

Junior rates application (AM2024/24)
Youth Law Australia – Submissions

1. On 24 December 2024, Youth Law Australia was granted leave by President Hatcher to file a submission addressing the Shop, Distributive and Allied Employees' Association ("SDA") junior rates application ("the Application").
2. Youth Law Australia supports the Application and fully endorses the SDA's submissions dated 6 November 2024.
3. In these submissions, we draw upon our experience advising young people on employment law matters, and our expertise in international law and human rights, to assist the Fair Work Commission ("FWC") to consider the Application.

About Youth Law Australia

4. Youth Law Australia (YLA) (formerly the National Children's and Youth Law Centre) is an accredited, national, community legal centre dedicated to helping children and young people under the age of 25 years and their supporters to understand their legal rights and find solutions to their legal problems.
5. In 2021, YLA was granted four-year funding by the Fair Work Ombudsman's Community Engagement Grants Program to provide a specialist employment law service for young people under the age of 25 years, relating to the federal workplace relations system. This service is called the Young Workers' Rights Service (YWRS).
6. With over 4000 young worker client contacts in the past four years, the YWRS has extensive experience advising young workers covered by the General Retail Industry Award 2020 (MA00004) ("GRIA"), Fast Food Industry Award 2020 (MA00003) ("FFIA") and the Pharmacy Industry Award (MA00012) ("PIA") (collectively, "the Awards").

7. YLA is also accredited to the UN Economic and Social Council as a specialist, national children's human rights civil society organisation.

Introduction

8. YLA submits that, in accordance with [Section 157\(2\)](#) of the *Fair Work Act 2009* (FWA), the Fair Work Commission (FWC) can be satisfied that:
 - a. the variations of the minimum wages in the Awards sought by the Application are justified by work value reasons; and
 - b. it is necessary to make such determination outside the system of annual wage reviews to achieve the modern awards objective in [section 134\(1\)](#) of the *FWA*, the minimum wages objective in [section 284](#) of the *FWA*, and the objects of the *FWA* set out in [section 3](#).
9. Our submissions are structured as follows:
 - a. **Part 1** addresses the need for the determination sought in view of the modern awards objective, the minimum wages objective and the objects of the *FWA*.
 - b. **Part 2** expands upon Australia's international labour obligations which should be taken into account pursuant to section 3(a) of the *FWA*, and which include commitments to eliminate discrimination in the workplace, and to guarantee equal pay for equal work.
 - c. **Part 3** addresses the justification for this application by work value reasons.

Part 1 – The need for a determination

10. Section 134(1) of the modern awards objective, section 284(1) of the minimum wages objective and section 3(b) of the *FWA* objects all set out various factors to be considered.

While there are differences in the factors to be considered under each provision, there are also commonalities between them.

11. In this section we focus on those factors that in our experience are most relevant to the Application from the perspective of the lived experience of young workers. These are:

- a. the FWC's duty to ensure a fair and relevant minimum safety net for young workers, and to consider the relative living standards of young people
- b. the need to provide additional remuneration for employees working unsocial, irregular or unpredictable hours
- c. access to secure work across the economy
- d. the impact of junior wages on business, including regulatory burden.

(a) The need for a fair safety net for young workers – Section 134(1) FWA; Section 284(1) FWA; Section 3(b) FWA and relative living standards – Section 134(1)(a) FWA; Section 284(c) FWA

12. Section 134(1) of the modern awards objective, section 284(1) of the minimum wages objective and section 3(b) of the FWA objects all explicitly refer to the FWC's duty to ensure a fair and relevant minimum safety net of terms and conditions for all workers. We submit that the determinations sought by the SDA are necessary as the Awards do not currently act as a fair safety net for young workers covered by them.

13. The 2020 *Productivity Commission Report on Youth Incomes* found that youth incomes declined over a decade from 2008 and was partly attributed to decreased wages.¹ At the same time, Australia has experienced a cost-of-living crisis which has seen the prices of basic goods increase substantially. We note the evidence adduced by the SDA illustrating the basic affordability difficulties young workers earning junior wages are currently experiencing.

¹ Productivity Commission 2020, *Why did young people's incomes decline?*, Commission Research Paper, Canberra.

14. In addition to that evidence, in our submission, the low wages paid to young employees in accordance with junior wage provisions in the Awards are contributing to the well-documented mental health crisis currently experienced by young Australians aged 15 to 20 years old. The following statistics demonstrate the vulnerabilities of young workers and highlight how they are unacceptably disadvantaged by the current structure of junior wages in the Awards.
15. Young people are uniquely vulnerable in the workforce, with employment problems disproportionately affecting their well-being and exacerbating their mental health. Young workers (aged 18-24) experience employment-related challenges at rates higher than older age groups.² The Public Understanding of Law Survey (PULS) found that 10.8% of young people reported at least one employment problem in the past two years, compared to 7.9% of older workers (aged 25+).³ Additionally, young employees often face multiple concurrent employment issues, with 55.8% reporting more than one problem, far exceeding the rates for other age cohorts.⁴ Young people face higher rates of most employment-related issues, especially harassment and bullying.⁷ Other frequent problems include issues related to workplace rights, such as pay, hours, leave, and contracts, as well as being fired or made redundant.⁵ Only 14% of young workers seek legal advice for employment issues, and 70.4% of all employment-related problems remain unresolved.⁶
16. PULS data reveals that stress is the most reported adverse effect of employment problems, impacting 78% of young workers who encounter such issues.⁷ Further, young workers

² Rychner, G. & McDonald, H.M. (2024). Problems at work: Young people, employment and legal need. Melbourne: Victoria Law Foundation. https://cdn.prod.website-files.com/64e6d2582dd4319151be6a26/66d7dd229d44bf4fe152c8e1_PULS-Short-Paper---Problems-at-work.pdf.

³ Rychner, G. & McDonald, H.M. (2024), *ibid*.

⁴ Rychner, G. & McDonald, H.M. (2024), *ibid*.

⁵ Rychner, G. & McDonald, H.M. (2024), *ibid*.

⁶ McDonald, H.M. & Jupp, R. (2024). Mental distress and experience of legal problems. Melbourne: Victoria Law Foundation https://cdn.prod.website-files.com/64cb3eaa05058fe9b199601b/66d7d520c5a797b9126145f9_PULS%20In%20Brief%20-%20Mental%20di%20stress%20and%20experience%20of%20legal%20problems.pdf

⁷ Rychner, G. & McDonald, H.M. (2024). Problems at work: Young people, employment and legal need. Melbourne: Victoria Law Foundation. https://cdn.prod.website-files.com/64e6d2582dd4319151be6a26/66d7dd229d44bf4fe152c8e1_PULS-Short-Paper---Problems-at-work.pdf

experiencing employment difficulties are significantly more likely to report moderate or severe mental distress (72.9%) compared to their older counterparts (58.6%).⁸

17. At the same time as employment problems have an adverse impact on mental health, research indicates that poor mental health also increases vulnerability to employment problems. For example, individuals experiencing severe mental distress reported employment problems at rates nearly four times higher (16.6%) than those with no or low mental distress (4.3%).⁹ This highlights the strong link between mental health and employment challenges. The PULS study found that stress was the most commonly reported consequence of justiciable problems (72%), followed by loss of confidence (38%), damage to family relationships (21%), and ill-health or injury (20%).
18. This research should be understood in the context of broader research on youth mental health in Australia. According to Headspace's National Youth Mental Health Survey 2020, one-third of Australian young people reported high or very high levels of psychological distress, a rate consistent with findings from 2018.¹⁰ Further, according to the Black Dog Institute, the prevalence of mental illness in 16–24-year-olds has increased significantly—from 26.4% in 2007 to 39.6% in recent years.¹¹ In addition, suicide is the second leading cause of death for young people ages 15-24.¹²
19. Junior wages compound the disadvantage for young people in need of affordable mental health care. A recent poll by the Black Dog Institute found that cost is the primary reason people delay or avoid seeking mental health care.¹³ Young adults are the most affected, with

⁸ Rychner, G. & McDonald, H.M. (2024), *ibid.*

⁹ Rychner, G. & McDonald, H.M. (2024), *ibid.*

¹⁰ Headspace, *Insights: young mental health and wellbeing over time* (National Young Mental Health Survey 2020) <https://headspace.org.au/assets/Uploads/Insights-youth-mental-health-and-wellbeing-over-time-headspace-National-Youth-Mental-Health-Survey-2020.pdf>.

¹¹ Black Dog Institute, 'Black Dog Institute welcomes National Study of Mental Health and Wellbeing, but data still needed for children under 16' (Web Page, July 2022) <https://www.blackdoginstitute.org.au/media-releases/national-study-of-mental-health-and-wellbeing-but-data-still-needed-for-children-under-sixteen/>.

¹² Black Dog Institute, *Facts and figures about mental health* (Fact Sheet) https://www.blackdoginstitute.org.au/wp-content/uploads/2020/04/1-facts_figures.pdf.

¹³ Sam Harvey, 'Addressing Australia's Mental Health Crisis: Time for Bold Reform', *Black Dog Institute* (Web Page, 2024) <https://www.blackdoginstitute.org.au/news/addressing-australias-mental-health-crisis-time-for-bold-reform/>

60% of those aged 18 to 24 reporting they couldn't afford the help they needed—higher than any other age group.¹⁴ Further, mental illness is increasing rapidly, with nearly two in five young Australians now living with a mental illness—a 50% rise over the past 14 years.¹⁵

(b) The need to provide additional remuneration for employees working unsocial, irregular or unpredictable hours – Section 134(1)(da) FWA

20. It is well known that junior employees covered by these Awards typically work outside of normal business hours, around their school and university studies. In 2024, the Australian Bureau of Statistics found that 81% of young Australians aged 15-24 years were doing at least some work or study or a combination of both.¹⁶ It is submitted that as the penalty rates payable to a junior employee for working unsociable hours (such as evenings and weekends), and the casual loading applied for working irregular or unpredictable hours is in most cases less than the junior wage percentage discount applied to their hourly rate, additional remuneration is needed to meet this objective.

(c) Access to secure work across the economy – Section 134(1)(a) FWA; Section 3 FWA

21. There is evidence that young workers in industries covered by these Awards are having to work increased hours, and that this is interfering with their education, and ultimately, their career potential and future ability to gain secure work across the economy and address Australia's skilled worker shortages.

22. As junior wages make young workers commercially attractive to employers, it is common for young workers to be asked to work hours that interfere with their ability to engage with their schooling commitments, including being well-rested and completing private study. There is a concern that young people, particularly those from financially disadvantaged backgrounds, are being induced into low-paid and low-skilled work at an early age in the sectors covered

¹⁴ Sam Harvey, 'Addressing Australia's Mental Health Crisis: Time for Bold Reform', *Black Dog Institute* (Web Page, 2024) <https://www.blackdoginstitute.org.au/news/addressing-australias-mental-health-crisis-time-for-bold-reform/>

¹⁵ Sam Harvey, *ibid.*

¹⁶ Australian Bureau of Statistics, 'Education and Work, Australia' (Web Page, 2024) <https://www.abs.gov.au/statistics/people/education/education-and-work-australia/latest-release>.

by the Awards, to the detriment of their further education and career potential. At the same time, as set out above, young workers are having to work increased hours in order to afford basic necessities.

23. Combined with the lack of consistent regulation about hours of work and the absence of any age quota requirements, junior wages risk contributing to inequality in educational outcomes for young people. Regulation of the working hours of children is a matter for individual States/Territories. Generally, from the age of 15, there are very few restrictions on when a child can work, apart from not being permitted to work during their normal school hours. In our experience, the combination of junior wages and lack of regulation of working hours means that young workers are pressured into accepting more shifts than they can reasonably manage alongside their study commitments and other recreational activities, sometimes working until midnight or even all night.

24. As junior wages can apply up until the age of 21, this also affects large numbers of tertiary students who are experiencing significant pressure to work in conflict with their studies. The Universities Australia Survey, cited in the National Union of Students 2021-2022 pre-budget submissions, found that:

- (a) More than one-quarter of full-time domestic undergraduates regularly miss classes because they have to work; 41% report that work has a negative impact on study.
- (b) 36% of part-time domestic undergraduates regularly missed classes to work; 52% reported that work has a negative impact on study.
- (c) Only 35% of students who work believe that their work/study balance is satisfactory; 39% of domestic students report that their work has little value to them apart from the money.¹⁷

¹⁷ National Union of Students Inc, Submission to Department of the Treasury, Parliament of Australia, *A Submission to the Australian Treasury for the Pre-Budget 2021-2022* (January 2021) 3.

25. Given the skilled worker shortages in Australia identified by the Australian Government,¹⁸ where 36% of occupations assessed were in national shortage, it is necessary to ensure that junior wages covered by these Awards do not inadvertently inhibit young people's access to secure work across the economy and thwart the objects of the *FWA* to promote productivity and economic growth for Australia's future economic prosperity.

26. In our submission, the Application will further improve access to secure work across the economy, as it is likely that reducing the labour cost incentives currently provided by junior wages will encourage employers to offer more part-time roles in preference to casual roles.

(d) The impact of junior wages on business, including regulatory burden – section 134(1)(f) *FWA*

27. It is submitted that the system of junior wages in these Awards imposes a regulatory burden on employers that many are not equipped to manage. As detailed above, young employees are typically unfamiliar with workplace rights and have difficulty identifying and dealing with workplace problems. In our experience, administrative errors relating to junior rates are very common, including where employers have not applied or updated the correct rate relevant to a junior's age, resulting in underpayments that are extensive and difficult to rectify. This is often complicated by poor record-keeping, the absence of any written employment contract, confusion over whether employment is part-time or casual, classification changes or disputes, and penalty rates that have not been applied correctly over a long period of time. The Fair Work Ombudsman's regulatory audits of the Fast Food, restaurant, cafes and retail sectors shows that between 2019 and 2020, out of 171 businesses investigated, 50% failed to pay their staff correctly.¹⁹ Additionally, 16% of employers failed to meet pay slip and record-keeping requirements and 34% breached both monetary and non-monetary obligations.²⁰ Given the high numbers of young people employed in the sectors

¹⁸ Australian Government, 'Towards a National Jobs and Skills Roadmap: Annual Jobs and Skills Report' (October 2023) 12.

¹⁹ Australian Government Fair Work Ombudsman, 'National Food & Retail Revisit' (Report, 2020) <https://www.fairwork.gov.au/sites/default/files/migration/1151/national-food-and-retail-revisit.pdf>

²⁰ Australian Government Fair Work Ombudsman, 'National Food & Retail Revisit' (Report, 2020) <https://www.fairwork.gov.au/sites/default/files/migration/1151/national-food-and-retail-revisit.pdf>

covered by these Awards,²¹ it is submitted that junior wages impose a regulatory burden on employers that is a common source of underpayments, hindering young workers' economic participation and national economic prosperity.

Part 2 - Australia's International Labour Obligations

28. Section 3 of the *FWA* lists the objects of the *FWA*, which include to provide 'workplace relations laws that are fair to working Australians' and which, among other things, 'take into account Australia's international labour obligations'.

29. Australia's 'international labour obligations' are not defined in the *FWA*. The Explanatory Memorandum of the *Fair Work Bill 2008*, suggests that at a minimum, Australia's international labour obligations include those falling under the following instruments (relevant to this submission):

1. *ILO Convention (No. 111) concerning Discrimination in respect of Employment and Occupation* (Geneva, 25 June 1958) [1974] ATS 12 (the "ILO Convention");
2. the *International Covenant on Economic, Social and Cultural Rights* (New York, 16 December 1966) [1976] ATS 5.²² (the "ICESCR")

30. We outline those aspects of these instruments relevant to our submissions below, as well as other international labour and human rights laws relevant to the issue that is the subject of this Application. We submit that together, these laws impose the following obligations on Australia with respect to employment:

1. an obligation to take steps to eliminate discrimination in the workplace;
2. an obligation to give effect to the rights of all workers to receive equal pay for equal work.

²¹ Australian Bureau of Statistics, *12 insights about work and study from the 2021 Census* (Media Release, 12 October 2022) <https://www.abs.gov.au/media-centre/media-releases/12-insights-about-work-and-study-2021-census>. According to the 2021 census, fast food cooks have a median age of 18 years old.

²² See *Fair Work Bill 2008*, Explanatory Memorandum, para 2251.

31. We submit that laws which allow lower pay for equal work, merely on the basis of age, are not consistent with Australia's international labour obligations, and are not justified by any exceptions to those laws.

A. ILO Convention No. 111

32. Australia has ratified the *Discrimination (Employment and Occupation) Convention, 1958 (No. 111)* (the "Discrimination Convention"). This is one of the International Labour Organization's ("ILO") Fundamental Conventions, which means it is deemed to cover subjects considered to be fundamental principles and rights at work.²³ It is a legally binding treaty on Australia, and has been incorporated into domestic law through the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (now the *Australian Human Rights Commission Act 1986* (Cth)).²⁴

33. While age is not one of the grounds of discrimination listed in Article 1(a) of the Discrimination Convention, Article 1(b) includes 'such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with appropriate bodies'. In 1989, Australia added various further grounds to the definition of discrimination, including 'age'.²⁵

34. Article 2 of the Discrimination Convention requires Australia 'to pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof'. Under Article 3(c), Australia is required

²³ See the *Declaration on Fundamental Principles and Rights at Work*, adopted by the International Labour Conference at its Eighty-Sixth Session, Geneva, 18 June 1998.

²⁴ See Schedule 1.

²⁵ Through the Human Rights and Equal Opportunity Commission Regulations 1989 (Cth), reg 4. These regulations were replaced in 2019 by the Australian Human Rights Commission Regulations 2019 (Cth), but age remained a ground of declared discrimination. See reg 6. See International Labour Organisation, 'Observation (CEACR) – adopted 1993, published 80th ILC session (1993)' on the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) – Australia.

to, among other things, ‘repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the policy’.

35. Under Article 1(2), distinction ‘in respect of a particular job based on the inherent requirements’ shall not be considered discrimination. This does not justify general distinctions across industries such as the junior pay rates in the Awards the subject of the Application, where age does not affect the ability of an employee to perform the inherent requirements of the particular job.

36. The only other exception to the general obligations in the Discrimination Convention is found in Article 5 which concerns special measures.

i. "Special Measures" under Article 5 of the Discrimination Convention

37. Article 5(1) excludes ‘Special measures of protection or assistance provided for in other Conventions or Recommendations adopted by the International Labour Conference’. We submit that there are no such special measures in ILO Conventions or Recommendations that are relevant to the application of junior pay rates.

38. Article 5(2) permits Members ‘after consultation with representative employers’ and workers’ organisations’ to ‘determine that other special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognized to require special protection or assistance, shall not be deemed to be discrimination’. We are not aware that Australia has made a determination that junior rates of pay are a ‘special measure’ for the purposes of this Article, or that the requisite consultation occurred before such a determination. In any event, we submit that junior rates of pay in these Awards do not meet the requirements of a special measure for the purposes of Article 5 of the Discrimination Convention.

39. There are two main types of special measures under Article 5: protective measures, and affirmative action or positive measures ('assistance').²⁶ The International Labour Office has made the following comments in relation to Article 5(2):

1. it is important to ensure that the special measures concerned do in fact pursue the objective of offering protection or assistance;
2. special measures must be proportional to the nature and scope of the protection needed or of the existing discrimination;
3. once adopted, the special measures should be re-examined periodically, in order to ascertain whether they are still needed and remain effective - such measures are clearly of a temporary nature in as much as their objective is to compensate for imbalances resulting from discrimination against certain workers or certain sectors.²⁷

40. In our submission, junior rates of pay do not meet these requirements, and should not be considered a special measure under Article 5(2). For the reasons detailed below, we submit that:

1. laws that actively disadvantage a group in need of protection or assistance cannot be considered a special measure;
2. junior rates of pay in the Awards are not proportionate to the nature and scope of protection or assistance needed to address youth unemployment, and other policies could be adopted which would likely be more effective, and less intrusive on the rights of young people;
3. special measures must be of a temporary nature, and the data outlined in our submission in relation to young people's economic and social rights in Australia demonstrates that any perceived benefit of this policy is now outweighed by other considerations.

²⁶ International Labour Office, 'Fundamental Rights at Work and International Labour Standards' (Geneva, 2003), p76.

²⁷ International Labour Office, 'Fundamental Rights at Work and International Labour Standards' (Geneva, 2003), p76; International Labour Office, 'Guide to International Labour Standards and Rights at Work Concerning Young People' (Geneva, 2017), p28.

ii. Special measures must pursue an objective of protection or assistance

41. A review of Hansard records since 1975 indicates that the rationale for junior rates of pay in Australia is to assist young people to overcome discrimination they would otherwise face in entering the workforce.²⁸ In a 2007 Direct Request in relation to the ILO's Minimum Wage Fixing Convention 1970, the ILO Committee noted the Australian Government's explanations that these lower rates are 'necessary for securing employment for young people'.²⁹ However, the Australian Industrial Relations Commission's 1998 Issues paper on the Junior Rates Inquiry observed that that youth rates were of little use in securing a direct entry to full-time employment.³⁰
42. Even assuming junior rates of pay are designed to assist young people to gain employment, this is not an argument that can be plausibly maintained in the context of the highly automated, unskilled labour markets of the fast food and retail industries, typified by junior employees working in customer service roles. Not all Awards have junior rates of pay, and there is no particular justification evident for their inclusion in these Awards.
43. Further, any objective of protection or assistance should not come at the expense of other rights of the protected or assisted group or adversely affect a young person's safety and quality of life. Special measures are, by definition, intended to have a protective or positive effect for a disadvantaged group. To the extent that junior wage rates disadvantage young people as a particular group in terms of remuneration, it is questionable whether they could be considered a special measure at all. Indeed, Australia has adopted other measures to encourage the employment of older Australians, who likewise can face barriers to entering the workforce.

²⁸ Commonwealth, *Parliamentary Debates*, House of Representative, 19 June 1996, 2310 (Dr Brendan John Nelson).

²⁹ Direct Request (CEACR) – adopted 2006, published 96th ILC session (2007) – *Minimum Wage Fixing Convention, 1970 (No 131) – Australia (Ratification: 1973)*. This is consistent with our review of Hansard records on this issue since 1975.

³⁰ Australian Industrial Relations Commission, *Junior Rates Inquiry* (Report of the Full Bench Inquiring Under Section 120B of the Workplace Relations Act 1996) 176.

44. As various comments by the ILO Committee demonstrate, there are other models that can be adopted to address concerns about youth unemployment, which do not have such a negative impact on young workers.³¹ Further, evidence from other jurisdictions which have abolished junior rates of pay, such as New Zealand, suggests that this does not have a significant detrimental impact on levels of employment of young people. This raises doubt as to whether junior rates of pay can genuinely be considered to pursue the objective of offering protection or assistance for young people, even if they are accepted to be a special measure.

iii. Special measures must be proportional to the nature and scope of the existing discrimination

45. Even if junior rates of pay are capable of being considered a special measure, we submit that they are not proportional to the nature and scope of the protections or assistance that may be needed.

46. Junior rates of pay under these Awards apply in a blanket fashion, and do not take into account the qualifications or skills that young people may have, or the unique contributions they may be able to make compared with other workers. Under these Awards, there already exists a mechanism for tailoring rates of pay to the skills and responsibilities required for a particular role. Further, junior rates of pay apply well beyond the time that might be expected for young people in their first job to meet the requirements of the role. In most jurisdictions, a young person can start working from at least the age of 15, and yet junior rates of pay under the Awards apply until the age of 21.

iv. Special measures are temporary

³¹ See for example: International Labour Office, 'Guide to International Labour Standards and Rights at Work Concerning Young People' (Geneva, 2017); Report of the Committee of Experts on the Application of Conventions and Recommendations (Articles 19, 22 and 35 of the Constitution), General Survey on Minimum Wages (1992); General Survey of the reports on the Minimum Wage Fixing Convention, 1970 (No. 131), and the Minimum Wage Fixing Recommendation, 1970 (No. 135), (2014).

47. The junior rates of pay in these Awards are not subject to regular review in terms of their effectiveness, whether barriers to youth participation in the workforce remain and if so, for what reasons, and whether other policies could be adopted to address the problem.

v. Junior wages cannot be considered a "special measure"

48. In our submission, given the criteria discussed above, junior wages cannot be considered a "special measure" under the Discrimination Convention. There is therefore no legal justification to support any popular view that junior wages are a form of affirmative action to help young people "get a foot in the door".

49. It is therefore necessary for the FWC to make the determination sought by the SDA in order to meet the objects of the Act to provide workplace relations laws that are fair to young Australians, taking into account Australia's international labour obligations to eliminate discrimination in the workplace.

B. International Covenant on Economic, Social and Cultural Rights (ICESCR)

50. Australia ratified the ICESCR in 1975. This is a legally binding treaty on Australia, and has been incorporated into domestic law through the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (now the *Australian Human Rights Commission Act 1986* (Cth)).³² As above, the ICESCR was listed in the Explanatory Memorandum for the Fair Work Bill as being one of the instruments containing Australia's international labour obligations.

51. Article 7 of the ICESCR begins:

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

³² See Schedule 2.

(a) *Remuneration which provides all workers, as a minimum, with:*

- (i) *Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;*
- (ii) *A decent living for themselves and their families in accordance with the provisions of the present Covenant.*

52. Article 2 also includes a non-discrimination clause in relation to the rights listed in the ICESCR. While ‘age’ is not a specific ground in this Article, it is covered by the inclusive reference to ‘other status’.³³

53. In General Comment No 23 (2016) on the right to just and favourable conditions of work (Article 7 of the ICESCR), the UN Committee on Economic, Social and Cultural Rights commented in relation to Article 7(a)(i) that workers should receive equal remuneration when they perform the same or similar jobs, and that ‘their remuneration should also be equal even when their work is completely different but nonetheless of equal value when assessed by objective criteria’.³⁴ The Committee reiterated that equality applies to all workers without distinction based on, among other things, ‘age’, and observed in relation to young workers:

*All workers should be protected against age discrimination. Young workers should not suffer wage discrimination, for example, being forced to accept low wages that do not reflect their skills.*³⁵

54. The Committee pointed to the need for ‘an ongoing evaluation of whether the work is of equal value and whether the remuneration received is equal’, and observed that the focus should be on the “value” of the work and, as such, ‘evaluation factors should include skills, responsibilities and effort required by the worker, as well as working conditions’.³⁶

³³ See for example CESCR General Comment No. 6: The Economic, Social and Cultural Rights of Older Persons, adopted 8 December 1995, para.12 (discussion of age discrimination as coming under ‘other status’).

³⁴ para 11.

³⁵ para 47(b).

³⁶ para 12.

55. Finally, the Committee observed, “The enjoyment of the right to just and favourable conditions of work is a prerequisite for, and result of, the enjoyment of other Covenant rights, for example, the right to the highest attainable standard of physical and mental health, by avoiding occupational accidents and disease, and an adequate standard of living through decent remuneration.”³⁷

56. We note that in General Comment 20 (2009) on non-discrimination in economic, social and cultural rights, the Committee commented that in order to eliminate substantive discrimination ‘States parties may be, and in some cases are, under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination’.³⁸ The Committee observed that that such special measures are legitimate only to the extent they ‘represent reasonable, objective, and proportional means to redress de facto discrimination and are discontinued when substantive equality has been achieved’.³⁹

57. In our submission, junior rates of pay do not meet these requirements, and are therefore not a legitimate measure under the ICESR.

C. Other international labour and human rights obligations

58. We submit that the principles of non discrimination and equal work for equal pay should be considered core tenets of Australia’s international labour obligations, and that these apply to young people within the objects of the *FWA* to promote social inclusion for all Australians. In this section, we briefly outline other international instruments that, in addition to the Discrimination Convention and the ICESR, support our submissions.

i. Other ILO instruments

³⁷ para 1.

³⁸ para 9.

³⁹ para 9.

59. Australia is a signatory to the ILO's Minimum Wage Fixing Convention 1970 ('the Minimum Wage Convention'). This Convention does not provide for the fixing of different minimum wage rates on the basis of age.⁴⁰ The ILO Committee has observed that this means "the general principles laid down in other instruments have to be observed, and particularly those contained in the Preamble of the Constitution of the ILO which specifically refers to the application of the principle of "equal remuneration for work of equal value".⁴¹
60. Article 1 of the Convention sets out the procedure for member states to exclude groups of wage earners from the system of minimum ages. This includes a procedure for full consultation with the representative organisations of employers and workers concerned.
61. The ILO has made various statements with respect to the issue of the remuneration of young workers. In doing so, it has tended to distinguish between young workers who perform the same work as their adult counterparts, and young people who work while training (apprentices or trainees).⁴² As early as 1945, the International Labour Conference adopted a Resolution which stated:
- Provisions with reference to wages paid to young workers should have the objective of assuring that they are paid wages commensurate with the work performed, observing wherever possible the principle of equal pay for comparable jobs. Provision should be made for inexperienced young workers through learners' rates when substantial periods of learning are required and through apprenticeship programs.*
62. The Resolution also provided that wages for young workers who are not apprentices 'should be fixed in the light of educational requirements, experience, job content and the average output of young workers, with provision for successive increases in minimum wage rates

⁴⁰ See commentary in Youcef Ghellab: Minimum Wages and Youth Unemployment ILO Geneva: 1998 Employment and Training Paper 26.

⁴¹ Report of the Committee of Experts on the Application of Conventions and Recommendations (Articles 19, 22 and 35 of the Constitution), General Survey on Minimum Wages (1992), para 169.

⁴² See for example the summary in in Youcef Ghellab: Minimum Wages and Youth Unemployment ILO Geneva: 1998 Employment and Training Paper 26.

commensurate with the average time needed to gain proficiency, and without prejudice to the principle of equal pay for equal work...'⁴³

63. In a 1992 General Survey, the Committee referred to the principle of equal pay for equal work, commenting that the 'quantity and quality of work carried out should be the decisive factor in determining the wage paid'.⁴⁴ The Committee also commented:

The reasons that prompted the adoption of lower minimum wage rates for groups of workers on account of their age and disabilities should be regularly re-examined in the light of the principle of equal remuneration for work of equal value.⁴⁵

64. Similarly, in a 2014 General Survey, the Committee commented that in relation to remuneration: 'Rather than using the criterion of age, it might be preferable to take account of the qualifications and experience of the workers concerned.'⁴⁶

65. The issue of Australia's lower wage rates for junior workers has been raised by the International Labour Committee in respect of the Minimum Wage Convention. In a 2007 Direct Request in relation to the Minimum Wage Fixing Convention 1970, for example, the ILO Committee noted the Australian Government's explanations that these lower rates are 'necessary for securing employment for young people'.⁴⁷ The Committee outlined its expectations that 'the Government will continue to review from time to time the rationale and advisability of fixing differentiated wage rates on grounds such as age or disability'.⁴⁸

ii. Other international law instruments

⁴³ International Labour Conference (27th, 1945: Paris, France), 'Resolutions concerning the protection of children and young workers, submitted by the Committee on the protection of children and young workers', para 30.

⁴⁴ Report of the Committee of Experts on the Application of Conventions and Recommendations (Articles 19, 22 and 35 of the Constitution), General Survey on Minimum Wages (1992), para 171.

⁴⁵ Report of the Committee of Experts on the Application of Conventions and Recommendations (Articles 19, 22 and 35 of the Constitution), General Survey on Minimum Wages (1992), para 176.

⁴⁶ Report of the Committee of Experts on the Application of Conventions and Recommendations (Articles 19, 22 and 35 of the Constitution), General Survey of the reports on the Minimum Wage Fixing Convention, 1970 (No. 131), and the Minimum Wage Fixing Recommendation, 1970 (No. 135), (2014), para 178.

⁴⁷ Direct Request (CEACR) – adopted 2006, published 96th ILC session (2007) – *Minimum Wage Fixing Convention, 1970 (No 131) – Australia (Ratification: 1973)*.

⁴⁸ Direct Request (CEACR) – adopted 2006, published 96th ILC session (2007) – *Minimum Wage Fixing Convention, 1970 (No 131) – Australia (Ratification: 1973)*.

66. There are various other provisions in international human rights instruments that support the importance of non-discrimination in relation to remuneration in general, and for young people in particular, including the following provisions of Article 23 of the *Universal Declaration of Human Rights* (UDHR):

1. *Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.*
2. *Everyone without any discrimination, has the right to equal pay for equal work.*
3. *Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.*

67. Sustainable Development Goal 8.5 similarly seeks by 2030 to ‘achieve full and productive employment and decent work for all women and men, including for young people and persons with disabilities, and equal pay for work of equal value’.

Part 3 - Work value reasons

68. In our submission, the variations sought by the SDA to the junior rates in the Awards are justified by "work value reasons", as defined in [section 157\(2A\)](#) of the *FWA*, being the reasons justifying the amount that employees should be paid for doing a particular kind of work, relating to:

- 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.*

(a) Nature of the work

69. YLA endorses the totality of the SDA's submissions, and submits that the evidence demonstrates that the nature of the work performed by junior employees under these Awards requires minimal skill, experience or supervision, and can be done by a person of any age

meeting the inherent requirements of a particular role within the Classification structures set out in each Award.

70. While section 153(3) of the *FWA* effectively maintains that junior wages are a lawful form of age discrimination, there is no specifically stated rationale for why this is.
71. As outlined in the SDA's application, the rationale for junior rates has never been expressly linked to "work value". Nor has the justification for junior rates ever been properly examined by the legislature. Neither the explanatory memorandum nor the second reading speech articulates why the *FWA* enables the setting of minimum wages for junior employees. Julia Gillard's second reading speech in relation to the *Fair Work Bill 2008* merely reinforces the object of the bill as one that 'contains protections against discrimination'.⁴⁹ However, neither the explanatory memorandum nor the second reading contains any mention of junior wages or why they were specifically exempted as a permissible form of age discrimination in section 153(3).
72. There is no basis for junior wages in these Awards simply because the nature of the work is suited to young workers due to the minimal skills and experience required and their general availability.
73. The scope of work for young employees covered by these Awards is generally limited, with few staying in the industry beyond secondary or tertiary education. Unlike apprentices, young employees covered by these Awards do not tend to require intense supervision or extensive training and do not attain specific qualifications or skills at the conclusion of their employment as an apprentice or trainee would.

⁴⁹Commonwealth, *Parliamentary Debates*, House of Representative, 25 November 2008, 11189 (Julia Gillard).

(b) Level of Skill or responsibility

74. The junior wage provisions in these Awards cannot be plausibly maintained on the basis of any assumption that a young worker's ability or skill to perform the inherent requirements of their position is inferior to that of an older worker.

75. The Awards all set out clear Classification levels identifying respective roles, duties and responsibilities that are matched with a worker's level of skill, training and experience. Age is not a factor that affects Classification.

76. Clause 12.2 of the FFIA, clause 14.2 of the GRIA, and clause 12.2 of the PIA each uniformly state that, *"The classification by the employer must be based on the skill level that the employer requires the employee to exercise in order to carry out the principal functions of the employment."*

77. There is no doubt that an employee with the requisite skill level can meet the criteria for a particular Classification irrespective of their age. However, once junior wages are applied, the difference in pay is stark. For example, a casual 15-year-old is paid \$12.83/hour as a Level 1 employee under the Fast-Food Industry Award. A 20-year-old performing the identical job is paid \$28.86/hour.

78. In our submission, the absence of junior rates in other Awards that commonly employ junior workers (eg Aged Care Award, Building and Construction General On-Site Award, SCHADS Award) demonstrates that age should not be a relevant factor in making a wage determination, where a Classification structure exists, as it does in these Awards, based on the experience, skills and capacity of an employee to perform a particular role irrespective of age.

79. The existing junior wage schedules in these Awards are not commensurate with work value as the productivity, level of skill and responsibilities of workers of different ages is the same, or more similar than the difference in wages.

80. A disproportionate number of younger workers are employed in unskilled and service roles within the Fast Food and Retail sectors, where the productivity gains from experience are minimal.⁵⁰ This negates any argument that gaining skills or experience is necessary to achieve organisational productivity and efficiency.⁵¹
81. For example, the role and level of skill of a pizza delivery driver who starts working when they get their drivers' license at the age of 17 does not change despite the annual increase in wage with age.
82. In [*Application by Shop Distributive and Allied Employees Association \(SDA\) \[2014\] FWCFB 1846*](#), the Fair Work Commission accepted evidence that an employee's aptitude and competence is not necessarily limited by age. A review of the [transcript](#) demonstrates that length of experience with an employer, not age, was more valuable to employers.
83. YLA endorses the SDA's submissions to the effect that junior wages mean that a young employee is paid significantly less than an older employee performing an identical job, even where their skill, ability and experience is the same, or indeed in circumstances where the younger employee may be supervising older employees.
84. The evidence submitted by the SDA that employers prefer to roster young workers to save costs shows that youth wages are not being set proportionately to productivity, skill or responsibilities. The productivity of older workers relative to their wage is lower than for younger workers. The increase in wage according to age is greater than the increase in productivity. This reveals that junior wages are flawed in any purported rationale of reflecting differences of productivity bearing on skill or responsibilities.

⁵⁰ Alysia Blackham, 'Young Workers and Age Discrimination: Tensions and Conflicts' (2019) 48(1) *Industrial Law Journal* 1, 28.

⁵¹ Malcolm Sargeant, 'The UK National Minimum Wage and Age Discrimination' (2010) 31(3) *Policy Studies* 351, 353.

85. Any notion that an older worker is inherently more valuable than a younger employee within these Awards is flawed. While older workers might have transferable skills from prior employment or life experience, young people also bring valuable attributes, including a preparedness to undertake unskilled work, work unsociable hours (after 5pm and weekends), having market currency as consumers and followers of trends, particularly in the fast food and retail sector, and capacity to use and adapt to digital technology, such as the highly automated systems in the fast food and retail sectors. According to the Australian Bureau of Statistics, people aged 18-34 had the highest score on the Digital Inclusion Index Dashboard in 2022, with adults over the age of 70 having the lowest scores.⁵² The work value provided by junior employees covered by these Awards in terms of skill and responsibilities is therefore equal to or potentially even greater than that of an older worker.

(c) Conditions under which work is done

86. As discussed above, the conditions in which junior employees perform work covered by these Awards involve highly automated and digitized systems, requiring minimal skills, experience, individual discretion and supervision. The work is low-paid, and it is generally expected that employees in these industries will be available outside of standard business hours, commonly on a casual basis. The combination of these factors accounts for the high numbers of young employees who work in these industries, providing essential services and conveniences for the general public, typically representing their employers in customer-facing roles. As such, young workers provide work of significant value that should be reflected in the Award wage variations sought by the SDA.

Conclusion

⁵² Australian Bureau of Statistics, 'Digital preparedness' (Web Page, 2024)
[https://www.abs.gov.au/statistics/measuring-what-matters/measuring-what-matters-themes-and-indicators/prosperous/digital-preparedness#:~:text=According%20to%20the%20Australian%20Digital,had%20the%20lowest%20score%20\(48.5\)](https://www.abs.gov.au/statistics/measuring-what-matters/measuring-what-matters-themes-and-indicators/prosperous/digital-preparedness#:~:text=According%20to%20the%20Australian%20Digital,had%20the%20lowest%20score%20(48.5))

87. In summary, we submit that it is necessary for the FWC to vary these Awards as sought by the SDA as the current junior wage provisions do not provide a fair or relevant minimum safety net for young workers, and contravene Australia's international labour obligations to eliminate discrimination and provide equal pay for work of comparable value. As such, they contravene fundamental objects of the *FWA*.

88. On balance, we submit that the FWC should find in favour of the Application as the variations sought are fairer, less discriminatory, more compliant with Australia's international labour obligations, and better support the living standards and economic prosperity of young workers, hence further advancing the modern awards objective, the minimum wages objective and the *FWA*'s objects.

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