, in proceedings, I was not given a copy of all notices of protected industrial action, Mr O'Donnell lists in his witness statement, 15 separate instances of protected industrial action. There is one (1) instance of employee claim action, five (5) instances of employer response action and nine (9) instances of employee response action.

[17] In view of the nature of this application, it is useful to set out the episodes of employer response action. They are as follows:

- 28 May 2013: Lock out of five (5) employees until 12 June 2013.
- 1 June 2013: Lock out of additional nine (9) employees indefinitely.
- 9 June 2013: Lock out of additional 11 employees indefinitely.
- 18 June 2013: Lock out of additional one (1) employee indefinitely.
- 21 June 2013: Lock out of additional four (4) employees indefinitely.

[1] Witness statement, paragraph 26.

[18] The witnesses, Ms Litsoev and Mr Jones, have been locked out since 1 June 2013 and Ms Greer has been locked out since 9 June 2013.

[19] At the date of the application, 25 employees are locked out by the Employer indefinitely.

[20] The longest period of lock out of employees is approximately one (1) month and the shortest period is nine (9) days.

[21] In the words of Mr O'Donnell's witness statement, the application is to terminate "the Respondent's lockouts, which are currently affecting 25 employees...due to the ongoing and indefinite period of the lockout, all members locked out are **either currently facing financial harm or will be if the industrial action is not terminated as a matter of urgency**".[2]

[22] Mr O'Donnell also, and properly, gave evidence that:

> "United Voice has been providing limited financial assistance to its members who have been locked out. United Voice is no longer in a position to provide the same level of financial assistance to members. Assistance given to an employee, if provided at all, would be substantially less than was being previously provided."

[23] I now turn to consider the statutory provisions in which I must consider the facts and evidence of the application.

RELEVANT PROVISIONS OF THE *FAIR WORK ACT 2009*

[24] While the immediate concern of both parties was with s.423 of the FW Act, this particular statutory provision has to be seen in context.

[25] Section 3 sets out the objectives of the FW Act. One objective at paragraph 3(f) provides "achieving productivity and fairness through an emphasis on enterprise-level collective bargaining **underpinned** by simple good faith bargaining obligations and **clear rules** governing industrial action" (my emphasis).

[26] Section 423 falls within Chapter 3 of the FW Act. Chapter 3 is entitled, "Rights and responsibilities of employees, employers, organisations etc." For the purposes of this application, Chapter 3 deals with the rights of employees, employers and organisations in relation to protected industrial action.

[27] Part 3-3 of Chapter 3 deals with, as its title suggests, "industrial action". The "Guide" to Part 3-3 states that Division 6, in which s.423 of the FW Act can be found, "provides for FWC to make orders suspending or terminating protected industrial action for a proposed enterprise agreement **in certain circumstances**". (my emphasis)

[28] Before setting out, in detail, the "certain circumstances" in s.423 of the FW Act, it is appropriate that I recall the underlying premises of the FW Act, and general approach to protected industrial action by employees and employers in this jurisdiction. They are:

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[2] Exhibit A1 paragraph 10

- the making of enterprise agreements is **"underpinned"** by the potential to take industrial action;

- many enterprise agreements are made without the necessity to resort to industrial action;

- where the parties resort to industrial action, there are "**clear rules**" governing that action;

- subject to meeting the requirements of the FW Act, employees, employers and organisations have a **"right"** to take protected industrial action;

- it is only in **"certain circumstances"** should that **"right"** be taken away.

[29] Put very shortly, this application seeks to take away the Employers legal right to take protected industrial action. While this application deals with the employer's right to take protected industrial action, it is to be treated no differently to an application by an employer to take away the right of employees or organisations to engage in protected industrial action.

[30] I now turn to the "certain circumstances" or the particular requirements of s.423 of the FW Act.

RELEVANT STATUTORY FRAMEWORK

- **Section 423 FWC may suspend or terminate protected industrial action—significant economic harm etc.**

  Suspension or termination of protected industrial action

  (1) The FWC may make an order suspending or terminating protected industrial action for a proposed enterprise agreement that is being engaged in if the requirements set out in this section are met.

  Requirement—significant economic harm

  (2) If the protected industrial action is employee claim action, the FWC must be satisfied that the action is causing, or is threatening to cause, significant economic harm to:

  (a) the employer, or any of the employers, that will be covered by the agreement; and
  (b) any of the employees who will be covered by the agreement.

  (3) If the protected industrial action is:

  (a) employee response action; or
  (b) employer response action;

the FWC must be satisfied that the action is causing, or is threatening to cause, significant economic harm to any of the employees who will be covered by the agreement.

(4) For the purposes of subsections (2) and (3), the factors relevant to working out whether protected industrial action is causing, or is threatening to cause, significant economic harm to a person referred to in those subsections, include the following:

(a) the source, nature and degree of harm suffered or likely to be suffered;
(b) the likelihood that the harm will continue to be caused or will be caused;
(c) the capacity of the person to bear the harm;
(d) the views of the person and the bargaining representatives for the agreement;
(e) whether the bargaining representatives for the agreement have met the good faith bargaining requirements and have not contravened any bargaining orders in relation to the agreement;
(f) if the FWC is considering terminating the protected industrial action:

(i) whether the bargaining representatives for the agreement are genuinely unable to reach agreement on the terms that should be included in the agreement; and
(ii) whether there is no reasonable prospect of agreement being reached;

(g) the objective of promoting and facilitating bargaining for the agreement.

Requirement—harm is imminent

(5) If the protected industrial action is threatening to cause significant economic harm as referred to in subsection (2) or (3), the FWC must be satisfied that the harm is imminent.

Requirement—protracted action etc.

(6) The FWC must be satisfied that:

(a) the protected industrial action has been engaged in for a protracted period of time; and
(b) the dispute will not be resolved in the reasonably foreseeable future.

Order may be made on own initiative or on application

(7) The FWC may make the order:

(a) on its own initiative; or
(b) on application by any of the following:
(i) a bargaining representative for the agreement;
(ii) the Minister;
(iia) ...
(iib) ...
(iii) ...

UNITED VOICE'S CASE

[31] United Voice submits that the decision to terminate the protected industrial action involves the Commission in two discretionary decisions adopting the approach in *Schweppes Australia Pty Limited v United Voice - Victoria branch* [2011] FWA 9329 (**Schweppes**).

[32] The first discretionary decision is whether the Commission is satisfied that the protected industrial action "**is causing, or threatening to cause, significant economic harm to any of the employees who will be covered by the agreement**. That question must be determined by reference to the facts and circumstances attending the industrial action taken in support of the claims having regard to, in particular but not exclusively, the matters set out in section 423(4)".[3].

[33] The second discretionary decision flows from the first. If the Commission is satisfied that the protected industrial action is causing or threatening to cause significant economic harm to affected employees, the Commission has a further discretionary decision as to whether the industrial action should be terminated.

[34] When considering these discretionary decisions, United Voice submits that the Commission should not be concerned with the protected industrial action carried out by employees prior to or subsequent to the Employer locking out employees. The Commission should only be concerned with whether the lock out is causing or threatening to cause significant economic harm to any of the employees who will be covered by the agreement.

[35] United Voice submits that "the nature of the harm is the inability of the affected employees to derive income from their employer during the lock out".

[36] Secondly, I must have regard to, "the likelihood that the harm will continue to be caused or will be caused".

[37] Finally, I must consider "the capacity of the person to bear the harm" and in that regard the evidence of Ms Greer, Ms Litsoev and Mr Jones is demonstrative of significant economic harm.[4]

[38] United Voice, as bargaining representative, is supportive of terminating the industrial action and believes it will assist in reaching agreement on a replacement enterprise agreement.

[39] United Voice contend that the industrial action has been engaged in for a protracted period of time, and finally, the Applicant has concerns that the Employer is not meeting the good faith bargaining requirements of the FW Act.

EMPLOYER'S CASE

[40] The Employer asserts that there is no evidence, or insufficient evidence, that the protected industrial action engaged in by the Employer is causing, or threatening to cause, "significant economic harm" to any of the employees who will be covered by the agreement.

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[3] Applicant's Outline of submission

[4] Applicant's Outline of submission

[41] The Employer opposes the termination of protected industrial action.

[42] In view of the fact that the first vote on the replacement enterprise agreement is currently being conducted and does not conclude until 17 July 2013, there is no basis for the Commission to find that "there is no reasonable prospect of agreement being reached pursuant to paragraph 423(4)(f)(ii) of the FW Act".

[43] The protected industrial action is not "protracted".

[44] The Commission cannot be satisfied that "the dispute will not be resolved in the reasonable foreseeable future pursuant to paragraph 423(6)(b) of the FW Act".

[45] Further, the use by the Employer of a lock out increases, not decreases, the prospect of an agreement being reached.

[46] Even if the Commission is satisfied that the industrial action being engaged in by the Employer is causing, or threatening to cause, significant economic harm, the dispute is protracted and it will not be resolved in the reasonable foreseeable future, the Commission should exercise its discretion to dismiss the application as being premature, inappropriate and inconsistent with the scheme of the FW Act.

[47] Finally, the Employer submits that termination of protected industrial action should be used as a last resort, "perhaps after many months of protracted industrial action and a number of votes have been held on the proposed agreement"[5].

CONSIDERATION

[48] I indicated earlier in these reasons for decision that many enterprise agreements are made without resorting to industrial action. The freedom to choose whether to take protected industrial action is a matter for bargaining representatives of employees to be covered by a replacement enterprise agreement and, subsequently, employees themselves.

[49] The FW Act is not judgemental about the right to take protected industrial action except where the requirements are not met. The party taking protected industrial action is free to act in accordance with their choice.

[50] In this particular dispute, there is no argument from the Employer that United Voice has exercised its right to take protected industrial action incorrectly.

[51] Following on members of United Voice having exercised their right to take employee claim action, the Employer has exercised its right to take employer response action. Finally, the employees have responded to the Employer's response action, with employee response action.

[52] The Commission is not concerned, in this application, whether the parties have made the right choice regarding protected industrial action but whether the Employer's freedom to exercise employer response action should be terminated in accordance with the FW Act.

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[5] Employer's outline of submission.

[53] I agree with Mr Ash for United Voice that that decision can only be determined by reference to the facts and circumstances attending the industrial action.

[54] Subsection 423(1) of the FW Act is the "entry" into the provision of s.423 and provide that the Commission may make an order "terminating protected industrial action for a proposed enterprise agreement that is being engaged in **if the requirements set out in this section are being met**" (my emphasis). In my view, that means all of the requirements or conditions in s.423 have to be met, for an order to be made.

[55] The first requirement is that of "**significant economic harm**" as set out in the subheading to sections 423(2), (3) and (4) of the FW Act.

[56] Subsection 423(2) is not relevant as the application is not referring to the termination of employee claim action.

[57] Subsection 423(3) provides that if the application is for an order relating to termination of employer response action, the Commission:

> "must be satisfied that the action is causing, or is threatening to cause, significant economic harm to any of the employees who will be covered by the [proposed replacement] agreement."

[58] I consider the legislative term in subsection 423(3) of the FW Act consists of two conditions, one of which must be satisfied for the requirement to be met. The conditions are:

- the employer response action is causing significant economic harm to any employee; or
- the lock out is threatening to cause significant economic harm to any employee.

[59] In arriving at a determination of whether the Commission can be satisfied that one of the above conditions exists, it is necessary to consider the factors in paragraphs 423(4)(a)-(g) of the FW Act.

FACTORS RELEVANT TO WHETHER PROTECTED INDUSTRIAL ACTION IS CAUSING OR THREATENING TO CAUSE SIGNIFICANT ECONOMIC HARM

s.423(a), (b) and (c) Source, nature, degree and capacity of person to bear economic harm

[60] The factors in paragraphs 423(4)(a), (b) and (c) of the FW Act can be described as economic in nature. They deal with the source, nature, degree and capacity of the person to bear the harm or economic consequences of the lock out.

[61] The source and nature of the economic harm is, without dispute, the loss of wages as a result of employees being locked out.

[62] The degree of the economic harm will vary from employee to employee.

[63] For the purposes of privacy, I intend to consider the witness evidence relating to economic harm collectively.

[64] Firstly, all witnesses agreed that they were aware of and had read the Employer's "flyer" which reads:

> "MSS Security may respond to industrial action by locking out those employees who engage in industrial action for a period of time without pay, up to and including "indefinitely", until an agreement is reached. For example, we could refuse to allow you to work for the next 7 days and you would not be paid for that period."[6]

[65] Secondly, all witnesses agreed that taking industrial action would most likely lead to being locked out by their employer.

[66] Third, all the witnesses agreed that the purpose of taking the industrial action was to put pressure on the Employer to improve its offer for the replacement enterprise agreement.

[67] Fourth, all the witnesses had access to a credit card. One witness paid off the card as and when it became due. Another witness had an amount of approximately $600 owing and another gave evidence that they were living off their credit card.

[68] Fifth, all witnesses had mortgages in which the amounts owing varied Equity in their homes ranged from almost 100% to 50%.

[69] Sixth, as expected, the witnesses' financial circumstances varied from individual to individual.

[70] All the witnesses preferred not to be in debt whether to family or friends, as a result of being locked out and receiving no income. In particular, the witnesses had not, and did not want, to go to their financial institution or access a redraw facility on their mortgage.

[71] In summary, the witnesses considered that they had made the right decision to take industrial action knowing that the consequences would most likely lead to being locked out, loss of wages and harm to their current financial situation.

[72] This damage to the witnesses' financial situation has been mitigated by support from others including United Voice. However, as to be expected, circumstances varied from individual to individual. Unexpected expenses add a further burden in managing any financial circumstances.

[73] The witnesses' evidence would not come as a surprise to persons involved in industrial relations. The ability to bear the economic reality of having no wages, due to being locked out by the employer, has a multiplicity of individual variables, and no uniformity, except the loss of income.

[74] In these circumstances of employees being locked out, and dissimilarity of the capacity to bear the harm, the critical question for the Commission is whether there is significant economic harm.

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[6] Exhibit R1

[75] In *National Tertiary Education Union v University of South Australia* [2010] FWAFB 1014 (**NTEU**) a Full Bench of the then Fair Work Australia found that:

> "[8] Within the scheme of the Act, the powers in relation to the suspension or termination of protected industrial action are intended to be used in exceptional circumstances and where significant harm is being caused by the action. This is clear from the *Explanatory Memorandum to the Fair Work Bill 2008*:
>
> > "The Bill recognises that employees have a right to take protected industrial action during bargaining. These measures recognise that, while protected industrial action is legitimate during bargaining for an enterprise agreement, there may be cases where the impact of that action on the parties or on third parties is so severe that it is in the public interest, or even potentially the interests of those engaging in the action, that the industrial action cease — at least temporarily.
> >
> > It is not intended that these mechanisms be capable of being triggered where the industrial action is merely causing an inconvenience. Nor is it intended that these mechanisms be used generally to prevent legitimate protected industrial action in the course of bargaining." [paras. 1708-1709]
>
> [15] Whether in a particular case the exceptional circumstances for the making of an order suspending or terminating protected industrial action under s.424 of the Act have arisen will be a matter to be determined on a consideration of all the circumstances and having regard to the evidence and submissions before FWA."

[76] While that decision involved an appeal against a Decision of SDP O'Callaghan in relation to an application pursuant to s.424 of the FW Act for suspension of protected industrial action, I consider the views of the Full Bench pertinent regarding the operation of terminating industrial action pursuant to s.423 of the FW Act.

[77] The approach in NTEU was followed by the Full Bench in *Tyco Australia Pty Limited T/A Wormald v CEPU* (**Tyco**) [2011] FWAFB 1598.

[78] The Full Bench in *Construction, Forestry, Mining and Energy Union v Woodside Burrup Pty Ltd (First respondent) and Kentz E & C Pty Ltd (Second respondent)* (**Woodside**) [2010] FWAFB 6021 referred to NTEU and added:

> "[43] Just as that Full Bench considered that the power in s.424 was intended to be used only in "exceptional circumstances", we consider that the power in s.426 is likewise intended only to be used in exceptional circumstances. That outcome is determined by a proper construction of the expression "significant harm' and also by a proper appreciation of when it will be "appropriate" to make an order within the meaning of s.424(5). It is also consonant with the approach taken by the majority of the Full Court of the Federal Court in relation to s.170MW of the Workplace Relations Act 1996 in *Re Polites; Ex parte Construction, Forestry, Mining and Energy Union*[7] and paragraphs 1709 and 1728 of the Explanatory Memorandum in particular.
>
> [44] When regard is had to context of the FW Act as a whole and to the explanatory memorandum, the expression "significant harm" in s.426(3) should be construed as

[7] (2002) 117 FCR 212 per Lee and Madgwick JJ esp. at [54]

> having a meaning that refers to harm that has an importance or is of such consequence that it is harm above and beyond the sort of loss, inconvenience or delay that is commonly a consequence of industrial action. In this context, the word "significant" indicates harm that is exceptional in its character or magnitude when viewed against the sort of harm that might ordinarily be expected to flow from industrial action in a similar context. In this way, an order will only be available under s.426 in very rare cases, as contemplated by the Explanatory Memorandum. It follows that it will not, of itself, be sufficient that the harm, viewed in isolation, can be characterised as "substantial". Substantial harm to third parties is a common consequence of effective industrial action. Unless the harm is out of the ordinary then suspension would [be] contrary to the legislative intention that suspension should not be able to [be] used generally to prevent legitimate protected industrial action in the course of bargaining. In assessing whether there is "significant harm" context is also important. A particular quantum of financial loss may constitute "significant harm" in one context but not in another."

[79] These decisions have been followed by individual members of the Commission in *Prysmian Power Cables and Systems Australia Pty Ltd v AMWU* [2010] FWA 9402, *G4S Custodian Services Pty Ltd v Health Services Union of Australia (Vic No 2 Branch)* [2011] FWA 5902, *Toyota Motor Corporation Australia Ltd v AMWU and CEPU* [2011] FWA 6268.

[80] While all the above decisions of the Commission (with the exception of Schweppes which was described as novel) involved applications by employers relating to protected industrial action by employees, I am unable in this application to determine any good reasons to depart from the statutory interpretation set out in the above decisions generally, although they involve a variety of applications under different sections of Division 6 of Part 3-3 of the FW Act.

[81] Notwithstanding the scheme of the FW Act in relation to the protected industrial action, the Commission needs to be satisfied that the lock out has led to significant economic harm.

[82] The word "significant" means "of considerable amount or effect or importance, not insignificant or negligible" according to the Australian Concise Oxford Dictionary. The sense of importance of the word "significant" can be gauged by the fact that it was first recorded in the English language in Daniel Defoe's *A New Voyage Around the World (1725)* (Chambers Dictionary of Etymology). In his book, Defoe uses the word "significant" to describe the newly found straights of Magellan providing a natural passage between the Atlantic and Pacific oceans.

[83] While many words have acquired a meaning well beyond what they originally possessed, the word "significant" has generally retained its understood definition of exceptional, momentous or telling.

[84] I now turn to the remaining factors in s.423(4) of the FW Act and begin with s.423(d).

s.423(d) Views of the person and the bargaining representatives for the agreement

[85] Mr O'Donnell gave evidence that:

> "I believe that terminating the industrial action at this time will allow the parties a better environment to consider proposals and greater opportunity to negotiate an outcome in a more timely manner."[8]

[86] While much of Mr O'Donnell's cross examination focused on United Voice's contribution to locked out members in the future, and the profile of the various groups of employees, the substance of his evidence relating to the application was that employees who have been locked out are experiencing "financial hardship"[9] or "either currently facing financial harm, or will be, if the industrial action is not terminated as a matter of urgency"[10]. Notably, Mr O'Donnell does not use the term "significant economic harm".

[87] Mr Ash, for United Voice, relies upon the witness evidence to support the proposition that the requirement of "significant economic harm" is being met pursuant to s.423 of the FW Act[11].

[88] Alternatively, Mr Ash relies upon witness evidence, to support the position, "that they have limited capacity to bear the harm, particularly if it continues for a longer period of time"[12]. However, witness evidence focussed upon the present circumstances of the employees and not on the future. I consider it reasonable to conclude that the longer a person is without income the greater the harm but the witness evidence clearly indicated that the same employees have capacity to offset their loss of income with access to cash, but are unwilling to do so. That is a decision the employees have made themselves but I would be remiss in not considering that decision as part of the capacity to bear that harm.

[89] The Employer, as a bargaining representative, opposes an order terminating the Employer's protected industrial action for the reasons I have outlined in paragraphs [40] to [47].

s.423(f) Inability to reach agreement and there is no reasonable prospect of agreement being reached

[90] The parties are in agreement that they have reached an impasse or stalemate. For that reason, the Employer has put out to ballot its preferred enterprise agreement. Whether the employees approve the proposed enterprise agreement is a matter of speculation. However, an impasse is not unusual in negotiations.

[91] Conflict is inherent in negotiations and there is no fixed set of rules for resolving that conflict when it reaches an impasse. However, the Commission is well populated with enterprise agreements that have experienced an impasse or stalemate. For this reason, the "bar" for the Commission to be satisfied that the parties are genuinely unable to reach

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[8] Exhibit A1

[9] Transcript PN127

[10] Exhibit A1

[11] Transcript PN763

[12] Transcript PN767

agreement or there is no reasonable prospect of agreement, should be relatively high. If not, such an assertion would be self serving and at odds with past practical experience.

s.423(g) Promoting and facilitating bargaining for the agreement

[92] It would be unusual for an applicant to seek an order for the termination of a lock out and not contend that it would achieve the objective of promoting and facilitating bargaining for an agreement. United Voice is no exception.

[93] United Voice applied for, successfully, the right to take protected industrial action under the FW Act. The purpose of taking that industrial action is to encourage the Employer to improve its offer on the proposed enterprise agreement by inflicting harm. The Employer has reciprocated and has taken its own protected industrial action for the purposes of getting employees to accept its arguments for the proposed enterprise agreement which incurs economic harm to the employee.

[94] The Fair Work Bill 2008 Explanatory Memorandum does not provide any assistance to the Commission in the statutory interpretation of this factor in s.423(4) of the FW Act.

[95] In my view, what is necessary to take into account in this factor is that notwithstanding the lock out may cause economic harm, is it promoting and facilitating bargaining for the replacement agreement.

[96] The evidence I have in these proceedings is that since the commencement of the lock out on 28 May 2013, United Voice and the Employer have: maintained a verbal and email dialogue; conducted bargaining meetings; provided draft clauses and the Union has reduced its claims. I should note that some of these actions have occurred after the Employer made the decision to put its offer on a replacement agreement to ballot.

[97] The empirical evidence is that industrial action by the Employer generally has not impeded bargaining. In making this observation, I note that neither party has made concession on some key terms.

[98] I now move to subsection 423(4) and (5) of the FW Act.

s.423(5) Harm is imminent

[99] If I find that the lock out, at this time, is not causing significant economic harm, it is necessary to consider whether the potential of the lock out continuing beyond 17 July 2013 will result in that harm being imminent. The short answer is no. I have no evidence that significant economic harm is imminent for the three employees who were witnesses. It is not the role of the Commission to make assumptions in the absence of evidence. While it is obvious that there will be a financial impact on employees who are not receiving an income, I had no evidence which I could be positively satisfied that would lead me to the view that employees would transfer from a state of financial hardship to one of experiencing significant economic harm.

s.423(6) The industrial action is protracted and the dispute will not be resolved in the reasonably foreseeable future

[100] As a matter of fact the protected industrial action commenced on 28 May 2013 and this application was made on 1 July 2013. It is a matter of fact that the longest employees subject to this application were locked out is since 1 June 2013 and the shortest being 21 June 2013.

[101] Not unexpectedly, the parties' views differed on whether the lock out was protracted or not.

[102] United Voice relied upon the statement of Cargill C in *Prysmian Power Cables and Systems Australia Pty Ltd v NUW, CEPU and AMWU* (**Prysmian**) where she states:

> "[99] There is little guidance as to the meaning of "protracted period of time". Ultimately it is a subjective decision to be made in the context of a particular matter. Although minds will certainly differ on this point, I am satisfied that the present period of industrial action has been protracted."

[103] The context in Prysmian was an application by the employer to terminate a complete withdrawal of labour by 206 production employees for a period of six weeks. From commencement of the strike, there had been no production at the employer's premises. Notwithstanding these circumstances, Commissioner Cargill dismissed the employer's application because she was not satisfied that the dispute would not be resolved in the reasonably foreseeable future.

[104] The context of this application can be distinguished from Prysmian. The period of industrial action is at most one month at the time of the application and at the time of the ballot approximately six weeks. Further, approximately one-quarter of employees have been locked out, and for some, it only commenced on 21 June 2013.

[105] The word "protracted" has the meaning for the Employer of "lasting for a long time or longer than expected", "extended and 'continuing for a long time, especially longer than is normal or necessary". No dispute can be taken with those definitions.

[106] The difficulty with the word "protracted" is that if approached by reference to absolutes, that is, number of days or weeks, it ignores the mental element. I have no doubt that for those employees who have been locked out since 1 June 2013, the period of time is protracted. However, if the Employer was meeting some of the employees' demands, the period of time would be described as "productive".

[107] Notwithstanding the above difficulties with what is meant by protracted, the word "and" in s.423(6) of the FW Act should be used in its ordinary conjunctive sense. Accordingly, it is necessary for the lock out to be both "protracted" and that the dispute will not be "resolved in the reasonably foreseeable future".

[108] In the "reasonably foreseeable future", the employees will cast a vote on the Employer's proposed enterprise agreement. Further, I have evidence that due to the nature of the dispute, the views of employees are being articulated more clearly. Finally, in evidence, that was not contested, a similar agreement in Victoria which was approved by the

Commission on 1 July 2013 required three (3) ballots before a majority of employees approved the proposed agreement.

[109] I also note that the Victorian agreement contains a clause which states that:

> "United Voice and MSS Security have an excellent relationship, founded on principles of commitment to a quality security industry, cooperation and respect for freedom of association". (subclause 5.1)

[110] The Victorian enterprise agreement contains the mutual recognition of United Voice as the "leading voice for security officers" and MSS as the "leading employer and contractor" in the Victorian contract security industry.

[111] Finally, I note that United Voice has been able to reach agreement, over a number of years, in multiple enterprise agreements with employers of security officers, including the Employer, at Perth Airport. I have observed nothing in these proceedings which would indicate that this practice will not continue in the reasonable foreseeable future.

CONCLUSION

[112] Having considered the evidence of the witnesses, the scheme of the FW Act as it relates to protected industrial action, the right of the employer to lock out employees and the plain and ordinary meaning of "significant", and the principles set out in NTEU and Woodside, I am not satisfied that the employees are experiencing significant economic harm with respect to the factors in s.423(4) of the FW Act.

[113] Further, I am not satisfied that "the dispute will not be resolved in the reasonably foreseeable future" irrespective of whether it is considered "protracted" or not in accordance with s.423(6) of the FW Act.

[114] Finally I have no evidence, and cannot be satisfied, that significant economic harm is imminent, or immediate, because of the potential of the lock out to continue, beyond 17 July 2013 pursuant to s.423(5) of the FW Act.

[115] For the above reasons, I am not satisfied that the requirements in s.423 of the FW Act have been met such as to enable me to exercise my discretion to terminate the employer response action. For these reasons, the application will be dismissed.

[116] I now turn to two further issues raised and requiring reasons before concluding this Decision and Reasons for Decision.

ss.596(2) LEGAL REPRESENTATION

[117] At the commencement of proceedings, Mr Ash, on behalf of United Voice, objected to the Commission granting permission for the Employer to be represented by a lawyer. The Commission may grant permission for a person, in this case, MSS Security Pty Ltd, only if one or more of the requirements in paragraphs 596(2)(a), (b) or (c) are met. Notwithstanding that one of the requirements may be met, it is not automatic that permission to appear should be granted; is still a matter for the Commission's discretion.

[118] Section 596(2) is as follows:

> (2) The FWC may grant permission for a person to be represented by a lawyer or paid agent in a matter before the FWC only if:
>
> (a) it would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter; or
> (b) it would be unfair not to allow the person to be represented because the person is unable to represent himself, herself or itself effectively; or
> (c) it would be unfair not to allow the person to be represented taking into account fairness between the person and other persons in the same matter.
>
> Note: Circumstances in which the FWC might grant permission for a person to be represented by a lawyer or paid agent include the following:
>
> (a) where a person is from a non-English speaking background or has difficulty reading or writing;
> (b) where a small business is a party to a matter and has no specialist human resources staff while the other party is represented by an officer or employee of an industrial association or another person with experience in workplace relations advocacy.

[119] Mr Ash submitted that: the application was not complex; there was no unfairness as the Employer has in-house human resources person whom could efficiently and effectively take carriage of the case.

[120] Mr Ash took me to the decision in *G & S Fortunato Group Pty Ltd v J Stranieri* (**Fortunato**) [2013] FWCFB 4098 and the Explanatory Memorandum.

[121] It should be noted that in Fortunato, the decision states, "**It was conceded** [by the Employer] that there was no particular complexity about the appeal and that the matters in **paragraphs 596(2)(b) and (c) did not arise** in the circumstances of this matter." (my emphasis)

[122] As I have already indicated, this is the fourth application dealing with this dispute. Of the previous three (3) applications, the Employer has been represented by the same lawyer on two occasions - no objection to Mr Levin representing the Employer was made on those occasions.

[123] I consider this application more complex than the previous two applications. Further, given the complexity of this application, legal representation enabled the matter to be dealt with more efficiently - for which I was grateful. Finally, while not entirely relevant, I note that in Schweppes and Prysmian to which Mr Ash referred to in his submissions, the unions involved were represented by a lawyer. While this is not, of itself, demonstrative of complexity, it is indicative, in my view, of the manner in which those parties viewed the necessity of having counsel.

[124] With respect to paragraphs 596(2)(b) and (c), it is unnecessary to examine the criterion in detail but at some time in the future, a party to proceedings in the Commission will claim

that it would be unfair to not allow them legal representation on grounds of "effectiveness" prior to the application being heard. However, that will be a matter for another day.

[125] Having considered Mr Ash's submission, the circumstances of the dispute, the nature of the application and the above consideration, I granted permission for Mr Levin to appear on behalf of the Employer.

SUSPENSION OF INDUSTRIAL ACTION BY EMPLOYER

[126] Without notice to the Employer, United Voice in its closing submission, put the proposition that if the Commission was not prepared to terminate the Employer's protected industrial action, the Commission should consider suspending the lock out until the declaration of the ballot on the Employer's proposed enterprise agreement.

[127] The Employer objected to such a proposition.

[128] On transcript, I informed Mr Ash that I was not prepared to agree to such a request. The simple facts are that the application, written and oral submissions and evidence were all based on termination of the lock out. In such circumstances, it would have been inappropriate and unfair to consider such a proposition at such a late time in the proceedings.

[129] An Order dismissing the application is issued conjointly with this Decision and Reasons for Decision.

COMMISSIONER

Appearances:

Mr W Ash on behalf of the Applicant.

Mr R Levin of counsel for the Respondent.

Hearing details:

2013:
Perth,
8 July.

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Second Reading

Mr BURKE (Watson—Minister for Employment and Workplace Relations, Minister for the Arts and Leader of the House) (09:09): I move:

That this bill be now read a second time.

For nearly 10 years, wages were kept low as a deliberate design feature of the previous government's management of the economy.

Insecure work was encouraged, with no regard to the households crying out for security.

Institutions were established, and appointments made, with the intention of increasing conflict rather than bringing people together.

The introduction of this bill is about making a choice.

- A choice to get wages moving and end the era of deliberate wage stagnation.
- A choice to act to close the gender pay gap and take long-overdue steps to put gender equity at the heart of our workplace laws.
- A choice to improve job security—and
- A choice to wind up institutions which were established with a political agenda to promote conflict.

At a time when the pressures of global inflation are hitting every household, our workplace laws are simply not up to date.

Cost of living is about the gap between income and prices. No-one can seriously claim to care about the cost of living if they support continued wage stagnation. Today, inflation is running at 7.3 per cent and wages are at 2.6 per cent. Every day the impact of a decade of wage stagnation is felt by households trying to make ends meet.

The urgency of getting wages moving is most acute in feminised industries. The gender pay gap still sits at an unacceptable 14.1 per cent.

For a decade we were told low unemployment would create the hydraulic pressure which would push up wages. We now have sustained low unemployment. Yet wage growth remains unacceptably low. The hydraulic pressure is there, but there are leaks in the pipes. This bill starts to plug those leaks, so wages can start moving again.

To promote job security, to close the gender pay gap, to get wages moving—we need to change the law.

In the design of these reforms, we have deliberately focused on the needs of lower-paid and feminised workforces.

Loopholes which have hindered job security and wage growth have appeared in the Fair Work Act over the past decade.

Years ago, job security was simply defined across the economy as the difference between being a casual or a permanent employee. Job insecurity now has many faces. We see it in the gig economy, labour hire, new forms of insecurity for part-time employees, and rolling fixed-term contracts which effectively amount to a permanent probation period for employees. We see it where casual loading has not been a sufficient incentive to promote secure jobs.

All legitimate forms of employment have their place. All will continue to exist. But where there is abuse, we must curtail it. Where loopholes have arisen in legislation, we must close them.

Despite a near-record low unemployment rate of 3.5 per cent, inflation is fast outpacing wages growth and workers are falling behind.

Businesses are struggling to attract workers, and to retain those they already have.

Australia's current workplace relations framework is not working to deliver a fair go for workers, or productivity gains for employers.

The Albanese Labor government wants to see a strong economy that delivers for all Australians. We want to see more workers in good jobs: jobs with security, fair pay and proper protections. We want workers to have a pathway to a better life and businesses to thrive.

For this, we need fair, effective and up-to-date laws.

Australians have asked for change. They have asked for less conflict and fairer pay. They have asked for a better future for themselves, and for their families.

It will take time for this bill to result in improvements in workplaces and pay increases in the pockets of Australians, so we cannot waste a moment in passing it.

My department and I have consulted closely with businesses and unions in the design of these reforms. As a result of that ongoing consultation, further government amendments may be made to this bill. Discussions are well advanced with stakeholders as to how we clarify certain issues, including how to best ensure that (1) businesses and workers who already successfully negotiate single-enterprise agreements can continue to do so; (2) voting processes in relation to multi-employer agreements are fair, democratic and workable and occur at the enterprise level; (3) agreements cannot be put to a vote of employees without the agreement of employee organisations who are bargaining representatives; (4) a reasonable period of good-faith bargaining occurs before either party can resort to arbitration; (5) businesses competing on quality, on innovation and on product and service offerings, rather than wages and conditions, are able to continue to do so; and, finally, that multi-employer bargaining is not extended to industries in which it is neither appropriate nor necessary—in particular, commercial construction.

I'll now outline in detail the measures in the bill.

Gender equity

Australian women are among the most educated in the OECD; and are participating in the workforce in significant numbers. Yet over the period from 1983 to date, successive governments have only been able to close the gender pay gap by 5.1 percentage points.

Some of the most undervalued workers in our country are workers in female-dominated industries. Many are the very workers who put their health and safety on the line to guide us through the shutdown period of the pandemic. Workers in health care, aged care, disability support, early childhood education and care, the community sector, and other care and service sectors.

Work in these industries is undervalued because of unfair and discriminatory assumptions about the value of the work and the skill required to do the job.

This undervaluation is one of the biggest causes of the gender pay gap and our reforms take a number of key steps to address it.

Objects

Gender equity is at the very heart of our government's agenda; and this bill will place gender equity at the very heart of our Fair Work system—where it belongs.

Under our reforms, gender equity will be included as an overarching object of the Fair Work Act, in the modern awards objective and in the minimum wages objective.

These amendments will embed gender equity as a central goal of our workplace laws; and set a clear expectation that the Fair Work Commission must take into account the need to achieve gender equity when performing all its functions—when setting the minimum wage; when considering changes to awards; and in all other decisions it takes.

Pay equity principle and expert panels

It shouldn't be impossible for working women in undervalued industries to win a pay equity claim before the commission; but currently it is.

Our laws have placed insurmountable hurdles in the path of workers seeking equal pay over many years. Our early childhood educators, for example, were unable to win a pay rise in 2021 because they were unable to find an appropriate male comparator group. Because there is no male comparator. It's an impossible task.

The work of our early childhood educators is essential to the successful development of our children and our nation. It should be valued on its own merits, free of discriminatory assumptions based on the gender of the people who perform the work.

Over the years there have been many important milestones in the long fight to win equal pay for women: the national minimum wage and equal pay cases of 1969 and 1972; the passage of the Sex Discrimination Act in 1984; the establishment of the Workplace Gender Equality Agency in 1986, and improvements in the Fair Work Act in 2009.

The reforms in this bill are intended to reverse decades of unfair outcomes for women workers, by removing the need to find a male comparator and making clear that sex discrimination is not necessary to establish that work has been undervalued.

To support these changes to our laws, we've announced $20 million in the budget to establish a Pay Equity Expert Panel and a Care and Community Sector Expert Panel, with a dedicated research unit, in the Fair Work Commission.

These changes are further complemented by our reforms providing greater access to bargaining for lower-paid and feminised sectors through the supported bargaining stream, which will help workers to negotiate better pay and conditions for themselves.

The historic reforms in this bill are the result of decades of courageous and tireless campaigning by women workers and their unions, gender equity advocates and academics—some of whom are with us in the chamber today—who have simply refused to accept that certain types of work should be valued less by our society, simply because it is work done by women.

From the public servant Louisa Dunkley campaigning for and winning equal pay in 1895; to the factory worker Zelda D'Aprano chaining herself to the doors of Melbourne's Commonwealth building in October of 1969; to the historic victory of the Australian Services Union winning equal pay for community sector workers in 2012.

I also acknowledge the work of so many of my colleagues who have championed this reform over many years: the Minister for Women, Senator Katy Gallagher; her predecessor the member for Sydney, who made a number of the election commitments that are in this bill; and many other members of caucus—past and present.

I also acknowledge the leading work of the states, including Queensland, in developing pay equity principles on which provisions in our bill are closely modelled.

I recently visited an early childhood education centre in Brunswick East, where the director, Jane (who I understand is with us today) told me she has spent 40 years in the industry. She is incredibly passionate about her job, but struggles constantly with staffing shortages due to inadequate pay and conditions in the sector. She has been waiting for a lifetime for the essential work of her and her staff to be properly valued. She should not have to wait any longer.

Pay secrecy

Workers who want to have a discussion about pay equity at work should not be prohibited by their employment contracts from doing so.

This bill will prohibit pay secrecy clauses, bringing transparency to workplaces.

Critically, this bill protects workers by saying if you want to tell someone how much you are paid, that's up to you.

Prohibiting sexual harassment

Stamping out workplace sexual harassment is central to achieving safe, productive and gender equitable workplaces.

Under the previous government's laws, there was no express prohibition on sexual harassment under the Fair Work Act; and stop sexual harassment orders were only available to some workers.

We will fix these issues.

Our changes mean that whether you're a nurse in Tamworth, a plumber in Perth, or an office worker in Canberra, you can ask the Fair Work Commission to deal quickly and effectively with your complaint of sexual harassment in the Fair Work Commission—whether the harassment occurred in the past or is ongoing, or both. The new provisions also allow the Fair Work Ombudsman, to investigate and assist with compliance.

These changes send a clear message that workplace sexual harassment will not be tolerated.

These reforms fully implement recommendation 28 of the *Respect@Work* report, complementing the Attorney-General's proposed reforms to the Sex Discrimination Act. This bill means that all legislative changes recommended by Respect@Work are now before the parliament.

This bill also strengthens the Fair Work Act's antidiscrimination protections, bringing it into line with other Commonwealth antidiscrimination laws.

Flexible working arrangements

Too many Australians are struggling to manage their work and care responsibilities. This is damaging families, communities, and our national economy.

Women still carry the main responsibility for caring work; and are more likely to request flexible work arrangements. In order to access the flexibility they need to manage work and care, they are often forced to drop out of the workforce, or to take lower-paid or less secure employment. This plays a major role in widening the gender pay gap. We want families to have better access to flexible work, so they can better share and manage their caring responsibilities.

Under our current laws, an employee can ask for flexible work, but if their employer says no, they've got nowhere to go.

The problem is starkly illustrated by the recent report by the Social Policy Research Centre at the University of New South Wales, commissioned by the Shop, Distributive and Allied Employees Association (SDA), called *Who*

cares?, which outlines the damaging collision between work, family and caring arrangements for Australia's retail, fast food and warehousing workers.

The essential contribution of these workers meant we could all access food and other necessities during lockdown periods of the pandemic.

Yet the harrowing stories in this report show these workers are stressed out, exhausted and barely able to manage their family responsibilities. Alarmingly, the report shows that the children of workers in this industry are struggling to access early childhood education and care; essential for their development and future success.

These types of stories are unacceptable.

The findings of *Who cares?* are supported by the Senate Select Committee on Work and Care, chaired by Senator Barbara Pocock, which finds that 'current workplace laws and cultures are not designed to recognise or support working carers, with the needs of people balancing work and care being easily ignored or overlooked'. The interim report recommends access to flexible work as a key area for reform.

Flexible working arrangements not only help parents and carers but also provide job security and an economic lifeline to employees with disability, older Australians, and workers experiencing family and domestic violence.

We will make two key changes to the law to support flexible work.

We will bring employers and employees together in workplaces in the first instance to have a genuine discussion about flexible work.

And if agreement can't be reached at the workplace level, we will give the Fair Work Commission the power to resolve the dispute.

Job security

Fixed term contracts

The number of workers on fixed term contracts has increased by over 50 per cent since 1998. More than half of all employees engaged on fixed term contracts are women; and more than 40 per cent of fixed term employees have been with their employer for two or more years.

This bill will limit the use of fixed term contracts for the same role beyond two years or two consecutive contracts, whichever is shorter, including renewals. If these rules are breached, the term of the contract that provides for its expiry on a set date will be of no effect, but otherwise the contract will be valid. The provisions allow employers to use fixed term contracts for legitimate purposes, while providing appropriate protections to employees.

Stronger protections for workers

The bill gives immediate effect to recommendations of the 2019 Migrant Workers' Taskforce.

Amendments I am introducing today would not have been possible without the advocacy of migrant workers and their unions.

It will now be unlawful to advertise a job for less than the applicable minimum rate.

Secondly, the bill will provide greater ability to recover unpaid entitlements, by increasing the cap on small claims under the Fair Work Act from $20,000 to $100,000. The current low threshold forces many workers to pursue pay claims through a full court process which can be expensive, time consuming and complex.

Firefighters

The bill will also fix a loophole the previous government failed to address by including ACT volunteer firefighters in the presumptive liability provisions. We will also add malignant mesothelioma to the list of presumptive cancers for firefighters, and lower the qualifying period for oesophageal cancer from 25 to 15 years.

This is unfinished business and we will continue to consult to ensure our laws provide firefighters and all first responders with better access to the compensation they deserve for work related injuries and illnesses.

I acknowledge the advocacy of Mr Brett McNamara, an ACT government firefighter, who has been lobbying for changes to the law. I also acknowledge the representations that have been made to me from all members in this place and the Senate who represent the ACT, as well the United Firefighters Union and the ACT Volunteer Brigades Association.

Reducing barriers to bargaining

Australia's bargaining system is not working effectively and hasn't worked effectively for a long time. Bargaining delivers simpler and more tailored workplace arrangements for businesses, and an average of $601 more to workers each week, compared with those on awards.

Yet only 14.7 per cent of employees are covered by an agreement that is in date.

The bill enacts commitments I made at the Jobs and Skills Summit in September.

Reforms will remove unnecessary limitations from the existing framework. Multi-employer bargaining is already contemplated by the act through three streams—single interest, multi-employer and low paid. The problem is it isn't working.

We're not creating new streams of bargaining; we are varying the existing streams to make them work and to get wages moving.

The prohibition already in the act on pattern bargaining will remain.

Bargaining at the enterprise level delivers strong productivity benefits and is intended to remain the primary and preferred type of agreement making. For employees and employers that have not been able to access the benefits of enterprise level bargaining, these reforms will provide flexible options for reaching agreements at the multi-employer level. This is intended to deliver more equitable and inclusive wage outcomes which benefit more Australians.

A stronger role for the Fair Work Commission

The bill will allow the Fair Work Commission to resolve intractable disputes through arbitration, where there is no reasonable prospect of agreement being reached.

These changes are intended to provide a strong incentive for good-faith negotiations, reduce the time for enterprise agreements to be finalised and allow for quicker resolution of intractable disputes.

Agreement terminations

The bill will limit the circumstances in which an agreement can be terminated by the Fair Work Commission if the application has been made by only one party, rather than by consent.

To address this challenge, when determining unilateral application for termination of agreement, the bill requires the Fair Work Commission to consider whether bargaining is underway and whether the termination would adversely affect employees' bargaining position.

The commission will have the capacity to terminate an agreement where its continued operation would pose a significant threat to the viability of the employer's business, and termination would likely reduce the potential of job losses, and the employer guarantees to pay employees the relevant termination entitlements.

Termination of zombie agreements

The bill will return balance and fairness to the system by sunsetting enterprise agreements that are out of step with the wages and conditions provided in modern awards. It's inconceivable that in 2022 there are agreements that still exist which lock in terms and conditions back to the WorkChoices days.

Sunsetting 'zombie agreements' will mean businesses need to pay the minimum entitlements provided for in awards, to benefit workers and level the playing field.

Simplifying the better off overall test

We'll make the better off overall test simple, flexible and fair.

There's consensus that approval requirements for enterprise agreements are onerous, complex and unnecessarily prescriptive.

We'll make key changes to fix this.

First, the concept of 'prospective award covered employees' is removed for enterprise agreements that are not greenfield. For the majority of proposed enterprise agreements, the test will be applied in relation to actual workers, and patterns and types of work that are reasonably foreseeable.

The bill will restore the original intent of the test as a global, rather than line-by-line, comparison against the modern award.

And, thirdly, if there is a common view that the employer and union have that the agreement passes the test, the commission will give primary consideration to that view.

Finally, as an important safeguard, the bill includes a process to allow employees or their representatives to reassess the test in relation to circumstances that the commission did not have regard to at the time.

This makes sure that no worker will be worse off.

Simplifying approval requirements

Building on these reforms, we'll also remove complexity by streamlining commission approval of an agreement, while retaining strong protections to ensure employees are not disadvantaged.

Initiating bargaining

In addition, to encourage employers and employees to remain within the single enterprise bargaining stream, a bargaining representative will be able to commence bargaining if no more than five years have passed since the nominal expiry date of a single enterprise agreement, and a proposed new agreement will cover the same or a similar group of employees as the earlier agreement.

Supported bargaining stream

The bill will rename and remove barriers to access the existing low-paid bargaining stream, with the intention of closing the gender pay gap and improving wages and conditions in sectors such as community services, cleaning, and early childhood education and care, which have not been able to successfully bargain at the enterprise level.

Unnecessary hurdles to entry in the current low-paid stream will be replaced by a broad discretion for the Fair Work Commission to consider the prevailing rates of pay in the industry, including whether workers in the industry or sector are low paid.

The commission must also be satisfied that employers who would be covered by a supported bargaining authorisation have clearly identifiable common interests, for example, whether or not they are substantially funded, directly or indirectly, by the Commonwealth, a state or a territory.

Single-interest bargaining stream

Under the existing single-interest employer authorisation stream, employers who are not franchisees need to obtain my personal permission as minister. It's unnecessary red tape.

Under our changes, employers in the single-interest stream must have clearly identifiable common interests and the Fair Work Commission must be satisfied that it is in the public interest.

We want to see businesses competing on quality, on innovation, on product and service offerings—not on who can pay the lowest wage. If we are going to get wages moving, we need to stop the race to the bottom.

Cooperative bargaining stream

The cooperative bargaining stream reframes and retains the existing multi-employer stream in the Fair Work Act; and is open to all businesses.

It's entirely voluntary. Note there's no industrial action in that stream. Conciliation and arbitration are by consent.

Bargaining assistance from the commission can be accessed on the request of the parties.

Fair work institutions

The government is committed to fairness and integrity, and this extends to the agencies that regulate workplace relations matters.

The Australian Building and Construction Commission and the Registered Organisations Commission are ineffective and discredited institutions, more concerned about prosecuting workers and their representatives than tackling rampant wage theft or addressing workplace safety, or educating and promoting good workplace relations.

This bill will abolish the ABCC and the Registered Organisations Commission. The Fair Work Ombudsman will be the workplace relations regulator for all industries and the general manager of the Fair Work Commission will be the regulator on registered organisations.

Conclusion

These reforms reflect our vision for a fairer, safer and more inclusive Australia.

This bill is just the start of the government's reform of workplace relations, with a second tranche next year.

This bill is for those workers, like Jane in Brunswick East, who have been waiting far too long for their work to be properly valued. This bill is for all the employers who want to treat their employees fairly without fear of being undercut by unscrupulous competitors.

This bill delivers on the government's commitment to ensure a fairer workplace relations system that provides Australians with job security, gender equity and sustainable wage growth.

This bill will not fix every problem in our workplace relations system. But it is a strong start. And it will provide a strong foundation on which we can continue to build the fairer and more equitable system Australians need, want and deserve.

There will be requests to move more slowly, to wait extra months, to pretend that there's no urgency.

As this bill proceeds through the House and the other place I ask members and senators to remember how long people have already waited.

Waited a decade while wages were kept deliberately low.

Waited generations while the gender pay gap refused to close.

Waited while children became adults and caring responsibilities collided with rosters.

Waited in insecure work for the secure job which still hasn't arrived.

These Australians have waited long enough. And while waiting they have turned up every day and done their job. It's now time we did ours and legislated for secure jobs and better pay.

I commend the bill to the House.

Debate adjourned.

Education Legislation Amendment (2022 Measures No. 1) Bill 2022

First Reading

Bill and explanatory memorandum presented by **Mr Clare**.

Bill read a first time.

Second Reading

Mr CLARE (Blaxland—Minister for Education) (09:38): I move:

That this bill be now read a second time.

I'm pleased to introduce the Education Legislation Amendment (2022 Measures No. 1) Bill 2022.

This bill amends the Higher Education Support Act 2003 to improve equality of access to higher education and support this government's commitment to building a highly skilled workforce.

The bill delivers on our election commitment to remove the 10 per cent HECS-HELP discount for students who pay upfront their student contribution amounts for Commonwealth supported places.

This was a measure that we took to the election on the principle that all students should pay the same amount for the same course, regardless of their ability to pay up front.

The measure will take effect on 1 January 2023 and is projected to save $144 million over the forward estimates.

Those savings will help to fund the extra 20,000 new university places that I announced earlier this week.

Those 20,000 extra places have been allocated to support students who are currently under-represented in our universities.

Students from poorer families.

Students from regional Australia.

Indigenous Australians.

Australians with a disability.

And students who are the first in their family to ever set foot in a university.

The bill will also extend the FEE-HELP loan fee exemption for a further 12 months.

This exemption originally commenced on 1 April 2020 as a COVID-19 financial relief measure, and will now continue through to 31 December 2022.

This will help around 30,000 full-fee-paying undergraduate students accessing FEE-HELP to study in 2022. It will also support the higher education providers where these students are enrolled.

This bill also extends FEE-HELP to eligible students who participate in the government's microcredential pilot.

The microcredential pilot encourages universities to develop and deliver industry targeted, flexible short courses as part of building a highly skilled workforce.

The bill also makes other amendments to the Higher Education Support Act to clarify and improve its operation.

It clarifies arrangements around enabling courses.

Enabling courses help prepare students for higher education study like a bachelor's degree.

The measures in this bill clarify that these enabling courses will not count toward a student's lifetime limit of Commonwealth support.

The bill also improves consistency by aligning the HECS-HELP and FEE-HELP citizenship and residency requirements for New Zealand citizens with the existing requirements for those students accessing a Commonwealth supported place.

It requires that these students be resident in Australia for the duration of their unit of study to be eligible for HECS-HELP and FEE-HELP.

The bill also strengthens administration and accountability by requiring that students seeking Commonwealth funding provide their Unique Student Identifier to their institution and the Commonwealth.

It also makes other minor technical amendments to the Higher Education Support Act and the Tertiary Education Quality and Standards Agency Act to improve their operation.

The measures in this bill support the government's commitment to equal access to higher education and building the skills of Australia's workforce.

I commend this bill to the House.

Debate adjourned.

Defence Home Ownership Assistance Scheme Amendment Bill 2022

First Reading

Bill and explanatory memorandum presented by **Mr Thistlethwaite**.

Bill read a first time.

Second Reading

Mr THISTLETHWAITE (Kingsford Smith—Assistant Minister for Defence, Assistant Minister for Veterans' Affairs and Assistant Minister for the Republic) (09:42): I move:

That this bill be now read a second time.

I am pleased to present the Defence Home Ownership Assistance Scheme Amendment Bill 2022.

This bill fulfils another election commitment from the Albanese Labor Government to boost homeownership for defence members and veterans by expanding the Defence Home Ownership Assistance Scheme eligibility criteria.

This scheme was established in 2008 by the Rudd government, and it continues to be an important retention offering by the Australian Defence Force. The scheme also has an important secondary benefit of improving home ownership levels for Defence Force members, veterans and their families.

The bill advances these objectives and it comes as housing affordability remains one of the biggest issues facing Australians.

The bill also responds to the struggles experienced by veterans communities and the role that housing can play in their greater wellbeing. We've seen with the veterans royal commission the effect that homelessness has had on the mental wellbeing of veterans throughout the country. The Australian Institute of Health and Wellbeing found that safe, secure and affordable housing is fundamental to veteran wellbeing. While maintaining the retention focus, the bill makes four broad policy amendments to the scheme which look to further homeownership levels amongst serving Defence Force personnel and members of the veterans community.

Firstly, the bill expands access to the scheme by providing Defence members with access to the benefits earlier in their careers. This amendment reduces by half, the period of effective service that a Defence member must complete before they can access the scheme. The qualifying period will be reduced to two years for serving members and four years for reservists. So this means that a member of the permanent Defence Force will qualify in two years. For members of the reserves it's four years, and for a foreign service member it's two years.

To accommodate the halving of the qualifying service period, the bill similarly amends the requisite period of effective service to access each subsidy tier. There are three subsidy tiers: 40, 60 and 80 per cent of the average house price. Based on the years of effective service, the tiers determine the subsidy amount received by participants of the scheme.

The bill provides members of the permanent forces and the Reserves, as well as members who have separated from the Defence Force because of a compensable condition, with access to each subsidy tier between two and four years earlier than is currently provided by the act. And that is a great benefit to serving and veteran personnel. The amendment will provide members of the permanent forces access to tier 1 when they have less than four years of effective service, to tier 2 when they have between four and eight years of effective service and to tier 3 when they have between eight and 12 years of effective service.

Secondly, the bill allows veterans to apply for their final subsidy certificate at any time after they have separated from the Defence Force. Currently, veterans must apply to access the scheme within five years of separating from the Defence Force. Removing this limitation will ensure veterans can access the scheme at any time that suits them without feeling pressured to do so in that five-year period.

The Albanese Labor government acknowledges that the nature of military service is unique and families can be deeply affected by military service. This can include the frequency of postings throughout Australia, which has an impact on homeownership. And that's why this amendment is so vitally important, by extending to surviving partners who have similarly been impacted by the nature of their family's service within the Australian Defence Force.

FAIR WORK LEGISLATION AMENDMENT (SECURE JOBS, BETTER PAY) BILL 2022

OUTLINE

The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (the Bill) would amend the *Fair Work Act 2009* (the FW Act) and related legislation to improve the workplace relations framework by:

- Restoring fairness and integrity to workplace relations institutions by abolishing the Australian Building and Construction Commission so that the Fair Work Ombudsman (FWO) is the workplace relations regulator for the building and construction industry and abolishing the Registered Organisations Commission and transferring its functions to the General Manager of the Fair Work Commission (FWC).
- Boosting bargaining by removing unnecessary complexity, ensuring bargaining is genuine, fair and conducted in good faith, and making the better off overall test simple, flexible and fair.
- Encouraging bargaining for single-enterprise agreements by making it easier to bargain and simplifying approval requirements.
- Remove unnecessary limitations on access to the low-paid bargaining stream (and rename it the supported bargaining stream) and the single-interest employer authorisation stream; and provide enhanced access to FWC support for employees and their employers who require assistance to bargain.
- Restoring balance and fairness to the system by ensuring the process for agreement terminations is fit for purpose and fair, and sunsetting 'zombie' agreements.
- Improving job security and gender equality by including both concepts in the objects of the FW Act, limiting the use of fixed term contracts, introducing a statutory equal remuneration principle and prohibiting pay secrecy clauses.
- Improving workplace conditions and protections by providing stronger access to flexible working arrangements, stronger protections for workers, including victim survivors of sexual harassment, and enhancing small claims procedures to enable unpaid entitlement recovery.
- Establishing a National Construction Industry Forum as a statutory advisory body.
- Updating the workers' compensation presumptive liability provisions for firefighters in the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act).
- Requiring the FWC and FWO (in exercising their advisory and related functions) to have regard to the need for guidelines and other materials and community outreach in multiple languages.

Bargaining disputes

33. Part 18 would increase scope for the FWC to provide effective assistance to the parties to resolve intractable bargaining disputes. It would repeal the unused serious breach declaration provisions that have been ineffective in assisting bargaining parties to reach agreement and introduce a new intractable bargaining declaration scheme.

Industrial action

34. The Bill would promote efficiencies through the establishment of a panel of ballot providers who are 'pre-approved' to conduct Protected Action Ballots (PAB).

35. The Bill would seek to de-escalate disputes before industrial action is taken and after industrial action has been authorised. The Bill would empower the FWC to require bargaining representatives to attend a conference during the PAB period and enable the FWC to conduct the conference within a 14-day period before voting closes on the PAB.

36. The Bill would include a new notice requirement before commencing employee industrial action for two types of multi-enterprise bargaining. Bargaining representatives would need to provide a minimum of 120 hours' notice.

Supported bargaining

37. Part 20 would reform the low-paid bargaining provisions in Division 9 of Part 2-4 of the FW Act and create the supported bargaining stream. The supported bargaining stream is intended to assist those employees and employers who may have difficulty bargaining at the single-enterprise level. For example, those in low-paid industries such as aged care, disability care, and early childhood education and care who may lack the necessary skills, resources and power to bargain effectively. The supported bargaining stream will also assist employees and employers who may face barriers to bargaining, such as employees with a disability and First Nations employees.

38. The provisions would amend the existing low-paid bargaining process. When an application for a supported bargaining authorisation is made, the FWC must consider whether it is appropriate for the parties to bargain together. The FWC would consider the prevailing pay and conditions in the relevant industry, whether employers have clearly identifiable common interests, and whether the number of bargaining representatives would be consistent with a manageable collective bargaining process. The proposed supported bargaining stream is intended to be easier to access than the existing low-paid bargaining stream.

39. If a supported bargaining authorisation is in operation in relation to a proposed multi-enterprise agreement, the FWC has additional powers to assist the parties in coming to an agreement. This includes convening conferences with a third party who has control over the terms and conditions that can be offered under an agreement.

40. Once an employer is specified in a supported bargaining authorisation, they cannot bargain for any other agreement in relation to those employees. An employer can apply to the FWC to be added to, or removed from, a supported bargaining authorisation.

41. When a supported bargaining agreement is made and approved by the FWC, the agreement may then be varied to cover additional employers and their employees. A variation may be made jointly by the employers and their employees and approved by the FWC. Alternatively, an employee organisation may apply to the FWC for variation of a supported bargaining agreement to cover additional employers and their employees, if a majority of those employees want to be covered by the agreement.

Single interest employer authorisations and varying agreements to remove employers and their employees

42. Parts 21 and 22 would amend the FW Act to remove unnecessary limitations on access to single interest employer agreements. It would also enable these agreements to be varied to remove an employer and affected employees from coverage, by agreement.

43. Part 21 would support employers with clearly identifiable common interests to bargain together under a single interest employer authorisation in certain circumstances. Employee bargaining representatives would also be able to apply for a single interest employer authorisation where there is majority support of the relevant employees. The amendments are intended to make it easier to obtain a single-interest employer authorisation. Relevant employers and employee bargaining representatives could apply to add or remove an employer from an authorisation, subject to meeting specified criteria (including a majority vote of employees or majority support of employees as applicable).

44. New employers or employee organisations covered by an existing single interest employer agreement would have scope to apply to the FWC to extend coverage of that agreement to the new employer and its employees, subject to meeting the specified requirements (including a majority vote of employees or majority support of employees as applicable).

Cooperative workplaces

45. The Bill would amend existing provisions relating to making multi-enterprise agreements to be known as cooperative workplace agreements. These agreements would replace the process of bargaining for and making multi-enterprise agreements where a supported bargaining authorisation or single-interest employer authorisation is not in operation

46. The proposed framework for cooperative workplace agreements would have some differences to the existing multi-enterprise provisions, including that a multi-enterprise agreement that is not a greenfields agreement cannot cover employees in relation to the performance of certain types of excluded work. A new legislative scheme would also be introduced to allow employers and employees not covered by a particular

intractable disputes about terms and conditions of employment to be established by enterprise agreement. Without such a provision, the dispute may be irresolvable and there would be no change to the conditions of work.

108. While the primary focus of the FW Act would remain on supporting parties to reach their own agreements through collective bargaining in good faith, the FWC would, following the proposed amendments, have the ability to determine any outstanding matters by arbitration where there is otherwise no reasonable prospect of the parties reaching agreement. In arbitrating a workplace determination, the FWC would, among other things, be required to:

- take into account the interests of the employers and employees who will be covered by the workplace determination;
- exercise its powers in a manner that is fair and just; and
- ensure that the workplace determination would, if it was an enterprise agreement, meet the BOOT against the relevant modern award.

Supported bargaining

109. The Bill would promote the right to work and rights in work by amending the existing low-paid bargaining stream to assist people who face barriers to bargaining to negotiate their terms and conditions of employment. By increasing access to the renamed supported bargaining stream, the Bill intends to assist workers who require support to bargain. This might include those in low paid occupations, government-funded industries, and female-dominated sectors, as well as employees with a disability, employees who are culturally and linguistically diverse and First Nations employees who may be employed in such sectors and face additional hurdles.

110. Increasing the accessibility of collective bargaining promotes the right to enjoyment of just and favourable conditions of work by enabling employees to leverage the collective power of multi-employer bargaining to secure safe, healthy and fair working conditions.

111. When making a proposed supported bargaining authorisation, the FWC must be satisfied that at least some employees are represented by a registered organisation. Employee organisations would also be empowered to apply for a variation of a supported bargaining agreement to cover an additional employer.

112. The proposed provisions recognise the important role that trade unions play in advocating for the collective interests of employees during bargaining, particularly for employees who may require support in bargaining.

Single interest employer authorisations

113. Items 633-635 of Part 21 would support employers with clearly identifiable common interests to bargain together in certain circumstances under a single interest employer authorisation for terms and conditions of employment that would apply to the cohort of

65(1A)(b) and (c)). The Bill would support employees in these circumstances to access flexible working arrangements, by strengthening employer obligations when considering an employee's request. By improving the processes for how employers deal with requests for flexible work, the Bill would reduce the risk of discrimination against employees and support employees to engage in work on just and favourable conditions.

Supported bargaining

253. The supported bargaining stream promotes the right to equality and non-discrimination by facilitating collective bargaining for employees who face barriers to bargaining, such as workers in low paid occupations, government funded industries, and female dominated sectors. The supported bargaining stream is also intended to facilitate bargaining for employees with a disability, employees who are culturally and linguistically diverse, and First Nations employees who may be employed in such sectors and therefore face additional hurdles.

The right of women not to be discriminated against based on gender

254. The CEDAW provides that in relation to discrimination against women, State Parties must:

- ensure the effective protection of women against acts of discrimination (Article 2(c));
- ensure the full development and advancement of women (Article 3); and
- take all appropriate measures to eliminate discrimination against women in the field of employment to ensure the same rights between men and women (Article 11). This includes the right to equal remuneration, treatment in respect of work of equal value, and evaluation of the quality of work (Article 11(1)(c)).

255. Article 26 of the ICCPR requires State laws to guarantee equal and effective protection against discrimination on a number of grounds, including sex.

Objects of the Fair Work Act

256. The Bill would promote Article 11(1) of the CEDAW by requiring the FWC to consider gender equality when performing functions or exercising its powers under the FW Act, including when setting conditions in modern awards and reviewing minimum wages. Under the amendments, the FWC would be required to consider the principles of equal remuneration, address gender-based undervaluation of work and promote fair working conditions for women, in order to prevent discrimination against women in employment.

Equal remuneration

257. The amendments to Part 2-7 of the FW Act would provide better guidance on what matters the FWC may consider when deciding whether there is equal remuneration for

PART 20—SUPPORTED BARGAINING

Overview

921. Part 20 would reform the low-paid bargaining provisions in Division 9 of Part 2-4 of the FW Act and create the supported bargaining stream. The proposed supported bargaining stream is intended to assist those employees and employers who may have difficulty bargaining at the single-enterprise level. For example, those in low paid industries such as aged care, disability care, and early childhood education and care who may lack the necessary skills, resources and power to bargain effectively. The supported bargaining stream will also assist employees and employers who may face barriers to bargaining, such as employees with a disability and First Nations employees.

922. The supported bargaining process would operate similarly to the existing low-paid bargaining process. When an application for a supported bargaining authorisation is made, the FWC must consider whether it is appropriate for the parties to bargain together. The FWC would consider the prevailing pay and conditions in the relevant industry, whether employers have clearly identifiable common interests, and whether the number of bargaining representatives would be consistent with a manageable collective bargaining process. The supported bargaining stream is intended to be easier to access than the existing low-paid bargaining stream. The revised criteria for making a supported bargaining authorisation is intended to address the limited take-up of the low-paid bargaining process.

923. If a supported bargaining authorisation is in operation in relation to a proposed multi-enterprise agreement, the FWC has additional powers to assist the parties in coming to an agreement. This includes convening conferences with a third party who has control over the terms and conditions that can be offered under an agreement.

924. Once an employer is specified in a supported bargaining authorisation, they cannot bargain for any other agreement in relation to those employees. An employer can apply to the FWC to be added to a supported bargaining authorisation, or removed if their circumstances have changed.

925. When a supported bargaining agreement is made and approved by the FWC, the agreement may then be varied to cover additional employers and their employees. A variation may be made jointly by the employers and their employees and approved by the FWC. Alternatively, an employee organisation may apply to the FWC for variation of a supported bargaining agreement to cover additional employers and their employees, if a majority of those employees want to be covered by the agreement.

926. To make a supported bargaining agreement the employees of each employer to be covered must vote as a separate cohort. If a majority of employees of one employer do not ‘vote up’ the agreement (i.e. a majority of those who cast a valid vote do not vote to approve the agreement), then that employer will not be covered by the agreement (see section 182(2) and 184 of the FW Act).

927. These amendments would deliver on the Jobs and Skills Summit outcome of ensuring workers and businesses have flexible options for reaching agreements, including removing unnecessary limitations on access to single and multi-employer agreements.

Amendments to the *Fair Work Act 2009*

Item 586: Section 12

Item 587: Section 12

Item 588: Section 12 (paragraph (a) of the definition of *workplace determination*)

928. These items would repeal references to the low-paid bargaining stream.

929. This Part would repeal low-paid workplace determinations. Instead, a bargaining representative for a proposed supported bargaining agreement would be able to apply for a new intractable bargaining declaration, and subject to satisfying the relevant criteria, obtain an intractable bargaining workplace determination.

930. Item 587 would insert a new definition of 'supported bargaining agreement' and 'supported bargaining authorisation'. A supported bargaining agreement is defined as a multi-enterprise agreement in relation to which a supported bargaining authorisation was in operation immediately before the agreement was made. A supported bargaining authorisation is defined by reference to subsection 242(1).

Item 589: Paragraph 58(2)(c)

Item 590: Subsection 58(3)

931. Item 589 is consequential upon the insertion of new subsection 58(3).

932. Item 590 would repeal subsection 58(3), which currently provides that a single-enterprise agreement can replace a multi-enterprise agreement at any time, irrespective of whether the multi-enterprise agreement has passed its nominal expiry date.

933. New subsection 58(3) would provide when a supported bargaining agreement comes into operation in relation to an employee, any single-enterprise agreement would cease to apply to that employee, regardless of the nominal expiry date of the single-enterprise agreement.

934. The interaction rule in new subsection 58(3) would have very limited application and only relates to the anti-avoidance mechanism in new subsection 243A(3). New subsection 243A(1) would provide that ordinarily the FWC must not make a supported bargaining authorisation specifying an employee who is covered by a single-enterprise agreement that has not passed its nominal expiry date. However, new subsection 243(A)(3) provides that a supported bargaining authorisation can specify an employee who is covered by a single-enterprise agreement that has not passed its nominal expiry date if the FWC is satisfied that the employer's main intention in making the agreement was to avoid being specified in the authorisation. New subsection 58(3) would operate to give effect to that rule.

935. New subsection 58(3) is an exception to the general interaction rule in subsection 58(2), which provides that a later agreement cannot displace an earlier agreement until the earlier agreement has passed its nominal expiry date.

Item 591: Section 169 (paragraph beginning "Division 9")

936. This item would omit a reference to 'low-paid' and substitute 'supported bargaining' to reflect the replacement of the low-paid bargaining stream.

Item 592: At the end of section 172

937. This item would insert new subsection 172(7) which provides that if an employer is specified in a supported bargaining authorisation that is in operation, the only kind of enterprise agreement the employer may make with their employees who are specified in the authorisation is a supported bargaining agreement. Further, the employer must not initiate bargaining, agree to bargain, or be required to bargain with those employees for any other kind of agreement.

938. If an employer wishes to bargain for a different kind of agreement, they may apply to the FWC to be removed from the supported bargaining authorisation under section 244. This would require that the FWC is satisfied that, because of a change in the employer's circumstances, it is no longer appropriate for the employer to be specified in the authorisation.

Item 593: Paragraph 173(2)(d)

Item 594: Subparagraph 176(1)(b)(ii)

Item 595: Subsection 176(2) (heading)

Item 596: Paragraph 176(2)(a)

939. These items would make technical amendments to replace references to 'low-paid' with 'supported bargaining'.

Item 596A: After subsection 211(1)

940. Existing section 211 sets out when the FWC must approve a variation of an enterprise agreement. Item 596A inserts subsection 211(1A) that would provide that the FWC must not approve the variation if the varied agreement will cover employees whose employer is specified in a supported bargaining authorisation, or a single interest employer authorisation, in relation to those employees.

Item 597: In the appropriate position in Division 7 of Part 2-4

941. This item would insert new Subdivision AA and Subdivision AB into Division 7 of Part 2-4 of the FW Act.

942. Subdivision AA would provide for how a supported bargaining agreement can be varied to add an employer and their employees by consent.

943. Subdivision AB would establish how a supported bargaining agreement can be varied to add an employer and their employees, without the consent of the parties.

Subdivision AA – Variation of supported bargaining agreement to add employer and employees (with consent)

Section 216A - Variation of supported bargaining agreement to add employer and employees

944. New section 216A would set out how a variation of a supported bargaining agreement to add an employer and their employees may be jointly made by an employer and their employees. An employer may request that the 'affected employees', being employees who would be covered by the agreement if the variation is made, approve the variation by voting for it. The variation is made when a majority of the affected employees who cast a valid vote approve the variation.

945. Subsection 216A(3) states that an employer can request that the employees vote by a ballot or by electronic means. These methods of voting are not exhaustive but the voting method needs to demonstrate the employees' genuine agreement.

946. The employer would be required to apply to the FWC under section 216AA and the FWC must approve the variation under section 216AB before the variation can have any effect.

Section 216AAA - Terms of variation must be explained to employees

947. Subsection 216AAA(1) would provide that before an employer requests that affected employees approve the proposed variation, the employer must take all reasonable steps to ensure that:

- the terms of the agreement as proposed to be varied, and the effect of those terms, are explained to the affected employees; and
- the explanation is provided in an appropriate manner taking into account the particular circumstances and needs of those employees.

948. Subsection 216AAA(2) would provide that without limiting paragraph 1(b), the following are examples of the kinds of employees whose circumstances and needs are to be taken into account for the purposes of complying with that paragraph:

- employees from culturally and linguistically diverse backgrounds;
- young employees;
- employees who were not represented during negotiations for the variation.

Section 216AA - Application for the FWC's approval of a variation of a supported bargaining agreement to add employer and employees

949. New section 216AA would require the employer who is seeking to join the agreement to apply to the FWC for approval of the variation. Certain requirements apply to how and when the application must be made.

Section 216AB - When the FWC must approve a variation of a supported bargaining agreement to add employer and employees

950. New section 216AB would establish when the FWC must approve a variation of a supported bargaining agreement to add a new employer and employees with consent. The FWC must be satisfied of the following three criteria:

- that if the application that was made for the supported bargaining authorisation in relation to the agreement had specified the employer and the affected employees, the FWC would have been required to make the authorisation, in accordance with new section 216AC;
- the affected employees have voted and a majority of those who cast a valid vote approved the variation; and
- the variation has been genuinely agreed to by the affected employees, in accordance with new section 216AD.

951. The FWC does not have to approve the variation if there are serious public interest grounds for not approving the variation. This is consistent with the variation process for enterprise agreements in existing section 211. The public interest would be likely to favour the making of variations that inhibit a 'race to the bottom' on wages and conditions, while discouraging the making of variations that could adversely affect competition on the basis of factors such as quality (including service levels) and innovation. The views of the employers and employee bargaining representatives could be relevant to the FWC's consideration of the public interest, including whether they support the variation being made.

952. New subsection 216AB(2) would provide that the FWC must not approve the variation if, as a result of the variation, the agreement would cover employees in relation to general building and construction work.

953. New subsection 216AB(3) that would provide that the FWC must not approve the variation if the employer that will be covered by the agreement is specified in a single interest employer authorisation in relation to any of the affected employees.

Section 216AC - Determining whether the FWC would have been required to make a supported bargaining authorisation

954. New section 216AC would include modifications to sections 243 and 243A in relation to making a supported bargaining authorisation, to ensure those provisions can be

applied in the context of section 216AB. These modifications are required because, for example, a variation does not involve bargaining representatives and so the FWC cannot consider whether the number of bargaining representatives is manageable.

Section 216AD - Determining whether a variation of a supported bargaining agreement to add employer and employees has been genuinely agreed to by affected employees

955. New section 216AD would require the FWC to be satisfied of the same genuine agreement requirement that applies when an enterprise agreement is approved, as set out in existing section 188 of the FW Act. The operation of section 188 would be modified by this section to address the fact that the FWC would be considering a variation, and not the making of an agreement.

956. For example, the FWC would be required to consider references in section 188 to employees as being references to the affected employees for the variation.

957. A further example is that in taking into account the statement of principles made under section 188B, the FWC may disregard matters concerning informing employees of bargaining and of their right to be represented by a bargaining representative because the making of a variation does not strictly involve bargaining under the FW Act.

958. New paragraph 216AD(1)(d) would have the effect that the new requirement to obtain written agreement from relevant employee organisations to put a variation of a multi-enterprise agreement to a vote of employees does not apply to a variation of a supported bargaining agreement to add an employer and their employees.

959. Applications to make the relevant variations must be made jointly by the employer and their affected employees.

960. New paragraph 216AD(1)(e) would provide that when the FWC is to determine whether it is satisfied that a variation of a supported bargaining agreement to cover a new employer and its employees has been genuinely agreed to in accordance with section 188 (which deals with genuine agreement), subsections 188(4A) and (5) are to apply as if references to subsection 180(5) were references to section 216AAA.

961. New paragraphs 216AD(1)(e) and (f) have the effect that the FWC must be satisfied that the employer has taken all reasonable steps to explain the terms of the supported bargaining agreement, as varied, and their effect, to employees in a manner appropriate to their circumstances and needs (subject to any minor errors that may be disregarded under subsection 188(5)).

962. Subsection 216AD(3) would specify that regulations may provide that, for the purposes of the FWC deciding whether it is satisfied that the variation has been genuinely agreed to, specified provisions of the Part or regulations made for the purposes of the Part, have effect with such modification as are prescribed by the regulations. This would ensure that there is sufficient flexibility to modify the regime in ways that are necessary or desirable to ensure it is operating as intended.

Section 216AE - When the FWC may refuse to approve a variation of a supported bargaining agreement to add employer and employees

963. New section 216AE would provide that if an application for the approval of a variation of a supported bargaining agreement is made under section 216AA, the FWC may refuse to approve the variation if it considers that complying with the terms of the agreement, as proposed to be varied, would result in a person committing an offence against a law of the Commonwealth or being liable to pay a pecuniary penalty in relation to a contravention of such a law. This largely mirrors the provisions in existing section 214.

Section 216AF - When variation comes into operation

964. This section would provide that a variation to a supported bargaining agreement made by the FWC would operate from the day specified in the decision to approve the variation.

Subdivision AB – Variation of supported bargaining agreement to add employer and employees (without consent)

Section 216B- Application for the FWC to vary a supported bargaining agreement to add employer and employees

965. New section 216B would provide that an employee organisation that is covered by a supported bargaining agreement may apply to the FWC for a variation of a supported bargaining agreement to cover a new employer and their employees.

966. This section would also establish procedural requirements for an application in new subsection 216B(2) that largely mirror the requirements in existing section 210(2).

Section 216BA - When the FWC must make a variation of a supported bargaining agreement to add employer and employees

967. New section 216BA would set out when the FWC must vary a supported bargaining agreement to add an employer without the employer's consent. The FWC would need to be satisfied that the majority of the employer's employees who would become covered by the supported bargaining agreement want to be covered by it and that it is appropriate for those employees to be covered. It is intended that the FWC could work out whether a majority of employees want to be covered by the agreement using any method it considers appropriate. This could include, for example, relying on a ballot or petition of a representative sample of the employer's employees.

968. In determining whether it is appropriate for the employees to be covered by the agreement, the FWC must take into account the views of each employee organisation covered by the agreement and the employer who will be covered by the agreement if the variation is made. The FWC may have regard to the matters in section 243. New

section 243 sets out when the FWC must make a supported bargaining authorisation, including whether the employers have clearly identifiable common interests, etc.

969. New paragraph 216BA(3)(a) would provide that the FWC must not make the variation if, as a result of the variation, the agreement would cover employees in relation to general building and construction work.

970. New paragraph 216BA(3)(b) would provide that the FWC must not make the variation if the affected employees are covered by an enterprise agreement that has not passed its nominal expiry date.

971. New subsection 216BA(4) would provide that the FWC must not make the variation if the employer that will be covered by the agreement is specified in a single interest employer authorisation in relation to any of the affected employees.

Section 216BB - When the FWC may refuse to make a variation of a supported bargaining agreement to add employer and employees

972. This new section would allow the FWC to refuse to approve the variation of a supported bargaining agreement in certain circumstances. These circumstances mirror the criteria for refusing to approve a variation by consent (section 216AE) and would be applied by the FWC in the same way. They are modelled on existing section 214.

Section 216BC - When variation comes into operation

973. This new section would provide that a variation of a supported bargaining agreement made under section 216BA operates from the day specified in the decision to make the variation. The new section largely mirrors existing section 216.

Item 598: Subsection 229(2)

Item 599: Paragraph 230(2)(d)

974. These items would make technical amendments to replace the words ‘low-paid’ with ‘supported bargaining’.

Item 600: After subsection 236(1)

975. This item would amend section 236 to insert a new subsection 236(1A) which would provide that a bargaining representative may not apply to the FWC for a majority support determination if a supported bargaining authorisation that specifies the employee is in operation. It is intended that an employer cannot bargain for an enterprise agreement while they are named in a supported bargaining authorisation. If they wish to bargain for a different kind of enterprise agreement, the employer would need to apply to the FWC to have their name removed from the authorisation under section 244.

Item 601: Paragraph 240(2)(b)

Item 602: Division 9 of Part 2-4 (heading)

976. These items would make technical amendments to reflect the change from the low-paid bargaining scheme to the supported bargaining scheme.

Item 603: Paragraph 241(a)

Item 604: Paragraph 241(b)

Item 605: Paragraphs 241(c) and (d)

Item 606: Section 241 (note)

977. These items would update the objects of Division 9 of Part 2-4 to reflect the change from the low-paid bargaining scheme to the supported bargaining scheme.

978. Item 603 would remove the references to 'low-paid' employees in the objects of Division 9. This amendment would expand the objects of the supported bargaining stream to encompass employees and their employers who require support to bargain.

979. The supported bargaining stream is intended to assist those employees and employers who may have difficulty bargaining at the single-enterprise level. For example, those in low paid industries such as aged care, disability care, and early childhood education and care who may lack the necessary skills, resources and power to bargain effectively. The supported bargaining stream will also assist employees and employers who may face barriers to bargaining, such as employees with a disability and First Nations employees.

Item 607: Section 242 (heading)

Item 608: Subsection 242(1)

Item 609: Subsection 242(1) (note)

980. These items would make technical amendments to replace the words 'low paid' with 'supported bargaining'.

981. Subsection 242(1), as amended, would provide that the persons who may apply to the FWC for a supported bargaining authorisation are a bargaining representative for the agreement or an employee organisation that is entitled to represent the industrial interests of an employee in relation to work to be performed under the agreement.

Item 611: Section 243

982. This item would insert new sections 243 and 243A. Section 243 would provide the criteria which the FWC must consider in determining whether to make a supported bargaining authorisation. Section 243A would set out the employers and employees who must not be specified in a supported bargaining authorisation. These provisions are intended to improve access to the supported bargaining stream beyond the scope of the existing low-paid bargaining stream.

Section 243- When the FWC must make a supported bargaining authorisation

983. Section 243 would require the FWC to make a supported bargaining authorisation if: an application has been made, the FWC is satisfied that it is appropriate for the employers and employees to bargain together, and that at least some of the employees will be covered by an employee organisation. The FWC would not be required to make the authorisation in relation to all of the employers and employees specified in the application but would be able to specify just that subset of employers and employees that meet the criteria. In determining whether it is appropriate for the employers and employees to bargain together, it will be relevant for the Fair Work Commission to consider whether any employee organisation or employer supports this course of action. For example, if an employee organisation did not support an authorisation being made, its reasons for not supporting the authorisation would be a relevant factor to consider.

984. When considering whether it is appropriate for the employer and employees to bargain together, the FWC would have regard to:

- the prevailing pay and conditions in the relevant industry – this is intended to include whether low rates of pay prevail in the industry, whether employees in the industry are paid at or close to relevant award rates, etc;
- whether the employers have clearly identifiable common interests (explained in subsection 243(2));
- whether the likely number of bargaining representatives for the agreement would be consistent with a manageable collective bargaining process (for example, employers may need to form bargaining units; this consideration is not intended to allow employers to try to opt out by encouraging employees to appoint individual bargaining representatives); and
- any other matters the FWC considers appropriate – this may include considering the views of the bargaining representatives.

985. Subsection 243(2) would provide examples of common interests that employers may have. This includes the geographical location of the employers, the nature of the enterprises to which the agreement will relate, and the terms and conditions of employment in those enterprises, and whether the employers are substantially funded (directly or indirectly) by the Commonwealth, or a State or Territory.

986. Subsection 243(3) would provide that a supported bargaining authorisation must specify the employers and employees who will be covered by the agreement and any other maters prescribed by the procedural rules.

987. Subsection 243(4) would provide that an authorisation comes into operation on the day on which it is made.

Section 243A- Restrictions on making supported bargaining authorisations

988. New subsection 243A(1) would provide that a supported bargaining authorisation cannot specify an employee who is covered by a single-enterprise agreement that has not passed its nominal expiry date.

989. However, new subsection 243A(3) would provide that this rule does not apply if the FWC is satisfied that the employer's main intention in making the single-enterprise agreement with the employees covered by it was to avoid being specified in a supported bargaining authorisation.

990. New subsection 243A(2) would provide that a supported bargaining authorisation has no effect to the extent that it specifies an employee who is covered by a single-enterprise agreement that has not passed its nominal expiry date.

991. New subsection 243A(4) would provide that the FWC must not make a supported bargaining authorisation in relation to a proposed enterprise agreement if the agreement would cover employees in relation to general building and construction work.

Item 612: Section 244 (heading)

Item 613: Subsections 244(1) and (3)

992. These items would make technical amendments to replace the words 'low-paid' with 'supported bargaining'.

993. Following these amendments, subsections 244(1) and (2) would provide that if an employer applies to have its name removed from a supported bargaining authorisation, the FWC must do so if satisfied that a change in the employer's circumstances is significant enough to mean that it is no longer appropriate for the employer to be specified in the authorisation.

Item 614: Subsection 244(4)

994. This item would amend section 244 in relation to the process for varying a supported bargaining authorisation to add a new employer.

995. New subsection 244(4) would provide that, on application, the FWC must vary an authorisation to add an employer if it is satisfied that it is in the public interest to do so, taking into account:

- whether it would be appropriate for the parties to bargain together, as set out in the new paragraph 243(1)(b) – this includes having regard to the prevailing pay and conditions in the relevant industry, whether the employers have clearly identifiable common interests, whether the number of bargaining representatives would be manageable, and any other matter the FWC considers appropriate;

- whether the FWC is prohibited from making an authorisation specifying the employer under new section 243A – this includes employees who are covered by a single-enterprise agreement that has not passed its nominal expiry date; and

- any other matters the FWC considers appropriate.

996. The public interest would be likely to favour the making of a variation to a supported bargaining agreement where that would inhibit a 'race to the bottom' on wages and conditions, while discouraging the making of variations that could adversely affect competition on the basis of factors such as quality (including service levels) and innovation. The views of the employers and employee bargaining representatives could be relevant to the FWC's consideration of the public interest, including whether they support the variation being made.

997. New subsection 244(5) would provide that the FWC must not vary the authorisation if, as a result, the proposed supported bargaining agreement would cover employees in relation to general building and construction work.

Item 615: Section 245

Section 245 – Variation of supported bargaining authorisations – enterprise agreement etc. comes into operation

998. Items 615 repeals existing section 245 and substitutes a new section 245.

999. New section 245 would provide that the FWC is taken to have varied a supported bargaining authorisation to remove an employer's name when the employer and all of their employees who are specified in the authorisation are covered by an enterprise agreement, or a workplace determination, that is in operation.

1000. This is a technical change to existing section 245, which would eliminate the possibility of an employer being removed from an authorisation where they make an enterprise agreement with a separate group of employees to those covered by the authorisation or where they make a supported bargaining agreement with some, but not all, of the employees specified in the authorisation.

Item 618: Section 246 (heading)

Item 619: Subsection 246(1)

1001. These items would make technical amendments to remove the words 'low-paid' and replace them with appropriate references to supported bargaining and FWC's assistance.

Item 620: Section 258 (paragraph beginning with "Division 2")

Item 621: Division 2 of Part 2-5

Item 622: Subsection 274(1)

Item 623: Paragraphs 275(b)

Item 624: Paragraph 275(c)

1002. These items would make technical amendments to remove references to low-paid workplace determinations. Instead, a bargaining representative for a proposed

supported bargaining agreement would be able to apply for a new intractable bargaining declaration, and subject to satisfying the relevant criteria, obtain an intractable bargaining workplace determination.

Item 625: Subsection 413(2)

Item 626: Paragraph 437(2)(b)

1003. These items would substitute 'multi-enterprise agreement' with 'a cooperative workplace agreement' to reflect that protected industrial action would be enabled in relation to multi-enterprise agreements that are supported bargaining agreements but not cooperative workplace agreements.