

[2018] FWCFB 5897 [Note: a [correction](#) has been issued to this document; the changes arising have been incorporated in this version at [275] and [284]]



DECISION

Fair Work Act 2009
s.156 - 4 yearly review of modern awards

4 yearly review of modern awards – *General Retail Industry Award 2010* (AM2017/43)

General retail industry

JUSTICE ROSS, PRESIDENT
VICE PRESIDENT HATCHER
COMMISSIONER LEE

MELBOURNE, 27 SEPTEMBER 2018

4 yearly review of modern awards – General Retail Industry Award 2010 – award specific penalty rates claims.

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ABBREVIATIONS

ABI	Australian Business Industrial and the New South Wales Business Chamber
ABS	Australian Bureau of Statistics
<i>Anglo American</i>	<i>CFMEU v Anglo American Metallurgical Coal Pty Ltd</i>
ANZSIC	Australian and New Zealand Standard Industrial Classification
ARA	Australian Retailers Association
ARS	Award Reliance Survey
AWRS	Australian Workplace Relations Study
Borland Report	Report by Professor Jeff Borland
<i>Casuals Case</i>	<i>4 yearly review of modern awards – Casual employment and part-time employment decision</i>
Census	Census of Population and Housing
CoE	Characteristics of Employment Survey
Commission	Fair Work Commission
CXI Research Group	Customer Experience and Insight Research Group
EEH	Survey of Employee Earnings and Hours
<i>Fast Food Award</i>	<i>Fast Food Industry Award 2010</i>
Act	<i>Fair Work Act 2009 (Cth)</i>
HERRC industries	Hospitality, entertainment, retail, restaurant and cafés
HILDA	Household, Income and Labour Dynamics in Australia
<i>Hospitality Award</i>	<i>Hospitality Industry (General) Award 2010</i>
IGA	Independent Grocers of Australia
<i>Junior Rates Case</i>	<i>Modern Awards Review 2012 – Junior Rates Decision</i>
MGA	Master Grocers Australia Limited
NES	National Employment Standards
NPS	Net Promoter Score
PC	Productivity Commission
PC Final Report	<i>Productivity Commission Inquiry Report: Workplace Relations Framework</i>
<i>Penalty Rates Decision</i>	<i>4 yearly review of modern awards – Penalty Rates – hospitality and retail industries decision</i>
<i>Penalty Rates Review</i>	<i>Shop, Distributive and Allied Employees Association v The Australian Industry Group</i>
<i>Pharmacy Award</i>	<i>Pharmacy Industry Award 2010</i>
Retail Award	<i>General Retail Industry Award 2010</i>
Retail Employers	Australian Retailers Association and Master Grocers Association
Retail sector	Division G—Retail trade (from the Australian and New Zealand Standard Industrial Classification 2006)
Review	4 yearly review of modern awards
Sands Report	<i>Retail Industry Store-Based Employee Experience and Perceptions of Working on Weekday Evenings and Saturdays</i>
Sands Survey	Survey by Survey Sample International for Dr Sean Sands
SDA	Shop, Distributive and Allied Employees Association
<i>Transitional Arrangements Decision</i>	<i>4 yearly review of modern awards – penalty rates – hospitality and retail sectors – transitional arrangements decision</i>
YO	Years old

1. Introduction

[1] Section 156 of the *Fair Work Act 2009* (Cth) (the Act) requires the Fair Work Commission (the Commission) to conduct a 4 yearly review of modern awards as soon as practicable after 1 January 2014 (the Review). Subsection 156(2) deals with what must be done in the Review and provides that the Commission must review all modern awards and may, among other things, make determinations varying modern awards.

[2] The decision deals with two claims to vary the *General Retail Industry Award 2010* (the Retail Award) as part of the Review. The Australian Retailers Association and Master Grocers Australia (the Retail Employers) seek to vary clause 30.3(c) to reduce the rates payable for shiftwork performed on Sundays. If granted the variation would reduce the Sunday shiftwork rate from 200 per cent to 175 per cent for full time and part-time employees and from 225 per cent to 200 per cent for casual employees.

[3] The Shop, Distributive and Allied Employees Association (SDA) seeks to vary the penalty rates for casuals on Saturday and for evening work on Monday to Friday. In short, the SDA seeks a penalty payment of an additional 25 per cent for ordinary hours worked by casual employees after 6pm Monday to Friday, and for all ordinary hours worked on a Saturday.

[4] It is necessary to first say something about the Commission's task in the Review before turning to describe the Retail industry and some other important contextual matters.

2. The Review

[5] Section 156 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'.¹ The discretion in s.156(2)(b)(i) to make determinations varying modern awards in a Review, is expressed in general, unqualified, terms.

[6] 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.² 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 is in Part 2-3 of the Act and hence 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.

[7] A range of other provisions of the Act and s.138 (achieving the modern awards objective) are also relevant to the Review: s.3 (object of the Act); s.55 (interaction with the National Employment Standards (NES)); Part 2-2 (the NES); s.135 (special provisions

¹ *Shop, Distributive and Allied Employees Association v The Australian Industry Group* (2017) 253 FCR 368 at [38].

² *O'Sullivan v Farrer* (1989) 168 CLR 210 at [12] per Mason CJ, Brennan, Dawson and Gaudron JJ.

relating to modern award minimum wages); Division 3 (terms of modern awards) and Division 6 (general provisions relating to modern award powers) of Part 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 Division 3 of Part 5-1 (conduct of matters before the Commission).

[8] The modern awards objective is set out in s.134 of the FW Act. It states:

‘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
- (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).⁷

[9] The 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 ss.134(1)(a)–(h) (the s.134 considerations).

[10] The modern awards objective is very broadly expressed.³ 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 the matters in ss.134(1)(a)–(h).⁴ Fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question.⁵

[11] 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.⁶ No particular primacy is attached to any of the s.134 considerations⁷ and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.

[12] 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) and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance. It is not necessary to make a finding that the award fails to satisfy one or more of the s.134 considerations as a prerequisite to the variation of a modern award.⁸ Generally speaking, the s.134 considerations do not set a particular standard against which a modern award can be evaluated; many of them may be characterised as broad social objectives.⁹

[13] Nor is it necessary for the Commission to conclude that the award, or a term of it as it currently stands, does not meet the modern awards objective. Rather, it is necessary for the Commission to review a particular modern award and, by reference to the s.134 considerations 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.¹⁰

³ *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227 at [35].

⁴ [2017] FWCFB 1001 at [128]; *Shop, Distributive and Allied Employees Association v The Australian Industry Group* (2017) 253 FCR 368 at [41]–[44].

⁵ [2018] FWCFB 3500 at [21]–[24].

⁶ *Edwards v Giudice* (1999) 94 FCR 561 at [5]; *Australian Competition and Consumer Commission v Leelee Pty Ltd* [1999] FCA 1121 at [81]–[84]; *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [56].

⁷ *Shop, Distributive and Allied Employees Association v The Australian Industry Group* (2017) 253 FCR 368 at [33].

⁸ *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [105]–[106].

⁹ See *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [109]–[110]; albeit the Court was considering a different statutory context, this observation is applicable to the Commission’s task in the Review.

¹⁰ *Ibid* at [28]–[29].

[14] In the *4 Yearly Review of Modern Awards – Penalty Rates (Hospitality and Retail Sectors decision (the Penalty Rates Decision))*¹¹ the Commission made a number of observations about the s.134 considerations, which are apposite to the matters before us:

- **s.134(1)(a):** a threshold of two thirds of median (adult) ordinary time earnings provides a suitable benchmark for determining who is ‘low paid’. There is, however, no single accepted measure of two-thirds of median (adult) ordinary time earnings. The two main ABS surveys of the distribution of earnings are the *Characteristics of Employment Survey*¹² (the CoE) and the *Survey of Employee Earnings and Hours*¹³ (the EEH).¹⁴
- The most recent data for the ‘low paid’ threshold is set out below:

CoE (August 2017) ¹⁵	\$845.33
EEH (May 2016) ¹⁶	\$917.33

- The assessment of relative living standards focuses on the comparison between award-reliant workers and other employed workers, especially non-managerial workers.¹⁷
- Award reliance is a measure of the proportion of employees whose pay rate is set according to the relevant award rate specified for the classification of the employee and not above that rate.¹⁸ Relevantly for present purposes, the most recent data shows that 34.5 per cent of the retail trade industry employees are award reliant, which is as among the most award-reliant industries.¹⁹
- **s.134(1)(b):** It is likely that employee and employer decision-making about whether or not to bargain is influenced by a complex mix of factors, not just the level of penalty rates in the relevant modern award.
- **s.134(1)(c):** *obtaining* employment is the focus of s.134(1)(c). The broader notion of promoting social inclusion (in s.134(b)) is also relevant in considering the level of penalty rates in a modern award as they may impact upon an employee’s remuneration and hence their capacity to engage in community life and the extent of their social participation. The likely impact of any exercise of modern award powers on ‘employment growth’ is one of the other matters we are required to take into account (s.134(1)(h)). These considerations (ss.134(1)(c) and (h)) require us to

¹¹ [2017] FWCFB 1001.

¹² ABS, *Characteristics of Employment, Australia, August 2017*, Catalogue No. 6333.0.

¹³ ABS, *Employee Earnings and Hours, Australia, May 2016*, Catalogue No. 6306.0.

¹⁴ [2017] FWCFB 1001 at [166].

¹⁵ ABS, *Characteristics of Employment, Australia, August 2017*, Catalogue No. 6333.0, Table 7.1.

¹⁶ ABS, *Employee, Earnings and Hours, Australia, May 2016*, Catalogue No. 6306.0, Data Cube 8.

¹⁷ [2016] FWCFB 3500 at [371].

¹⁸ [2017] FWCFB 1001 at [170].

¹⁹ [2018] FWCFB 3500 at [195].

assess the likely impact of any proposed change to penalty rates on employment growth, in terms of jobs and hours worked.²⁰

- **s.134(1)(da)**: speaks of the *need* to provide *additional* remuneration to employees working in the circumstances identified in paragraphs 134(1)(da)(i)–(iv). This requires a consideration of a range of matters, including:

- (i) the impact of working at such times or on such days on the employees concerned (i.e. the extent of the disutility);²¹

- (ii) the terms of the relevant modern award, in particular whether it already compensates employees for working at such times or on such days (e.g. through ‘loaded’ minimum rates or the payment of an industry allowance which is intended to compensate employees for the requirement to work at such times or on such days); and

- (iii) the extent to which working at such times or on such days is a feature of the industry regulated by the particular modern award.²²

- Ultimately, however, the issue is whether an award which prescribes a particular penalty rate provides ‘a fair and relevant minimum safety net.’ A central consideration in this regard is whether a particular penalty rate provides employees with ‘fair and relevant’ compensation for the disutility associated with working at the particular time(s) to which the penalty attaches.²³

- Five further points may be made about s.134(1)(da):

- (i) ‘additional remuneration’ means remuneration in addition to what employees would receive for working what are characterised as ‘normal hours’, ie reasonably predictable hours worked Monday to Friday within the spread of hours prescribed in the relevant modern award.²⁴

- (ii) s.134(1)(da) is a relevant consideration not a statutory directive that additional remuneration be provided for working in the identified circumstances.²⁵

- (iii) s.134(da) does not prescribe or mandate a fixed relationship between the remuneration of those employees who, for example, work on weekends or public holidays, and those who do not. The additional remuneration paid to the employees whose working arrangements fall within the scope of the descriptors

²⁰ [2017] FWCFB 1001 at [179]–[181].

²¹ This 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.

²² [2017] FWCFB 1001 at [45].

²³ Ibid at [202].

²⁴ Ibid at [192].

²⁵ Ibid at [195].

in s.134(1)(da)(i)–(v) will depend on, among other things, the circumstances and context pertaining to work under the particular modern award.²⁶

(iv) s.134(1)(da) identifies a number of circumstances in which we are required to take into account the need to provide additional remuneration (i.e. those in paragraphs 134(1)(da)(i) to (iv)). Working ‘unsocial ... hours’ is one such circumstance (s.134(1)(da)(i)) and working ‘on weekends or public holidays’ (s.134(1)(da)(iii)) is another. The inclusion of these two, separate, circumstances means that it is not necessary to establish that the hours worked on weekends or public holidays are ‘unsocial ... hours’. Rather, we are required to take into account the need to provide additional remuneration for working on weekends or public holidays, irrespective of whether working at such times can be characterised as working ‘unsocial ... hours’.²⁷

(v) s.134(1)(da)(ii) the use of the disjunctive ‘or’ makes it clear that the provision is dealing with separate circumstances: ‘unsocial, irregular or unpredictable hours’. Section 134(1)(da)(ii) requires that we take into account the need to provide additional remuneration for employees working in each of these circumstances. The expression ‘unsocial ... hours’ includes working late at night and or early in the morning, given the extent of employee disutility associated with working at these times. ‘Irregular or unpredictable hours’ is apt to describe casual employment.²⁸

- **s.134(1)(f)**: is expressed in very broad terms, it requires us to take into account the likely impact of any exercise in modern award powers ‘on business *including*’ (but not confined to) the specific matters mentioned, i.e. ‘productivity, employment costs and regulatory burden’. It is axiomatic that the exercise of modern award powers to vary a modern award to reduce penalty rates is likely to have a positive impact on business, by reducing employment costs for those businesses that require employees to work at times, or on days, which are subject to a penalty rate. Similarly, an increase in penalty rates will have a negative impact on businesses, by *increasing* employment costs for businesses that require employees to work at times which are subject to the increased penalty rate. The impact of a reduction or increase in penalty rates upon productivity is less clear.²⁹
- **s.134(1)(h)**: the requirement to take into account the likely impact of any exercise of modern award powers on ‘the sustainability, performance and competitiveness *of the national economy*’ (emphasis added) focuses on the aggregate (as opposed to sectoral) impact of an exercise of modern award powers.³⁰

[15] The matters which may be taken into account in determining whether a modern award constitutes a fair and relevant minimum safety net of terms and conditions are not confined to

²⁶ Ibid at [199].

²⁷ Ibid at [202].

²⁸ Ibid at [200]–[201].

²⁹ Ibid at [218]–[219].

³⁰ Ibid at [229].

the s.134 considerations. As the Full Court observed in *Shop, Distributive and Allied Employees Association v The Australian Industry Group*³¹ (*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).’³²

[16] 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.’

[17] As noted by the Full Federal Court in *CFMEU v Anglo American Metallurgical Coal Pty Ltd* (*‘Anglo American’*):

‘The words “only to the extent necessary” in s.138 emphasise the fact that it is the minimum safety net and minimum wages objective to which the modern awards are directed. Other terms and conditions beyond the minimum are to be the product of enterprise bargaining, and enterprise agreements under Pt 2-4.’³³

[18] 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.³⁴ A distinction is to be drawn between that which is ‘necessary’ and that which is merely desirable, as Tracey J observed in *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)*.³⁵

‘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 earn the same imperative for action. Whilst this distinction may be accepted it must also be

³¹ *Shop, Distributive and Allied Employees Association v The Australian Industry Group* (2017) 253 FCR 368.

³² *Ibid* at [48].

³³ *CFMEU v Anglo American Metallurgical Coal Pty Ltd* [2017] FCAFC 123 at [28]-[29]; cited with approval in *Shop, Distributive and Allied Employees Association v The Australian Industry Group* (2017) 253 FCR 368 at [45].

³⁴ See generally: *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)* (2012) 205 FCR 227.

³⁵ *Shop, Distributive and Allied Employees Associates v National Retail Association (No.2)* (2012) 205 FCR 227.

acknowledged that reasonable minds may differ as to whether particular action is necessary or merely desirable.³⁶

[19] In the *Penalty Rates Case*³⁷ 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.

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.³⁸

[20] 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 *Anglo American* as follows:³⁹

[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

³⁶ Ibid at [46]; also see [2017] FWCFB 1001 at [136].

³⁷ [\[2017\] FWCFB 1001](#).

³⁸ Ibid at [269].

³⁹ *CFMEU v Anglo American Metallurgical Coal Pty Ltd* (2017) FCR 337 at [28]–[29].

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.’

[21] 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.’⁴⁰

[22] We will apply the above principles in this decision.

3. General Retail Industry

3.1 The data

[23] The data in this section are based on the Commission’s report *General retail industry profile*.⁴¹ The data presented are collected from four sources: the Australian Bureau of Statistics (ABS), the Fair Work Commission’s Australian Workplace and Relations Study (AWRS) and the Award Reliance (AR) survey and the Household Income and Labour Dynamics in Australia (HILDA) survey. The ABS data contains a number of surveys on the performance, structure and characteristics of industries. The AWRS, the AR and HILDA surveys are large-scale quantitative surveys that collectively provide information on enterprises, employees and households. Further information on the Commission’s data sources is located on its website.⁴²

[24] There are 4 levels within the Australian and New Zealand Standard Industrial Classification (ANZSIC) structure: division, subdivision, group and class. The most readily available data are at the division level (or 1-digit level) and the following data are presented at this level. In this instance, the relevant division of ANZSIC is Division G: Retail trade (for convenience we refer to this as the Retail sector). The following presents the subdivisions, groups and classes within the Retail sector:

⁴⁰ Ibid at [46].

⁴¹ *General retail industry profile*, 22 August 2018.

⁴² Fair Work Commission, *Award Reliance Survey*, 2013, data manual: <https://www.fwc.gov.au/documents/sites/wagereview2015/research/AR-data-user-manual.pdf> and Fair Work Commission, *Australian Workplace Relations Study*, 2014: <https://www.fwc.gov.au/resources/research/australian-workplace-relations-study>.

- 39 Motor vehicle and motor vehicle parts retailing
 - 391 Motor vehicle retailing
 - 3911 Car retailing
 - 3912 Motor cycle retailing
 - 3913 Trailer and other motor vehicle retailing
 - 392 Motor vehicle parts and tyre retailing
 - 3921 Motor vehicle parts retailing
 - 3922 Tyre retailing
- 40 Fuel retailing
 - 400 Fuel retailing
 - 4000 Fuel retailing
- 41 Food retailing
 - 411 Supermarket and grocery stores
 - 4110 Supermarket and grocery stores
 - 412 Specialised food retailing
 - 4121 Fresh meat, fish and poultry retailing
 - 4122 Fruit and vegetable retailing
 - 4123 Liquor retailing
 - 4129 Other specialised food retailing
- 42 Other store-based retailing
 - 421 Furniture, floor coverings, houseware and textile goods retailing
 - 4211 Furniture retailing
 - 4212 Floor covering retailing
 - 4213 Houseware retailing
 - 4214 Manchester and other textile goods retailing
 - 425 Electrical and electronic goods retailing
 - 4221 Electrical, electronic and gas appliance retailing
 - 4222 Computer and computer peripheral retailing
 - 4229 Other electrical and electronic goods retailing
 - 423 Hardware, building and garden supplies retailing
 - 4231 Hardware and building supplies retailing
 - 4232 Garden supplies retailing
 - 424 Recreational goods retailing
 - 4241 Sport and camping equipment retailing
 - 4242 Entertainment media retailing
 - 4243 Toy and game retailing
 - 4244 Newspaper and book retailing
 - 4245 Marine equipment retailing
 - 425 Clothing, footwear and personal accessory retailing
 - 4251 Clothing retailing
 - 4252 Footwear retailing
 - 4253 Watch and jewellery retailing
 - 4259 Other personal accessory retailing
 - 426 Department stores
 - 427 Pharmaceuticals and other store-based retailing

- 4271 Pharmaceutical, cosmetic and toiletry goods retailing
- 4272 Stationery goods retailing
- 4273 Antique and used goods retailing
- 4274 Flower retailing
- 4279 Other store-based retailing n.e.c.
- 43 Non-store retailing and retail commission-based buying and/or selling
 - 431 Non-store retailing
 - 432 Retail commission-based buying and/or selling.

[25] A paper⁴³ by Commission staff provides a framework for ‘mapping’ modern award coverage to the ANZSIC. Table 1 shows how the Retail Award is ‘mapped’ with the relevant industry class. The ANZSIC classes included in the profile relate to Division G: Retail trade, Division L: Rental, hiring and real estate services, Division N: Administrative and support services and Division S: Other services.

Table 1⁴⁴
General Retail Industry Award 2010 ‘mapped’ to ANZSIC class

	ANZSIC class included in profile
General Retail Industry	4110 – Supermarket and grocery stores 4121 – Fresh meat, fish and poultry retailing 4122 – Fruit and vegetable retailing 4129 – Other specialised food retailing 4211 – Furniture retailing 4213 – Houseware retailing 4214 – Manchester and other textile goods retailing 4221 – Electrical, electronic and gas appliance retailing 4222 – Computer and computer peripheral retailing 4229 – Other electrical and electronic goods retailing 4231 – Hardware and building supplies retailing 4241 – Sport and camping equipment goods retailing 4242 – Entertainment media retailing 4243 – Toy and game retailing 4244 – Newspaper and book retailing 4245 – Marine equipment retailing 4251 – Clothing retailing 4252 – Footwear retailing 4253 – Watch and jewellery retailing 4259 – Other personal accessory retailing 4260 – Department stores 4272 – Stationary good retailing 4273 – Antique and used goods retailing

⁴³ Preston M, Pung A, Leung E, Casey C, Dunn A and Richter O (2012) ‘*Analysing modern award coverage using the Australian and New Zealand Industrial Classification 2006: Phase 1 report*’, Research Report 2/2012 Fair Work Australia: https://www.fwc.gov.au/documents/sites/wagereview2012/research/2_2012.pdf

⁴⁴ Fair Work Commission, *Modern awards and relevant ANZSIC classes*: <https://www.fwc.gov.au/awards-and-agreements/minimum-wages-conditions/annual-wage-reviews/previous-wage-reviews/annual-w-27>

4274 – Flower retailing
 4279 – Other store-based retailing n.e.c
 6632 – Video and other electronic media rental and hiring
 6639 – Other goods and equipment rental and hiring n.e.c.
 7220 – Travel agency and tour arrangement services
 9421 – Domestic appliance repair and maintenance
 9499 – Other repair and maintenance n.e.c.
 9532 – Photographic film processing

[26] We propose to first set out the data relating to the Retail sector and the employers who operate within it, before turning to the characteristics of employees in the Retail sector. It should be noted that the data in some of the tables presented in this section may not add up to 100, due to rounding. Throughout this section most of the data on the Retail sector is presented at the 1-digit level. Information specific to the industry class mapped to the Retail Award can only be obtained using the ABS Census of Population and Housing (Census) data. These data are used to describe the characteristics of employees in the General retail industry.

3.2 Features of the Retail Sector

(i) General economic indicators

[27] Key indicators for the Retail sector are presented in Table 2. The data show that the industry accounted for:

- almost \$400 billion of sales and 4.5 per cent of value added to the economy;
- over 10 per cent of employment, almost 9 per cent of actual hours worked per week in all jobs and over 8 per cent of wages;
- almost 6 per cent of all businesses and over 16 per cent of all award-reliant non-managerial employees;
- almost 2 per cent of investment;
- almost 20 per cent of total underemployment; and
- almost \$19 billion in company gross operating profit.

Table 2⁴⁵
Economic indicators of the Retail sector

⁴⁵ ABS, *Australian National Accounts: National Income, Expenditure and Product, Mar 2018*, Catalogue No. 5206; ABS, *Business Indicators, Australia, Mar 2018*, Catalogue No. 5676.0; ABS, *Counts of Australian Businesses, including Entries and Exits, Jun 2013 to Jun 2017*, Catalogue No. 8165.0; ABS, *Australian System of National Accounts, 2016–17*, Catalogue No. 5204.0; ABS, *Employee Earnings and Hours, Australia, May 2016*, Catalogue No. 6306.0; ABS, *Labour Force, Australia, Detailed, Quarterly, May 2018*, Catalogue No. 6291.0.55.003.

	Retail sector	Percentage of all industries
Industry value added (\$m) (March 2018) ^a	77 274	4.5
Sales (\$m) (March 2018) ^{a,c}	399 039	15.4
Employment ('000s) (May 2018) ^b	1 293	10.4
Actual hours worked per week in all jobs ('000s) (May 2018) ^b	36 856	8.9
Company gross operating profit (\$m) (March 2018) ^{a,c}	18 848	5.8
Wages (\$m) (March 2018) ^{a,d}	43 563	8.2
Gross fixed capital formation (\$m) (June 2017)	8 147	1.9
Businesses (June 2017) ^e	130 387	5.8
Award-reliant non-managerial employees ('000s) (May 2016) ^d	368	16.2
Underemployment ('000s) (May 2018) ^b	215	19.5

Note: (a) sum of four quarters; (b) average over the four quarters; (c) All industries excluding Agriculture, forestry and fishing, Education and training, Health care and social assistance and some subdivisions of Finance and insurance services; (d) all industries excluding Agriculture, forestry and fishing; (e) All industries excluding the public sector.

Industry value added and sales are seasonally adjusted and expressed in real terms from chain volume estimates. Employment is expressed in seasonally adjusted terms. Actual hours worked per week in all jobs and underemployment are expressed in original terms. Company gross operating profits and wages are seasonally adjusted from current price estimates. Gross fixed capital formation is expressed in original and real terms, from chain volume estimates.

(ii) *Business size*

[28] As shown in Table 3, small businesses accounted for over half of all businesses in the Retail sector. Businesses in the Retail sector were more likely to be employing businesses relative to businesses across all industries.

Table 3⁴⁶
Percentage of businesses by business size, June 2017

⁴⁶ ABS, *Counts of Australian Businesses, including Entries and Exits, Jun 2013 to Jun 2017*, Catalogue No. 8165.0.

	Retail sector (%)	All industries (%)
All businesses		
Non-employing	41.9	61.2
Small	53.7	36.3
Medium	4.2	2.3
Large	0.2	0.2
	100.0	100.0
Employing businesses		
Small	92.4	93.5
Medium	7.2	6.0
Large	0.4	0.5
	100.0	100.0

Note: Small businesses employ less than 20 persons, medium businesses employ 20 to 199 persons and large businesses employ 200 or more persons. The publication only includes actively trading businesses in the market sector and excludes entities that are in the public sector.

(iii) *Industry concentration*

[29] Industry concentration measures competition within an industry, as it estimates the degree to which a small number of businesses account for a large proportion of total production within that industry.

[30] As shown in Table 4, large businesses in the Retail sector accounted for around 47 per cent of total employment, sales and service income, industry value added and half of wages and salaries in 2016–17. These proportions were higher than for total selected industries. Medium businesses in the Retail sector accounted for lower proportions of total employment and wages and salaries, while lower proportions were reported across each measure for small and non-employing businesses in the Retail sector compared with total selected industries.

Table 4⁴⁷
Total employment, wages and salaries, sales and service income, and industry value added by business size, 2016–17

⁴⁷ ABS, *Australian Industry, 2016–17*, Catalogue No. 8155.0.

	Percentage of industry total			
	Employment (%)	Wages and salaries (%)	Sales and service income (%)	Industry value added (%)
Retail sector				
Small and non- employing	33.8	26.4	26.8	28.9
Medium	18.9	23.5	26.6	23.7
Large	47.8	50.1	46.6	47.4
	100.0	100.0	100.0	100.0
Total selected industries				
Small and non- employing	43.8	28.1	33.9	34.7
Medium	24.0	27.6	24.9	22.1
Large	32.1	44.2	41.2	43.3
	100.0	100.0	100.0	100.0

Note: Small and non-employing businesses employ less than 20 persons, medium businesses employ 20 to 199 persons and large businesses employ 200 or more persons. Total selected industries exclude Financial and insurance services as businesses in this industry were not in the scope of the survey. Small and non-employing businesses cannot be disaggregated.

(iv) *Operating days*

[31] The Commission's AWRS collected information on all non-farm Australian enterprises with five or more employees.⁴⁸ Table 5 presents data on operating days for enterprises in the Retail sector compared with enterprises across all industries. The data shows that the highest proportion of enterprises in the Retail sector operated 7 days per week, followed by weekdays and Saturday (Table 5). These two groups combined accounted for over three-quarters of enterprises in the Retail sector and around half of enterprises across all industries, with the remaining proportion of enterprises across all industries operating weekdays only.

⁴⁸ Yuen K, Rozenbes D and Farmakis-Gamboni S (2015), *Award reliance and business size: a data profile using the Australian Workplace Relations Study*, Research Report 1/2015, Fair Work Commission, p. 2.

Table 5⁴⁹
Operating days, 2014

	Retail sector (%)	All industries (%)
<i>Operating days</i>		
Weekdays only	18.9	48.8
Weekdays and Saturday	37.1	17.5
Some weekdays and weekend	2.8	2.3
Operating 7 days	40.6	31.1
Other	np	0.4
	100.0	100.0
Average number of operating days per week	6.2	5.8
Average years of operation under current ownership	18.9	18.5

Note: np = not published due to estimate having a relative standard error of greater than 50 per cent.

(v) *Modern award usage*

[32] The Commission's AR Survey collected information on modern award usage among non-public award-reliant organisations.⁵⁰ In the Retail sector, the most common modern award used by award-reliant organisations in 2013 was the *General Retail Industry Award 2010*, with more than six in 10 award-reliant organisations using this award. It was also the second most common modern award used by award-reliant organisations across all industries (Table 6).

⁴⁹ Fair Work Commission, *Australian Workplace Relations Study*, 2014.

⁵⁰ Wright S and Buchanan J (2013), *Award Reliance*, Research Report 6/2013, Fair Work Commission, p. vii.

Table 6⁵¹
Top 10 modern awards used in the Retail sector, percentage of award-reliant organisations, 2013

	Retail sector (%)	All industries (%)
<i>General Retail Industry Award 2010</i>	61.5	15.1
<i>Vehicle Manufacturing, Repair, Services and Retail Award 2010</i>	11.6	6.6
<i>Pharmacy Industry Award 2010</i>	10.9	2.1
<i>Clerks—Private Sector Award 2010</i>	8.9	16.0
<i>Meat Industry Award 2010</i>	4.0	0.9
<i>Manufacturing and Associated Industries and Occupations Award 2010</i>	2.5	4.7
<i>Road Transport and Distribution Award 2010</i>	2.0	2.3
<i>Hospitality Industry (General) Award 2010</i>	1.0	13.3
<i>Fast Food Industry Award 2010</i>	0.9	1.8
<i>Nursery Award 2010</i>	0.8	0.4

Note: An award-reliant organisation has at least one employee that receives the exact award rate of pay.

3.3 General retail industry employees

(i) Award reliance

[33] In the Retail sector, a higher proportion of non-managerial employees were reliant on award rates of pay compared with all industries, offset by a lower proportion of employees on individual arrangements in May 2016 (Table 7). However, the most common method of setting pay for the Retail sector was collective agreements.

Table 7⁵²
Methods of setting pay, May 2016

	Retail sector (%)	All industries (%)
Award only	34.5	24.5
Collective agreement	37.6	38.9
Individual arrangement	27.9	36.6
All methods of setting pay	100.0	100.0

(ii) Employee turnover

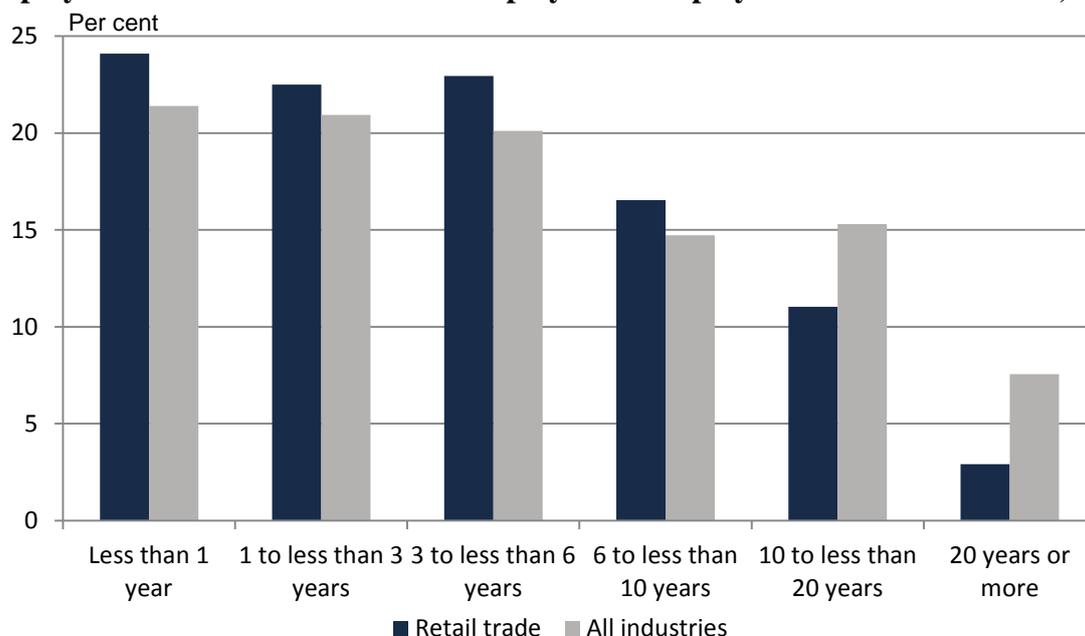
[34] Information on employee turnover can be analysed using data on the duration of employment with their current employer. This can be obtained from the HILDA Survey. Chart 1 compares duration with current employer for employees in the Retail sector and

⁵¹ Fair Work Commission, *Award Reliance Survey*, 2013.

⁵² ABS, *Employee Earnings and Hours, Australia, May 2016*, Catalogue No. 6306.0.

employees across all industries. In 2016, employees in the Retail sector were more likely to experience a shorter duration of employment with their current employer than employees across all industries. Almost half of employees had been with their current employer for less than three years and around seven in ten employees had been with their current employer for less than six years.

Chart 1⁵³
Employment duration with current employer for employees in the Retail sector, 2016



(iii) *Composition of employment*

[35] Table 8 shows that the total workforce in the Retail sector comprised around 10 per cent of total employment in May 2018. More than half of the workforce in the Retail sector were female and a higher proportion were employed part-time (52.0 per cent) relative to all industries (32.3 per cent).

⁵³ HILDA survey Wave 16, 2016.

Table 8⁵⁴
Composition of employed persons, May 2018

	Total employment No. ('000s)	Percentage of total employment							
		Male		Female		Total		Total	
		Full-time (%)	Part-time (%)	Full-time (%)	Part-time (%)	Male (%)	Female (%)	Full-time (%)	Part-time (%)
Retail sector	1267.9	27.7	17.3	20.3	34.6	45.0	55.0	48.0	52.0
All industries	12 574.4	42.9	10.1	24.8	22.2	53.0	47.0	67.7	32.3

Note: Data may not sum to 100 due to rounding. All data are expressed in original terms.

[36] The Retail sector has a relatively higher proportion of youth, with people aged between 15 and 24 years more likely to be employed in the Retail sector, comprising almost one in three employed persons aged 24 years or under compared with less than one in six employed persons across all industries (Table 9).

Table 9⁵⁵
Employed persons by age, May 2018

Age (Years)	Retail sector		All industries	
	No. ('000s)	Percentage of employment	No. ('000s)	Percentage of employment
15–19	178.1	14.0		5.5
20–24	221.1	17.4		9.9
25–34	272.5	21.5		23.7
35–44	227.1	17.9		21.6
45–54	187.3	14.8		20.5
55–59	78.3	6.2		8.7
60–64	67.7	5.3		5.9
65 and over	35.8	2.8		4.2
Total	1267.9	100.0		100.0

Note: All data are expressed in original terms.

(iv) *Average hours worked*

[37] Table 10 shows that the total average hours actually worked per week in all jobs in May 2018 were lower for the Retail sector than across all industries. While this was also the case for part-time workers, total average hours actually worked per week in all jobs for full-time workers were relatively similar.

⁵⁴ ABS, *Labour Force, Australia, Detailed, Quarterly, May 2018*, Catalogue No. 6291.0.55.003.

⁵⁵ Ibid.

Table 10⁵⁶
Average hours actually worked in all jobs, by industry group of main job and full/part-time status, May 2018

Industry group	Average hours actually worked in all jobs		
	Full-time	Part-time	Total
Retail sector	40.5	16.6	28.1
All industries	40.6	17.6	33.2

Note: Actual hours of work refers to the hours actually worked during normal periods of work (including overtime) over a specified reference week. It excludes meal breaks, paid/unpaid time 'on call', commuting time and time off during work hours to attend educational activities not connected to the job. The actual hours of work over a specified period may be affected if the person took personal/annual leave, went on strike, changed job, or similar reasons.

(v) *Forms and conditions of employment*

[38] The ABS defines casual employees as employees without paid leave entitlements.⁵⁷

[39] Although over half of workers in the Retail sector were employees with paid leave entitlements in May 2018, the proportion of casual employees in the Retail sector was higher relative to all industries (Table 11).

Table 11⁵⁸
Employed persons by employment type in main job, May 2018

	Retail sector		All industries
	No. ('000s)	Percentage of employment	Percentage of employment
Employee	1128.9	89.0	83.4
<i>With paid leave entitlements</i>	690.2	54.4	62.4
<i>Without paid leave entitlements</i>	438.7	34.6	21.0
Owner manager of enterprise with employees	74.1	5.8	5.7
Owner manager of enterprise without employees	63.1	5.0	10.7
Contributing family worker	1.8	0.1	0.2
Total	1267.9	100.0	100.0

Note: All data are expressed in original terms.

[40] Almost 40 per cent of employees in the Retail sector were casual employees,⁵⁹ which is higher than the all industries average. Full-time employees in the Retail sector were more likely to be employed with paid leave entitlements while part-time employees were more likely to be casual employees (Table 12).

⁵⁶ Ibid.

⁵⁷ ABS, *Characteristics of Employment, Aug 2017*, Catalogue No. 6333.0, Explanatory notes.

⁵⁸ ABS, *Labour Force, Australia, Detailed, Quarterly, May 2018*, Catalogue No. 6291.0.55.003.

⁵⁹ Table 11, 438,700 employees had no paid leave entitlements out of a total of 1,128,900 employees (38.9 per cent).

Table 12⁶⁰
Employees with and without paid leave, May 2018

	Full-time		Part-time		All employees	
	With paid leave (%)	Without paid leave (%)	With paid leave (%)	Without paid leave (%)	With paid leave (%)	Without paid leave (%)
Retail sector	89.7	10.3	37.6	62.4	61.1	38.9
All industries	88.5	11.5	45.6	54.4	74.9	25.1

Note: All data are expressed in original terms.

[41] Using the May 2016 EEH, the following data presents a profile of casual employees in the Retail sector. Table 13 shows that compared with casual employees in all industries, casual employees in the Retail sector were more likely to be:

- female (67.0 per cent, compared to 57.2 per cent for all industries);
- work less than 35 hours per week (which the ABS defines as part time)⁶¹ (96.4 per cent, compared to 87.0 per cent for all industries);
- aged between 15 and 24 years (58.0 per cent, compared to 36.4 per cent for all industries); and
- reliant on award rates of pay (60.7 per cent, compared to 45.1 per cent for all industries).

⁶⁰ ABS, *Labour Force, Australia, Detailed, Quarterly, May 2018*, Catalogue No. 6291.0.55.003.

⁶¹ ABS, *Employee Earnings and Hours, Australia, May 2016*, Catalogue No. 6306.0, Glossary.

Table 13⁶²
Casual employee characteristics in Retail sector, May 2016

	Retail sector (%)	All industries (%)
Gender		
Male	33.0	42.8
Female	67.0	57.2
Total	100.0	100.0
Full-time/part-time status		
Full-time	3.6	13.0
Part-time	96.4	87.0
Total	100.0	100.0
Age (5 year groups)		
15–19 years	34.2	17.3
20–24 years	23.8	19.1
25–29 years	8.4	11.6
30–34 years	6.5	8.8
35–39 years	4.6	7.8
40–44 years	4.9	7.3
45–49 years	6.8	7.8
50–54 years	3.3	6.7
55–59 years	2.9	6.2
60–64 years	3.4	4.7
65 years and over	1.3	2.8
Total	100.0	100.0
Method of setting pay		
Award	60.7	45.1
Collective agreement	32.1	28.6
Individual arrangements	7.1	26.2
Total	100.0	100.0

(vi) *Work schedule*

[42] Table 14 shows the prevalence and types of shiftwork arrangements used in enterprises in the Retail sector and across all industries using data obtained from the Commission's AWRS. A lower proportion of enterprises in the Retail sector used shiftwork arrangements while a higher proportion used short shifts of 4 hours or less, compared with all industries. The most common shiftwork arrangements used in both enterprises in the Retail sector and across all industries were set rosters and eight-hour shifts.

Table 14⁶³
Prevalence and types of shiftwork arrangements, 2014

⁶² ABS, *Microdata: Employee, Earnings and Hours, Australia, May 2016*, Catalogue No. 6306.0.55.001.

⁶³ Fair Work Commission, *Australian Workplace Relations Study*, 2014.

	Retail sector (%)	All industries (%)
Uses shiftwork arrangements	17.9	23.8
<i>Types of shiftwork arrangements</i>		
Rotating rosters	56.2	57.1
Set rosters	86.2	77.6
Early morning shifts	45.8	62.2
Afternoon shifts	72.7	71.9
Evening and night shifts	61.7	70.8
Standard business hours	78.2	69.7
Split/broken shifts	15.5	36.1
Standby/on call	35.8	39.8
8-hour shifts	86.2	80.3
12-hour shifts	20.7	27.8
Short shifts of 4 hours or less	59.5	53.7
Other	–	3.6

[43] Using the HILDA survey, Table 15 shows the current work schedule for employees in their main job in 2016. While the most common work schedule for employees in the Retail sector and all industries was a regular daytime schedule, this work schedule covered a higher proportion of employees across all industries. Employees in the Retail sector were more likely to work a regular evening shift than employees across all industries.

Table 15⁶⁴
Current work schedule in main job, employees, 2016

	Retail sector (%)	All industries (%)
A regular daytime schedule	65.9	75.7
A regular evening shift	8.3	4.7
A regular night shift	np	2.3
A rotating shift (changes from days to evenings to nights)	11.9	9.4
Split shift (two distinct periods each day)	np	1.1
On call	np	0.9
Irregular schedule	9.9	5.7
Other	np	0.3*
Total	100.0	100.0

Note: * Estimate has a relative standard error between 25 and 50 and should be used with caution. np = not published due to estimate having a relative standard error greater than 50 per cent.

(vii) *Earnings*

[44] As shown in Table 16, most employees in the Retail sector received the adult rate of pay in May 2016; however, this proportion was lower than for all industries. The proportion

⁶⁴ HILDA survey Wave 16, 2016.

of employees that received a junior rate of pay was over three times the proportion across all industries.

Table 16⁶⁵
Employees by rate of pay, May 2016

	Retail sector	All industries
	(%)	(%)
Adult rate of pay	85.4	94.0
Junior rate of pay	13.7	4.1
Apprentice or trainee	0.9*	1.9
Disability rate	0.04*	0.1
All rates of pay	100.0	100.0

Note: * Estimate has a relative standard error between 25 and 50 per cent and should be used with caution.

[45] Average weekly earnings in the Retail sector in May 2018 were lower than for all industries across each measure reported in Table 17. Average weekly earnings for full-time adult employees in the Retail sector were around three quarters of average weekly earnings for full-time adult employees in all industries.

Table 17⁶⁶
Average weekly earnings, May 2018

	Retail sector	All industries	Ratio of the Retail sector relative to all industries
	(\$)	(\$)	(%)
Average weekly earnings, all employees	741.00	1207.40	61.4
Average weekly earnings, full-time adult employees	1179.00	1650.60	71.4
Average weekly ordinary time earnings, full-time adult employees	1161.30	1585.30	73.3
Average weekly ordinary time earnings, full-time adult male employees	1191.40	1677.10	71.0
Average weekly ordinary time earnings, full-time adult female employees	1115.90	1433.40	77.8

Note: All data are expressed in original terms.

[46] Using the EEH for May 2016, data on earnings are available for all adult employees and full-time non-managerial employees paid at the adult rate. An analysis of these data found

⁶⁵ ABS, *Employee Earnings and Hours, Australia, May 2016*, Catalogue No. 6306.0.

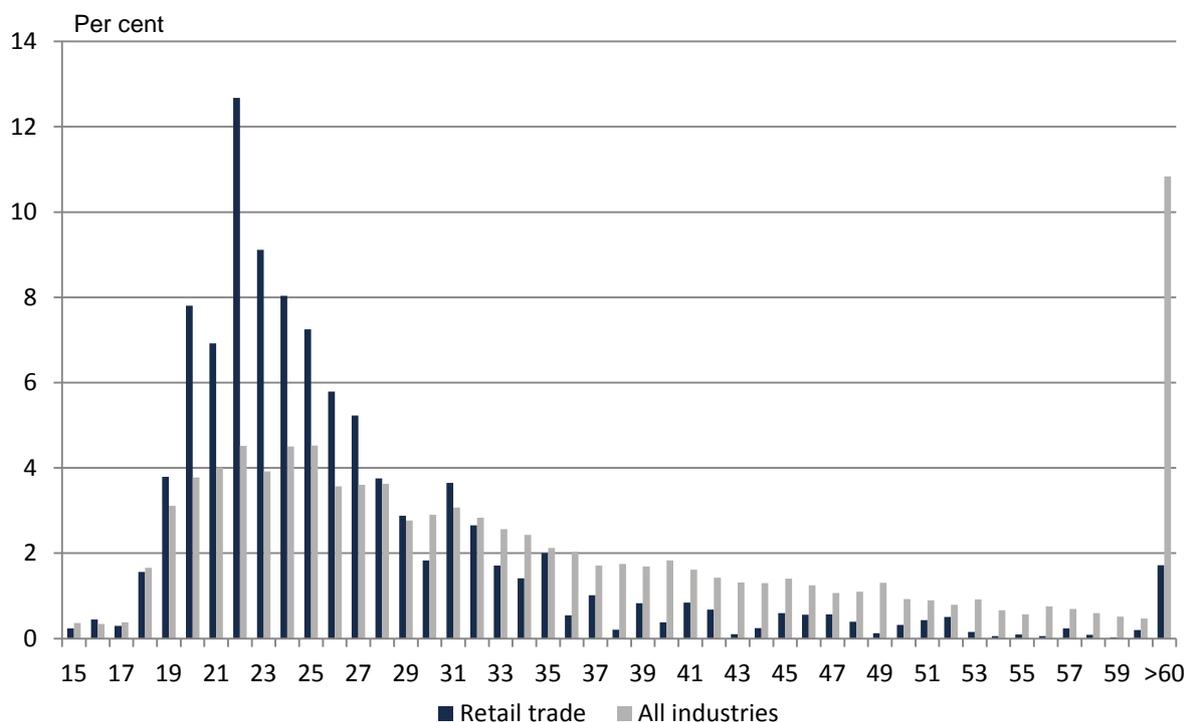
⁶⁶ ABS, *Average Weekly Earnings, Australia, May 2018*, Catalogue No. 6302.0.

that around six in 10 full-time non-managerial employees paid at the adult rate in the Retail sector had earnings that were below the average earnings for these employees (\$1102.70).⁶⁷

[47] Chart 2 shows the distribution of hourly total cash earnings for adult employees in the Retail sector in May 2016. It reveals that for the Retail sector, the distribution is relatively more concentrated toward the lower end of the wage distribution than the earnings of adult employees across all industries. Relative to all industries, the Retail sector had a higher proportion of employees earning up to \$29 per hour.

⁶⁷ ABS, *Employee Earnings and Hours, Australia, May 2016*, Catalogue No. 6306.0.

Chart 2⁶⁸
Distribution of hourly total cash earnings, adult employees, May 2016



Note: Earnings are calculated at \$1 intervals up to and including the amount presented (e.g. \$17 includes amounts over \$16 per hour and up to and including \$17 per hour) for adult employees in the federal jurisdiction. Earnings of employees who received a casual loading were discounted by 25 per cent.

(viii) Penalty payments

[48] The Commission’s AWRS collected detailed data on employees’ wages and identified employees that received penalty rates. Around one in 10 employees received penalty rates, both in the Retail sector and across all industries (Table 18). Compared with other methods of setting pay, employees on award rates of pay were more likely to receive penalty rates, both within the Retail sector and across all industries.

Table 18⁶⁹
Percentage of employees who receive penalty rates, by method of setting pay, 2014

⁶⁸ ABS, *Microdata: Employee, Earnings and Hours, Australia, May 2016*, Catalogue No. 6306.0.55.001.

⁶⁹ Fair Work Commission, *Australian Workplace Relations Study*, 2014.

	Retail sector	All industries
	(%)	(%)
Award	19.0	22.0
Other methods	5.5	6.2
All employees	10.6	10.6

Note: ‘Other methods’ of setting pay include enterprise agreements and individual arrangements. The sample analysed was restricted to employees that reported working for businesses that either operated 6 or 7 days in a week, operated on weekends or used shiftwork arrangements. ‘Penalty rates’ are collected in the AWRS by asking participants for the gross (before-tax) amount received for penalty payments (for work performed outside standard hours).

(ix) *‘Low paid’ employees in the Retail sector*

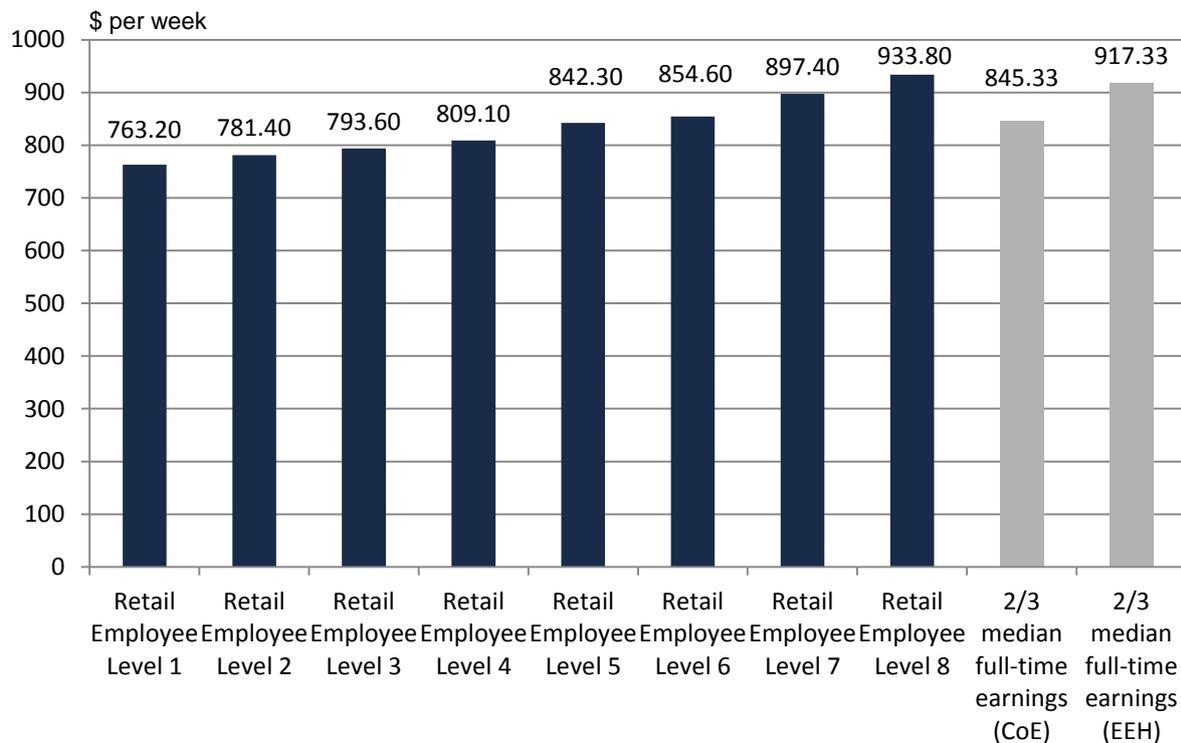
[49] A threshold of two-thirds of median full-time wages provides ‘a suitable and operational benchmark for identifying who is low paid’,⁷⁰ within the meaning of s.134(1)(a).

[50] The most recent data for median earnings is for August 2017 from the ABS CoE survey. Data on median earnings are also available from the EEH for May 2016. These are compared to the minimum weekly wages in the *Retail Award* as determined in the *Annual Wage Review 2016–17*, effective 1 July 2017 (Chart 3).

[51] The data shows that the full-time weekly wage for most classifications in the Retail Award was below the EEH measure of two-thirds of median full-time earnings except for Retail Employee Level 8 classification. Most classifications were also below the CoE measure of two-thirds of median full-time earnings except for Retail Employee Levels 6, 7 and 8.

⁷⁰ [2017] FWCFB 1001 at [166].

Chart 3⁷¹
Comparison of minimum weekly wages in the *General Retail Industry Award 2010* and two-thirds of median full-time earnings



Note: Weekly earnings from the Characteristics of Employment Survey are earnings in the main job for full-time employees. Weekly earnings from the Survey of Employee Earnings and Hours are weekly total cash earnings for full-time adult non-managerial employees.

(x) *Profile of a 'typical' Retail industry employee*

[52] The following information presents an employee profile of the General retail industry for data from the 2016 Census of Population and Housing (Census). The General retail industry is determined based on a framework⁷² developed by Commission staff. Using this framework the Retail Award is 'mapped' to the industry classes listed in Table 1.

[53] The 2016 Census data show that there were around 737 000 employees in the General retail industry. Table 19 compares characteristics of employees in the General retail industry with employees in 'all industries'.

Table 19⁷³
Employee characteristics of General retail industry, 2016

⁷¹ MA000004; ABS, *Characteristics of Employment*, Australia, August 2017, Catalogue No. 6333.0; ABS, *Employee Earnings and Hours*, Australia, May 2016, Catalogue No. 6306.0.

⁷² Preston M, Pung A, Leung E, Casey C, Dunn A and Richter O (2012) '*Analysing modern award coverage using the Australian and New Zealand Industrial Classification 2006: Phase 1 report*', Research Report 2/2012, Fair Work Australia.

⁷³ ABS, *Census of Population and Housing*, 2016.

	General retail industry		All industries	
	(No.)	(%)	(No.)	(%)
Gender				
Male	288 658	39.2	4 438 604	50.0
Female	448 052	60.8	4 443 125	50.0
Total	736 710	100.0	8 881 729	100.0
Full-time/part-time status				
Full-time	299 173	42.5	5 543 862	65.8
Part-time	404 069	57.5	2 875 457	34.2
Total	703 242	100.0	8 419 319	100.0
Highest year of school completed				
Year 12 or equivalent	464 045	63.6	5 985 652	68.1
Year 11 or equivalent	87 395	12.0	856 042	9.7
Year 10 or equivalent	139 143	19.1	1 533 302	17.4
Year 9 or equivalent	29 759	4.1	273 180	3.1
Year 8 or below	8069	1.1	112 429	1.3
Did not go to school	1401	0.2	26 356	0.3
Total	729 812	100.0	8 786 961	100.0
Student status				
Full-time student	159 063	21.7	715 436	8.1
Part-time student	33 813	4.6	491 098	5.6
Not attending	539 540	73.7	7 618 177	86.3
Total	732 416	100.0	8 824 711	100.0
Age (5 year groups)				
15–19 years	122 038	16.6	518 263	5.8
20–24 years	138 728	18.8	952 161	10.7
25–29 years	90 156	12.2	1 096 276	12.3
30–34 years	72 477	9.8	1 096 878	12.3
35–39 years	58 330	7.9	972 092	10.9
40–44 years	58 620	8.0	968 068	10.9
45–49 years	57 077	7.7	947 187	10.7
50–54 years	52 676	7.2	872 485	9.8
55–59 years	43 447	5.9	740 822	8.3
60–64 years	27 848	3.8	469 867	5.3
65 years and over	15 309	2.1	247 628	2.8
Total	736 706	100.0	8 881 727	100.0
Average age	34.2		39.3	
Hours worked				
1–15 hours	182 536	26.0	977 997	11.6
16–24 hours	115 082	16.4	911 318	10.8
25–34 hours	106 452	15.1	986 138	11.7
35–39 hours	133 827	19.0	1 881 259	22.3
40 hours	79 141	11.3	1 683 903	20.0
41–48 hours	43 669	6.2	858 120	10.2
49 hours and over	42 533	6.0	1 120 577	13.3
Total	703 240	100.0	8 419 312	100.0

Note: Part-time work is defined as employed persons who worked less than 35 hours in all jobs during the week prior to Census night. Totals may not sum to the same amount due to non-response. For full-time/part-time status and hours worked, data on employees that were currently away from work (that reported working zero hours), were not presented.

[54] The profile of the General retail industry employees differs from the profile of employees in ‘All industries’ in five important respects:

- General retail industry employees are predominately female (60.8 per cent, compared to 50 per cent of all employees);
- over half (57.5 per cent) of General retail industry employees are employed part-time (i.e. less than 35 hours per week), compared with only 34.2 per cent of all employees;
- over one quarter (26.0 per cent) of General retail industry employees work 1–15 hours per week compared with only 11.6 per cent of all employees;
- over one third (35.4 per cent) of General retail industry employees are aged between 15 and 24 years compared with only 16.6 per cent of all employees; and
- over one quarter (26.3 per cent) of General retail industry employees are students (21.7 per cent are full-time students and 4.6 per cent study part time) compared with 13.7 per cent of all employees.

[55] Between 2011 and 2016, employment within the General retail industry increased by around 18 000.⁷⁴ Over this period:

- the proportion of employees that were female or worked part time remained relatively stable;
- the proportion of employees aged between 15–19 years reduced (from 19.9 per cent to 16.6 per cent); and
- the proportion of employees whose highest level of education is Year 12 or equivalent increased (from 56.9 per cent to 63.6 per cent).

(xi) *Retail households and financial stress*

[56] A comparison of financial stress indicators between all employee households and households that have at least one adult employee working in the Retail sector (Retail employee households) is presented for 2016 using HILDA data. Across most of the financial stress indicators, Retail employee households were more likely than all employee households to experience financial stress. This suggests that their financial resources are more limited than other households (Table 20).

⁷⁴ ABS, *Census of Population and Housing*, 2011 and 2016.

Table 20⁷⁵
Financial stress experienced by employee households, 2016

Financial stress indicators	Retail employee households	All employee households
Unable to raise \$3000 in a week for something important	6.9	4.7
Could not pay electricity, gas or telephone bills on time	7.0	7.2
Could not pay the mortgage or rent on time	4.8*	3.4
Pawned or sold something	3.5*	2.3
Went without meals	2.1*	1.5
Could not afford to heat home	1.4*	1.2
Sought assistance from welfare/community organisation	1.1*	0.9
Sought financial help from friends or family	9.0	6.7
Any stress	18.4	14.4
Low stress (1–2)	13.2	11.0
Moderate stress (3–4)	4.1	2.7
High stress (5 or more incidences of financial stress)	1.0	0.7
Observations	664	4984

Note: *Relative standard error is between 25 and 50 per cent and should be interpreted with caution.

Employee households are those households whose main source of income is from wages or salary. Retail employee households are those with at least one employee employed in the Retail sector.

Both partners in a couple family household, the lone parent in a lone parent household and the lone person of a lone person household must report financial stress for that particular household to be considered as such. Observations from multi-family households, other related family households and group households are excluded.

4. Other contextual matters

[57] Two other contextual matters are relevant to the determination of the claims before us:

- The Productivity Commission Report; and
- The *Penalty Rates Decision*.

4.1 The Productivity Commission Report

[58] The *Productivity Commission Inquiry Report: Workplace Relations Framework* (the PC Final Report) was published by the Productivity Commission on 30 November 2015 following an inquiry into the ‘Workplace Relations Framework’ arising from a request made by the Commonwealth Government pursuant to Parts 2 and 3 of the *Productivity Commission Act 1998* (Cth).⁷⁶ Penalty rates for long hours and night work are considered in Chapter 9 and weekend penalty rates are considered in Chapters 10, 13, 14, 15 and Appendix F of the report. Chapters 11 and 12 dealt with the shift to a 7 day consumer economy and the social effects of weekend work.

⁷⁵ HILDA survey Wave 16, 2016.

⁷⁶ PC Final Report at p. v.

[59] The consideration of penalty rates in the PC Final Report was limited to penalty rates that apply to the hospitality, entertainment, retail, restaurant and café industries, referred to as the HERRC industries in the report. The Productivity Commission (the PC) explains the rationale for focussing on the HERRC industries, as follows:

‘... the appropriate *level* for regulated penalty rates for weekend work — particularly on Sundays in a number of discretionary consumer service industries — has become a highly contested and controversial issue. The industries of greatest concern are hospitality, entertainment, retail, restaurants and cafes (HERRC). These are industries where consumer expectations of access to services has expanded over time so that the costs of penalty rates affect consumer amenity in ways they did not when penalty rates were first introduced. Such industries are also important sources of entry-level jobs for, among others, relatively unskilled casual employees and young people (particularly students) needing flexible working arrangements. The provision of discretionary, and therefore demand responsive, services on weekends is less frequent in most other industries, which is a key (but not only) rationale for a focus of concerns on the HERRC industries. It is notable that the FWC is currently also considering appropriate penalty rates in awards, and that their focus almost exactly matches the group of industries that the Productivity Commission has identified as the most relevant.’⁷⁷
(footnotes omitted)

[60] The modern awards considered by the PC to be applicable to the HERRC industries are:

- *Restaurant Industry Award 2010*;
- *Registered and Licensed Clubs Award 2010*;
- ***General Retail Industry Award 2010***;
- *Hospitality Industry (General) Award 2010*;
- *Amusement, Events and Recreation Award 2010*;
- *Fast Food Industry Award 2010*;
- *Pharmacy Industry Award 2010*; and
- *Hair and Beauty Industry Award 2010*.⁷⁸

[61] In relation to weekend penalty rates the central recommendation in the PC Final Report (Recommendation 15.1) was that the Commission should, as part of its current award review process:

- set Sunday penalty rates that are not part of overtime or shiftwork at the higher rate of 125 per cent and the existing Saturday award rate for permanent employees in the hospitality, entertainment, retail, restaurant and café industries;
- set weekend penalty rates to achieve greater consistency between the above industries, but without the expectation of a single rate across all of them; and

⁷⁷ Ibid at p. 406.

⁷⁸ Ibid at p. 411, Table 10.1.

- investigate whether weekend penalty rates for casuals in these industries should be set so that casual penalty rates on weekends would be the sum of the casual loading and the revised penalty rates applying to permanent employees, with the principle being that there should be a clear rationale for departing from this.⁷⁹

[62] The last point is of particular interest in the context of the matter before us. At Attachment F3 of the PC Final Report the PC notes that there are three basic models for calculating penalty rates for casuals and concludes that the ‘default approach’ is ‘the optimal approach’.⁸⁰ Under the default method the casual loading is added to the penalty rate applying to a permanent employee. The ‘default method’ is the approach sought to be implemented by the SDA in these proceedings.

[63] The PC’s consideration of this issue led it to conclude that there may be grounds for some casual penalty rates to rise on Saturdays:

‘The conflation of the casual loading and the premium rate for weekend work can hide the anomalous treatment of weekend rates for casuals in some awards. In principle, a wage system should not favour the employment of a person with identical competencies over another, yet this occurs in some awards for weekend work ...

For neutrality of treatment, the casual loading should be *added* to the penalty rate of a permanent employee when calculating the premium rate of pay over the basic wage rate for weekend work. This would make an employer indifferent, at the margin, between hiring a permanent employee over a casual employee...

Achieving neutrality would require that penalty rates for casual employees would rise on Saturday’s for some awards (as in the Retail Award).⁸¹

[64] The PC went on to urge that care be taken in changing casual penalty rates:

‘However, a major proviso is that the current regulated pay levels set for casual employees are ‘rough and ready’ and may not take into account the generally lower average skills and experience of those employees. Were this to be true, achieving parity in the employer costs of employing casuals compared with permanent employees might only have the appearance of ‘equal pay for equal work’ and would disadvantage the employment of casuals. That would be unfortunate given that casual jobs are an important vehicle for gaining entry to the labour market for the disadvantaged, the young, and those needing flexible working arrangements. In that context, the wage regulator should make the presumption that casual penalty rates should fully take account of the casual loading, but should not adopt that principle without closely considering its impacts on such workers.’⁸² (emphasis added)

[65] The above statement may be broken up into two propositions:

1. The current regulated pay levels are ‘rough and ready’ and may not take into account the generally lower average skills and experience of those employees.

⁷⁹ Ibid at p. 497.

⁸⁰ Ibid at p. 1125.

⁸¹ Ibid at p. 496.

⁸² Ibid at p. 497.

2. If proposition 1 is true, then achieving parity in the cost of employing casuals would disadvantage the employment of casuals. This would be unfortunate because casual jobs are an important vehicle for gaining entry to the labour market for the disadvantaged, the young and those needing flexible working arrangements.

[66] The first proposition is plainly wrong and is not supported by any of the parties before us.⁸³ The classification structure in the Retail Award is competency based and requires employees to be classified according to their skill level (see clause 16.2). Further, the prescription of lower rates of pay for ‘junior’ employees takes account of the lower experience of those employees. As the Commission observed in the *Junior Rates Case*⁸⁴ the rates for ‘juniors’ reflected ‘the general lack of experience of young employees’.⁸⁵

[67] The first proposition provides the premise for the second proposition, that is, the PC’s observation that parity ‘would disadvantage the employment of casuals’. So much is clear from the use of the expression ‘were this to be true’. As the premise is false the latter observation lacks any foundation. That being said, we deal later with the proposition—put by the Retail Employers—that increasing penalty rates for casuals would result in a number of existing casual employees being worse off: ‘consequences may include loss of casual hours, loss of employment, loss of flexibility of being a casual employee’.⁸⁶

[68] The SDA submits that there is no evidence of a direct causal link between the availability of casual jobs and young and disadvantaged workers obtaining employment. It submits that the likely impact of the changes it proposes on casual employment will be small and will not have a major impact on the capacity for young and disadvantaged individuals to enter the labour market. This is said to be so because:

- (i) The retail industry only accounts for 15.5 per cent of casual jobs, hence any small change in the share of casual jobs in the retail industry will not have a significant impact.⁸⁷
- (ii) Other paths into employment in the retail industry and in other industries exist for young and disadvantaged workers.⁸⁸
- (iii) A 2017 study by Inga Lass and Mark Wooden showed that on average, less than half of people who moved into employment from unemployment moved into casual employment.⁸⁹
- (iv) Junior rates in the Retail Award still provide an incentive for hiring young employees.^{90 91}

⁸³ Retail Employers submission, 23 July 2018 at para. 52; Transcript, 15 August 2018 at PN1070–PN1077; SDA submission, 21 May 2018 at paras 15–20.

⁸⁴ [2014] FWCFB 1846.

⁸⁵ *Ibid* at [104].

⁸⁶ Retail Employers submission, 23 July 2018 at para. 55.

⁸⁷ Exhibit SDA 5 at para. 4.8(a).

⁸⁸ *Ibid* at para 4.8(b).

⁸⁹ *Ibid* at para 4.8(b).

[69] The SDA relies on Professor Borland’s expert evidence in support of these propositions.

[70] This aspect of Professor Borland’s evidence was in response to the PC’s observation that ‘casual jobs are an important vehicle for gaining entry to the labour market for the disadvantaged, the young and those needing flexible working arrangements’. However, that observation was linked to the second proposition set out above—that achieving ‘neutrality would disadvantage casual employees. As we have mentioned, the PC’s second proposition is predicated upon the correctness of proposition 1—which is not supported by any of the parties before us and is plainly wrong. In these circumstances it is unnecessary for us to consider the correctness of the PC’s observation and nor is it necessary for us deal with this aspect of Professor Borland’s evidence.

4.2 The Penalty Rates Decision

[71] The *Penalty Rates Decision* determined that the existing Sunday penalty rates in the *Hospitality, Fast Food, Retail and Pharmacy Awards* did not achieve the modern awards objective, as they do not provide a fair and relevant minimum safety net. The effect of the *Penalty Rates Decision* was, relevantly, to reduce Sunday penalty rates to 150 per cent for full-time and part-time employees in the Retail Award and to 175 per cent for casual employees.

[72] There are three other matters addressed in the *Penalty Rates Decision* and the *Transitional Arrangements decision* which are relevant for present purposes.

[73] First, section 8.2.2 of the *Penalty Rates Decision* sets out the background to the Retail Award. In those proceedings the SDA submitted that:

‘the Sunday rate issue was very much a live issue in the context of the Award Modernisation process ... it was contested in different ways with numerous issues presented’.⁹²

[74] The Retail Employers took a contrary position and emphasised the fact that during the award modernisation:

- no witnesses were called to give evidence;
- no expert evidence was presented; and
- the Award Modernisation Full Bench did not undertake any analysis of the proceeding disabilities associated with working on weekends, or the relative disabilities as between Saturday and Sunday work, rather the focus of the AIRC was on ‘bringing together disparate State and Territory award conditions’.⁹³

[75] The Full Bench concluded:

⁹⁰ Ibid at para 4.8(c).

⁹¹ SDA proposed findings on expert evidence at 9(b)(i)–(iv).

⁹² [2017] FWCFB 1001 at [1490].

⁹³ Ibid at [1489].

[1491] As mentioned in Chapter 3, in conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue and will proceed on the basis the *prima facie* the modern award being reviewed achieved the modern awards objective at the time it was made. The extent of a previous Full Bench's consideration of a contested issue is relevant to assessing the weight to be attributed to that decision. It is apparent from an examination of the relevant decisions that the Award Modernisation Full Bench did not undertake a detailed or considered review of the penalty rates in the *Retail Award*. Rather, understandably enough in view of the time constraints on the award modernisation process, the Full Bench gave effect to the existing penalty rates in the 'critical mass' of pre-reform instruments.⁹⁴

[76] The parties in the proceedings before us take a contrary view to the position they advanced in the *Penalty Rates Case*. The Retail Employers placed considerable reliance on the award history in their written submissions⁹⁵ contending that:

'the current GRIA provisions regarding casual employee weekday evening and Saturday penalty rates were the result of careful consideration by the AIRC'.⁹⁶

[77] The SDA say that the award history is irrelevant.⁹⁷

[78] We deal with these submissions later.

[79] Second, in the *Penalty Rates Case* the Retail Employers had sought to amend the Retail Award to reduce the rates payable for shiftwork performed on Sundays. The changes sought are set out below in a marked up version of clause 30.3(c):

30.3 Rate of pay for shiftwork

(c) Any shiftwork performed on a Sunday will be paid at the rate of ~~200%~~ 175% (~~225%~~ 200% for casuals) of the ordinary time rate of pay.⁹⁸

[80] This claim was not addressed by the Retail employers in their submissions in the Penalty Rates proceedings but was raised in the subsequent transitional arrangements proceedings. The relevant extracts from the *Transitional Arrangements decision* are as follows:

[210] The Retail Associations contend that the decision to reduce the Sunday penalty rate applies equally to shiftworkers under the *Retail Award* and advance the following submission in support of that contention:

'Despite not being specifically addressed in the Penalty Rates Case decision, the Retail Associations have operated on the basis that the decision to reduce the Sunday penalty rate, applies equally to shiftworkers under the Retail Award.

⁹⁴ Ibid at [1491].

⁹⁵ Retail Employers submission, 23 July 2018 at paras 10–12 and paras 28–31.

⁹⁶ Ibid at para. 31(a).

⁹⁷ Transcript, 15 August 2018 at PN952–PN953.

⁹⁸ [2017] FWCFB 10001 at [1468].

The Retail Associations make this assumption on the basis of the FWC's findings that the current Sunday penalty rate is neither fair nor relevant, and the disutility of Sunday work has reduced over time. There is nothing before the FWC to suggest that shiftworkers should be treated any differently to permanent employees under the Retail Award.

As such, these submissions of the Retail Associations are intended to apply equally to shiftworkers under the Retail Award. The Retail Associations propose that from 1 July 2017 the rate for shiftwork performed on Sundays be 175% (200% for casuals) of the ordinary time rate.⁹⁹

[211] In response to this submission we posed the following question on notice¹⁰⁰ to the SDA:

5.1 Question for the SDA:

Does the SDA oppose the submission advanced by the Retail Associations? If so, on what basis?

[212] The SDA responded to the question put that it opposed the Retail Employers submission and submitted that:

'it is an impermissible attempt to invite the Commission to introduce a further reduction to penalty rates which is not the subject of the decision. The Commission has invited the parties to make submissions on transitional matters, not to request further cuts after the substantive case has been conducted.'¹⁰¹

[213] We note that there was no evidence in the substantive proceedings as to the number of shiftworkers covered by the *Retail Award*; indeed there was no evidence at all directed specifically at this aspect of the Retail Employers claim. We also note that the Retail Employers did not address this issue in their submissions or otherwise draw attention to the matter.

[214] In the circumstances the appropriate course is for the Retail Employers (or any other interested party) to file an application to vary the *Retail Award* in respect of the Sunday rate applicable to shiftworkers. Such an application would then be determined in conjunction with the SDA's claim in respect of Saturday and late night rates for casuals.¹⁰²

[81] The Retail Employers subsequently filed an application to vary the Retail Award (in the terms set out at [79] above) and that is the matter before us.

[82] Third, in the *Penalty Rates Decision* the Full Bench noted the references in the PC Final Report to the interaction between penalty rates and casual loadings¹⁰³ and said:

⁹⁹ Retail Associations' submission, 24 March 2017 at paras 53–55.

¹⁰⁰ [2017] FWCFB 1934, at Attachment B, Question 5.1.

¹⁰¹ SDA submission in reply, 21 April 2017 at para. 53.

¹⁰² [2017] FWCFB 1001 at [210]–[214].

¹⁰³ Ibid at [333]–[337].

[337] The PC Final Report argued that, in order for employers to be indifferent or neutral (at the margin) in choosing between a permanent and casual employee, the ‘default’ method should be preferred. As we observe later, the casual loading is paid to compensate casual employees for the nature of their employment and the fact that they do not receive the range of entitlements provided to full-time and part-time employees, such as annual leave, personal/carer’s leave, notice of termination and redundancy benefits.

[338] For our part we would observe that the ‘default’ approach is also consistent with one of the considerations we are required to take into account in determining whether a modern award satisfies the modern awards objective, in that it provides a casual loading that is simple and easy to understand, consistent with s.134(1)(g) of the FW Act.¹⁰⁴

[83] In relation to the interaction between casual loadings and penalty rates in the Retail Award the Full Bench said:

[1704] We now turn to the application of weekend penalty rates in the *Retail Award* to casual employees. The *Retail Award* provides that casual employees are paid a casual loading of 25 per cent.

[1705] Casuals are currently paid an additional 10 per cent for work performed on a Saturday between 7.00 am and 6.00 pm, that is in addition to the 25 per cent casual loading. It is not clear whether the 10 per cent premium is compounded upon the casual rate of 125 per cent of the applicable minimum hourly rate or whether it is simply added to the 125 per cent such that casuals are paid 135 per cent of the applicable hourly rate. But for present purposes, and for the sake of convenience, we will refer to the Saturday rate for casuals as 135 per cent, for work performed during 7.00 am and 6.00 pm.

[1706] It is also relevant to observe that clause 30.3(c) of the *Retail Award* provides that:

‘Any shiftwork performed on a Sunday will be paid at the rate of 200% (225% for casuals) of the ordinary time rate of pay.’

[1707] Yet, curiously, the Sunday rate for non-shift casuals is 200 per cent (inclusive of the 25 per cent casual loading), which is the same as the Sunday rate for full-time and part-time employees.

[1708] While these provisions no doubt have some history, they are plainly inconsistent and appear to lack logic and merit.

[1709] For instance, how is it that a casual employee working on a Saturday between 7.00 am and 6.00 pm is paid a premium of 135 per cent, but a casual working at, say, 6.00 am on a Saturday (or after 6.00 pm) is only paid the casual loading (i.e. 125 per cent)? Working early on a Saturday (at say 5.00 am or 6.00 am) or working late (say after 9.00 pm) may be said to attract a higher level of disutility than working between 7.00 am and 6.00 pm, yet casual employees receive *less* for working at these times.

[1710] The position in respect of Sunday work is even more curious. Casuals who work shiftwork on a Sunday are paid the Sunday loading (i.e. 225 per cent in total). In these proceedings the Retail Employers are seeking to reduce the premiums for shiftwork on

¹⁰⁴ Ibid at [337]–[338].

Sunday, yet the proposal advanced retains the differential between full-time/part-time employees (at 150 per cent) and casual employees (at 175 per cent). If casual shiftworkers who work on Sunday are entitled to the Sunday loading *plus* their casual loading why is it that casual non-shiftworkers are treated differently?

[1711] Casual loadings and weekend penalty rates are separate and distinct forms of compensation for different disabilities. Penalty rates compensate for the disability (or disutility) associated with the time at which work is performed.

[1712] The casual loading is paid to compensate casual employees for the nature of their employment and the fact that they do not receive the range of entitlements provided to full-time and part-time employees, such as annual leave, personal carer's leave, notice of termination and redundancy benefits.

[1713] Importantly, the casual loading is *not* intended to compensate employees for the disutility of working on Sundays.

[1714] As mentioned earlier we have a preference for what the Productivity Commission calls the 'default' approach to the interaction of casual loadings and weekend penalties. Under this approach, the casual loading is *added* to the applicable weekend penalty rate when calculating the Saturday and Sunday rates for casuals.

[1715] In our view, the casual loading should be *added* to the Sunday penalty rate when calculating the Sunday rate for casual employees. We propose to adopt the Productivity Commission's 'default' method. Accordingly, the new Sunday rate for casual employees in the *Retail Award* will be 25 *plus* 150, that is 175 per cent.

[1716] If the approach advocated by the Productivity Commission was applied to the Saturday rates for casuals then they would be entitled to a loading of 150 per cent (being the standard Saturday loading of 125 per cent *plus* the 25 per cent casual loading) for *all* hours worked on Saturday.

[1717] The Productivity Commission acknowledged that doing so could increase the casual rates in some awards such as the *Retail Award*, which, to some extent, could offset the impact of reducing Sunday penalty rates:

‘The neutral treatment of casual penalty rates would diminish or, in some cases, eliminate the impact of income effects of the Productivity Commission's other penalty rate reforms affecting casual employees.’¹⁰⁵

[1718] Recommendation 15.1 of the PC Final Report states:

‘The Fair Work Commission should, as part of its current award review process:

¹⁰⁵ Common Exhibit 1, Vol. 1 at p. 497.

- ...
- investigate whether weekend penalty rates for casuals in these industries should be set so that casual penalty rates on weekends would be the sum of the casual loading and the revised penalty rates applying to permanent employees, with the principle being that there should be a clear rationale for departing from this.’

[1719] While expressing the view that there may be grounds for some casual penalty rates to rise on Saturdays the Productivity Commission urged some caution in the adoption of the principle of neutrality:

‘... a major proviso is that the current regulated pay levels set for casual employees are ‘rough and ready’ and may not take into account the generally lower average skills and experience of those employees. Were this to be true, achieving parity in the employer costs of employing casuals compared with permanent employees might only have the appearance of ‘equal pay for equal’ work and would disadvantage the employment of casuals. That would be unfortunate given that casual jobs are an important vehicle for gaining entry to the labour market for the disadvantaged, the young, and those needing flexible working arrangements. In that context, the wage regulator should make the presumption that casual penalty rates should fully take account of the casual loading, but should not adopt that principle without closely considering its impacts on such workers.’¹⁰⁶

[1720] Despite the apparent merit of adopting a consistent approach to the application of weekend penalty rates to casuals we are conscious of the fact that no party in the present proceedings has advocated an increase in the Saturday rates for casuals. In the event that such an application is made it can be determined in the award stage of the Review.’

[84] The SDA has subsequently made an application to vary the Saturday (and evening work) rates for casuals and that is one of the matters before us.

5. The Evidence

5.1 The Retail Employers’ evidence

[85] The Retail Employers rely upon the expert evidence of Dr Sean Sands, Associate Professor, Marketing and Co-Director, CXI Research Group, Swinburne Business School. Dr Sands prepared an expert report titled ‘Retail Industry Store-Based Employee Experience and Perceptions of Working on Weekday Evenings and Saturdays’ (the Sands Report).¹⁰⁷

[86] The objectives of the Sands Report were to analyse and compare employee experience and perceptions of working on weekday evenings and Saturdays between casual and permanent retail industry store-based employees including their demographic and other characteristics.¹⁰⁸

¹⁰⁶ Ibid at p. 497.

¹⁰⁷ Exhibit ARA 1 and Transcript of 14 August 2018 at PN189–PN428.

¹⁰⁸ Exhibit ARA 1 at pp. 4–5.

[87] The analysis was undertaken in two stages. The first stage comprised quantitative research using an online survey of retail industry store-based employees to quantify employees' experience and perceptions of working on weekdays and evenings (Stage 1). The second stage focused on qualitative research based on eight focus groups conducted in Sydney and Melbourne to provide further 'context and deep understanding' of retail industry store-based employees' experience and perceptions of working on weekday evenings and Saturdays (Stage 2).¹⁰⁹

[88] A total of 930 retail industry store-based employees participated in the online survey and a total of 50 retail industry store-based employees participated in the focus groups. The respondents for the survey were obtained through a third party provider called Survey Sample International, who used a mixed method approach to recruit people from online and offline advertising.¹¹⁰ During the course of cross-examination, Sands noted that only those who were aged over 18 were included in the sample.¹¹¹ To reflect the different methodologies used findings were presented as 'Stage 1' and 'Stage 2' data throughout the report. Data from both stages were integrated to provide an overview on employee satisfaction with working in retail.

[89] Research findings on the employee experience and perceptions of working on weekday evenings and Saturdays are presented thematically.

Retail industry store-based satisfaction

[90] In Stage 1 respondents were asked to rate their satisfaction from 0 to 10, where 0 is not at all satisfied and 10 is extremely satisfied. Data are expressed as averages as well as categorised into groups where a range between 0 to 6 is defined as 'Detractor', 7 to 8 'Neutral' or 'Passive', and 9 to 10 Promoter. This grouping method is known as the Net Promoter Score and provides a means of comparison between groups. A net promoter score (NPS) is derived by subtracting Detractors from Promoters.¹¹²

[91] Overall mean scores showed that permanent and casual employees had similar satisfaction with working in the retail industry. While a relatively high proportion of permanent and casual employees working Monday to Friday evenings were classified as Detractors, permanent employees were more likely to be classified as Promoters particularly those working on a Saturday.¹¹³ Similar overall mean score levels of satisfaction with current employer were also reported. These results are discussed further at paragraphs [117] to [130].

[92] In terms of recommending retail as a career, although the overall mean scores were similar across groups, casual employees were less likely to be 'Promoters', particularly casual employees working Monday to Friday evening/night shifts. Stage 2 research found that for both casual and permanent employees, most respondents would recommend working in retail, particularly to someone looking for their first job, with the caveat that they must be flexible

¹⁰⁹ Ibid at p. 5.

¹¹⁰ Transcript, 14 August 2018 at PN231–PN232.

¹¹¹ Ibid at PN263.

¹¹² Exhibit ARA 1 at p. 7; and Transcript, 14 August 2018 at PN283–PN287.

¹¹³ Exhibit ARA 1 at p. 7.

with their availability.¹¹⁴ Permanent full-time employees were strongly represented as ‘careerists’—employees that pursue managerial roles in the retail industry,¹¹⁵ while permanent part-time and involuntary casual employees were strongly represented as ‘drifters’—employees that generally intend to continue working and remain at their current level.¹¹⁶ Voluntary casual employees were strongly represented as ‘transients’—employees that ‘intend to exit Retail once a trigger indicates that they have outgrown it’.¹¹⁷

[93] Casual employees were also asked a series of questions related to their experience of being employed on a casual basis in retail. For those working Monday to Friday evenings/night shift a significantly higher proportion reported ‘not having certainty about how much I earn each week is a problem for me’, whereas ‘flexibility’ was rated highest among those working Saturday shifts.¹¹⁸ With regard to their level of satisfaction of being employed on a casual basis, a majority of casual employees were classified as ‘Detractors’ (providing a rating of between 0 to 6 out of 10).¹¹⁹

[94] The survey found that 45 per cent of casual employees would prefer to be employed on a permanent basis. This was a much higher figure than the 26 per cent of respondents that would choose to stay casual (and of which 29 per cent responded ‘don’t know’).¹²⁰ However, ‘elective’ casuals demonstrated ‘little interest’ in changing to permanent employment due to the loss of valued benefits, such as flexibility.¹²¹

[95] The qualitative research identified advantages and disadvantages with being employed on a casual basis. Some advantages included more control, greater flexibility, higher earning capacity and an ‘appealing working micro environment’ with less managerial presence.¹²² Disadvantages included lack of employee benefits, being ‘financially precarious’ and ‘financially inadequate’ as work is not guaranteed and particularly for ‘involuntary’ casuals ‘earnings are insufficient to live on.’¹²³ While ‘financial security’, employment contracts that offer certainty and provide protection and increased opportunities in the form of training and career advancement were cited as advantages by permanent employees.¹²⁴

Experience working weekday evenings/nights and Saturdays

[96] Relative to permanent workers, casual workers were more likely to work on weekday evenings/nights due to study commitments (26 per cent compared with 5 per cent),¹²⁵ although a relatively high proportion of both permanent and casual employees cited that they

¹¹⁴ Ibid at p. 13.

¹¹⁵ Ibid at p. 14.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Ibid at p. 22.

¹¹⁹ Ibid at p. 7.

¹²⁰ Ibid at Table 17, p. 24.

¹²¹ Ibid at pp. 26–27.

¹²² Ibid at p. 24.

¹²³ Ibid at p. 25.

¹²⁴ Ibid at p. 26.

¹²⁵ Ibid at Table 18, pp. 27–28.

were given those hours by their employer (25 and 26 per cent, respectively). These results were similar for those who worked on Saturdays, although the most common response for all employees was that these were the hours given by their employer.¹²⁶

[97] Respondents were asked to consider a series of potential benefits associated with their work shifts. The most common response for all employees working weekday evenings/nights was ‘flexibility around life commitments’ and this was substantially higher for casual employees (25 per cent compared with 15 per cent for permanents). Casual employees were also more likely to have selected ‘study commitments’ compared with permanent employees (23 per cent compared with 6 per cent).¹²⁷

[98] The most common response for all employees working Saturdays was ‘increased pay’ and this response was substantially higher among casual employees (28 per cent compared with 15 per cent). Compared with permanent employees, casual employees also preferred the ‘flexibility around study commitments’ (20 per cent compared with 2 per cent), ‘family commitments’ (10 per cent compared with 5 per cent) and ‘enjoyed weekend trade’ (10 per cent compared with 5 per cent).¹²⁸ Qualitative research identified ‘two broad types of pay-off’ associated with working on Saturday—more money and better prospects. The research found that while some employees received a Saturday penalty rate, the ‘typically-held view’ was that the 10 per cent loading was ‘not making Saturday worthwhile’ particularly given the work volume.¹²⁹

Retail industry store-based employee profile

[99] The report also presented a retail industry store-based employee profile using data collected from the online survey. A demographic, employment and study profile was constructed for each work arrangement (casual and permanent) and work shift (Monday to Friday evening/night shifts and Saturday shifts).

[100] A comparison of the profiles found that compared with permanent employees, casual employees were more likely to report:

- being female (79 per cent compared with 68 per cent of permanent employees);¹³⁰
- aged 18 to 24 years (71 per cent compared with 16 per cent of permanent employees);¹³¹
- high school as their highest level of education (56 per cent compared with 34 per cent of permanent employees);¹³²
- working in businesses with 20 or less employees (29 per cent compared with 20 per cent of permanent employees);¹³³

¹²⁶ Ibid at Table 22, p. 32.

¹²⁷ Ibid at Table 19, pp. 28–29.

¹²⁸ Ibid at Table 23, p. 34.

¹²⁹ Ibid at p. 33.

¹³⁰ Ibid at Table 26, p. 39.

¹³¹ Ibid.

¹³² Ibid at Table 28, p. 41.

¹³³ Ibid at Table 30, pp. 43–44.

- covered by the Retail Award (60 per cent compared with 43 per cent of permanent employees);¹³⁴
- lower levels of income (76 per cent of casual employees earned \$30 000 or less annually, compared with 21 per cent of permanent employees);¹³⁵
- higher proportions that received Government benefits (44 per cent compared with 23 per cent of permanent employees) as an additional source of income;¹³⁶
- living with their parents (60 per cent of casual employees lived with their parents compared with 15 per cent of permanent employees);¹³⁷
- 2 years or less with current employer (64 per cent of casual employees worked with their current employer for two years or less compared with 26 per cent of permanent employees);¹³⁸
- 5 years and less in the retail industry (80 per cent of casual employees worked in the retail sector for 5 years or less compared with 36 per cent of permanent employees)¹³⁹;
- studying (63 per cent compared with 13 per cent of permanent employees)¹⁴⁰; and
- lower proportions of casual female employees working Monday to Friday evening/night shifts (61 per cent compared with 79 per cent of permanent employees).¹⁴¹

[101] Although the report found that among employees that relied on ‘other income sources’, higher proportions of casual employees received government benefits (44 per cent compared with 23 per cent of permanent employees),¹⁴² relatively similar proportions of both permanent (94 per cent) and casual employees (87 per cent) reported that their ‘retail role’ was their main source of income.¹⁴³

[102] The quantitative findings from the Sands Report do not correspond well with data obtained from ABS sources and are unlikely to be representative of the Australian retail industry store-based employees, particularly with regard to location, gender and age.¹⁴⁴ Employees aged less than 18 years were not included in the sample and some 14 per cent of employees in the retail sector are aged 15 to 19 years.¹⁴⁵

¹³⁴ Ibid.

¹³⁵ Ibid at Table 28, p. 41.

¹³⁶ Ibid.

¹³⁷ Ibid.

¹³⁸ Ibid at Table 30, pp. 43–44.

¹³⁹ Ibid at Table 30, pp. 43–44.

¹⁴⁰ Ibid at Table 32, p. 36.

¹⁴¹ Ibid at Table 27, p. 40.

¹⁴² Ibid at Table 28, p. 41.

¹⁴³ Ibid.

¹⁴⁴ Ibid at p. 5.

¹⁴⁵ Table 9 at [36].

[103] In the Annual Wage Review 2012–13 decision, the Panel provided some guidance on the requirements of a survey providing a representative picture at an industry level:

‘... A valuable step in assessing the representativeness of the respondents is to check the answers against other data that is known to be reliable, such as those from the ABS, where possible. It is good practice to include in such surveys one or more questions that match those in a relevant ABS or other reliable survey, so that this test may be applied. As an example, the collection of information about the industry of the employer and the numbers of persons employed would provide information allowing a comparison with ABS data for employment by industry.’¹⁴⁶

[104] The following discussion provides a snapshot of results obtained from the online survey compared with ABS statistics obtained from the Census and EEH.

[105] The online survey found that 45 per cent of all retail industry store-based employees were aged between 18 and 24 years, significantly higher than the 35.4 per cent aged between 15 and 24 years working in the General retail industry (ABS Census 2016 data).¹⁴⁷ Further, 74 per cent of retail industry store-based employees surveyed were female, which is significantly higher than the 60.8 per cent of females reported working in the General retail industry (ABS Census 2016 data).¹⁴⁸

[106] Focusing now only on casual employees, the online survey found that 79 per cent of female retail industry store-based employees surveyed were casual, which is relatively higher than the 67 per cent of females reported as casual employees in the retail sector (EEH 2016 data) and that 71 per cent of retail industry store-based employees aged 18–24 years were casual employees, which is significantly higher than the 58 per cent of employees aged 15–24 years that worked as a casual in the Retail sector (EEH 2016).¹⁴⁹

[107] As noted in the *Penalty Rates Decision* ‘if survey material such as this is to be regarded as definitive we need to be confident that it is a reliable representation of the target population’.¹⁵⁰ In this case the target population is casual employees working in the retail sector. Based on the statistics on age and gender alone, the survey is not representative of the population of interest to these proceedings.

[108] During the course of cross-examination, the SDA questioned the value of research when findings are not based on a representative sample. Dr Sands argued that weights could be applied to the data to make it representative.¹⁵¹ However, as noted by the SDA, if no information has been collected on a group of people, such as retail industry store-based employees aged 15–17 years, then weights cannot be applied to bring the proportion in line with the population.¹⁵² Dr Sands agreed that if he had had more time, the survey would have

¹⁴⁶ [2013] FWCFB 4000 at [441].

¹⁴⁷ Exhibit ARA 1 at Table 26, p.39 and *General retail industry profile* at Table 19, p. 28.

¹⁴⁸ *Ibid.*

¹⁴⁹ Exhibit ARA 1 at Table 26, p. 39 and *General retail industry profile* at Table 12, p. 12.

¹⁵⁰ [2017] FWCFB 1001 at [1571].

¹⁵¹ Transcript, 14 August 2018 at PN234.

¹⁵² *Ibid* at PN236.

included that age group, as they are an ‘important sector in relation to casual people in retail.’¹⁵³

[109] The Retail employers sought a finding that we accept the characteristics of store-based retail industry casual employees as found in the Sands Report (set out above at [100]). Subject to a ‘caveat’ the SDA does not cavil with the finding sought. The ‘caveat’ is to the effect that the Sands Report findings are not based on a representative sample of employees, in that it excludes employees aged under 18.¹⁵⁴ To this we would add that the online survey does not appear to represent the gender split in the retail industry. These considerations limit the utility of the survey results in making generalised statements as to the profile of store-based employees in the Retail industry. Despite these limitations the survey data does provide some insight into the characteristics of these employees.

[110] The Retail Employers also sought a series of findings regarding the characteristics of casuals versus permanent employees who work on weekday evenings and Saturdays.

‘Casual store based weekday evening workers

Casual store based weekday evening workers:

- (i) are more likely to choose to work weekday evenings because of study commitments (26% compared with 5% of permanent employees);
- (ii) are more likely to view flexibility around life commitments as a benefit of working weekday evenings (25% compared with 15% of permanent employees);
- (iii) are more likely to view flexibility around study commitments as a benefit of working weekday evenings (23% compared with 6% of permanent employees); and
- (iv) are more likely to want to take up additional weekday evening work than permanent employees (65% compared with 41% of permanent employees).

Casual store based Saturday workers

Casual store based Saturday workers:

- (i) are more likely to choose to work [on Saturdays] because of study commitments (29% compared with 2% of permanent employees);
- (ii) are more likely to choose to work on Saturdays because of family commitments (6% compared with 4% of permanent employees);
- (iii) are more likely to choose to work on Saturdays because of other work commitments (4% compared with 2% of permanent employees);
- (iv) are more likely to view flexibility around family commitments as a benefit of working Saturdays (10% compared with 5% of permanent employees);
- (v) are more likely to view flexibility around study commitments as a benefit of working Saturdays (20% compared with 2% of permanent employees);
- (vi) are more likely to enjoy weekend trade (10% compared with 5% of permanent employees); and

¹⁵³ Ibid at PN254–PN255.

¹⁵⁴ SDA outline of closing submissions, 15 August 2018 at Appendix C, para. 3.

(vii) are more likely to want to take up additional Saturday work (59% compared with 32% of permanent employees).¹⁵⁵

[111] The findings sought are based on Tables 18, 19, 21, 22, 23 and 25 from the Sands Report. These tables are derived from the online survey results. We have already identified the deficiencies in this survey. Further, even if the findings proposed were made they would not be particularly probative. Implicit in the finding sought is the suggestion that casuals ‘choose’ to work weekday evenings and on Saturdays as it suits their lifestyle. Yet this proposition conflicts with the finding from the Sands Survey that the most common response to questions as to the reasons for employees working at these times was that they were the hours given by their employer.

[112] Two further points can be made in this regard. First, the data presented is somewhat selective and needs to be seen in the context of the Sands Report as a whole.

[113] When asked about the benefits of Saturday work the most common response of *all* employees working on a Saturday was ‘increased pay’. The Sands Report also found that ‘[a]cross the board, working Saturdays is viewed as a significant burden, based on a combination of more demanding work with meagre or no financial recognition depending on the retail category.’¹⁵⁶

[114] The most common difficulty with working weekday evenings/nights among *all* employees was the ‘impact on ability to spend time with family’ (21 per cent) and ‘ability to socialise with friends’ (20 per cent).¹⁵⁷ These difficulties were considered to be significantly higher among casual workers than permanent workers, including the pace of evening trade.¹⁵⁸

[115] Similar findings were reported for working Saturdays, although the differences between permanent and casual employees were greater, with a significantly higher proportion of casual employees reporting ‘ability to socialise with friends’ (28 per cent compared with 16 per cent) and ‘pace of Saturday trade’ (15 per cent compared with 9 per cent) than permanent employees.¹⁵⁹

[116] The second point to be made is that the primary purpose of penalty rates (such as the Monday to Friday evening rate and the Saturday premium) is to compensate for the disutility associated with working at these times. In relation to relative disutility the Retail Employers sought a finding in the following terms:

‘The data suggests casual employees experience disutility in different ways and generally at lower levels when compared to permanent employees.’¹⁶⁰

¹⁵⁵ The Retail Employers proposed findings, 8 August 2018 at paras 4–5.

¹⁵⁶ Exhibit ARA 1 at p. 33.

¹⁵⁷ Ibid at Table 20, p. 30.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid at Table 24, p. 36.

¹⁶⁰ The Retail Employers proposed findings, 8 August 2018 at para. 11.

[117] The Sands Report is cited in support of the proposed findings, though the particular part of the report is not referenced. We assume it is a reference to the tables supporting the proposed finding set out at [110] above. Contrary to the submission advanced by the Retail Employers, the data in the Sands Report relating to satisfaction with working in retail, in terms of work arrangement and work shift, does *not* support the proposed finding. Table 2 from the Sands Report is set out below (as Table 21).

Table 21¹⁶¹
Satisfaction with working in retail (work arrangement by work shift)

	Total	Permanent		Casual	
		M-F evening	Saturday	M-F evening	Saturday
<i>Mean</i>	6.4	5.6	6.4	5.8	6.5
Detractor	47%	66%↑	40%	61%	45%
Passive	41%	24%	37%	36%	45%
Promoter	12%	10%	23%↑	3%↓	10%
NPS	-35	-56	-17	-58	-35

Note: Significant differences are represented by Blue text = significantly HIGHER than total sample; Red text = significantly LOWER than total sample; Green cell = significantly HIGHER when compared to respective column (i.e. work arrangement or work shift); SAMPLE BASE = Permanent (M-F = 58, Saturday = 114), Casual (M-F = 72, Saturday = 157).

[118] A high proportion of casuals (61 per cent) and permanent (66 per cent) working on Monday to Friday evening shifts are ‘detractors’. Dr Sands describes these results as ‘similar’.¹⁶²

[119] The NPS for working evenings Monday to Friday are similar for permanents (-56) and casuals (-58).

[120] In relation to Saturday work the NPS for casuals is -35, compared to -17 for permanents (though the mean is similar for both groups (6.5 versus 6.4)).

[121] Table 4 from the Sands Report is set out below (as Table 22).

¹⁶¹ Exhibit ARA 2, Table 2 at p.8.

¹⁶² Exhibit ARA 1 at p. 7.

Table 22¹⁶³
Satisfaction with current employer (work arrangement by work shift)

	Total	Permanent		Casual	
		M-F evening	Saturday	M-F evening	Saturday
Mean	6.7	5.7	6.9	5.8	7.0
Detractor	40%	62%↑	32%	58%↑	33%↓
Passive	36%	21%↓	39%	36%	40%
Promoter	24%	17%	29%	6%↓	27%
NPS	-16	-45	-3	-52	-6

Note: Significant differences are represented by Blue text = significantly HIGHER than total sample; Red text = significantly LOWER than total sample; Green cell = significantly HIGHER when compared to respective column (i.e. work arrangement or work shift); SAMPLE BASE = Permanent (M-F = 58, Saturday = 114), Casual (M-F = 72, Saturday = 157).

[122] The above table shows employee satisfaction with their current employer in terms of work arrangement and workshift. Dr Sands describes the proportion of detractors amongst permanent (62 per cent) and casuals (58 per cent) working evening shifts as ‘similar’.¹⁶⁴ Satisfaction with working on Saturdays is also similar as between permanent and casual employees (NPS of -3 and -6 respectively; similar proportion of Detractors and Promoters).

[123] In the qualitative part of his report Dr Sands states:

‘Casual and Permanent employees both identify the same types of disadvantages associated with working weekday evenings, including: (emphasis added)

- More potential for “boring” shifts that drag because there are so few customers to serve so other time-filling activities have to be found. This disadvantage was category-specific.
It’s a case of trying to look busy which means folding throws and towels endlessly to tidy up. Nothing else can be done but that. Casual, Home wares, Female, 55 YO, Sydney
- Detracts from important aspects of family life.
We are not there to do the dinner or put the kids to bed, so you have to rely on someone else like mum or friends. Permanent PT, Supermarket, Female, 38 YO, Sydney
- Takes a physical toll. Getting home after 9.30/10.00 pm can make it hard to wind down, meal times and exercise routines get disrupted and it can be tough if a late night is followed by an early start the next day.
The day gets dragged out too. If I start my shift at 12 or 1.00 I would have already have flown around all morning doing loads of washing at home or cleaning and mopping, then you are at work and on your feet for the next 8 hours. Casual, Department Store, 32 YO, Female
- Potential to miss out on post-work socialising with friends (going to the pub) or one-off events (gallery openings, workshops, lectures)

¹⁶³ Ibid at Table 4, p. 11.

¹⁶⁴ Ibid at p. 11.

- Limited after-hours public transport can make getting home difficult and more expensive if taxis have to be used.¹⁶⁵

[124] One of the ‘pay offs’ associated with working on Saturdays by the focus group participants was more money:

‘**More money:** Whilst (some) employees received a Saturday penalty rate, the typically-held view was that:

- (a) A 10% loading does not make working Saturday worthwhile.

It's really not worth it to give up your Saturday for an extra \$2 an hour. And it's the busiest time so you are stressed out the whole time. Casual, Department Store, Female, 39 YO, Melbourne

Usually the weekends are the busiest out of the week. I find Saturdays are busier than Sundays often and the couple of extra dollars you get for the Saturday don't really compensate and should be a little bit more because you are so exhausted by the end of the day. Casual, Furniture Retailing, Female, 55 YO, Sydney

- (b) Higher weekend penalty rates should actually apply to Saturdays not Sundays, in recognition of the fact that Saturday is a significantly harder day to work.

I get time and half on Sundays and nothing Saturday! Saturday you should get triple pay because it is horrible, the worst day of the week. You do 350k through the tills compared to 70k on weekdays and it is nuts and no benefit for it. They stripped Saturday rate and Sunday they are doing their best with that and I will give it a flick and not work weekends if they do that. Permanent PT, Supermarket, Male, 42 YO, Sydney

If you are going to be working all weekend, you should be compensated a bit more especially on the Saturday. It is ridiculous that for Sunday you get paid more, when Saturday is just insane. Casual, Department Store, Male, 35 YO, Sydney¹⁶⁶

[125] The reported ‘difficulties’ with working on a Saturday are presented in Table 24 of the Sands Report, set out below as Table 23:

Table 23¹⁶⁷
Difficulties of working Saturday

¹⁶⁵ Ibid at pp. 30–31

¹⁶⁶ Ibid at p. 33.

¹⁶⁷ Ibid at Table 24, p. 36.

Items	Total	Work arrangement	
		Permanent	Casual
Ability to spend time with family	26%	23%	28%
Ability to socialise with friends	22%	16% ↓	28% ↑
Ability to attend events	14%	12%	16%
Pace of Saturday trade	12%	9% ↓	15% ↑
Limited staff on a Saturday	10%	8%	11%
Inexperienced staff	5%	6%	5%
No real difficulty	11%	9%	12%
Other	1%	1%	1%

Note: Significant differences are represented by Blue text = significantly HIGHER than total sample; Red text = significantly LOWER than total sample; Green cell = significantly HIGHER when compared to respective column (i.e. work arrangement or work shift).

[126] The most common difficulty of working a Saturday is ‘ability to spend time with family’ (26 per cent), followed by ‘ability to socialise with friends’ (22 per cent). Ability to socialise with friends is rated as a significantly higher difficulty for employees on a casual work arrangement (28 per cent). Also, the difficulty, ‘pace of Saturday trade’, is rated higher for employees on a casual work arrangement (15 per cent).

[127] In the qualitative part of his report Dr Sands states:

‘Stage 2 data: Casuals and Permanent employees regard Saturday as the most challenging of the entire week. Described as *hectic* and *chaotic*, Saturday is the toughest day of the week irrespective of retail category. Some simply refuse to work on Saturday, preferring instead to put personal or family needs ahead of earning. *I am passionate about not working Saturdays. It is the busiest day, I don’t think the money is worth enough for that stress and chaos and everything else that happens on Saturday.* Casual, Fashion Retailing, Female, 32 YO, Sydney

Advantages of working Saturdays are few (small loading but only in some categories, easier commute, team spirit) but disadvantages are many and material. (emphasis added)

- Harder work: With more customers, different kinds of customers and more demanding customers on a Saturday, Casual and Permanent staff alike are required to spend a significantly greater proportion of the day in customer interaction, leaving them more tired and with non-sales related tasks unfinished by the end of the day.
- Upstream & downstream effect: There can be constraints on evenings activities, both pre and post Saturday shift.

It can ruin your Friday night if you have something planned because you know Saturday will be a blockbuster and you have to have your wits about you. Bondi Junction is chaotic and will go from 9 to 6, if not later. Casual, Home ware Retailing, Female, 55 YO, Sydney
- Social deprivation: Working Saturdays means missing out on entire weekends away, having to decline invitations to significant celebratory occasions such as

weddings, engagements and birthday parties (especially children's parties) and losing connection with sporting or cultural interest groups.

How many times have we all missed out on family functions? I have lost count over the years, how many engagement parties I have missed because I had to work the Saturday or dinners on Friday night or friends BBQ or grand final. I miss going to the footy on a Saturday – it might sound trivial but I still miss it. Permanent, Luxury Goods, Female, 45 YO, Melbourne

- Erosion of family relationships: Working Saturdays means missing out on involvement in children's sporting and social activities, negotiating with partners to cover child rearing duties and dealing with emotional fall out from families feeling neglected.

A structural aspect underpinning a qualitative difference between Casual and Permanent employee's propensity and willingness to work Saturdays (and weekends in general) is the fact that those working casually over the weekend are often time richer (have fewer responsibilities, have only themselves to consider, have less structured routines) and so make less of a distinction between weekdays and weekends.

Being a student, you don't have uni at the weekend so you can work a full day if you want to earn more money than a few hours after uni. For younger people it is a time when you can work, even though you are trading it for maybe social time. Casual, Bakery, Female, 18YO, Sydney¹⁶⁸

[128] Further, during the course of his cross examination Dr Sands was taken to his 'Synthesis of Key Findings' notes of the qualitative interviews.¹⁶⁹ These notes include the following observation about working on Saturdays:

'My take, definitely more significant disutility for working on Saturday compared with any other time, including Sunday.'¹⁷⁰

[129] Dr Sands agreed that the above statement reflected his 'sentiments following the groups'.¹⁷¹

[130] In our view, and contrary to the submission advanced by the Retail Employers, the Sands Report supports a finding that permanent and casual employees experience similar levels of disutility associated with evening (Monday to Friday) and Saturday work. In short, the Sands Report lends support to the proposition that the penalty rates for working at these times should be the same for permanent and casual employees.

¹⁶⁸ Ibid at pp. 37–38.

¹⁶⁹ Transcript, 14 August 2018 at PN372.

¹⁷⁰ Ibid at PN385.

¹⁷¹ Ibid at PN388–PN389.

[131] We note that the present case may be contrasted with the circumstances pertaining to the review of penalty rates in the Fast Food Industry Award where there was a marked difference in reported experiences and preferences of employees at particular classification levels. Such differences in employee disutility reflected the age and student status of employees in the lower classification level and warranted a lower Sunday penalty rate.¹⁷² There was no comparable evidence in the present proceedings.

[132] The Retail Employers also called five lay witnesses:¹⁷³

- Joanne Elson, Director, B&J Elson Nominees;¹⁷⁴
- Terry Slaughter, Director, Slaughter Enterprises Pty Ltd;¹⁷⁵
- Anita Dorwald, Chief Operating Office of City Beach.¹⁷⁶
- Jordan Freeman, casual employee of IGA Springfield Lakes;¹⁷⁷ and
- Campbell Vears, Duty Manager, IGA Mount Barker;¹⁷⁸

[133] Joanne Elson¹⁷⁹ is Director of a standalone supermarket in South Australia, which Ms Elson purchased in November 2013. Ms Elson employs 40 retail employees (10 permanent and 30 casual), all covered by the Retail Award.¹⁸⁰

[134] Ms Anita Dorwald¹⁸¹ is the Chief Operating Officer of City Beach, a large surf, skate and street fashion retailer with a number of stores across Australia and employs over 2500 employees in retail store positions. All its retail store employees are covered by the Retail Award and 85 per cent of all employees are employed on a casual basis.¹⁸²

[135] Mr Terry Slaughter¹⁸³ is the Director of Slaughter Enterprises Pty Ltd, which operates an IGA store in Queensland, a medium size retail business. Mr Slaughter is responsible for all aspects of managing the business and store including finance management, product purchase

¹⁷² [2017] FWCFB 1001 at [1377] to [1378] ad [1388] to [1396]

¹⁷³ Witness Statement of Joanne Elson dated 22 July 2018, Exhibit ARA3; Witness Statement of Campbell Vears dated 23 July 2018, Exhibit ARA4; Witness Statement of Terry Robert Slaughter dated 23 July 2018, Exhibit ARA5; Witness Statement of Jordan James Freeman dated 23 July 2018, Exhibit ARA6; Witness Statement of Anita Monique Dorwald dated 23 July 2018, Exhibit ARA7.

¹⁷⁴ Transcript, 14 August 2018 at PN467–PN579.

¹⁷⁵ Ibid at PN629–PN728.

¹⁷⁶ Ibid at PN760–PN842.

¹⁷⁷ Ibid at PN730–PN759.

¹⁷⁸ Ibid at PN581–PN622.

¹⁷⁹ Ibid at PN471.

¹⁸⁰ Ibid at PN475.

¹⁸¹ Ibid at PN764.

¹⁸² Ibid at PN787.

¹⁸³ Ibid at PN634.

and managing employees. All employees of Mr Slaughter's store are covered by the Retail Award. Some 73 per cent of its workforce are casuals. Casual employees represent 100 per cent of Mr Slaughter's workforce on Saturdays.¹⁸⁴

[136] The Retail Employers rely on the evidence of Elson, Slaughter and Dorwald to support a number of the propositions they advance about what are said to be the negative consequences of granting the SDA's claims.¹⁸⁵ In short, it is put that:

- (i) Retail employers set labour budgets such that labour costs are maintained at a percentage of store sales.
- (ii) The labour budget will affect the composition of the work team on any one shift. If labour costs increase 'many retailers are likely to reduce store hours to maintain profitability'.¹⁸⁶ (emphasis added)
- (iii) If the cost of employing casuals increases, hours will need to be reduced in order to meet store labour budgets. In the event that hours were reduced, it is likely this will have most impact on young casual employees.

[137] We accept that the evidence supports the first proposition; it is also consistent with the following finding in the *Penalty Rates Decision*:

'In order to maintain profitability it is common for retail businesses to fix labour budgets to a proportion of retail sales, hence changes in labour costs (or sales) may impact on the amount of labour rostered.'¹⁸⁷

[138] But the evidence before us does *not* support propositions (ii) and (iii). Two points may be made in this regard.

[139] First, the evidence before us is from businesses which are plainly *not* representative of all employers covered by the Retail Award.

[140] Ms Elson and Mr Slaughter operate what may be characterised as 'medium size businesses' and Ms Dorwald represents a large business.¹⁸⁸ Medium businesses comprise 7.2 per cent, and large businesses 0.4 per cent, of employing businesses in the retail sector; a sector dominated by small businesses (comprising 92.4 per cent of all employing businesses in the sector).¹⁸⁹ Small and non-employing businesses employ about one third of employees in the retail sector.¹⁹⁰

[141] Further, the Mt Barker IGA employs 40 employees, of whom 30 (75 per cent) are casual employees and 73 per cent of the Springfield Lakes IGA workforce are casual

¹⁸⁴ Ibid at PN660–PN670.

¹⁸⁵ Retail Employers proposed findings, 8 August 2018 at paras 6–8.

¹⁸⁶ Ibid at para. 7.

¹⁸⁷ [2017] FWCFB 1001 at [1619](ii).

¹⁸⁸ See the note to Table 3 at [28].

¹⁸⁹ See Table 3 at [28].

¹⁹⁰ See Table 4 at [30].

employees. Some 85 per cent of City Beach’s employees are casuals. The proportion of casual employees in total employment in the retail sector was 36 per cent in August 2017.¹⁹¹ The employment arrangements at City Beach, the Mt Barker and Springfield Lakes IGA’s cannot be said to be representative of the retail sector—they employ more than twice the number of casuals that would be expected if the industry norm were applied (85, 75 and 73 per cent respectively versus 36 per cent). The evidence of these witnesses cannot simply be extrapolated to the circumstances of all employers covered by the Retail Award.

[142] The second point concerns deficiencies in the evidence of these witnesses, in particular:

- each witness overstated the impact of granting the claim as they compounded the penalty rate on the casual loading;¹⁹² and
- none of the witnesses provided a profit and loss statement or indeed any profit data.

[143] Absent any profit data it is difficult to evaluate the witnesses’ assertions that they would reduce labour hours if the increases sought by the SDA were granted.

[144] Further, when confronted with their overstatement of the cost of the SDA’s claim Ms Elson said that she would ‘still *seriously consider* changing the structure of my Saturdays if the rates were to go up’;¹⁹³ and Mr Slaughter said ‘I can’t afford *any increase* in my business ... I would have to reduce [labour hours] ... those casual employees would lose hours’.¹⁹⁴

[145] This evidence is somewhat speculative in that the witnesses assert what *would* happen if the SDA’s claims were granted, and needs to be considered in the light of what these businesses *actually did* when faced with general wage increases flowing from recent Annual Wage Review decisions.

[146] Mr Slaughter did not reduce any labour hours as a result of the recent Annual Wage Review increases;¹⁹⁵ whereas Ms Elson just ‘trimmed’ hours ‘a little bit ... to help with that increase’, by ‘maybe five hours per week’.¹⁹⁶

[147] Ms Dorwald’s evidence as to the impact of granting the SDA’s claims on City Beach was of no assistance. The projected reductions in labour hours which appeared in her statement had been calculated by someone else and Ms Dorwald was unable to explain how they had been arrived at.¹⁹⁷

¹⁹¹ Exhibit SDA 5 at para 2.23 and Exhibit SDA 4 at Table 4, p. 9.

¹⁹² Elson transcript, 14 August 2018 at PN539–PN550; Slaughter transcript, 14 August 2018 at PN681–PN690 and PN705–PN706; and Dorwald transcript, 14 August 2018 at PN774–PN785.

¹⁹³ Transcript, 14 August 2018 at PN576.

¹⁹⁴ Ibid at PN719–PN721.

¹⁹⁵ Ibid at PN654–PN657.

¹⁹⁶ Ibid at PN520–PN523.

¹⁹⁷ Ibid at PN821.

[148] In our view, the evidence of Elson and Slaughter is limited to their own businesses and does not support more generalised findings. Further, for the reasons given, Ms Dorwald's evidence as to the impact of granting the SDA's claim is of no assistance.

[149] Two employees also gave evidence on behalf of the Retail Employers.

[150] Mr Campbell Vears¹⁹⁸ has been employed on a casual basis at an IGA store in South Australia since May 2016. Mr Vears is currently taking a 'gap year' between finishing secondary school and commencing tertiary study.¹⁹⁹ Mr Vears generally works about 25 to 30 hours per week.

[151] Mr Vears gave evidence that he prefers to work on a casual basis because of the higher rate of pay, flexibility to change his working hours around other commitments and the ability to swap or pick up extra shifts. Mr Vears stated he is aware he has the ability to request conversion to permanent employment but he has advised his employer he does not wish to do so.

[152] Mr Jordan Freeman²⁰⁰ has been employed as a casual employee at an IGA store in Queensland since 2014. Mr Freeman's duties include serving customers, stocking shelves, general tidying, merchandising and supervising staff. Mr Freeman works about 20 to 30 hours per week, including 'more likely than not' on a Saturday.²⁰¹

[153] Mr Freeman gave evidence that his employer has offered to convert him to permanent part-time employment, but he declined the offer because he prefers to work on a casual basis. Mr Freeman stated that he prefers being paid a higher amount as a casual and enjoys having the flexibility to decline an offer to work or swap a shift to attend a social or sporting commitment. Further, Mr Freeman prefers casual employment because he is unsure if he would start studying again or pursue a different career and therefore doesn't 'want to be locked in on a permanent roster or set hours of work each week'.²⁰²

[154] The Retail Employers also seek to rely on the evidence of Mr Vears in support of the proposed findings:

'some casual retail employees acknowledge this flexibility cannot be afforded in a permanent role.'²⁰³

[155] The evidence upon which this proposition is based is from two employees; there are 1,293,000 persons employed in the Retail sector. The evidence of two employees provides too fragile a base upon which to make any meaningful findings at all.

¹⁹⁸ Exhibit ARA 4.

¹⁹⁹ Ibid at para. 5.

²⁰⁰ Exhibit ARA 6.

²⁰¹ Ibid at paras 6, 8.

²⁰² Ibid at para. 10.

²⁰³ Exhibit ARA 4 at paras 9–10; Retail Employers proposed findings, 8 August 2018 at para 14.

[156] We note that the qualitative research aspect of the Sands Report supports the proposition that some casual employees perceive an advantage in the greater flexibility afforded by casual employment. But this must be seen in context. The Sands Survey also found that 45 per cent of casual employees would prefer to be employed on a permanent basis (a much higher figure than the 26 per cent of respondents who would choose to remain casual)²⁰⁴—and hence this group would appear to value stability and certainty over flexibility.²⁰⁵ In any event we fail to see how an employee preference for the flexibility of casual employment per se is relevant to the level of penalty rate applicable to working at unsocial times.

5.2 The SDA's evidence

[157] The SDA filed an expert report prepared by Professor Jeff Borland, 1 June 2018 (Borland Report).²⁰⁶ Professor Borland is the Truby Williams Professor of Economics at the University of Melbourne²⁰⁷ and was called to give evidence during the proceedings.²⁰⁸

[158] The Borland Report addressed the following issues:

- (i) estimates of the maximum possible impact of the proposed changes to penalty rates on the cost of labour in the retail industry;
- (ii) impact of changes to penalty rates on total employment in the retail industry;
- (iii) commentary of the PC on potential impact of changes to penalty rates, published in the PC Final report.²⁰⁹

[159] For the reasons set out above (at [64] to [70]) it is unnecessary for us to deal with that part of the Borland Report which relates to issue (iii).

[160] Professor Borland applies a general formula for estimating the maximum impact on the weekly total cost of labour for different types of employers in the retail industry. The impact of the proposed changes to penalty rates will depend on:

- (i) the share of total weekly hours worked in retail accounted for by the hours in which the evening and Saturday penalty rates apply;
- (ii) the share of those hours which are worked by casual employees; and
- (iii) the percentage change in the cost of hiring an hour of casual labour during times at which penalty rates apply as a result of the proposed changes (expressed as the proportion of the current cost of labour).²¹⁰

²⁰⁴ Exhibit ARA 1 at p. 23, Table 16.

²⁰⁵ See [94].

²⁰⁶ Exhibit SDA 5.

²⁰⁷ Ibid at para. 1.2.

²⁰⁸ Transcript 14 August 2018 at PN47–PN184.

²⁰⁹ PC Final Report at p. 497.

[161] Those three components of the general formula are discussed in more detail below.

[162] The formula is applied based on the assumption that the proposed changes in penalty rates do not cause any change in the:

- total employment of permanent and casual employees; and
- shares of total weekly hours worked by casual employees at hours for which penalty rates apply.²¹¹

[163] Professor Borland explained that by doing so allows the following question to be answered:²¹²

‘What would be the addition to the total cost of labour for an employer to retain its current arrangements for hiring labour after the proposed changes to penalty rates?’

[164] In the absence of available data to address this question, Professor Borland makes the following assumptions:

- all casual employees in the Retail trade industry receive an increase to their penalty rates on weekday evenings and Saturdays. It takes no account of the possibility that some employers may already pay casual employees above award rates. The data are not adjusted for method of setting pay and therefore the estimate derived overstates the impact on weekly total labour costs, as it would include the proposed change to penalty rates on wages paid to casual employees who are covered by an enterprise agreement or individual arrangement.
- Professor Borland explained that if the proportion of award-reliant employees in Retail trade (34.5 per cent) were representative of award-reliant casual employees who would be affected by the proposed change, the estimated change in the aggregate weekly cost of labour would need to be divided by a factor of three.²¹³
- all casual employees in the Retail trade industry are adults and therefore increases in penalty rates are expressed as a percentage of the adult ordinary time wage which will over-state the percentage increase in weekly total labour costs to employers.²¹⁴
- offsetting effects on the cost of labour from an increase in penalty rates are not taken into account, such as reduced employee turnover, as discussed in Manning (2016).²¹⁵

²¹⁰ Exhibit SDA 5 at paras 2.3, 2.8.

²¹¹ Ibid at para. 2.10.

²¹² Ibid.

²¹³ Ibid at para. 2.11.

²¹⁴ Ibid at para. 2.14.

²¹⁵ Ibid at para. 2.15; Manning A (2016), ‘The elusive employment effect of the minimum wage’, Centre for Economic Performance, London School of Economics and Political Science, Discussion Paper No. 1428.

[165] Professor Borland estimates the maximum effect on the weekly total cost of labour based on different trading patterns using the following scenarios:²¹⁶

- A) Supermarket A and Convenience stores
 - Weeknight evenings: Monday to Friday, 6pm to 11pm
 - Saturdays: 7am to 11pm
- B) Supermarket B
 - Weeknight evenings: Monday to Friday, 6pm to 9pm
 - Saturdays, 8am to 6pm
- C) CBD and Shopping centres
 - Weeknight evenings: One night, 6pm to 9pm
 - Saturdays: 9am to 5pm
- D) Strip shopping
 - Weeknight evenings: Nil
 - Saturdays: 9am to 5pm.

[166] To estimate the maximum impact on the weekly total cost of labour, Professor Borland makes the following assumptions on the 3 components of the general formula (discussed in paragraph [157]) in the absence of available data.

1. The share of total weekly hours worked accounted for by hours to which penalty rates apply is likely to vary between retail businesses with different opening hours. For each scenario, Professor Borland makes assumptions on these shares, which are shown in the first column of Table 25.

Professor Borland uses the same ‘shares of total weekly hours’ for scenarios A and B of 0.2, which Retail Employers questioned during the course of cross-examination.²¹⁷ Professor Borland explained that the hours worked by casual employees on week nights and Saturdays cannot be larger than the total proportion of hours that casual employees work in retail across the whole of every week (which was 25.1 per cent), and that his assumptions reflected this.²¹⁸ Professor Borland provides an example using scenario A—Supermarket A and convenience stores. In this scenario, the upper bound estimate for weekly hours worked by casuals is 0.24—that is 0.2 share of total weekly hours worked on week nights, 0.2 share of total weekly hours worked on Saturdays multiplied by the upper bound share of hours worked by casual employees at penalty rates which is 0.6.

²¹⁶ Exhibit SDA 5 at para. 2.16.

²¹⁷ Transcript, 14 August 2018 at PN117.

²¹⁸ Ibid at PN101.

2. The share of total weekly hours worked by casual employees at the evening and Saturday penalty rates is presented using lower and upper-bound estimates.²¹⁹ These estimates are shown in the second column of Table 25.

The lower estimate was based on the proportion of casual employees in total employment in the retail industry as at August 2017 (obtained from the ABS CoE) which was 36 per cent.²²⁰ Professor Borland noted that this lower estimate was ‘conservative’ given that the share of hours worked by casual employees (14.9 per cent of casual employees work full-time) would be less than their share of total employment.²²¹

An upper estimate of 60 per cent was chosen. This was considered to be ‘roughly equal’ to the proportion of all employees who worked only on weekends or employees who worked weekdays and weekends and were casual employees (36.4 per cent—obtained from the ABS CoE). This proportion is scaled up by the ratio of the share of casual employees in the Retail trade industry to the share in total employment ($1.43 = 35.9/25.1$ —obtained from the ABS CoE).²²² The basis for using this figure as an upper estimate was that these employees must receive the penalty rate for at least some of the hours they work.²²³

Professor Borland also noted that while the ‘lower and upper estimates are intended to describe the average experience’ for all retailers, these proportions will vary among individual employers.²²⁴

The percentage change in the cost of hiring an hour of labour from a casual employee during hours to which penalty rates apply on each day due to the proposed change in penalty rates are shown in the third column of Table 25.

[167] Based on these assumptions, estimates of the maximum impact on the total cost of labour for each scenario are presented in the fourth column of Table 25. The increase in total labour costs is proportional to the share of total weekly hours worked at which penalty rates apply and the likely share of penalty rate hours worked by casual employees, with Supermarket A and convenience stores likely to incur larger costs relative to other stores.

²¹⁹ Exhibit SDA 5 at para. 2.22.

²²⁰ Ibid at para. 2.23; ABS, *Characteristics of Employment, August 2017*, Catalogue No. 6333.0.

²²¹ Exhibit SDA 5 at para. 2.23.

²²² Ibid at para. 2.24; ABS, *Characteristics of Employment, August 2017*, Catalogue No. 6333.0.

²²³ Ibid at para. 2.24.

²²⁴ Ibid at para. 2.25.

Table 25²²⁵

Lower and upper estimates of the maximum impact on weekly total labour costs from proposed SDA penalty rate changes, by scenario

Scenario		Share of total weekly hours worked at which penalty rates apply	Share of hours at which penalty rates apply that are worked by casual employees	Increase in cost of hiring an hour of casual labour due to proposed change in penalty rates	Estimate of the impact on total cost of labour	
		(%)	(%)	(%)	(%)	
Supermarket A and Convenience stores	Lower estimate	Weeknight evenings	20	36	20	2.3
		Saturdays	20	36	13.3*	
	Upper estimate	Weeknight evenings	20	60	20	3.9
		Saturdays	20	60	13.3*	
Supermarket B	Lower estimate	Weeknight evenings	20	36	20	2.2
		Saturdays	20	36	11.1	
	Upper estimate	Weeknight evenings	20	60	20	3.7
		Saturdays	20	60	11.1	
CBD and Shopping centres	Lower estimate	Weeknight evenings	10	36	20	1.5
		Saturdays	20	36	11.1	
	Upper estimate	Weeknight evenings	10	60	20	2.5
		Saturdays	20	60	11.1	
Strip shopping	Lower estimate	Weeknight evenings	0	36	20	0.9
		Saturdays	25	36	11.1	
	Upper estimate	Weeknight evenings	0	60	20	1.6
		Saturdays	25	60	11.1	

Notes: Share of total weekly hours worked at the relevant penalty rates are based on the trading hours under each scenario as follows: (a) Supermarket A and Convenience stores from 7am–11pm weekdays, 7am–11pm Saturdays and 7am–11pm Sundays; (b) Supermarket B from 8am–9pm weekdays, 8am–6pm Saturdays and 8am–6pm Sundays; (c) CBD and shopping centres from 9am–6pm weekdays (with one weeknight evening

²²⁵ Ibid at pp 7–10.

from 6pm to 9pm), 9am–5pm Saturdays and 9am–5pm Sundays; and (d) Strip shopping 9am–5pm weekdays (no weeknight evenings), 9am–5pm Saturdays and not open on Sundays.

*As this group operates within a span of hours where both the proposed Saturday and Saturday evenings penalty rates would be applicable, it is assumed that 75 per cent of casual hours are worked between 7am to 6pm (with a proposed penalty rate increase of 10 to 25 per cent) and the remaining 25 per cent are worked after 6pm (with a penalty rate increase from zero to 25 per cent) in order to calculate the average change in labour costs for an hour of casual labour on Saturdays at 13.3 per cent.²²⁶

[168] As discussed in paragraph [161], we note that for the following reasons the actual impact on the weekly cost of labour is likely to be less than the estimates of maximum possible impact above.²²⁷

- (i) The maximum impact estimates rely on the assumption that businesses do not reduce the total weekly hours worked by casual employees at hours for which penalty rates apply.²²⁸
- (ii) The estimates do not take into account the possibility that some employers are already paying penalty rates for casual workers that are above the award level. ABS data shows that only 34.5 per cent of workers in the retail industry had ‘Award only’ as their method of pay setting.²²⁹
- (iii) The estimates assume all casual employees in the retail industry are adults and are not being paid junior rates.²³⁰

[169] Professor Borland also considered the impact of the proposed penalty rate changes on total employment (in reference to total hours worked) in retail, having regard to substitution and scale effects.

[170] The substitution effect is the change in the total hours worked by employees caused by an increase in the penalty rate for casual employees, which causes a change in the relative cost of employing that input compared with other inputs. The size of the substitution effect is dependent on the extent of the change in the relative cost of inputs, i.e. casual employees compared with other inputs (permanent and unpaid labour) and the technological scope for substitution—the technical feasibility of replacing one input with another input.²³¹

[171] If casual labour were substituted for permanent labour, there would be no change in total employment. A decrease in total employment would only occur to the extent that casual employees are substituted for capital and unpaid labour; however Professor Borland noted

²²⁶ Ibid at para. 2.28.

²²⁷ Ibid at para 3.22(c). Borland states that it is important to bear in mind the reasons why the *actual* impact on the weekly total cost of labour is likely to be less than the estimates of the *maximum* impact. It is apparent that he is referring here to the matters raised in paragraphs 2.10–2.15.

²²⁸ Ibid at para 2.10.

²²⁹ Ibid at para 2.11.

²³⁰ Ibid at para 2.13.

²³¹ Ibid at paras 3.3–3.4.

that the scope and financial incentive to do so would be limited given that the estimated impact on total labour costs is ‘relatively small’.²³²

[172] For capital substitution, a retailer must also consider the installation and adjustment costs of capital and that the technical feasibility of replacing the activities performed by labour is ‘likely to be limited’ in the retail sector.²³³ While small firms may find it possible to substitute casual for unpaid labour performed by the owner or other related family members, Professor Borland referred to evidence presented in the PC Final report which found that there was a limit to this amount of substitution. The PC Final report estimated that 10.6 per cent of total labour time in retail is performed by owners or unpaid labour from family members.²³⁴

[173] Based on a range of hypothetical scenarios on the substitution of casual employees by permanent employees, Professor Borland expressed the opinion that the proposed changes to penalty rates are likely to cause ‘some modest’ substitution of permanent employees for casual employees. However, Professor Borland emphasised that ‘[w]hat is critical, however, is that this substitution would not be associated with any change in total employment. It is important to reiterate this point.’²³⁵

[174] The scale effect refers to the change in the total hours of work by paid labour as a result of a change in the level of output following an increase in labour costs for casual employees. This effect is dependent on the extent to which the increase in penalty rates affects prices and the demand for output.²³⁶ Drawing on research undertaken by the Commission, Professor Borland commented that the size of the scale effect is likely to be small, as labour costs comprised around 11 per cent of total costs in Retail trade.²³⁷ Applying this estimate to the proposed changes to penalty rates on the cost of labour for Supermarket A and convenience stores, Professor Borland estimated that the effects would be to increase total costs on average by 0.25 to 0.43 per cent.²³⁸

[175] Professor Borland concluded that ‘the proposed changes to penalty rates will have a very small impact on prices and on the demand for output, and hence any impact on total employment from the scale effect will be minimal’.²³⁹

[176] Professor Borland’s opinion as to the overall impact of granting the SDA’s claims on total employment in the retail industry are set out at paragraph 3.22 of the Borland Report:

‘3.22 In my opinion:

²³² Ibid at para. 3.6.

²³³ Ibid at paras 3.5–3.6.

²³⁴ Ibid at para. 3.7; PC Final Report at pp. 412–413.

²³⁵ Ibid at para. 3.18.

²³⁶ Ibid at para. 3.20.

²³⁷ Ibid at para. 3.21; Fair Work Commission, *Industry profile—Retail trade*, material to assist AM2014/305—Penalty Rates Case.

²³⁸ Exhibit SDA 5 at para. 3.21.

²³⁹ Ibid at para. 3.21.

- (a) The likely size of any change in total employment due to a substitution effect will be small. This is because the main type of substitution that will occur is of casual employees for permanent employees, which will leave total employment unchanged. Little substitution of casual employees for other inputs is likely to occur.
- (b) The likely size of any scale effect on total employment will be minimal. This is because the impact of the proposed changes to penalty rates on prices is likely to be very small.
- (c) It follows from (a) and (b) that, even using my estimates of the maximum impact of the proposed changes to penalty rates on the weekly total cost of labour, any impact on total employment will be small. It is also important to bear in mind the reasons I have set out earlier in my report as to why the actual impact on the weekly total cost of labour is likely to be less than my estimates of the maximum impact (and perhaps substantially less).²⁴⁰

[177] In the event that the proposed changes lead to a decline in casual employment, Professor Borland considered whether this ‘could have an adverse effect on the capacity to gain entry to the labour market for young and disadvantaged jobseekers and jobseekers needing flexible work arrangements.’²⁴¹

[178] Professor Borland supported the assertion made in the PC report that there was a correlation between casual employment and young and disadvantaged individuals.²⁴² This claim was supported by findings from Lass and Wooden (2017), who found casual employment is disproportionately associated with those who are younger, less educated and who had spent more time unemployed in the previous 12 months.²⁴³

[179] However, Professor Borland noted that it is important not to ‘exaggerate the extent to which casual employment is focused on young and disadvantaged workers’, highlighting that many young workers holding casual jobs are full-time students and around a third of those in casual employment are aged 35 years or above.²⁴⁴

[180] The Retail Employers submit that Professor Borland’s conclusion as to the likely effects in the event that the variations proposed by the SDA are made ‘is demonstrably unreliable’.²⁴⁵ Three reasons are advanced in support of this proposition:

- (i) Professor Borland was unable to identify any statistical basis for his characterisation of the impact as ‘relatively small’.²⁴⁶
- (ii) Professor Borland was unable to explain what appeared to be errors in his calculations,²⁴⁷ this is said to have been made evident by his assertion (at PN118 of the Transcript): ‘As I said, yes, so there’s no formula behind it’.

²⁴⁰ Ibid at para. 3.22.

²⁴¹ Ibid at para 4.1(b).

²⁴² Ibid at para. 4.6.

²⁴³ Ibid at para. 4.3.

²⁴⁴ Ibid at para. 4.3–4.4.

²⁴⁵ Retail Employers submission, 6 September 2018 at para. 15.

²⁴⁶ Transcript, 14 August 2018 at PN79–PN81.

- (iii) Professor Borland acknowledged making additional assumptions in creating the formula he used to estimate the impact, and did so without reverting to his instructor.²⁴⁸

[181] There is no substance in the Retail Employers first point.

[182] Under cross examination, Professor Borland outlined that when undertaking empirical analysis, there is ‘no scale’ which defines a range of small, moderate or large values and that it depends on the particular context of the analysis. Professor Borland explained that in empirical research ‘when you ... use the word small or moderate you’re thinking about the particular context and you’re drawing on your understanding of that context to decide what would constitute ... small, medium, moderate or large.’²⁴⁹ In this regard, Professor Borland explained that the term ‘small’ was used in a specific context regarding the assessment of the likely consequences of the proposed change to the cost of labour and the aggregate impact of those changes on employment.²⁵⁰ Further, while Professor Borland described the results as ‘small’ he also advised that the results are likely to be overstated given that the model assumes all casual employees in the retail industry will receive the increase in their penalty rates.

[183] Second, it was argued that Professor Borland was unable to ‘explain what appeared to be errors in his calculation’ in cross-examination.²⁵¹ Contrary to the submission put, we do not consider these to be ‘errors’ in the calculation but rather ‘assumptions’ in the formula applied by Professor Borland. Professor Borland explained, in the absence of available information, such as exact trading hours for these types of businesses, consideration should be given to whether the assumptions made are reasonable compared with ABS data.²⁵² For instance, Professor Borland’s assumption that the hours worked by casual employees on weeknights and Saturdays cannot be larger than the total proportion of hours that casual employees work in retail across the whole of every week (which was 25.1 per cent) appears reasonable. We are satisfied that the assumptions underpinning Professor Borland’s opinion are sound.

[184] Finally, the Retail Employers submitted that Professor Borland made ‘additional assumptions in creating the formula he used to estimate the impact, and did so without reverting to his instructor.’²⁵³ While Professor Borland was provided with the weeknight and Saturday trading hours for four scenarios in his letter of engagement, Professor Borland made additional assumptions about their trading hours over the course of a whole week.²⁵⁴ Contrary to the submissions put, these assumptions are reasonable, if not necessary, for the formula as

²⁴⁷ Ibid at PN116, PN118, PN125.

²⁴⁸ Ibid at PN88–89, PN92, PN10–PN103, PN125.

²⁴⁹ Ibid at PN84.

²⁵⁰ Ibid at PN86.

²⁵¹ Retail Employers reply submission, 6 September 2018 at para. 17.

²⁵² Transcript, 14 August 2018 at PN123.

²⁵³ Retail Employers reply submission, 6 September 2018 at para. 18; Transcript, 14 August 2018 at PN88–PN89, PN92, PN101–PN103, PN125.

²⁵⁴ Transcript, 14 August 2018 at PN92–93.

‘a mathematical expression to get to the correct ... value of the average change in weekly labour costs that would arise because of this change in penalty rates’.²⁵⁵

[185] As mentioned above, in the absence of available data, Professor Borland constructed reasonable assumptions about the share of hours worked at penalty rates and the share of those hours worked by casual employees.²⁵⁶ Professor Borland also noted that he had ‘deliberately taken an approach of trying to be, in a sense, as conservative or as generous as I can...’²⁵⁷ with regard to the assumptions applied to the formula.

[186] We accept Professor Borland’s opinion that the impact of the proposed variations to the Retail Award on total employment (total hours of work) will be small²⁵⁸ because:

- (i) Casual employees are unlikely to be substituted by other inputs such as unpaid labour or capital expenditure.²⁵⁹
- (ii) If substituted, casual employees are likely to be substituted by permanent employees.²⁶⁰
- (iii) Substitution of casual employees by permanent employees will not change total employment.²⁶¹
- (iv) The effect on total employment due to decreased output (through a decrease in demand arising from an increase in prices, or other factors) will be minimal.²⁶²

[187] We also accept Professor Borland’s evidence that the changes sought by the SDA would only result in a ‘small’ decrease in casual employment, which would not have a significant impact on the opportunities for young and disadvantaged jobseekers to gain employment.

[188] While we have accepted Professor Borland’s opinion that the impact of the proposed variations on total hours worked will be small, it is important to bear in mind that this is an assessment of the *aggregate* impact of the variations. While the aggregate effect will be small, we also accept that the impact may be more significant for individual businesses, depending on the extent to which they utilise casual employees at the times which will be affected by the variations. The businesses operated by the lay witnesses before us (Elson, Slaughter and Dorwald) are a case in point. They employ more than twice the number of casuals than would be expected if the industry norm were applied (see [138]) and generally use a high proportion of casual employees to perform work on Saturday and in the evenings Monday to Friday. These businesses will require time to adjust to any variation in casual penalty rates; including giving consideration to the substitution of full time and part time employees for casuals at these times.

²⁵⁵ Ibid at PN89.

²⁵⁶ Ibid at PN101, PN133.

²⁵⁷ Ibid at PN133.

²⁵⁸ Exhibit SDA 5 at paras 1.5(b), 3.22(c).

²⁵⁹ Ibid at paras 3.19, 3.22(a).

²⁶⁰ Ibid at para. 3.19.

²⁶¹ Ibid at paras 3.1, 3.19.

²⁶² Ibid at paras 3.21, 3.22(b).

6. The Claims

6.1 Sunday shiftworker penalty rate

[189] As we have mentioned, the Retail Employers seek to vary clause 30.3(c) of the Retail Award to reduce the penalty rate paid for shiftwork performed on a Sunday, from 200 per cent to 175 per cent for full-time and part-time employees and from 225 per cent to 200 per cent for casual employees.

[190] Australian Business Industrial and the New South Wales Business Chamber (ABI) filed written submissions stating they supported the Retail Employers' claim and submissions in respect of weekend penalty rates for shift workers and opposed the SDA's claims.²⁶³

[191] In the Retail Award shiftworkers who work on weekends are compensated for both the disutility associated with shiftwork and for the disutility associated with weekend work. Monday to Friday shiftwork is paid at 130 per cent of the ordinary time rate of pay (155 per cent for casual). Any shiftwork performed on a Sunday is paid at the rate of 200 per cent (225 per cent for casuals). As noted in the Retail Employers' written submission:

‘It is clear from this that shiftworkers are compensated for the disutility associated with shiftwork through the payment of a shift loading, and are provided with additional compensation where they perform work on weekends ... In the case of Sunday work the additional compensation equates to 70% of the ordinary time rate of pay.’²⁶⁴

[192] The Retail Employers' case in support of the claimed reduction in the Sunday shiftwork penalty is based on the finding in the *Penalty Rates Decision* that the extent of the disutility associated with Sunday work ‘is much less than in times past’.²⁶⁵ The Retail Employers do not seek any reduction in the component of the Sunday shiftwork penalty which relates to the disutility of shiftwork, they only seek to reduce the component relating to the disutility of Sunday work ‘to reflect the new assessment’ of that disutility. So much is clear from the following extract of the Retail Employers' written submission of 21 May 2018:

‘As set out above, the Commission has concluded that the disutility associated with Sunday work is “much less” than in times past, that the Sunday penalty rate (as it was) did not represent a fair and relevant minimum safety net of conditions, and accordingly has reduced the Sunday penalty rate for day work under the GRIA to address this. In relation to the Sunday shiftwork penalty and loading it follows that it also does not represent a fair and relevant minimum safety net, as it has not been reduced to reflect the new assessment of the disutility associated with Sunday work. ARA and MGA are not asking the Commission to reduce the component of the Sunday shiftwork penalty and loading which relates to the disutility of performing shiftwork. What is being asked of the Commission is to reduce the compensation for working on Sundays to reflect the Commission's decision as to the disutility associated with Sunday work.’²⁶⁶ (emphasis added)

²⁶³ ABI submission, 13 August 2018.

²⁶⁴ Retail Employers submission, 21 May 2018 at para. 18.

²⁶⁵ Ibid at para. 19; [2017] FWCFB 1001 at [54].

²⁶⁶ Ibid at para. 18.

[193] In the *Penalty Rates Decision* the Commission determined that the disutility associated with Sunday work in the retail sector warranted a penalty payment of 150 per cent for full-time and part-time employees and 175 per cent for casuals.²⁶⁷

[194] The SDA opposes any reduction in Sunday shiftwork penalties, submitting that there is no evidence before the Commission to support the application.²⁶⁸

[195] We accept that the Retail Employers have not adduced evidence specifically directed at their claim. It is, however, common ground that the following categories of retail operations are likely to employ shiftworkers under the Retail Award:

- large supermarkets who have an evening/night or dawn fill function and/or who have bakery operations;
- supermarkets that trade extended hours or 24 hour operations;
- airport retail stores; and
- convenience stores, especially those that operate 24 hours.

[196] This is not an exhaustive list.

[197] The Retail Employers estimate that 6.14 to 6.93 per cent of retail industry employees are likely to work shiftwork on Sundays, though it is conceded that ‘some caution would need to be exercised in relation to this estimate’.²⁶⁹ The SDA submits that the estimate provided by the Retail Employers ‘would appear to be unrealistically high’, while acknowledging that no reliable statistical data are available.²⁷⁰ The number of shiftworkers who would be affected by the Retail Employers’ claim cannot be estimated with any precision.

[198] As we have mentioned, variations to modern awards must be justified on their merits and the extent of the merit argument required will depend on the circumstances. The most relevant circumstance in the present case is the fact that the Commission has recently determined that the Sunday penalty rate for non-shiftworkers employed under the Retail Award ‘is neither fair nor relevant’.²⁷¹ That conclusion was based on the following finding (among others):

‘There is a disutility associated with weekend work, above that applicable to work performed from Monday to Friday. Generally speaking, for many workers Sunday work has a higher level of disutility than Saturday work, though the extent of the disutility is much less than in times past.’²⁷²

[199] In view of the findings and determination in the *Penalty Rates Decision* in relation to the Retail Award it is appropriate that the Sunday shiftwork rates be reviewed.

²⁶⁷ [2017] FWCFB 1001 at [55].

²⁶⁸ SDA submission in reply, 23 June 2018.

²⁶⁹ Retail Employers submission, 30 August 2018 at paras 9–10.

²⁷⁰ SDA submission, 6 September 2018 at para. 9.

²⁷¹ [2017] FWCFB 1001 at [1701].

²⁷² *Ibid* at [689].

[200] We now turn to the s.134 considerations.

[201] 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). As shown in Chart 3²⁷³ most classifications covered by the Retail Award are ‘low paid’. Further, retail households face greater difficulties in raising emergency funds.²⁷⁴ This suggests that their financial resources are more limited than those of other industry households.

[202] A reduction in Sunday shiftwork penalty rates will have an adverse impact on the earnings of those retail employees who usually work shiftwork 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.

[203] The extent to which lower wages induce a greater demand for labour on Sundays (and hence more hours for low-paid employees) may ameliorate the reduction in income, albeit by working more hours. But most existing employees will probably face reduced earnings as it is improbable that, as a group, existing workers’ hours on Sundays would rise sufficiently to offset the income effects of the penalty rate reduction.

[204] The ‘needs of the low paid’ is a consideration which weighs against a reduction in Sunday penalty rates.

[205] Section 134(1)(b) requires that we take into account ‘the need to encourage collective bargaining’. A reduction in Sunday shiftwork penalty rates is likely to increase the incentive for employees to bargain, but may also create a disincentive for employers to bargain. It is also likely that employee and employer decision-making about whether or not to bargain is influenced by a complex mix of factors, not just the level of penalty rates in the relevant modern award.

[206] Section 134(1)(b) speaks of ‘the need to *encourage* collective bargaining’. We are not persuaded that a reduction in penalty rates would ‘*encourage* collective bargaining’, it follows that this consideration does not provide any support for a reduction to Sunday shiftwork penalty rates.

[207] 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). Given we are not able to identify, with any precision, the number of employees affected by the claim and absent any evidence on the issue, we are unable to assess whether a reduction in the Sunday shiftwork penalty rate is likely to lead to some additional employment. This consideration is neutral.

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

²⁷³ See Chart 3 at [51].

²⁷⁴ See Table 20 at [56].

[209] There is no evidence before us to support the proposition that reducing Sunday shiftwork penalty rates would ‘promote flexible work practices and the efficient and productive performance of work’ (s.134(1)(d)).

[210] 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’. It is self-evident that if the Sunday shiftwork penalty rates were reduced then employment costs would reduce. It was not contended that a reduction in the Sunday penalty rate would impact on the regulatory burden. This consideration supports a reduction in the Sunday penalty rate.

[211] Section 134(1)(da) requires that we take into account the ‘need to provide additional remuneration’ for, relevantly, ‘employees working on weekends’. As mentioned earlier, an assessment of ‘the need to provide additional remuneration’ to employees working in the circumstances identified in paragraphs 134(1)(da)(i)–(iv) requires a consideration of a range of matters, including:

- (i) the impact of working at such times or on such days on the employees concerned (i.e. the extent of the disutility);
- (ii) the terms of the relevant modern award, in particular whether it already compensates employees for working at such times or on such days (e.g. through ‘loaded’ minimum rates or the payment of an industry allowance which is intended to compensate employees for the requirement to work at such times or on such days); and
- (iii) the extent to which working at such times or on such days is a feature of the industry regulated by the particular modern award.

[212] It is convenient to deal with matters (ii) and (iii) first.

[213] As to matter (ii), the minimum wage rates in the Retail Award do not already compensate employees for working on weekends.

[214] In relation to matter (iii), weekend work is a feature of the Retail sector. As mentioned earlier (see [31]), just over 40 per cent of enterprises in the Retail sector operate 7 days a week (compared to 31.1 per cent across all industries), with enterprises in the Retail sector operating an average of 6.2 days per week.

[215] We have already dealt with matter (i), the extent of the disutility of Sunday work.

[216] We note that in the event that the Sunday shiftwork penalty rates were reduced (but not removed entirely) shiftworkers working on Sundays would still receive ‘additional remuneration’.

[217] Section 134(1)(e) requires that we take into account ‘the principle of equal remuneration for work of equal or comparable value’. Any reduction in Sunday shiftwork penalty rates would apply equally to men and women workers. Section 134(1)(e) is neutral to our consideration of the claim before us.

[218] The considerations in ss 134(1)(g) and (h) are not relevant in the present context. No party contended to the contrary.

[219] The central issue in these proceedings is whether the existing Sunday shiftwork penalty rates provides a ‘fair and relevant minimum safety net’. 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.

[220] In our view, the current Sunday shiftwork penalty rates are neither fair nor relevant. In short, the existing Sunday shiftwork penalty rates are not ‘proportional to the disability’.

[221] 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)–(h). We have taken into account those considerations insofar as they are relevant to the matter before us and have decided to reduce the Sunday shiftwork penalty rate for full-time and part-time employees, from 200 per cent to 175 per cent and from 225 per cent to 200 per cent for casuals.

[222] We deal with the transitional arrangements associated with the reduction in section 7 of our decision.

6.2 SDA claim

[223] The SDA seeks to vary the penalty rates for casuals on Saturday and for evening work Monday to Friday. In short, the SDA seeks a penalty payment of an additional 25 per cent for ordinary hours worked by casual employees after 6pm Monday to Friday, and for all ordinary hours worked on a Saturday.

[224] The SDA’s claim seeks to amend sub-clauses 29.4(a) and (b), as follows:

29.4 Penalty payments

(a) Evening work Monday to Friday

A penalty payment of an additional 25% will apply for ordinary hours worked after 6:00pm ~~for full-time, part-time and casual employees. This does not apply to casuals.~~

(b) Saturday work

A penalty payment of an additional 25% will apply for ordinary hours worked on a Saturday for full-time, ~~and~~ part-time and casual employees. ~~A casual employee must be paid an additional 10% for work performed on a Saturday between 7:00am and 6:00pm.~~

[225] Clause 29.4(b) of the Retail Award currently provides:

‘A penalty payment of an additional 25% will apply for ordinary hours worked on a Saturday for full time and part-time employees. A casual employee must be paid additional 10% for work performed on a Saturday between 7.00am and 6.00pm.’ (emphasis added)

[226] In other words, a casual employee working on a Saturday between 7.00am and 6.00pm is paid their casual loading of 25 per cent plus an additional 10 per cent, but a full-time or part-time employee is paid a premium of 25 per cent for working ordinary hours on a Saturday.

[227] In our view the current casual rates for Monday to Friday evening work and Saturday work lack logic and merit.

[228] In the context of the Retail Award casual loadings and penalty rates are separate and distinct forms of compensation for different disabilities. Penalty rates compensate for the disability (or disutility) associated with the time at which work is performed. The casual loading is paid to compensate casual employees for the nature of their employment and the fact that they do not receive the range of entitlements provided to full-time and part-time employees, such as annual leave, personal carer's leave, notice of termination and redundancy benefits. Importantly, the casual loading is *not* intended to compensate employees for the disutility of working evenings or on Saturdays.

[229] We note that the Full Bench in the *Penalty Rates Decision* adopted what the PC calls the 'default' approach to the interaction of casual loadings and Sunday penalties. The Full Bench *added* the casual loading to the Sunday penalty rate, such that the new Sunday rate for casual employees is 175 per cent, that is a 50 per cent penalty rate plus the 25 per cent casual loading. The same approach is apposite to the matters before us.

[230] We also note that in the context of award modernisation, an application was made by employers to vary a provision of the *Fast Food Award 2010* to limit the payment of Saturday penalty rates to full-time and part-time employees.²⁷⁵ In rejecting that claim, the Full Bench stated:²⁷⁶

'It is a common feature of awards generally including awards in the restaurant industry that casual employees receive relevant loadings in addition to casual loadings.'

[231] This conclusion was referred to with approval by the Full Bench in the *Casuals Case* which observed:²⁷⁷

'...the Full Bench did not consider that the casual loading compensated for the disabilities associated with evening or weekend work or that those disabilities did not apply to casual employees equally to full-time and part-time employees.'

[232] It is also relevant to note that in the *Penalty Rates Decision* the Commission was satisfied that the existing Saturday penalty rates for full-time and part-time employees in the Retail Award achieve the modern awards objective—in that they provide a fair and relevant minimum safety net.²⁷⁸

²⁷⁵ [2010] FWAFB 379.

²⁷⁶ *Ibid* at [24].

²⁷⁷ *Ibid* at [670].

²⁷⁸ [2017] FWCFB 1001 at [1700].

[233] As we have mentioned, in our view, and contrary to the submission advanced by the Retail Employers, the Sands Report supports a finding that permanent and casual employees experience similar levels of disutility associated with evening (Monday to Friday) and Saturday work. In short, the Sands Report lends support to the proposition that the penalty rates for working at these times should be the same for permanent and casual employees.

[234] Merit and logic compel the conclusion that the Saturday penalty rate for casuals working between 7.00am and 6.00pm should be increased from 10 per cent to 25 per cent. The position in relation to work performed *before 7am* and *after 6.00pm* on a Saturday is more complicated.

[235] In the *Penalty Rates Decision* the Full Bench observed::

‘Working early on a Saturday (at say 5.00am or 6.00am) or working late (say after 9.00pm) may be said to attract a higher level of disutility than working between 7.00am and 6.00pm, yet casual employees receive *less* for working at these times.’²⁷⁹

[236] On examination this observation is incorrect, at least for some casuals, as explained below.

[237] Clause 27.2(a) provides that ordinary hours may *generally* be worked within the following spread of hours:

Saturday 7.00am – 6.00pm

[238] This general position is subject to the exceptions in clause 27.2(b):

(b) Provided that:

- (i) the commencement time for ordinary hours of work for newsagencies on each day may be from 5.00 am;
- (ii) the finishing time for ordinary hours for video shops may be until 12 midnight; and
- (iii) in the case of retailers whose trading hours extend beyond 9.00 pm Monday to Friday or 6.00 pm on Saturday or Sunday, the finishing time for ordinary hours on all days of the week will be 11.00 pm.

[239] Hours worked by casual employees outside the span of hours provided in clause 27 are to be paid at overtime rates—175 per cent for the first three hours and 225 per cent thereafter (inclusive of the casual loading) (see clause 29.2(c)(ii)).

[240] The reference to ‘work performed on a Saturday between 7.00am and 6.00pm’ in clause 29.4(b) is simply a reference to the spread of hours during which ordinary hours may be worked on a Saturday.

²⁷⁹ Ibid at [1709].

[241] It follows that, contrary to the observation in the *Penalty Rates Decision* casual employees do *not* generally receive *less* for working *before* 7.00am or *after* 6.00pm on a Saturday than they do for working *between* 7.00am and 6.00pm. Outside of the hours of 7.00am to 6.00pm casual employees are *generally* paid at overtime rates – an additional 50 per cent for the first 3 hours and 100 per cent thereafter. We say generally because an anomaly plainly exists in relation to the categories of employment specified in clause 27.2(b) of the award. For example, in news agencies ordinary hours may be worked from 5.00am to 6.00pm on Saturdays yet there is no provision for the payment of any penalty for work performed between 5.00am and 7.00am. Similarly, in video shops ordinary hours may be worked until midnight meaning that under the current award provisions there is no provision for a penalty payment after 6.00pm on a Saturday.

[242] The same applies to retailers whose trading hours extend beyond 6.00pm on Saturday, in such circumstances ordinary hours may be worked until 11.00pm. Hence casuals employed by these retailers receive no Saturday penalty at all between 6pm and 11pm. By contrast, full-time and part-time employees working at these times receive a 25 per cent premium.

[243] These anomalies could be addressed by amending clause 29.4(b) as follows:

‘A casual employee must be paid an additional 10% for ordinary hours worked on a Saturday ~~work performed on a Saturday between 7.00am and 6.00pm.~~’

[244] Further, the anomalous treatment of casual employees vis a vis full-time and part-time employees can be addressed by the adoption of the ‘default’ approach to the interaction of casual loadings and Saturday penalties. Such an approach would see the reference to 10 per cent in clause 29.4(b) being increased to 25 per cent. The amendment proposed by the SDA addresses this issue.

[245] As we have mentioned, variations to modern awards must be justified on their merits and the extent of the merit argument required will depend on the circumstances. Two relevant circumstances in the present case are:

- (i) the fact that the Commission has recently adopted what the PC calls the ‘default’ approach to the interaction of casual loadings and penalties for working unsocial hours; and
- (ii) the findings set out in section 5 of this decision.

[246] In view of these matters it is appropriate that the casual rates for evening work and Saturday rates be reviewed.

[247] We now turn to deal with the s.134 considerations.

[248] 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). As shown in Chart 3 (see [51]) most classifications 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.

[249] The ‘needs of the low paid’ is a consideration which weighs in favour of the variations proposed by the SDA.

[250] Section 134(1)(b) requires that we take into account ‘the need to encourage collective bargaining’. An increase in penalty rates for casuals is likely to increase the incentive for employers to bargain, but may also create a disincentive for employees to bargain. It is also likely that employee and employer decision-making about whether or not to bargain is influenced by a complex mix of factors, not just the level of penalty rates in the relevant modern award. Section 134(1)(b) speaks of ‘the need to *encourage* collective bargaining’. We are not persuaded that an increase in penalty rates for casuals would ‘*encourage* collective bargaining’, it follows that this consideration does not provide any support for a change to those rates.

[251] 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). As mentioned earlier, we accept Professor Borland’s opinion that any impact of the variations proposed by the SDA on total employment is likely to be small. Further, we accept that casual employment in the retail industry represents an important pathway into the workforce for young people and in the event that the variations lead to a decline in casual employment this may adversely impact on young workers.

[252] This consideration tells against an increase in the penalty payments for casuals engaged in evening work (Monday to Friday) and working on Saturdays.

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

[254] It is self-evident that if the penalty rates payable to casuals were increased then employment costs would increase. This consideration tells against an increase in casual rates. As we have mentioned, s.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’.

[255] The Retail Employers submit that:

‘Increasing the price of labour without any commensurate improvement in output (and there is no evidence that the variation will improve output) will naturally have a detrimental impact on the productive performance of work and productivity and employment costs.’²⁸⁰

[256] We accept that the variations proposed will increase employment costs and to the extent that permanent employees are substituted for casuals, the changes may reduce flexibility. But it is unclear to us why these variations would have a detrimental impact on the productive performance of work.

[257] The Retail Employers also contend that increasing the price of labour without a commensurate increase in output will ‘naturally have a detrimental impact on ... productivity’. This submission is misconceived. Productivity is a volume measure; it

²⁸⁰ Retail Employers submission, 23 July 2018 at para. 76.

measures the volumes or quantities of output relative to the quantity of inputs, it is not concerned with the price of labour. The price of inputs, including the cost of labour, raises different considerations—relating to business competitiveness and employment costs.²⁸¹

[258] Section 134(1)(da) requires that we take into account the ‘need to provide additional remuneration’ for, relevantly, ‘employees working on weekends’. As mentioned earlier, an assessment of ‘the need to provide additional remuneration’ to employees working in the circumstances identified in paragraphs 134(1)(da)(i)–(iv) requires a consideration of a range of matters, including:

- (i) the impact of working at such times or on such days on the employees concerned (i.e. the extent of the disutility);
- (ii) the terms of the relevant modern award, in particular whether it already compensates employees for working at such times or on such days (e.g. through ‘loaded’ minimum rates or the payment of an industry allowance which is intended to compensate employees for the requirement to work at such times or on such days); and
- (iii) the extent to which working at such times or on such days is a feature of the industry regulated by the particular modern award.

[259] As to matter (ii), as we have mentioned, the minimum wage rates in the Retail Award do not already compensate employees for working on weekends. In relation to matter (iii), weekend work is a feature of the Retail sector. We now turn to matter (i) and in particular the extent of the disutility of, relevantly, Saturday work and evening work Monday to Friday. The evidence before us supports a finding that permanent and casual employees experience similar levels of disutility associated with evening (Monday to Friday) and Saturday work. This supports the proposition that the penalty rates for working at those times should be the same for permanent and casual employees.

[260] The considerations in s.134(1)(e)(g) and (h) are not relevant in the present context. No party contended to the contrary.

[261] The central issue in these proceedings is whether the existing penalty rates provide a ‘fair and relevant minimum safety net’.

[262] In substance, the submission put by the SDA is that the current penalty rates are neither fair nor relevant. In short, the existing penalty rates for casuals working evenings (Monday to Friday) and on Saturdays are not fair and proportionate to the disability experienced by casual employees working at these times. We agree.

[263] 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)–(h). We have taken into account those considerations insofar as they are relevant to the matter before us and have decided to grant the SDA’s application to vary the Retail Award. We deal with the transitional arrangements associated with these increases in Section 7 of our decision.

²⁸¹ [2017] FWCFB 1001 at [224]–[225].

7. Transitional Arrangements

[264] In the *Penalty Rates – Transitional Arrangements decision*²⁸² the Full Bench confirmed the views expressed in the *Penalty Rates Decision*—that there is a need for appropriate transitional arrangements to mitigate hardship—and was satisfied that it had the power to make appropriate transitional arrangements. The Full Bench also observed that ‘the determination of appropriate transitional arrangements is a matter that calls for the exercise of broad judgement, rather than a formulaic or mechanistic approach involving the qualification of the weight accorded to each particular consideration’.²⁸³

[265] The Full Bench summarised the matters which were relevant to its determination of the transitional arrangements under three broad categories:

- (i) The statutory framework: any transitional arrangements must meet the modern awards objective and must only be included in a modern award to the extent necessary to meet that objective. The Full Bench also noted that it must perform its functions and exercise its powers in a manner which is ‘fair and just’ (as required by s.577(a)) and must take into account the objects of the Act and ‘equity, good conscience and the merits of the matter’ (s.578).
- (ii) The *Penalty Rates Decision*: the evidence, findings and conclusions in the *Penalty Rates Decision* are relevant.
- (iii) Fairness is a relevant consideration, given that the modern awards objective speaks of a ‘fair and relevant minimum safety net’. Fairness in this context is to be assessed from the perspective of both the employees *and* employers covered by the modern award in question.²⁸⁴ The Full Bench said “while the impact of the reductions in penalty rates on the employees affected is a plainly relevant and important consideration in our determination of appropriate transitional arrangements, it is not appropriate to ‘totally subjugate’ the interests of the employers to those of the employees.”²⁸⁵

[266] In relation to the Retail Award, the Full Bench decided the transitional arrangements set out below in relation to the reductions in Sunday penalty rates were necessary to ensure that the award achieved the modern awards objective:

Full-time and part-time employees

1 July 2017	200 per cent → 195 per cent
1 July 2018	195 per cent → 180 per cent
1 July 2019	180 per cent → 165 per cent

²⁸² [2017] FWCFB 3001.

²⁸³ [2017] FWCFB 1001 at [142].

²⁸⁴ *Ibid* at [117]–[119].

²⁸⁵ *Ibid* at [148].

1 July 2020 165 per cent → **150** per cent

Casual employees (inclusive of casual loading)

1 July 2017 200 per cent → **195** per cent

1 July 2018 195 per cent → **185** per cent

1 July 2019 185 per cent → **175** per cent

[267] We propose to adopt and apply the observations in the *Transitional Arrangements* decision regarding the matters which are relevant to our determination of the transitional arrangements in the matters before us, with one modification. Instead of the matter at (ii) in [162] above, we will have regard to the evidence, findings and conclusions in this decision.

[268] The Retail Employers and the SDA filed written submissions addressing the issue of transitional arrangements in the event we granted the claims before us. We deal with those submissions below.

Sunday shiftwork penalty rate

[269] As we have mentioned, the Sunday penalty rate for shiftworkers will be reduced from 200 per cent to 175 per cent, for full time and part time shiftworkers, and from 225 per cent to 200 per cent, for casual shiftworkers.

[270] In their submission of 30 August 2018 the Retail Employers submitted that the approach adopted in the *Transitional Arrangements* decision in respect of the reductions in Sunday penalty rates should be applied to the reductions in Sunday shiftwork penalty rates:

‘Given the quantum of the reductions aligns with the quantum of reductions for casual employees in relation to the Sunday ordinary hours penalty rate, it is proposed that the reductions in Sunday penalty rate for shift workers be implemented in a three stage transition, as proposed below:

Full-time and part-time employees

1 July 2019 200 per cent → 195 per cent

1 July 2020 195 per cent → 185 per cent

1 July 2021 185 per cent → 175 per cent

Casual employees (inclusive of casual loading)

1 July 2019 225 per cent → 220 per cent

1 July 2020 220 per cent → 210 per cent

1 July 2021 210 per cent → 200 per cent²⁸⁶

[271] The SDA submitted that the phasing schedule in the *Transitional Arrangements* decision should apply.²⁸⁷

²⁸⁶ Retail Employers submission, 30 August 2018 at para. 17.

²⁸⁷ SDA submission, 6 September 2018 at para. 12.

[272] In their reply submission of 6 September 2018 the Retail Employers submitted (at [11]) that ‘it is open for the Commission to implement reductions to Sunday shiftwork penalty rates immediately in full’.²⁸⁸

[273] Contrary to the submission of the Retail Employers, we are not persuaded that these reductions should be implemented ‘immediately in full’. In our view there is a need for appropriate transitional arrangements to mitigate hardship.

[274] In our view it is desirable to bring the Sunday penalty rates for shiftworkers and non-shiftworkers into alignment as soon as practicable. Employees working on Sunday experience the same extent of disutility, whether they are working shiftwork or not.

[275] We have decided that the transitional arrangements set out below are necessary to ensure that the Retail Award achieves the modern awards objective.

Full time and part time shiftworkers

1 November 2018	195 per cent
1 July 2019	190 per cent
1 July 2020	175 per cent

Casual shiftworkers (inclusive of casual loading)

1 November 2018	220 per cent
1 July 2019	215 per cent
1 July 2020	200 per cent

[276] These transitional arrangements will ensure that the Sunday penalty rates for shiftworkers and non-shiftworkers are brought into alignment by 1 July 2020, while ensuring that the reductions are phased in so as to mitigate hardship.

Weekend evening and Saturday penalty rates

[277] The Retail Employers submit that we should ‘act cautiously in implementing such changes’ and that ‘an extensive transitional period is appropriate’.²⁸⁹ They propose that the increases be implemented in five stages, as set out below:

Weekday Evening Penalty Rates (inclusive of casual loading)

1 July 2019	25 per cent → 30 per cent
1 July 2020	30 per cent → 35 per cent
1 July 2021	35 per cent → 40 per cent
1 July 2022	40 per cent → 45 per cent
1 July 2023	45 per cent → 50 per cent

Saturday Penalty Rates (inclusive of casual loading)

1 July 2019	35 per cent → 38 per cent
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²⁸⁸ Retail Employers submission, 6 September 2018 at para. 11.

²⁸⁹ Retail Employers submission, 30 August 2018 at para. 23.

1 July 2020	38 per cent → 41 per cent
1 July 2021	41 per cent → 44 per cent
1 July 2022	44 per cent → 47 per cent
1 July 2023	47 per cent → 50 per cent ²⁹⁰

[278] The Retail Employers contend that the ‘hardship’ imposed on employers as a consequence of these increases would be ‘substantially ameliorated’ if the above transitional arrangements were adopted.²⁹¹

[279] The SDA opposed *any* transitional arrangements in respect of these arrangements and submitted that they should be operative as soon as possible. Three broad lines of argument were advanced in support of this contention:

- the increases are limited to casual employees who work at specific times and will only have a ‘marginal economic impact’;²⁹²
- the SDA’s application was originally filed in March 2015 and employers have effectively been on notice for some time of a possible increase to penalty rates for casuals working at these times;²⁹³
- the limited quantum of the increase compare to ‘the far more significant quantum of the decrease in penalty rates effected by the Commission in the Penalty Rates Case which the SDA submits was appropriately transitioned in circumstances where the decision deprived low paid retail employees of benefits already secured and relied upon.’²⁹⁴

[280] In its reply submission of 6 September 2018 the SDA opposes the phasing schedule proposed by the Retail Employers, submitting that:

‘The SDA opposes any proposal to delay corrective increases until July 2019 and beyond. This is inappropriate. This simply affords yet another 9 months and more of anomalous financial advantage (at the expense of a workforce already identified as low paid) which the employers have profited from Critically, in the after 6pm Saturday period, no penalty would continue to be the accepted norm. So the anomaly of the total casual rate being higher during the ‘day’ and lower after 6pm would continue.

Further having this increase linked to a 1st July timetable would mean that employers would face both a possible National Wage Increase and the Casual increase at the same time. If this casual increase is so demanding then it seems illogical to compound the potential change in wages.²⁹⁵

[281] Contrary to the SDA’s submission, there is a need for appropriate transitional arrangements in respect of these increases in order to ameliorate any adverse impact upon

²⁹⁰ Retail Employers submission, 30 August 2018 at para. 25.

²⁹¹ Ibid at para. 26.

²⁹² SDA submission, 30 August 2018 at para. 9.

²⁹³ Ibid at para. 11.

²⁹⁴ Ibid at para. 12.

²⁹⁵ SDA submissions, 6 September 2018 at paras 17–18.

employers. The arguments advanced by the SDA in support of immediate implementation are unconvincing. While we accept—based on Professor Borland’s evidence—that the aggregate impact on labour costs of the increases will be ‘relatively small’,²⁹⁶ they are not properly characterised as ‘marginal’. Further, the quantum of the increase (an *additional* 25 per cent on week day evenings and on Saturdays before 7.00am and after 6pm for casual employees) is not a more significant quantum than the decrease in Sunday penalty rates for casuals arising from the *Penalty Rates Decision*, it too was 25 per cent.

[282] Nor does the fact of the SDA’s March 2015 application warrant the immediate implementation of the increases. Even if it is accepted that employers were put on notice as to the possibility of an increase one might ask, so what? Until such a possibility becomes a reality it is highly unlikely that any proactive steps would be taken by employers to ameliorate the effect of such increases. Indeed if accepted the same argument could be applied to the reduction in Sunday penalty rates for shiftworkers as the ARA filed submissions and a draft determination in respect of that issue in February 2015.

[283] We do think there is merit in the points raised in the SDA’s reply submission, in particular:

- a phase in period of almost 5 years is simply too long;
- the existing anomaly in respect of the Saturday penalty rates for casuals should be addressed as quickly as practicable (though we think the SDA overstates the extent of the anomaly, see [233] to [243] above); and
- contrary to the Retail Employers’ proposal, the operative date of the phased increases should not be 1 July. The timetable proposed by the Retail employers would mean that employers may face an Annual Wage Review increase and an increase in casuals’ penalty rates simultaneously. As the SDA submits ‘it seems illogical to compound the potential change in wages’.

[284] In respect of the adjustment to the Saturday rate for casuals and the extension of the evening work Monday to Friday penalty we have decided that the transitional arrangements below are necessary to ensure that the Retail Award achieves the modern awards objective:

Saturday work – casuals

1 November 2018	A casual employee must be paid an <i>additional</i> 15 per cent for <i>all</i> work performed on a Saturday
1 October 2019	A casual employee must be paid an <i>additional</i> 20 per cent for <i>all</i> work performed on a Saturday
1 March 2020	A casual employee must be paid an <i>additional</i> 25 per cent for <i>all</i> work performed on a Saturday

Evening work: Monday to Friday

1 November 2018	An additional 5 per cent will be paid to casuals for hours worked after 6pm
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²⁹⁶ Exhibit SDA 5 at para 1.5(a).

1 October 2019	An additional 10 per cent will be paid to casuals for hours worked after 6pm
1 March 2020	An additional 15 per cent will be paid to casuals for hours worked after 6pm.
1 October 2020	An additional 20 per cent will be paid to casual for hours worked after 6pm
1 March 2021	An additional 25 per cent will be paid to casuals for hours worked after 6pm

[285] Variation determinations will be published shortly.

PRESIDENT

Appearances:

W. Friend QC (with Mr Tierney) appeared for SDA

P. Wheelahan (with Mr Tindley) appeared for Australian Retailers Association and the Master Grocers Australia.

Hearing details:

2018.
Melbourne.
14 and 15 August.

Final submissions

Shop, Distributive and Allied Employees' Association, 30 August 2018 and 6 September 2018

Australian Retail Association and Masters Grocers Australia, 30 August 2018 and 6 September 2018

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ATTACHMENT 1 – Witness Statements and exhibits

Sean James Sands	Expert Report, Transcript [188]	Exhibit ARA1, ARA2, SDA6 and SDA7
Joanne Elson	Statement of Joanne Elson, 22 July 2018, Transcript [470]	Exhibit ARA3
Campbell Vears	Statement of Campbell Vears, 23 July 2018, Transcript [583]	Exhibit ARA4
Terry Slaughter	Statement of Terry Slaughter, 23 July 2018, Transcript [629]	Exhibit ARA5
Jordan Freeman	Statement of Jordan Freeman, 23 July 2018, Transcript [732]	Exhibit ARA6
Anita Dorwald	Statement of Anita Dorwald, 23 July 2018, Transcript [672]	Exhibit ARA7
Professor Jeffrey Ian Borland	Expert Report, Transcript [47]	Exhibit SDA1, SDA2, SDA3, SDA4, SDA5

ATTACHMENT 2: penalty rates in pre-reform instruments (Amended 15 August 2018)²⁹⁷

NOTE: This comparison contains late night/evening and Saturday penalty rates only.

The analysis is for a simple comparison only – readers should refer to the instruments for details of monetary allowances and exceptions.

Award		Evening rate (Monday-Friday)				Saturday rate		
		Casual loading	Span of ordinary hours	F/T & P/T	Casual (incl. casual loading)	Span of ordinary hours	F/T & P/T	Casual (incl. casual loading)
Modern	General Retail Industry Award 2010 [MA000004]	25%	After 6pm to 9pm or after 6pm to 11pm	125%	125%	7am to 6pm or 7am to 11pm ²⁹⁸	125%	135%
Federal	Shop, Distributive and Allied Employees Association - Victorian Shops Interim Award 2000 AP796250 (clauses 10.4 & 18.1)	25% ²⁹⁹	After 6.00pm to 9pm (or 10pm for two week days per week for Class A Exempt shops)	125%	125% (some exceptions apply in clause 10.4)	7am to 6pm ³⁰⁰ (or up until 10pm for Class A Exempt shops)	36% (approx) ³⁰¹	36% (approx) ³⁰²

²⁹⁷ This table excludes shiftwork penalties and rates.

²⁹⁸ These span of hours apply to most employees however there are some exceptions that apply in the award. See cl 27.2 (b)(i) and (ii).

²⁹⁹ An ordinary casual loading of approximately 33% may apply if the casual employee receives, at the election of the employer, the entitlement to annual leave (an additional 1/12th of the appropriate ordinary hourly rate) under cl 10.4.2(e).

³⁰⁰ These span of hours apply to most employees however there are some exceptions that apply in the award. For example, newsagents' ordinary hours are from 5am to 6pm.

³⁰¹ Additional monetary amounts apply in clause 18.2.1; we have calculated the equivalent percentage to be a loading of approx. 36 per cent.

³⁰² Various additional rates apply in clause 10.4; we have calculated the equivalent percentage to be a loading of approx. 36 per cent.

Award		Evening rate (Monday-Friday)				Saturday rate		
	Casual loading	Span of ordinary hours	F/T & P/T	Casual (incl. casual loading)	Span of ordinary hours	F/T & P/T	Casual (incl. casual loading)	
Federal	Retail, Wholesale and Distributive Employees (NT) Award 2000 AP794741 (clause 28.7)	20%	From 6.30pm to 9.30 pm One late night only in any week	125%	145%	7am to 6.30pm	Monetary allowance (clause 28.7.2)	120% + monetary allowance (clause 28.7.2)
	Retail and Wholesale Industry – Shop Employees - Australian Capital Territory - Award 2000 AP794740 (clauses 28)	15%	6.00- 9.00 pm Friday only	125%	115% ³⁰³	7am to 6pm ³⁰⁴ 5am- 6pm (newsagents)	Monetary allowance (clause 28.2)	(Appropriate adult weekly rate/38) + (\$41.20/7.6) x 115% ³⁰⁵
NSW	Shop Employees' State Award AN120499	15% ³⁰⁶ 24.53% incl annual leave	After 6pm to 9pm Thursday or Friday	125%	124.53% (General shops only)	7am to 6pm	125%	124.53% plus \$7.00 or \$14.40 which is approx. 131.93% to 142.29% (General shops only)

³⁰³ Cl 13.4.3(a) of the Retail and Wholesale Industry – Shop Employees - Australian Capital Territory - Award 2000 states that for time worked within the ordinary hours of work Monday to Friday, an hourly rate equal to the appropriate weekly rate divided by 38 plus 15 per cent.

³⁰⁴ The span of ordinary hours displayed does not include warehouse and wholesale employees as per cl 23.4 of the Retail and Wholesale Industry – Shop Employees - Australian Capital Territory - Award 2000.

³⁰⁵ See cl 13.4.3(b) for more information.

³⁰⁶ The award provides for a casual loading of 15 per cent but casual employees were also entitled to the 1/12th annual leave loading under the *Holidays Act 1944*.

Award		Evening rate (Monday-Friday)				Saturday rate		
		Casual loading	Span of ordinary hours	F/T & P/T	Casual (incl. casual loading)	Span of ordinary hours	F/T & P/T	Casual (incl. casual loading)
Qld	Retail Industry Award - State 2004 AN140257 (clause 6.1)	23%	After 6.00pm to 9.30pm One late night (Non-Exempt) To midnight all nights (Exempt and independent)	125%	123%	Various ³⁰⁷	125%	123%
SA	Retail Industry (SA) Award AN150130 (clauses 6.3, 4.4, Sched 1 & 2)	20%	After 6.00pm to 9.30pm Either one late night or 5 nights ³⁰⁸	125% ³⁰⁹	120%	7am to 5.30pm	125% ³¹⁰	120%

³⁰⁷ The span of ordinary hours varies on a Saturday depending on what part of Queensland the work is being performed. In addition, there are different ordinary hours depending on the type of business the employee was working in. For example, there are different ordinary hours for independent and non-exempt shops.

³⁰⁸ There are different span of hours and loadings that apply to night fill employees, see cl 4.7.3

³⁰⁹ This penalty applies to employees working in establishments which, as at 1 December 2004, did not trade after 12.30pm on a Saturday (see cl 6.3.2–6.3.2.2). Employees working in establishments after 1 December 2004 are paid a higher base rate of pay inclusive of ordinary and overtime rates under Schedule 2. Different provisions apply for employees in cafes, restaurants, takeaway chicken and fish shops and retail outdoor salespersons.

³¹⁰ This penalty applies to employees working in establishments which, as at 1 December 2004, did not trade after 12.30pm on Saturday and those employees working in cafes, canteens and restaurants (cl 6.3.1–cl 6.3.1.1). Employees working in establishments after 1 December 2004 are paid a higher base rate of pay inclusive of ordinary and overtime rates under Schedule 2. Different provisions apply for employees in cafes, restaurants, takeaway chicken and fish shops and retail outdoor salespersons.

Award		Evening rate (Monday-Friday)				Saturday rate		
		Casual loading	Span of ordinary hours	F/T & P/T	Casual (incl. casual loading)	Span of ordinary hours	F/T & P/T	Casual (incl. casual loading)
Tas	Retail Trades Award AN170088 (clauses 12 & 21)	20%	After 6m to 9.30pm Thursday and Friday ³¹¹	Loaded rate	120% + loaded rate	7am to 6.30pm	Loaded rate	120% + loaded rate

³¹¹ The span of ordinary hours may be extended to include Monday, Tuesday and Wednesday under cl 21(b).

Award		Evening rate (Monday-Friday)				Saturday rate		
		Casual loading	Span of ordinary hours	F/T & P/T	Casual (incl. casual loading)	Span of ordinary hours	F/T & P/T	Casual (incl. casual loading)
WA	Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977, The AN160292 (clauses 7, 9, 13 & 48)	25 % for shifts under 7.6 hours, 20% for shifts more than 7.6 hours	After 6.00pm to 9pm but only one day of late night trading (general retail and special shops) ³¹² Special retail shops and small shops ordinary hours to 11.30 pm	\$4.29	120% + \$4.29 per hour loading for general retail shops 140% to 145% (20% evening loading and 20-25% casual loading) for special (pharmacy) and small shop employees	7am to 6pm (general retail shops) ³¹³	Overtime may apply (i.e loaded weekly rate)	140% ordinary time (approx) ³¹⁴

³¹² Note: Special retail shops have same late night provisions as General Retail Shops. However s12D of the *Retail Trading Hours Act 1987* (WA) states that a special retail shop is required to be closed after 11.30 pm.

³¹³ Note: This excludes span of ordinary hours and rates for nightfill workers.

³¹⁴ Clause 7(5) of the Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977 provides for the following calculation:

Weekly rate for full time worker Monday to Friday/38) + (Weekly rate for ordinary hours between Monday and Saturday with the completion of ordinary hours after 1.00p.m. Saturday - weekly rate for ordinary hours Monday to Friday 7.6) x 120%

ATTACHMENT 3—Index of material

Commission Documents

<u>General Retail Industry Award 2010</u>	
AIRC Decision on Priority Awards [2008] AIRCFB 1000	19 December 2008
Preliminary Jurisdictional Issues Decision – [2014] FWCFB 1788	17 March 2014
Decision – [2017] FWCFB 1001 Penalty Rates Decision	23 February 2017
Background Document – Penalty Rates – Transitional arrangements (Late night and Saturday penalty rates)	5 May 2017 (amended version uploaded to website on 15 August 2018)
Background Document – 4 yearly review of modern awards – Penalty Rates	5 May 2017
Decision – [2017] FWCFB 3001 Penalty Rates – Transitional arrangements	5 June 2017
Statement – [2017] FWCFB 3617	6 July 2017
Statement – [2017] FWC 4109	4 August 2017
Industry Profile – General Retail Industry	30 July 2018 (updated on 22 August 2018)
Legislative framework document	9 August 2018

Transcripts

Transcript of Mention	3 April 2018
Transcript of Mention	30 July 2018
Transcript of Hearing	14 August 2018
Transcript of Hearing	15 August 2018

Notices of listing

Notice of listing amended – for Mention	3 April 2018
Notice of listing amended – for Mention	30 July 2018
Notice of listing amended – for Hearing	14 August 2018 and 15 August 2018

Directions

Directions	6 April 2018
Directions	24 August 2018

Summary of submissions

<p>Summary of submissions concerning:</p> <ul style="list-style-type: none"> • The ARA's claim for a reduction in the rate of pay for shiftwork performed on a Sunday <ul style="list-style-type: none"> ○ Variation to clause 30.3(c) • The SDA's claim regarding casual evening penalties and casual Saturday penalties <ul style="list-style-type: none"> ○ Seeks the full casual loading for such employees at all times which incur penalty rates 	26 July 2018
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Australian Retails Association and Master Grocers Association

Document	Date
Submission and draft determination	13 February 2015
Closing submissions	12 February 2016
Submission	24 March 2017
Submission	21 April 2017
Submission – Application to vary – draft determination	28 July 2017
Correspondence and correspondence in reply from FWC (request for further information about Full Bench)	27 March 2018
Submission	21 May 2018
Submission and evidence in reply	23 July 2018
Submission – proposed findings	8 August 2018
Correspondence – source of data	22 August 2018
Submission – shiftworkers and proposed transitional arrangements	30 August 2018
Submission in reply – shiftworkers and proposed transitional arrangements	6 September 2018

Shop, Distributive and Allied Employees' Association

Document	Date
Submission	2 March 2015
Draft determination	17 July 2015
Correspondence (confirming SDA had previously filed variation application)	28 March 2017
Correspondence – General Retail Award – relisting request	7 March 2018
Submission	21 May 2018
Submission – expert report	4 June 2018
Submission in reply	23 July 2018
Submission – FWC background paper 5 May 2017	6 August 2018
Submission – proposed findings	8 August 2018
Closing submission – outline	15 August 2018
Submission – shiftworkers and proposed transitional arrangements	30 August 2018
Submission in reply – shiftworkers and proposed transitional arrangements	6 September 2018

Australian Business Industrial and the NSW Business Chamber

Document	Date
Submission	13 August 2018