DECISION

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

4 yearly review of modern awards – Award stage – General Retail Industry Award 2020

(AM2017/60)

JUSTICE ROSS, PRESIDENT
VICE PRESIDENT HATCHER
COMMISSIONER LEE

MELBOURNE, 24 NOVEMBER 2020

4 yearly review of modern awards – award stage – General Retail Industry Award 2020 – substantive issues.

1. Background

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

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

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

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

[5] A hearing was held on 18 November 2020. The transcript of that hearing is available here.

[1] [2020] FWCFB 5371

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

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

2. Legislative Framework

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

[9] The *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act* 2018 (the *2018 Amendment Act*) was assented to on 11 December 2018. The *2018 Amendment Act* repealed the parts of the Act providing for the conduct of 4 yearly reviews of modern awards. However, Schedule 4, Application and transitional provisions, of the *2018 Amendment Act* preserved the operation of the relevant provisions in the Act in respect of reviews of modern awards conducted as part of 4 yearly reviews of modern awards, if such review was commenced, but not completed, prior to 1 January 2018.

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

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

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

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[2] *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [38].

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

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

> ‘**134 The modern awards objective**
>
> What is the modern awards objective?
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> **(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:
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> **(a)** relative living standards and the needs of the low paid; and
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> **(b)** the need to encourage collective bargaining; and
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> **(c)** the need to promote social inclusion through increased workforce participation; and
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> **(d)** the need to promote flexible modern work practices and the efficient and productive performance of work; and
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> **(da)** the need to provide additional remuneration for:
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> **(i)** employees working overtime; or
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> **(ii)** employees working unsocial, irregular or unpredictable hours; or
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> **(iii)** employees working on weekends or public holidays; or
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> **(iv)** employees working shifts; and
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> **(e)** the principle of equal remuneration for work of equal or comparable value; and
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> **(f)** the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
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> **(g)** the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and
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> **(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***.
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> When does the modern awards objective apply?
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> **(2)** The modern awards objective applies to the performance or exercise of the FWC’s ***modern award powers***, which are:
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> **(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.
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> Note: The FWC must also take into account the objects of this Act and any other applicable provisions. For example, if the FWC is setting, varying or revoking modern award minimum wages, the minimum wages objective also applies (see section 284).'

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

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

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

[17] It is not necessary to make a finding that the modern award fails to satisfy one or more of the s.134 considerations as a prerequisite to the variation of a modern award.[9] Generally speaking, the s.134 considerations do not set a particular standard against which a modern award can be evaluated; many of them may be characterised as broad social objectives.[10] In giving effect to the modern awards objective the Commission is performing an evaluative function taking into account the matters in ss.134(1)(a)–(h) of the Act and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance.

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

> 'What must be recognised, however, is that the duty of ensuring that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of

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

[5] (2017) 256 IR 1 at [128]; *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [41]-[44].

[6] [2018] FWCFB 3500 at [21]-[24].

[7] *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].

[8] *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [33].

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

[10] 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.

[11] *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [161].

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

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

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

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

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

> 'The statutory foundation for the exercise of FWA's power to vary modern awards is to be found in s 157(1) of the Act. The power is discretionary in nature. Its exercise is conditioned upon FWA being satisfied that the variation is "necessary" in order "to achieve the modern awards objective". That objective is very broadly expressed: FWA must "provide a fair and relevant minimum safety net of terms and conditions" which govern employment in various industries. In determining appropriate terms and conditions regard must be had to matters such as the promotion of social inclusion through increased workforce participation and the need to promote flexible working practices.
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> …
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> The question under this ground then becomes whether there was material before the Vice President upon which he could reasonably be satisfied that a variation to the Award was necessary, at the time at which it was made, in order to achieve the statutory objective.
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> …
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> In reaching my conclusion on this ground I have not overlooked the SDA's subsidiary contention that a distinction must be drawn between that which is necessary and that which is desirable. That which is necessary must be done. That which is desirable does not carry the same imperative for action. Whilst this distinction may be accepted it must also be acknowledged that reasonable minds may differ as to whether particular action is necessary or merely desirable. It was open to the Vice President to form the opinion that a variation was necessary.'[15]

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[12] Ibid at [48].

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

[14] (2012) 205 FCR 227.

[15] Ibid at [35]–[37] and [46].

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

[23] In the *4 Yearly Review of Modern Awards - Penalty Rates (Hospitality and Retail Sectors) Decision* (the *Penalty Rates Case*)[17] 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.
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> 2. Variations to modern awards must be justified on their merits. The extent of the merit argument required will depend on the circumstances. Some proposed changes are obvious as a matter of industrial merit and in such circumstances it is unnecessary to advance probative evidence in support of the proposed variation. Significant changes where merit is reasonably contestable should be supported by an analysis of the relevant legislative provisions and, where feasible, probative evidence.
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> 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.
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> 4. The particular context may be a cogent reason for not following a previous Full Bench decision, for example:
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> - the legislative context which pertained at that time may be materially different from the *Fair Work Act 2009* (Cth);
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> - 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

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

[17] (2017) 256 IR 1.

- the extent of the previous Full Bench's consideration of the contested issue. The absence of detailed reasons in a previous decision may be a factor in considering the weight to be accorded to the decision.'[18]

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

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

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

[26] The above summary of the legislative framework formed part of the *October 2020 Statement* and no party took issue with it. Further, it is common ground that the application seeks to vary modern award minimum wages and that the Commission must be satisfied that such a variation is justified by work value reasons. Section 156 relevantly provides:

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

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[18] Ibid at [269].

[19] *CFMEU v Anglo American Metallurgical Coal Pty Ltd* [2017] FCAFC 123.

[20] Ibid at [46].

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

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

> 'At the outset it is important to appreciate that the Act was legislated against the background of a long-standing approach to minimum wage fixation. Parliament may be presumed to have known of the historical approach taken to such claims. The concepts of uniformity and consistency of treatment have underpinned the fixation of minimum wages in modern awards and date back to the establishment of consistent minimum rates within and across awards endorsed in the *National Wage Case February 1989 Review* and implemented in the *National Wage Case August 1988* decision. The principle of consistent minimum rates across awards was maintained through the award simplification process; the *Paid Rates Review*; and award modernisation.
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> As to the current legislative framework, the minimum wages objective requires us to establish and maintain "a safety net of fair minimum wages" and the modern awards objective requires us to ensure that modern awards (together with the National Employment Standards) provide a fair and relevant minimum safety net of terms and conditions. The modern awards objective also speaks of the need to ensure a "stable and sustainable modern award system". In our view, considerations of fairness and stability tell against an award-by-award approach to minimum wage fixation. If differential treatment was afforded to particular industries this would distort award relativities and lead to disparate wage outcomes for award-reliant employees with similar or comparable levels of skill. In this regard, we note that in its submission, Australian Business Industrial (ABI) "fully accepts that there is a presumption of uniformity in the Fair Work Act and compelling reasons for the system of modern awards for awards to be treated equally in Division 3 Part 2-6 reviews" … The maintenance of consistent minimum wages in modern awards and the need to ensure a stable and sustainable modern award system would be undermined if the Panel too readily acceded to requests for differential treatment.
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> At a broader, conceptual, level it is important to appreciate that the framework for workplace relations established by the Act is predicated on a guaranteed safety net which underpins enterprise level collective bargaining. The safety net of fair, relevant and enforceable minimum wages and conditions is provided through modern awards, national minimum wage orders and the National Employment Standards. Collective bargaining at the enterprise level is underpinned by that safety net. This is evident from the fact that enterprise agreements must pass the "better off overall test" in s.193 of the Act and the terms of an enterprise agreement may supplement, but cannot exclude, any provision of the National Employment Standards (ss. 55 and 186(2)(c)).
>
> The award-by-award approach to minimum wage fixation, based on sectoral considerations, advocated by some parties in these proceedings is inimicable to the safety net nature of modern award minimum wages. Enterprise level collective bargaining is the primary means by which the statutory framework envisages differential treatment based on the circumstances in

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[21] NRA submission, 11 November 2020 at 1.10, citing *Project Blue Sky v ABA* [1998] HCA 28; (1998) 194 CLR 355 at paragraph [87]

[22] [2013] FWCFB 4000 at [76] – [79]

particular enterprises, which would be influenced by relevant sectoral considerations. That the system functions in this way is evidenced by the sectoral variation in actual wage outcomes.' (footnotes omitted)

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

3. The Evidence

3.1 Expert report of Dr O'Brien

[30] The SDA filed an Expert Report in support of its claim. The Expert Report was prepared by Dr Martin O'Brien, Associate Professor of Economics, University of Wollongong. Dr O'Brien's report was marked as Exhibit SDA 1 and was the subject of oral evidence on 8 October 2019. The transcript of that proceeding is available here.

[31] In essence, the purpose of the report was to establish the number of junior employees employed in classifications higher than Level 1; thus, identifying the number of employees affected by the claim. Using data from the 2016 Census Dr O'Brien concluded that:

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

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

1. The number of employees covered by the Retail Award is calculated from ABS ANZSIC data using the ANZSIC classes 'mapped' to the Retail Award contained in *Research Report 2/2012: Analysing modern award coverage using the Australian and New Zealand Standard Industrial Classification 2006: Phase 1 Report*.[23] The 2016 Census data was used as it is the only source of the 4 digit level ANZSIC data. In step 1 Dr O'Brien excluded, among other things, 4 digit ANZSCO unit groups with 'clerk' in their descriptions on the basis that the Retail Award 'excludes clerks'.[24]

2. Employee totals covered by the Retail Award are compiled for those aged 15 to 20 years (junior employees), using the 2016 Census data.

3. The number of Level 1 junior employees is identified using the Fair Work Ombudsman's list of job descriptions and aligning them with ANZSCO descriptions.

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[23] See Preston, M., Pung, A., Leung, E., Casey, C., Dunn, A., and Richter, O., 'Research Report 2/2012: Analysing modern award coverage using the Australian and New Zealand Standard Industrial Classification 2006: Phase 1 Report', February 2012; Spreadsheets with modern awards & relevant ANZSIC classes listed, Annual Wage Review 2012-2013.

[24] See Exhibit SDA 1 at [4].

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

- under classification level 3 an employee may not have to do supervision[28] and on that basis it is possible that some of the employees included in calculating the number of level 1 employees could actually be level 3 employees;[29]

- it is possible that some employees who identified themselves as 'store persons', and who Dr O'Brien classified as level 1 employees, operate forklifts and hence should have been classified as level 2 employees;[30] and

- the data used does not include employees aged *under* 15 years.[31]

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

(a) it excludes junior employees performing clerical functions at the retail establishment and clerks at levels 4-8;

(b) it is possible that some of those junior employees who identified themselves as 'store persons' operate forklifts (and are level 2) and have been improperly excluded;

(c) junior employees engaged as senior salespersons not performing supervisory duties have not been included; and

(d) it does not include junior employees under 15.[32]

[35] The NRA also notes that:

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

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[25] Transcript, 8 October 2019 at PN95 – PN103.

[26] Ibid at PN120.

[27] Ibid at PN206.

[28] Transcript, 8 October 2019 at PN183.

[29] Ibid at PN195.

[30] Ibid at PN163

[31] Ibid at PN203.

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

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

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

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

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

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

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

3.2 Survey Report

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

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

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

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

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

[42] A relevant finding from the Report is as follows:

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

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

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

3.3 Information Note – Junior Rates

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

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

4. The Submissions

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

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

[35] [2020] FWCFB 5371

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

1. The SDA contends that the award modernisation process did not address the merits of what is now clause 17.2 but rather adopted the 'limited objective' of providing a uniform set of rates based on the terms of the relevant predecessor awards and NAPSA's.[36]

2. Prior to the making of the modern award a number of 'significant' pre reform awards provided that junior employees employed above level 1 were paid the full adult rate, including the *Shop, Distributive and Allied Employees Association – Victorian Shops Award*, the *Shop Employees (State) Award (NSW)* and the *Retail and Wholesale Industry – Shop Employees – ACT Award 2000*.[37] The SDA submits that the underpinning awards did *not* support the outcome in the award modernisation process and did support the SDA's proposal.

3. Applying the junior percentages to levels above level 1 is said to diminish the additional monetary compensation which is provided in recognition of higher skills, competencies and responsibility.

4. The retention of junior rates in their current form is inconsistent with the principle of equal remuneration for work of equal value.[38]

5. The variation proposed is sustainable and affordable and will not have a detrimental impact on employers or the broader economy. The SDA relies on Dr O'Brien's report as to the number of employees who could be impacted by the variation, submitting that:

> 'At most approximately 17 000 employees could be entitled to an increase in wages. This number would be lower given the number of 20 year olds in that group who would already be paid the adult rate of pay'.[39]

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

6. In its current form clause 17.2 fails to meet the object of the Act (in particular s.3(a) and (b) and does not provide a 'fair and relevant safety net', as required by s.134(1).

7. The proposed variation is consistent with 2017 decision to vary junior rates in the Retail Award[41] and with the variation of the Pharmacy Industry Award to provide that junior rates only apply to levels 1 and 2 in that award.[42]

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[36] See SDA submission at [19] – [22] and [31] citing [2008] AIRCFB 1000 at [71].

[37] SDA submission at [50].

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

[39] SDA submission at [90].

[40] Exhibit SDA 1 at [13] – [14].

[41] See [2014] FWCFB 1846.

[42] [2017] FWCFB 3540.

[48] As to point 7 above, clause 16.2 of the Pharmacy Award provides:

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

Column 1 **Age**	**Column 2** **% of minimum rate**
Under 16 years of age	45%
16 years of age	50%
17 years of age	60%
18 years of age	70%
19 years of age	80%
20 years of age	90%

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

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

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

> '[66] In relation to the other variations sought by the interested parties by consent (as set out in Annexure A), those variations are agreed, straightforward and uncontroversial. The interested parties made submissions at the hearing on 31 March 2017 in support of the variations.[43]
>
> [67] Having regard to the requirements set out in s.134(1) of the Act, and the consent submissions of the interested parties to support the making of the variations in Annexure A, as stated, the variations sought are necessary to achieve the modern awards objective.

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[43] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [32], [38] – [39].

> [68] These variations are therefore, considered appropriate. Determinations to give effect to the variations will separately be issued. The variations will take effect on 7 August 2017.'[44]

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

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

> 'the position the SDA takes is that it is axiomatic that an employee promoted or appointed above the base level is promoted or appointed to perform the tasks at that level and that there is no room for the existence of junior rates in those circumstances. When it is recalled that the junior rates were established in the GRIA against a background of their non-existence in the major awards from which the GRIA was drawn it can be readily seen that there is a very strong work value argument for an abolition of the reduction which was imposed in the 2010 award at levels above Level 1.'[45]

[53] We deal later with the relevant award history.

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

[55] ABI opposes the SDA claim on 4 primary grounds:

1. There is insufficient evidence to support the SDA claim.

   - the SDA Claim seeks to vary modern award minimum wages, requiring the Full Bench to be satisfied that such variation is justified by work value reasons - no evidence whatsoever has been filed establishing that work value reasons exist; and

   - the SDA Claim seeks a significant change which is required to be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation. The evidence as filed (such as it is) does not demonstrate the facts supporting the proposed variation, only establishing the number of employees that the proposed variation may affect.

2. The SDA's reliance on s 134(1)(e) is entirely misconceived as that provision is irrelevant to the SDA Claim.

3. The SDA's contestation that the Award prima facie met the modern award objective when made appears to take issue with a matter already determined by the Full Bench.

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[44] [2017] FWCFB 3540 at [66] – [68].

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

4. There are strong merit arguments that arise against the claim.

[56] Similar arguments are advanced by the other employer interests.

5. Consideration

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

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

[59] It is convenient to deal first with the SDA's contention that in making the Retail Award, the Award Modernisation Full Bench gave no consideration of the merits of junior rates and, further, insofar as the Retail Award was based on pre-reform instruments the insertion of junior rates for *all* classification levels was an error because the relevant Victorian, NSW and ACT pre-reform awards did not provide for junior rates above level one.

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

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

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

> 'The consolidated request also provides that the process is not intended to disadvantage employees or increase costs for employers – objectives which are potentially competing. The content of the awards we have formulated is a combination of existing terms and conditions in relevant awards and existing community standards. In order to minimise

[46] There are now 121 modern awards.

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

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

> *The federal awards and NAPSAs with which we are dealing contain a very wide range of rates for junior employees and apprentices. The relevant instruments fix percentages of the adult wage for juniors and apprentices based on a host of historical and industrial considerations, most of which can only be guessed at. It is not possible to standardise these provisions on an economy-wide basis, at least not at this stage. We have adopted the limited objective of developing new rates which constitute a fair safety net for each of the modern awards based on the terms of the relevant predecessor awards and NAPSAs.*[48]

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

> '[41] We agree with the SDA's submission that the issues raised in the award making process which concerned junior rates were confined and specific. They related to the percentage of the adult rate below which no employee should be paid and to the rates for employees who worked in higher classifications and those with trade skills.

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[47] *Award modernisation – Stage 2 modern awards*, 2 September 2009, [2009] AIRCFB 800

[48] [2008] AIRCFB 1000 at [71].

[49] [2014] FWCFB 1846.

> [42] There was no specific consideration given to the percentage of the adult rate which should be paid to a 20 year old. From its first draft, the SDA had proposed that retail workers at the first two classification levels should be paid 90% of the relevant adult rate. In those circumstances, and given the employers also proposed that same percentage for these workers, there was no need for the Full Bench in the Statement accompanying the exposure draft (or at any later time) to comment about appropriate percentages for these workers. It was not in contest.'[50]

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

> 'Junior percentages should not apply to tradespersons and above rates. A person who is a tradesperson should not be paid less than the full trade rate. As the clause currently stands, tradespeople and higher qualified persons could be paid a lower rate if they are aged 20 or under. The variation seeks to limit the payment of junior rates to persons employed at below the tradesperson level.
>
> The justification for junior rates is that they constitute an aged based discounted rate on the skill based rate to take account of the lack of work experience, skill and maturity of junior workers. Employees employed at the level of tradesperson or higher are working at such levels of skill and responsibility that age based discounted wage rates are no longer appropriate'.[51]

[66] The application was made pursuant to s.576H of the *Workplace Relations Act 1996*, which states:

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

[67] As the application was not determined by 31 December 2009 it was determined by Fair Work Australia pursuant to item 14 of Schedule 5 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

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

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

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[50] [2014] FWCFB 1846 at [41] – [42].

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

[52] [2010] FWAFC 305.

Junior rates

[25] The SDA seeks to exclude junior rates from applying to trades classifications. The application is opposed and not supported by underpinning instruments. We reject the application.'

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

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

1. It may be accepted that the Award Modernisation Full Bench did *not* give any consideration to the merits of junior rates in the Retail Award, but, rather, adopted the limited objective of establishing a fair safety net for each modern award based on the terms of relevant pre-reform instruments.

2. In making a modern award – including the Retail Award – the Award Modernisation Full Bench sought to strike a balance as to appropriate safety net terms and conditions considering the diverse pre-reform instruments in support of that draft award. It is fair to say that the Award Modernisation Full Bench adopted a broad 'swings and roundabouts' approach, having regard to the relevant pre-reform instruments.[53]

3. The SDA's position in respect of the application of junior rates to particular classification levels has fluctuated over time. The draft award initially submitted by the SDA during the award modernisation process confined junior rates to classification levels 1 *and* 2. In its submission of 1 August 2008 the SDA says:

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

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

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[53] [2008] AIRCFB 1000 at [28].
[54] SDA Submission – AM2008/10 (1 August 2008), pages 12-16.

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

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

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

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

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

[75] The SDA's merit argument places considerable importance on the assertion that a junior employee would not be promoted above Level 1 unless they were competent and therefore, on the basis of that competence, they would be doing work equivalent to that of an adult employee and are therefore entitled to adult rates. This assertion is unsupported by evidence and is, of itself, insufficient to satisfy s 156(3). Indeed, the SDA has advanced *no* evidence regarding the work value of junior employees employed in the various classification levels in the Retail Award.

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

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

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[55] Print Q7661, 20 October 1998 per Giudice P, Marsh DSP, MacBean SDP, Smith and Larkin CC.

[56] See generally *Clerks (Breweries) Consolidated Award case* Print R9120, 15 September 1999 per Ross VP at [28] – [61].

[57] [2014] FWCFB 1846.

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

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

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

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

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

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

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

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

[83] A fundamental feature of the minimum wage objective is the requirement to establish and maintain 'a safety net of fair minimum wages', and a necessary element of this is that the level of those wages bears a proper relationship to the value of the worked performed.[59]

[84] It seems to us that the application of junior rates to level 4 classification employees gives rise to an anomaly. It is conceivable that, depending on their age and service with their employer, a 20 year old tradesperson may only receive 90 per cent of the level 4 minimum rate. Such an outcome is inconsistent with the general approach adopted by the Commission to the proper fixation of minimum rates. As mentioned earlier, the tradespersons rate (level 4 in the Retail Award) should align with the C10 rate in the *Manufacturing and Associated Industries*

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[58] [2017] FWCFB 3540.

[59] [2079] FWCFB 3500 at [99].

and Occupations Award 2020; but that is not presently the case for junior employees under the Retail Award. As mentioned earlier, the concepts of uniformity and consistency underpin the fixation of minimum wages in modern awards. In a practical sense this means that the minimum wage rate for a tradesperson should be set consistently across the modern award system; this is not the case in the Retail Award because of the application of junior rates to level 4 employees.

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

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

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

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

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

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

[91] Section 134(1)(b) requires that we take into account 'the need to encourage collective bargaining'. It is also likely that employee and employer decision-making about whether to bargain is influenced by a complex mix of factors, not just the content of the application of junior rates to classification levels 4 to 8. Section 134(1)(b) speaks of 'the need to *encourage* collective bargaining'. We are not persuaded that the variations we propose to make would '*encourage* collective bargaining', it follows that this consideration does not provide any support for the proposed variation.

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

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

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

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

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

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

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

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

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

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

[101] The Retail Award is in Group 3.

[102] It seems to us that the proposal advanced by the NRA is a sensible one, but we acknowledge that the parties have had a limited opportunity to consider this issue. It is our *provisional* view that the variation we have decided to make will operate from 1 February 2021. In accordance with s.165(3) of the Act the variation determination will not take effect in relation to a particular employee until the start of the employee's first full pay period that starts on or after 1 February 2021.

[60] [2020] FWCFB 3500.

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

PRESIDENT

Appearances:

Mr J Arndt for Australian Business Industrial and the New South Wales Business Chamber
Mr I Booth for the Newsagents Association of NSW and ACT; the Australian Newsagents Federation Ltd trading as Australian Lottery and Newsagents Association and its members
Mr W Friend, of counsel, for the Shop, Distributive and Allied Employees Association
Mr A Millman for the National Retail Association

Hearing details:

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Melbourne (by video link).

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Final written submissions:

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SDA, 20 November 2020

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