FAIR WORK COMMISSION

DECISION

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009
Item 6, Sch. 5—Modern awards review

Modern Awards Review 2012—Penalty Rates

(AM2012/8, AM2012/37, AM2012/59, AM2012/71, AM2012/101, AM2012/172, AM2012/177, AM2012/178, AM2012/196, AM2012/204, AM2012/215, AM2012/218, AM2012/239, AM2012/240, AM2012/245, AM2012/250, AM2012/252, AM2012/253, AM2012/266)

JUSTICE ROSS, PRESIDENT
SENIOR DEPUTY PRESIDENT WATSON
DEPUTY PRESIDENT SMITH
COMMISSIONER GOOLEY
COMMISSIONER HAMPTON

MELBOURNE, 18 MARCH 2013

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 - Transitional Review - penalty rates in particular modern awards - Transitional Review does not involve a fresh assessment of modern awards unencumbered by previous Tribunal decisions - need to advance probative evidence in support of an application to vary - not persuaded that a sufficient case was made out in support of the substantive claims - merit in the parties discussing the concept of incorporating loaded rates within certain awards - Commission to facilitate conciliation discussions in relation to this issue.

CONTENTS **Page** **Paragraph**

ABBREVIATIONS

AAA	Accommodation Association of Australia
ABS	Australian Bureau of Statistics
Act	*Fair Work Act 2009* (Cth)
ACTU	Australian Council of Trade Unions
AHA	Australian Hotels Association
Ai Group	Australian Industry Group
AIRC	Australian Industrial Relations Commission
ARA	Australian Retailers Association
AWUQ	Australian Workers' Union of Employees, Queensland
BIAQ	Baking Industry Association Queensland - Union of Employers
BMIAA	Baking Manufacturers Industry Association of Australia
Commission	Fair Work Commission
DEEWR	Department of Education, Employment and Workplace Relations
Fast Food Award	*Fast Food Industry Award 2010*
Food Manufacturing Award	*Food, Beverage and Tobacco Manufacturing Award 2010*
FWA	Fair Work Australia
General Retail Award	*General Retail Industry Award 2010*
GTA	Group Training Australia
Hair and Beauty Award	*Hair and Beauty Industry Award 2010*
HBIA	Hair and Beauty Industry Association

Hospitality Award	*Hospitality Industry (General) Award 2010*
MGA	Master Grocers Australia
NAPSA	Notional agreement preserving State awards
NES	National Employment Standards
NFFR Award	*National Fast Food Retail Award 2000*
NRA	National Retailers Association
P&P	P&P Holdings Pty Ltd t/as Elphin Continental Cakes
Restaurant Award	*Restaurant Industry Award 2010*
SDA	Shop, Distributive and Allied Employee's Association
Transitional Provisions Act	*Fair Work (Transitional Provisions and Consequential Amendments) Act* 2009
Transitional Review	Modern Awards Review 2012
VANA	Victorian Association for Newsagents
Victorian Shops Award	*Shop Distributive and Allied Employees Association - Victorian Shops Interim Award 2000*
WR Act	*Workplace Relations Act 1996* (Cth)

1. INTRODUCTION

[1] The *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the Transitional Provisions Act) provides that the Fair Work Commission[1] must conduct a review of all modern awards[2] as soon as practicable after 1 January 2012 (the Transitional Review).

[2] A statement issued in November 2011 called for applications to vary modern awards as part of the Transitional Review. Some 292 applications were received including a number directed at issues which were common to a number of modern awards (such as penalty rates) and others which were limited to particular issues in one modern award. In a statement on 27 April 2012 the President identified the common issues and directed that they be dealt with by a Full Bench. The Commission as presently constituted is dealing with 20 applications which seek to vary penalty rate provisions in a number of modern awards.

[3] Before turning to the process we have adopted in relation to the applications before us we propose to briefly deal with the legislative provisions applicable to the Transitional Review.

1.1 The legislative context

[4] The legislative context for the Transitional Review was comprehensively dealt with in a Full Bench decision of 29 June 2012 (the June 2012 Full Bench decision).[3] We adopt that decision and have applied it to the matters before us. For present purposes we only propose to deal with the legislative context in summary terms.

[5] The principal legislative provision in respect of the Transitional Review is Item 6 of Schedule 5 to the Transitional Provisions Act:

> "**6 Review of all modern awards (other than modern enterprise awards and State reference public sector modern awards) after first 2 years**
>
> (1) As soon as practicable after the second anniversary of the FW (safety net provisions) commencement day, FWA must conduct a review of all modern awards, other than modern enterprise awards and State reference public sector modern awards.
>
> Note: The review required by this item is in addition to the annual wage reviews and 4 yearly reviews of modern awards that FWA is required to conduct under the FW Act.
>
> (2) In the review, FWA must consider whether the modern awards:
>
> (a) achieve the modern awards objective; and
>
> (b) are operating effectively, without anomalies or technical problems arising from the Part 10A award modernisation process.
>
> (2A) The review must be such that each modern award is reviewed in its own right. However, this does not prevent FWA from reviewing 2 or more modern awards at the same time.

(3) FWA may make a determination varying any of the modern awards in any way that FWA considers appropriate to remedy any issues identified in the review.

Note: Any variation of a modern award must comply with the requirements of the FW Act relating to the content of modern awards (see Subdivision A of Division 3 of Part 2-3 of the FW Act).

(4) The modern awards objective applies to FWA making a variation under this item, and the minimum wages objective also applies if the variation relates to modern award minimum wages.

(5) FWA may advise persons or bodies about the review in any way FWA considers appropriate.

(6) Section 625 of the FW Act (which deals with delegation by the President of functions and powers of FWA) has effect as if subsection (2) of that section included a reference to FWA's powers under subitem (5).''

[6] Subitem 6(1) provides that the Commission must conduct a review of all modern awards (other than modern enterprise awards and State reference public sector modern awards) as soon as practicable after 1 January 2012 (being the second anniversary of the Fair Work (Safety Net Provisions) Act commencement day).

[7] At the outset it is important to note that the Transitional Review contemplated in Item 6 is quite separate from, and narrower in scope than, the 4 yearly reviews of modern awards provided for in s.156 of the *Fair Work Act* 2009 (Cth) (the Act). The scope of the Transitional Review was a matter of contention in the June 2012 Full Bench proceeding.

[8] The June 2012 Full Bench decision construed Item 6 according to its terms, having regard to the context and legislative purpose. Part of that context was the award modernisation process conducted by the former Australian Industrial Relations Commission under Part 10A of the *Workplace Relations Act* 1996 (Cth) (the WR Act). We deal with the award modernisation process in section 2 of this decision.

[9] The June 2012 Full Bench decision observed that two points about this historical context were particularly relevant:

> ''The first is that awards made as a result of the award modernisation process are now deemed to be modern awards for the purposes of the FW Act (see Item 4 of Schedule 5 of the Transitional Provisions Act). Implicit in this is a legislative acceptance that the terms of the existing modern awards are consistent with the modern awards objective. The second point to observe is that the considerations specified in the legislative test applied by the Tribunal in the Part 10A process is, in a number of important respects, identical or similar to the modern awards objective which now appears in s.136...''[4]

[10] The June 2012 Full Bench decided that two other textual considerations were also relevant. The first is that subitem 6(2)(b) of Schedule 5 directs specific attention to whether modern awards 'are operating effectively, without anomalies or technical problems arising from the Part 10A award modernisation process.' No such legislative direction is reflected in the provisions which deal with the 4 yearly review of modern awards (s.156 of the Act).

[11] The second textual consideration is that, Item 6 does not prescribe how the Commission is to be constituted for the purpose of conducting the Transitional Review. This may be contrasted with the 4 yearly reviews provided in s.156 and the award modernisation process under Part 10A of the WR Act, both of which are to be conducted by a Full Bench. The fact that the Transitional Review of a modern award may be conducted by a single member also suggests that the legislature contemplated that the Transitional Review would be more confined in scope that the 4 yearly reviews in s.156.

[12] These considerations led the June 2012 Full Bench to conclude as follows:

> "[91] It is important to recognise that we are dealing with a system in transition. Item 6 of Schedule 5 forms part of transitional legislation which is intended to facilitate the movement from the WR Act to the FW Act. The Review is a "one off" process required by the transitional provisions and is being conducted a relatively short time after the completion of the award modernisation process. The transitional arrangements in modern awards continue to operate until 1 July 2014. The fact that the transition to modern awards is still occurring militates against the adoption of broad changes to modern awards as part of the Review. Such changes are more appropriately dealt with in the 4 year review, after the transition process has completed. In this context it is particularly relevant to note that s.134(1)(g) of the modern awards objective requires the Tribunal to take into account:
>
> > "the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia . . ."
>
> [99] To summarise, we reject the proposition that the Review involves a fresh assessment of modern awards unencumbered by previous Tribunal authority. It seems to us that the Review is intended to be narrower in scope than the 4 yearly reviews provided in s.156 of the FW Act. In the context of this Review the Tribunal is unlikely to revisit issues considered as part of the Part 10A award modernisation process unless there are cogent reasons for doing so, such as a significant change in circumstances which warrants a different outcome. Having said that we do not propose to adopt a "high threshold" for the making of variation determinations in the Review, as proposed by the Australian Government and others.
>
> [100] The adoption of expressions such as a "high threshold" or "a heavy onus" do not assist to illuminate the Review process. In the Review we must review each modern award in its own right and give consideration to the matters set out in subitem 6(2). In considering those matters we will deal with the submissions and evidence on their merits, subject to the constraints identified in paragraph [99] above."

[13] We now return to Item 6 of Schedule 5.

[14] Under subitem 6(3) the Commission has a broad discretion to vary any of the modern awards in any way it considers necessary to remedy any issues identified in the Transitional Review. However, subitem 6(4) provides that in making such a variation the Commission must take into account the modern awards objective in s.134 of the Act, and, if varying modern award minimum wages, the minimum wages objective in s.284.

[15] The modern awards objective is set out in s.134 of the Act:

> **"134 The modern awards objective**
>
> What is the modern awards objective?
>
> (1) FWA 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
>
> (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."

[16] Any variation of a modern award arising from the Transitional Review must also comply with the provisions of the Act which deal with the content of modern awards (see ss.136–155 of the Act). To the extent that any application seeks to alter the coverage of a modern award, then the requirements set out in ss.162–164 within Division 6 of Part 2-3 of the Act are relevant. Similarly Division 3 of Part 2-1 will be relevant if an application seeks to alter the relationship between a modern award and the National Employment Standards (NES).

[17] Section 138 of the Act, dealing with the content of modern awards, is also relevant and is a factor to be considered in any variation to a modern award arising from the Transitional Review.

[18] In conducting the Transitional Review the Commission is able to exercise its usual procedural powers, contained in Division 3 of Part 5-1 of the Act. Section 577 and 578 are also relevant to the conduct of the Transitional Review.

[19] We now turn to the process we have adopted in dealing with the applications before us.

1.2 The procedure adopted

[20] We are dealing here with 20 applications to vary penalty rates provisions in the following awards:

- *Fast Food Industry Award 2010* (Fast Food Award)[5]
- *Food, Beverage and Tobacco Manufacturing Award 2010* (Food Manufacturing Award)[6]
- *General Retail Industry Award 2010* (General Retail Award)[7]
- *Hair and Beauty Industry Award 2010* (Hair and Beauty Award)[8]
- *Hospitality Industry (General) Award 2010* (Hospitality Award)[9]

[21] An application by various banking institutions to vary the *Banking, Finance and Insurance Award 2010*[10] in respect of penalty rates was also received but subsequently withdrawn on 15 March 2012. Further, with the consent of the relevant parties, all applications relating to the *Restaurant Industry Award 2010*,[11] including those pertaining to penalty rates, are being considered and determined by a single member.

[22] Amongst other matters, the June 2012 Full Bench determined that each of the common issues could be heard and determined by a Full Bench, but it also left open the possibility that the taking of evidence in relation to one or more awards could be delegated to single members of the Tribunal.[12] To that end, a Statement was published on the Commission website on 5 July 2012 proposing the broader award review process and timetable.[13]

[23] After further consultation with the parties and a report from Commissioner Hampton,[14] the Commission determined that the Penalty Rates and Public Holiday matters would be dealt with by separate Full Benches. In directions issued on 9 July 2012, applications concerning both penalty rates and public holidays in the relevant awards were grouped and referred to single members of the Commission to hear the evidence and report to the respective Full Benches.[15]

[24] This decision deals only with those matters referred to the Penalty Rates Full Bench.

[25] A Directions Hearing was held on 18 October 2012 before Commissioners Gooley, Hampton and Jones. Directions were issued by Commissioner Hampton on 22 October 2012. Commissioner Jones on 22 October 2012 and 23 October 2012 and Commissioner Gooley on 24 October 2012, 26 October 2012 and 1 November 2012.

[26] A further statement and directions was issued on 9 November 2012,[16] stating that the evidentiary reports of Commissioners Gooley, Hampton and Jones would be published on 7 December 2012 and directing parties to file written submissions addressing any issues in the Reports on the evidence by 14 December 2012.

[27] Ultimately, the evidence in relation to the applications concerning the relevant awards was heard and reported as follows:

- *Hospitality Industry (General) Award 2010* by Gooley C;[17]

- *General Retail Industry Award 2010 and the Food, Beverage and Tobacco Manufacturing Award 2010* by Hampton C;[18] and

- *Fast Food Industry Award 2010* and the *Hair and Beauty Industry Award 2010* by Jones C.[19]

[28] Following the publication of the reports by Commissioners Gooley, Hampton and Jones, this Full Bench received final written submissions in relation to all of the penalty rate matters before it. These matters were listed for short oral argument on 18 and 19 December 2012.

2. THE AWARD MODERNISATION PROCESS

[29] It is appropriate that we briefly review the process of award modernisation so that the present applications can be seen in context.

[30] The award modernisation process took place in the period from April 2008 to December 2009 and was conducted in accordance with a written request (the award modernisation request) made by the Minister for Employment and Workplace Relations to the President of the Australian Industrial Relations Commission (AIRC).[20] The process was completed in four stages, each stage focussing on different industries and occupations. All stakeholders and interested parties were invited to make submissions on what should be included in modern awards for a particular industry or occupation. Separate processes, including variously, the provision of submissions, hearings and release of draft awards, were undertaken in respect of the creation of each modern award to ensure parties were able to make submissions and raise matters of concern relevant to particular awards. By the end of 2009 the AIRC had reviewed more than 1500 federal awards and notional agreements preserving State awards (NAPSAs) and created 122 industry and occupation based modern awards.

[31] The award modernisation process was governed by Part 10A of the *Workplace Relations Act 1996* (Cth) (the WR Act). Section 576C of Part 10A required award modernisation to be conducted in accordance with an award modernisation request. The process involved the AIRC inviting submission from any interested person, conducting consultations with interested parties, publishing exposure drafts, accepting further written or oral submissions and then publishing a modern award. The modern awards now before us (with the exception of the Food Manufacturing award) were examined in the priority phase of the process.

[32] In making modern awards the AIRC could not, save in limited circumstances, differentiate between States[21] and had the task of balancing interests of employees and employers throughout Australia after examining both federal awards and NAPSAs. In relation to penalty rates for Saturdays and Sundays and other conditions, the AIRC adopted a '*swings and roundabouts'* approach where the most common provisions were seen as the most influential and were often adopted.

[33] Given the focus of the matters presently before us, it is appropriate that we consider the specific penalty rates provisions in the modern awards applying in the broader retail sector as determined by the AIRC in the award modernisation process. We make the point at this stage that the AIRC did not generally take into account enterprise based awards, as such

awards were to be dealt with in a separate process.[22] It is also apparent that in making the modern awards in the retail sector the AIRC relied upon multi-employer awards in the federal jurisdiction and NAPSAs previously in state jurisdictions, as enterprise awards raised different considerations including elements of consent.

[34] In making the various awards in the retail sector the AIRC said:

> "[283] The more awards with disparate provisions are aggregated the greater the extent of changes in the safety net. Changes may be able to be accommodated by a "swings and roundabouts" approach, specific provisions relevant to part of the industry or transitional provisions. However, significant changes may also result in net disadvantage to employees and/or increased costs for employers. The publication of an exposure draft which sought to rationalise the terms and conditions across the various types of retail establishment provided a means whereby the impact of such an approach could be fully evaluated.
>
> [284] We have considered these matters and the submissions of the parties and have decided to make separate awards for general retailing, fast food, hair and beauty, and community pharmacies. Further, we will exclude stand alone meat retailing and, at this stage, stand alone nurseries from the general retail award to enable those types of operations to be considered as part of the meat and agriculture industries respectively. The position regarding real estate agencies and motor vehicle related retailing will also be considered in subsequent stages.
>
> [285] In reaching this decision we have placed significant reliance on the objective of not disadvantaging employees or leading to additional costs. We note that such an approach will not lead to additional awards applying to a particular employer or employee.
>
> [286] The contents of the four awards we publish with this decision are derived from the existing awards and NAPSAs applying to the different sectors. Although the scope of the awards is obviously reduced, this did not eliminate the variations in terms and conditions within each part of the industry. We have generally followed the main federal industry awards where possible and had regard to all other applicable instruments. In this regard we note in particular the significant differences in awards and NAPSAs applying to the fast food and pharmacy parts of the industry.
>
> [287] Many of the submissions made to us from employers expressed concern at additional costs arising from provisions of the Retail industry exposure draft regarding hours of work, overtime, penalty rates, annual leave and allowances. We have revised these provisions having regard to the terms, incidence and application of relevant instruments for each sector. The result is provisions which more closely approximate to existing instruments for the relevant parts of the industry but which adopt different standards from one part to another. We have addressed submissions concerning the application of allowances and hours provisions and made other changes consistent with the approach to such matters in the main part of this decision" [23]

[35] The AIRC also recognised that there may be costs associated with the changes and, importantly, transitional provisions were included in each modern award.[24]

[36] We now deal more specifically with the *General Retail Industry Award 2010*.

[37] Although there are a number of penalty rate provisions that are sought to be varied in these applications, the major focus of both the evidence and the submissions has been on the Sunday penalty. There can be no doubt that this issue was expressly raised and determined by the AIRC through the award modernisation process. Indeed, various employer groups sought that the additional Sunday penalty rate in the retail sector be 50% or lower. Such submissions were advanced on a number of occasions including in response to the exposure draft in 2008 and following the revised award modernisation request issued on 2 May 2009.

[38] These submissions were considered by the AIRC and on 29 January 2010 the Full Bench determined[25] to retain the proposed 100% penalty for Sunday work. It indicated that it had done so in line with the general approach adopted in establishing the terms of modern awards by having particular regard to the terms of existing instruments and:

> "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.'[26]

[39] The Full Bench also observed that the modern award rate of 'double time' was in line with existing rates in Victoria, the ACT, Queensland non-exempt shops, Western Australia and Tasmania and that accordingly 'the critical mass supports the retention of this provision.'[27]

[40] The final review of the various federal awards and NAPSAs by the AIRC relevantly revealed that ordinary hours could be worked on any day but that finishing times for ordinary hours varied as between week days and weekends. In the result, the AIRC provided that in the modern award governing the general retail industry ordinary hours may be worked at the following times:

Days	**Spread of hours**
Monday to Friday, inclusive	7.00 am–9.00 pm
Saturday	7.00 am–6.00 pm
Sunday	9.00 am–6.00 pm

[41] For work performed during ordinary hours on weekends, the various federal and NAPSAs established that the more common provisions were:

- time and a quarter for Saturday work; and
- double time for Sunday work.

[42] In the result, the AIRC generally adopted these provisions in what is now the *General Retail Industry Award 2010*. It established the following:

> **29.4 Penalty payments**

(a) Evening work Monday to Friday

A penalty payment of an additional 25% will apply for ordinary hours worked after 6.00 pm. 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. This does not apply to casuals.

(c) Sunday work

A penalty payment of an additional 100% loading will apply for all hours worked on a Sunday. This penalty payment also applies to casual employees instead of the casual loading in clause 13.2.

[43] We also note that the AIRC established a casual loading of 25%. This was an increase in the casual loading applicable under many of the former NAPSAs and a decrease for some parties. Importantly for present purposes, the modern award established that the new casual loading would not apply as an additional payment at certain times where penalty rates applied.

[44] We now turn to the *Fast Food Industry Award 2010*. As outlined earlier, the initial proposal by the AIRC was for one retail award but in the end, the AIRC divided the broader retail industry into a number of sectors, including the fast food industry, having regard to costs and other considerations.

[45] In its decision establishing a separate Fast Food Award, the AIRC noted the significant differences applying in awards and NAPSAs operating within that sector.[28] In further proceedings, the AIRC considered concerns raised by the employers about the use of the *National Fast Food Retail Award* 2000[29] (the NFFR Award) as a benchmark for making the new modern award.

[46] The Full Bench recognised that the NFFR Award did not apply to many employers covered by NAPSAs or enterprise awards which contained lesser terms and conditions and that *'in some States there will be a change in the level of the safety net and this will impact on labour costs if current actual terms correspond to the terms of the relevant NAPSA.'*[30] The Full Bench also referred to the transitional arrangements that were to be used to phase in and minimise the impact of such changes.[31]

[47] In a later decision concerning an application to modify the proposed penalty rates,[32] the Full Bench stated that in award modernisation the Commission had nevertheless attached significant weight to the NFFR Award as much of its content had been the subject of relatively recent arbitration.[33]

[48] Importantly as part of that decision, the Full Bench dealt with applications from a number of employer groups to modify the proposed penalty rates and determined as follows:

> "[23] Since making this award the Commission has reviewed the penalty payments applying in the restaurant industry. Those penalty payments are found in the

Restaurant Industry Award 2010. For fast food operations that open into the evening there is logic in adopting a similar approach to penalty payments. We have decided to vary cl.26.2(a) to provide for a 10% loading to be payable after 9.00 pm and a 15% loading to be payable after midnight. Casual employees are to receive the relevant loading in addition to the 25% casual loading.

[24] In relation to Saturday work, the NRA and Ai Group seek to vary clause 26.2(b) so as to limit the payment of Saturday penalties to full-time and part-time employees. 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. We do not intend grant the application.

[25] The NRA and Ai Group seek an alteration in cl.26.2(c) to bring about a reduction in the penalty payable for ordinary hours worked on a Sunday by full-time and part-time employees from 75% to 25%.

[26] We have reconsidered the level of this loading having regard to the Sunday penalty rates in relevant pre-reform awards and NAPSAs and in particular the penalties now applicable in the restaurant industry. In all the circumstances we consider that a loading of 50% for full-time and part-time employees and 75% for casuals is fair and appropriate." [34]

[49] The Fast Food Award ultimately provided that an employee can be rostered to work an average of 38 hours over 4 weeks and up to a maximum of 11 hours per day on any 5 days. The following penalty rates apply in that modern award:

26.5 Penalty rates

(a) Evening work Monday to Friday

(i) A loading of 10% will apply for ordinary hours of work within the span of hours between 9.00 pm and midnight, and for casual employees this loading will apply in addition to their 25% casual loading.

(ii) A loading of 15% will apply for ordinary hours of work after midnight, and for casual employees this loading will apply in addition to their 25% casual loading.

(b) Saturday work

A loading of 25% will apply for ordinary hours of work within the span of hours on a Saturday, and for casual employees an additional 25% on top of the casual rate.

(c) Sunday work

(i) A 50% loading will apply for all hours of work on a Sunday for full-time and part-time employees.

(ii) A 75% loading will apply for all hours of work on a Sunday for casual employees, inclusive of the casual loading.

[50] The *Hair and Beauty Industry Award 2010* has much the same genesis as the other retail related awards. Having determined to make different awards for the various sectors, the AIRC made this award with a penalty rate of 33% for ordinary time work on Saturdays and 100% for Sundays.

[51] It is unnecessary for us to deal with the history of the *Hospitality Industry (General) Award 2010* given the absence of any probative material in support of the applications to review the penalty rates in this award.

3. THE CLAIMS

[52] We propose to summarise the claims before us in respect of each modern award.

3.1 *Hospitality Industry (General) Award 2010*

Clause 12: Overtime for part-time employees

[53] Clause 12.2 to 12.8 in the current award read as follows:

"12.2 A part-time employee is an employee who:

(a) works less than full-time hours of 38 per week;

(b) has reasonably predictable hours of work; and

(c) receives, on a pro rata basis, equivalent pay and conditions to those of full-time employees who do the same kind of work.

12.3 At the time of engagement the employer and the part-time employee will agree in writing on a regular pattern of work, specifying at least the hours worked each day, which days of the week the employee will work and the actual starting and finishing times each day.

12.4 Any agreed variation to the hours of work will be recorded in writing.

12.5 An employer is required to roster a part-time employee for a minimum of three consecutive hours on any shift.

12.6 An employee who does not meet the definition of a part-time employee and who is not a full-time employee will be paid as a casual employee in accordance with clause 13—Casual employment.

12.7 All time worked in excess of the hours as agreed under clause 12.3 or varied under clause 12.4 will be overtime and paid for at the rates prescribed in clause 33—Overtime.

12.8 A part-time employee employed under the provisions of this clause must be paid for ordinary hours worked at the rate of 1/38th of the weekly rate prescribed in clause 20—Minimum wages, for the work performed."

[54] The Australian Hotels Association (AHA) and the Accommodation Association of Australia (AAA) sought to vary the entitlement to overtime that applied to Part-time employees.

AHA proposal

[55] The AHA sought to vary clauses 12.2 to 12.8 to provide for overtime to be paid if the employee works in excess of their guaranteed number of hours or on either of their two nominated days off. The AHA proposes to delete clause 12.2 to 12.8 and insert the following:

"12.2 A part-time employee is an employee who:

a) works more than 15 hours and less than full-time hours of 38 per week; and

b) receives:

(i) at least two nominated days off each week, which must be the same days each week; or

(ii) the Flexible Part-time Allowance; and

c) receives, on a pro rata basis, equivalent pay and conditions to those of full-time employees who do the same kind of work.

12.3 Arrangements for work

a) At the time of engagement the employer and the part-time employee will agree in writing on the arrangements for work specifying:

(i) The guaranteed number of hours (at least 15) the employee will be required to work each week; and

(ii) Either:

I. the nominated days each week which will the employee will not be required to work; or

II. that the employee will receive the Flexible Part-time Allowance.

b) The guaranteed number of hours and whether the employee receives nominated days off or the Flexible Part-time Allowance may be varied by agreement. Any agreed variation must be recorded in writing.

12.4 An employee who does not meet the definition of a part-time employee and who is not a fulltime employee will be paid as a casual employee in accordance with clause 13 - Casual employment.

12.5 A part-time employee employed under the provisions of this clause must be paid for ordinary hours worked at the rate of 1/38th of the weekly rate prescribed in clause 20 Minimum wages, for the work performed, subject to clause 32-Penalty rates."

[56] The AHA also proposed to define a Flexible Part-time Allowance in clause 3 - Definitions and interpretations as follows:

"**Flexible Part-time Allowance** means an amount equal to 5% of the employee's minimum weekly wage under clause 20.1, which is paid on a daily basis."

AAA proposal

[57] The AAA sought the following variation to clause 12.2:

"12.2 A part-time employee is an employee who:

(a) works less than full-time hours of 38 per week;

(b) is paid for ordinary hours worked at the rate of 1/38th of the weekly rate prescribed in clause 20—Minimum wages, for the work performed;

(c) receives, on a pro rata basis, equivalent pay and conditions to those of full-time employees who do the same kind of work; and

(d) is regularly employed for no less than 15 hours each week and no more than 152 hours per four week period, subject to the following conditions:

(i) A minimum of three hours and a maximum of 11 and a half hours may be worked on any day. The daily minimum and maximum hours are exclusive of meal break intervals.

(ii) An employee cannot be rostered to work for more than 10 hours per day on more than three consecutive days without a break of at least 48 hours immediately following.

(iii) No more than eight days of more than 10 hours may be worked in a four week period.

(iv) Employees shall be entitled to a minimum of eight days off per each four week period."

Clause 32.1: penalty rates

[58] The penalty rates in the current award are as follows:

Hospitality Award	Monday-Friday %	Saturday %	Sunday %	Public Holiday %
Weekly employees	100	125	175	250
Casual employees (inclusive of the 25% casual loading)	125	150	175	275

[59] The AAA sought to vary clause 32.1 to reduce penalty rates payable in the award. The reductions sought by AAA are as follows (highlighted in red):

AAA	Monday-Friday %	Saturday %	Sunday %	Public Holiday %
Weekly employees	100	125	150	250
Casual employees	125	125	150	250

3.2 *General Retail Industry Award 2010*

New Clause: Annualised salaries

[60] Various parties sought new provisions permitting an employer to pay an employee an annual salary in lieu of other current entitlements including wages, allowances, penalty payments, overtime, shiftwork payments and annual leave loading. In some proposals these arrangements would be subject to a no disadvantage condition and annual review.

NRA and BIAQ proposal

[61] The National Retail Association (NRA) and the Baking Industry Association of Queensland (BIAQ) sought to insert an annualised salary clause which would read as follows:

> "19. Annualised salaries
>
> (a) An employer may pay an employee an annual salary in satisfaction of any or all of the following provisions of the award:
>
> (i) clause 17 & 18—Minimum weekly wages and Junior Rates;
> (ii) clause 20—Allowances;
> (iii) clause 27 – Hours of Work
> (iv) clause 29—Overtime and penalties;
> (v) clause 30 – Shiftwork; and
> (vi) clause 32.3—Annual leave loading.
>
> (b) Where an annual salary is paid the employer must advise the employee in writing of the annual salary that is payable and which of the provisions of this award will be satisfied by payment of the annual salary.
>
> Annual salary not to disadvantage employees

(a) The annual salary must be no less than the amount the employee would have received under this award for the work performed over the year for which the salary is paid (or if the employment ceases earlier over such lesser period as has been worked).

(b) The annual salary of the employee must be reviewed by the employer at least annually to ensure that the compensation is appropriate having regard to the award provisions which are satisfied by the payment of the annual salary.

Base rate of pay for employees on annual salary arrangements

(a) For the purposes of the NES, the base rate of pay of an employee receiving an annual salary under this clause comprises the portion of the annual salary equivalent to the relevant rate of pay in clause 16—Minimum weekly wages and excludes any incentive-based payments, bonuses, loadings, monetary allowances, overtime and penalties."

Master Grocers Australia proposal

"16.3 Annualised salaries

(a) Where an employee carries out duties according to Skill Levels 6, 7 or 8 as defined in Schedule B an employer and employee may agree to an annualized salary that includes all, or any of the following wage rates, penalties and allowances in this Award:

- Minimum weekly rate for the appropriate classification
- Allowances
- Hours of work
- Overtime and penalties
- Shift work (if applicable)
- Annual leave loading.

(b) The employer and employee shall agree in writing on the amount payable as an annual salary provided that the amount payable is no less than the employee would have received if the employee was paid the appropriate rates under the terms and conditions of the Award.

(c) The employer and the employee will review the Agreement annually.

(d) The terms of the annualized salary agreement shall also be no less than the employee is entitled to under the National Employment Standards as defined in the Fair Work Act 2009."

ARA proposal

"17A.1 Annual salary instead of award provisions

(a) An employer may pay an employee an annual salary in satisfaction of any or all of the following provisions of the award:

(i) clause 17 - Minimum weekly wages;
(ii) clause 20 - Allowances;
(iii) clauses 29 - Overtime and penalty rates; and
(iv) clause 32.3 - Annual leave loading.

(b) Where an annual salary is paid, the employer must advise the employee in writing of the annual salary that is payable and which of the provisions of this award will be satisfied by payment of the annual salary.

17A.2 Annual salary not to disadvantage employees

(a) The annual salary paid under this clause must be no less than the amount the employee would have received under this award for the work performed over the year for which the salary is paid (or if the employment ceases earlier over such lesser period as has been worked). When determining whether an employee's annual salary is no less than their entitlement under this award an employer is entitled to include any incentive, bonus or commission paid to the employee as part of the calculation of the annual salary the employee has been paid.

17A.3 For the purposes of the NES, the base rate of pay of an employee receiving an annual salary under this clause excludes any incentive - based payments, bonuses, loadings, monetary allowances, overtime and penalties."

Clause 13.2: Casuals on Saturdays

[62] The clause in the current award reads as follows:

"13.2 A casual employee will be paid both the hourly rate payable to a full-time employee and an additional 25% of the ordinary hourly rate for a full-time employee. A casual employee is not entitled to the additional penalty payment for evening work and Saturday work in clause 29.4 but must be paid an additional 10% for work performed on a Saturday between 7.00 am and 6.00 pm."

[63] Business SA sought clarification of the penalty paid to a casual employee on Saturdays:

"13.2 A casual employee will be paid both the hourly rate payable to a full time employee and an additional 25% of the ordinary hourly rate for a full-time employee."

Clause 27.2: Ordinary hours for bakers

[64] The current clause reads as follows:

"27.2 Ordinary hours

(a) Except as provided in clause 27.2(b), ordinary hours may be worked, within the following spread of hours:

Days	**Spread of hours**
Monday to Friday, inclusive	7.00 am–9.00 pm
Saturday	7.00 am–6.00 pm
Sunday	9.00 am–6.00 pm

(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

(c) 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.

(d) Hours of work on any day will be continuous, except for rest pauses and meal breaks."

[65] Some parties sought to extend the ordinary hours starting time for bakers to 5.00am.

NRA, ARA and BIAQ proposal

[66] The NRA, ARA and BIAQ proposed the following variation to ordinary hours in clause 27.2(b)(i):

"the commencement time for ordinary hours of work for newsagencies and bakeries on each day may be from 5.00 am"

BMIAA proposal

[67] The Baking Manufacturers Industry Association of Australia (BMIAA) proposed the same amendment, with a slight variation in wording:

"the commencement time for ordinary hours of work for newsagencies and bakery shops on each day may be from 5.00 am"

P&P Holdings

[68] P&P Holdings Pty Ltd t/as Elphin Continental Cakes (P&P) proposed to change the "ordinary hours for Bakers change to 4 am to 9 pm Monday to Friday, Saturday to Sunday 4am to 6pm and a per hour shift allowance before 4 am on all days and remove the two ten minute paid breaks."

Clause 27.2(b)(iii): Application of extended trading hours to 11 pm

[69] The current clause reads as follows:

> "(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."

[70] The Shop, Distributive and Allied Employees Association (SDA) proposed to modify the scope of retailers eligible to apply these provisions.

> "(iii) in the case of Special Category Shops, the finishing time for ordinary hours on all days of the week shall be 11.00pm"

[71] The SDA also proposed to define a special category shop in clause 3—Definitions and interpretation as follows:

> "Special Category Shop means a shop for the sale of foodstuffs and groceries and any other goods of a kind, and not exceeding a quantity, that a reasonable person would regard as appropriate to be sold as a sideline in a shop for the sale of foodstuffs and groceries.
>
> A shop is not a Special Category Shop at a particular time if, at any time during the period of seven days immediately before that time, the sum of: (a) the number of persons employed in the shop; and (b) the number of persons employed in shops of any kind by the occupier or manager of the first-mentioned shop; and (c) if the occupier or manager of the shop is a body corporate, the sum of the number of persons employed in shops of any kind by the body corporate and the number of persons so employed by related body corporate -was twenty or more. If the persons employed include persons employed on a part time basis, the number employed for the purpose of this definition may be taken to be the number of persons that would be employed if the hours worked by the pat1 time employees were worked by full time employees."

Clause 28.13: Employees regularly working Sundays

[72] The existing provision in the award reads as follows:

> "28.13 Employees regularly working Sundays
>
> (a) An employee who regularly works Sundays will be rostered so as to have three consecutive days off each four weeks and the consecutive days off will include Saturday and Sunday.
>
> (b) This requirement will not apply where the employee requests in writing and the employer agrees to other arrangements which are to be recorded in the time and wages records. It cannot be made a condition of employment that an employee make such a request.
>
> (c) An employee can terminate the agreement by giving four weeks' notice to the employer."

[73] The NRA, BMIAQ and BMIAA sought to remove the existing provision for employees regularly working on a Sunday.

NRA and BIAQ proposal

[74] These parties sought to remove the entire clause 28.13.

BMIAA proposal

[75] The BMIAA sought to delete parts of clause 28.13(b) to read as follows:

> **"(b)** This requirement will not apply where the employee requests in writing and the employer agrees to other arrangements which are to be recorded in the time and wages records. ~~It cannot be made a condition of employment that an employee make such a request.~~"

Clause 28.14: Notification of rosters

[76] The current clause reads as follows:

> "28.14 Notification of rosters
>
> (a) The employer will exhibit staff rosters on a notice board, which will show for each employee:
>
> (i) the number of ordinary hours to be worked each week;
>
> (ii) the days of the week on which work is to be performed; and
>
> (iii) the commencing and ceasing time of work for each day of the week.
>
> (b) The employer will retain superseded notices for twelve months. The roster will, on request, be produced for inspection by an authorised person.
>
> (c) Due to unexpected operational requirements, an employee's roster for a given day may be changed by mutual agreement with the employee prior to the employee arriving for work.
>
> (d) Any permanent roster change will be provided to the employee in writing with a minimum seven days notice. Should the employee disagree with the roster change, they will be given a minimum of 14 days written notice instead of seven days, during which time there will be discussions aimed at resolving the matter in accordance with clause 9—Dispute resolution, of this award.
>
> (e) Where an employee's roster is changed with the appropriate notice for a once-only event caused by particular circumstances not constituting an

emergency, and the roster reverts to the previous pattern in the following week, then extra work done by the employee because of the change of roster will be paid at the overtime rate of pay.

(f) An employee's roster may not be changed with the intent of avoiding payment of penalties, loading or other benefits applicable. Should such circumstances arise the employee will be entitled to such penalty, loading or benefit as if the roster had not been changed."

NRA Proposal

[77] The NRA sought to remove the obligation to pay overtime where a roster variation at short notice is agreed and provide that rosters may not be varied with the sole intent of avoiding loadings and penalties. NRA proposed that clause 28.14(e) be deleted and the following variation to clause 28.14(f):

~~(e) Where an employee's roster is changed with the appropriate notice for a once-only event caused by particular circumstances not constituting an emergency, and the roster reverts to the previous pattern in the following week, then extra work done by the employee because of the change of roster will be paid at the overtime rate of pay.~~

(f) An employee's roster may not be changed with the sole intent of avoiding payment of penalties, loading or other benefits applicable. Should such circumstances arise the employee will be entitled to such penalty, loading or benefit as if the roster had not been changed.

Clause 29.2: Overtime

[78] Current clause 29.2(a) and 29.2(b) in the award read as follows:

"29.2 Overtime

(a) Hours worked in excess of the ordinary hours of work, outside the span of hours (excluding shiftwork), or roster conditions prescribed in clauses 27 and 28 are to be paid at time and a half for the first three hours and double time thereafter.

(b) Hours worked by part-time employees in excess of the agreed hours in clause 12.2 or as varied under clause 12.3 will be paid at time and a half for the first three hours and double time thereafter.

(c) The rate of overtime on a Sunday is double time, and on a public holiday is double time and a half.

(d) Overtime is calculated on a daily basis."

[79] The SDA sought to provide for double time after two hours (in lieu of three) and overtime payments for casuals working in excess of 38 hours:

"29.2 Overtime

(a) Hours worked in excess of the ordinary hours of work, outside the span of hours (excluding shiftwork), or roster conditions prescribed in clauses 27 and 28 are to be paid at time and a half for the first ~~three~~two hours and double time thereafter.

(b) Hours worked by part-time employees in excess of the agreed hours in clause 12.2 or as varied under clause 12.3 will be paid at time and a half for the first ~~three~~two hours and double time thereafter."

[80] In addition, SDA proposed to add a new subclause to clause 13:

"13.5 The maximum ordinary weekly hours for a casual will be 38."

Clause 29.2: Overtime and shiftworkers

[81] The current clause 29.2 is shown at paragraph 78.

[82] BIAQ sought to clarify the application of overtime for shiftworkers in clause 29.2(a):

"29.2 Overtime (excluding shiftwork)

(a) Hours worked in excess of the ordinary hours of work, outside the span of hours ~~(excluding shiftwork)~~, or roster conditions prescribed in clauses 27 and 28 are to be paid at time and a half for the first three hours and double time thereafter."

Clause 29.2: Overtime and non-full-time employees

[83] The current clause is shown at paragraph 78.

[84] The NRA sought to provide that overtime is only to apply to full-time employees.

"29.2 Overtime

(a) Hours worked by full time employees in excess of the ordinary hours of work, outside the span of hours (excluding shiftwork), or roster conditions prescribed in clauses 28 and 29 are to be paid at time and a half for the first three hours and double time thereafter."

Clause 29.3: Time off in lieu of overtime

[85] The current clause reads as follows:

"29.3 Time off instead of payment

(a) Time off instead of payment for overtime may be provided if an employee so elects and it is agreed by the employer.

(b) Such time off will be taken at a mutually convenient time and within four weeks of the overtime being worked or, where agreed between the employee and the employer may be accumulated and taken as part of annual leave.

(c) Time off instead of payment for overtime will equate to the overtime rate, i.e. if the employee works one hour overtime and elects to take time off instead of payment the time off would equal one and a half hours or, where the rate of pay for overtime is double time, two hours."

[86] BIAQ sought to provide "time for time" where mutually agreed or requested by an employee (currently overtime equivalent):

"29.3 Time off instead of payment

(a) Time off instead of payment for overtime may be provided if mutually agreed between the employer and employee.

(b) Such time off will be taken at a mutually convenient time and within four weeks of the overtime being worked or, where agreed between the employee and the employer may be accumulated and taken as part of annual leave.

(c) Overtime taken as time off during ordinary hours must be taken at the ordinary time rate, that is an hour for each hour worked."

Clause 29.4(a): Evening penalties

[87] The current clause reads as follows:

"(a) Evening work Monday to Friday

A penalty payment of an additional 25% will apply for ordinary hours worked after 6.00 pm. This does not apply to casuals."

[88] The NRA sought to remove existing penalty payments for evening work by deleting clause 29.4(a).[35]

Clause 29.4(c): Sunday work

[89] The current clause reads as follows:

"(c) Sunday work

A penalty payment of an additional 100% loading will apply for all hours worked on a Sunday. This penalty payment also applies to casual employees instead of the casual loading in clause 13.2."

[90] The NRA, Master Grocers Australia (MGA), BIAQ, ARA, Victorian Association for Newsagents (VANA) and ACT & Region Chamber of Commerce and Industry sought to

provide a penalty of 50% for Sunday work (in lieu of 100%).[36] Although there are minor drafting differences, the various proposed changes were to the effect that the following would apply:

> "(c) Sunday work
>
> A penalty payment of an additional ~~100~~50% loading will apply for all ordinary hours worked on a Sunday. This penalty payment also applies to casual employees instead of the casual loading in clause 13.2."

Clause 30.4: Early morning shifts

[91] The current clause reads as follows:

> "30.4 Baking production employees – Early morning shifts
>
> (a) A baking production employee who commences a shift at or after 2:00 am and before 6:00 am will be entitled to an early morning shift allowance of 12.5% (37.5% for casuals) for the shift.
>
> (b) A baking production employee who commences a shift prior to 2:00 am will be entitled to a night shift allowance of 30% (55% for casuals) for the shift.
>
> (c) The rates of pay for Saturday, Sunday and public holidays will be the same as for other shiftworkers.
>
> (d) These allowances apply instead of shiftwork allowances and overtime payments for all hours up to 38 hours per week and nine hours per day."

[92] VANA sought to add newspaper delivery drivers to the early morning shift provisions in clause 30.4(a) and (b). Their proposed amendments read as follows:

> "30.4 Baking production employees and newspaper delivery drivers – Early morning shifts
>
> (a) A baking production employee or a newspaper delivery driver employed by a newsagent who commences a shift at or after 2:00 am and before 6:00 am will be entitled to an early morning shift allowance of 12.5% (37.5% for casuals) for the shift.
>
> (b) A baking production employee or a newspaper delivery driver employed by a newsagent who commences a shift prior to 2:00 am will be entitled to a night shift allowance of 30% (55% for casuals) for the shift."
>
> [No change to subclause (c) and (d)]

Clause 30.4: Early morning bakery shift

[93] The current clause is shown at paragraph 91.

[94] The ARA proposed that the 12.5% loading to apply only between 2.00 am and 5.00 am (currently 6.00am).[37] Proposed amendments to clause 30.4(a) and (b) are as follows:

> "**(a)** A baking production employee who commences a shift at or after 2.00am will be entitled to an early morning shift allowance of 12.5% (37.5% for casuals) from the commencement of their ~~for the~~ shift until the commencement of ordinary hours at 5.00am.
>
> **(b)** A baking production employee who commences a shift prior to 2.00am will be entitled to an night shift allowance of ~~30%~~ 12.5% (~~55%~~ 37.5% for casuals) ~~for the shift~~ from the commencement of their shift until the commencement of ordinary hours at 5.00am."
>
> [No change to subclauses (c) and (d)]

3.3 *Food, Beverage and Tobacco Manufacturing Award 2010*

New clause: Annualised salaries

[95] BIAQ also sought a new provision permitting an employer to pay an employee an annual salary in lieu of wages, allowances, penalty payments, overtime, shiftwork payments and annual leave loading - subject to a no disadvantage condition and annual review:

> "21. Annualised salaries
>
> 21.1 Annual salary instead of award provisions
>
> (a) An employer may pay an employee an annual salary in satisfaction of any or all of the following provisions of the award:
>
> (i) Clause 20- Classifications and adult minimum wages;
>
> (ii) Clause 26 -Allowances and special rates
>
> (iii) Clause 31 -Special provisions for shiftworkers
>
> (iv) Clause 33 - Overtime
>
> (v) Clause 34.5- Annual leave loading
>
> (b) Where an annual salary is paid the employer must advise the employee in writing of the annual salary that is payable and which of the provisions of this award will be satisfied by payment of the annual salary.
>
> 21.2 Annual salary not to disadvantage employees

(a) The annual salary must be no less than the amount the employee would have received under this award for the work performed over the year for which the salary is paid (or if the employment ceases earlier over such lesser period as has been worked).

(b) The annual salary of the employee must be reviewed by the employer at least annually to ensure that the compensation is appropriate having regard to the award provisions which are satisfied by the payment of the annual salary.

21.3 Base rate of pay for employees on annual salary arrangements

For the purposes of the NES, the base rate of pay of an employee receiving an annual salary under this clause comprises the portion of the annual salary equivalent to the relevant rate of pay in clause 17- Minimum weekly wages and excludes any incentive-based payments, bonuses, loadings, monetary allowances, overtime and penalties."

3.4 *Fast Food Industry Award 2010*

[96] BIAQ and the NRA sought new provisions permitting an employer to pay an employee an annual salary in lieu of other current entitlements including wages, allowances, penalty payments, overtime, shiftwork payments and annual leave loading. In some proposals these arrangements would be subject to a no disadvantage caveat and annual review.

BIAQ proposal

"18. Annualised salaries

18.1 Annual salary instead of award provisions

(a) An employer may pay an employee an annual salary in satisfaction of any or all of the following provisions of the award:

(i) Clause 17 - Minimum weekly wages;
(ii) Clause 19 - Allowances
(iii) Clause 26 - Overtime (including penalty rates, refer to Clause 26.5- Penalty rates)
(iv) Clause 28.3 - Annual leave loading

(b) Where an annual salary is paid the employer must advise the employee in writing of the annual salary that is payable and which of the provisions of this award will be satisfied by payment of the annual salary.

18.2 Annual salary not to disadvantage employees

(a) The annual salary must be no less than the amount the employee would have received under this award for the work performed over the year for which the salary is paid (or if the employment ceases earlier over such lesser period as has been worked)."

NRA proposal

"20. Annualised salaries

(a) An employer may pay an employee an annual salary in satisfaction of any or all of the following provisions of the award:

(i) clause 17 & 18—Minimum weekly wages and Junior Rates;
(ii) clause 21—Allowances;
(iii) clause 27 – Hours of Work
(iv) clause 28—Overtime and penalty rates;
(vi) clause 30.3—Annual leave loading; and
(vii) clause 32.3 – Compensation for work on a public holiday.

(b) Where an annual salary is paid the employer must advise the employee in writing of the annual salary that is payable and which of the provisions of this award will be satisfied by payment of the annual salary.

Annual salary not to disadvantage employees

(c) The annual salary must be no less than the amount the employee would have received under this award for the work performed over the year for which the salary is paid (or if the employment ceases earlier over such lesser period as has been worked).

(d) The annual salary of the employee must be reviewed by the employer at least annually to ensure that the compensation is appropriate having regard to the award provisions which are satisfied by the payment of the annual salary.

Base rate of pay for employees on annual salary arrangements

(e) For the purposes of the NES, the base rate of pay of an employee receiving an annual salary under this clause comprises the portion of the annual salary equivalent to the relevant rate of pay in clause 16—Minimum weekly wages and excludes any incentive-based payments, bonuses, loadings, monetary allowances, overtime and penalties."

Clause 26: Overtime:

[97] The overtime clause currently reads as follows:

"26. Overtime

The rate of overtime shall be time and a half for the first two hours on any one day and at the rate of double time thereafter, except on a Sunday which shall be paid for at the rate of double time and on a Public Holiday which shall be paid

for at the rate of double time and a half. Casual employees shall be paid 275% on a Public Holiday.

26.1 An employee shall be paid overtime for all work as follows:

(a) In excess of:

(i) 38 hours per week or an average of 38 hours per week averaged over a four week period; or

(ii) five days per week (or six days in one week if in the following week ordinary hours are worked on not more than four days); or

(iii) eleven hours on any one day; or

(b) Before an employee's regular commencing time on any one day; or

(c) After the prescribed ceasing time on any one day; or

(d) Outside the ordinary hours of work; or

(e) Hours worked by part-time employees in excess of the agreed hours in clause 12.2 or as varied under clause 1.1."

BIAQ proposal

[98] BIAQ sought an amendment to overtime pay to time and a half for the first three hours (currently two hours) and double time thereafter.

[99] It also sought to insert a new clause 26.6 providing that overtime is not compounded:

"26.6 For the purposes of the penalties and loadings in clause 26- Overtime, the casual loading is not compounded."

[100] BIAQ also sought a variation to provide that where time off in lieu is substituted for overtime by mutual agreement or at the request of an employee, it is paid at ordinary hours (currently penalty equivalent):

"26.3 Time off instead of payment

(a) Time off instead of payment for overtime may be provided if mutually agreed between the employer and employee.

(b) Such time off will be taken at a mutually convenient time and within four weeks of the overtime being worked or, where agreed between the employee and the employer may be accumulated and taken as part of annual leave.

(c) Overtime taken as time off during ordinary hours must be taken at the ordinary time rate, that is an hour for each hour worked."

NRA proposal

[101] NRA sought the following variations:

- Deletion of reference to public holiday rates of pay for casual employees on the basis that this should be dealt with in the public holidays clause.
- Variation to provide that overtime provisions do not apply to casual employees (this also includes a variation to clause 25—Hours of Work.
- Variation to clauses 26.1(b) and (c) to amend wording to provide consistent terms throughout the award.
- Sought variation to clause 26.1 to clarify that overtime is calculated on a daily basis.

[102] The proposed amendments are:

"26. Overtime

The rate of overtime shall be time and a half for the first two hours on any one day and at the rate of double time thereafter, except on a Sunday which shall be paid for at the rate of double time and on a Public Holiday which shall be paid for at the rate of double time and a half. ~~Casual employees shall be paid 275% on a Public Holiday.~~

26.1 ~~An~~ Full-time and part-time employee~~s~~ shall be paid overtime for all work as follows:

(a) In excess of:

(i) 38 hours per week or an average of 38 hours per week averaged over a four week period; or

(ii) five days per week (or six days in one week if in the following week ordinary hours are worked on not more than four days); or

(iii) eleven hours on any one day; or

(b) Before an employee's regular rostered commencing time on any one day; or

(c) After the prescribed rostered ceasing time on any one day; or

~~(d) Outside the ordinary hours of work; or~~

(d) Hours worked by part-time employees in excess of the agreed hours in clause 12.2 or as varied under clause 1.1.

Overtime is calculated on a daily basis."

Clause 26.5 - Penalty rates:

[103] The current clause reads as follows:

"26.5 Penalty rates

(a) Evening work Monday to Friday (excluding shiftwork)

(i) A loading of 10% will apply for ordinary hours of work within the span of hours between 9.00 pm and midnight, and for casual employees this loading will apply in addition to their 25% casual loading.

(ii) A loading of 15% will apply for ordinary hours of work after midnight, and for casual employees this loading will apply in addition to their 25% casual loading.

(b) Saturday work (excluding shiftwork)

A loading of 25% will apply for ordinary hours of work within the span of hours on a Saturday, and for casual employees an additional 25% on top of the casual rate.

(c) Sunday work

(i) A 50% loading will apply for all hours of work on a Sunday for full-time and part-time employees.

(ii**)** A 75% loading will apply for all hours of work on a Sunday for casual employees, inclusive of the casual loading."

Ai Group proposal

[104] The Australian Industry Group (Ai Group) proposed the following variations:

- To vary clause 26.5(a)(i) to alter the span of hours for penalty rates applying to evening work from Monday to Sunday such that a loading of 10% applies between 10.00pm and midnight and 15% between midnight and 5.00am (currently 10% between 9.00pm and midnight and 15% after midnight applies Monday to Friday).
- Deletion of clauses 26.5(b) and (c) which provide for penalty rates on the weekend
- Variation to clause 26.5(a)(ii) to specify the time at which penalty rate ceases (5.00am).

[105] The proposed amendments to the clause would read as follows:

"26.5 Penalty rates

(a) Evening work Monday to Sunday

(i) A loading of 10% will apply for ordinary hours of work within the span of hours between 10.00 pm and midnight, and for casual employees this loading will apply in addition to their 25% casual loading.

(ii) A loading of 15% will apply for ordinary hours of work after midnight, and before 5am and for casual employees this loading will apply in addition to their 25% casual loading.

~~(b) Saturday work (excluding shiftwork)~~

~~A loading of 25% will apply for ordinary hours of work within the span of hours on a Saturday, and for casual employees an additional 25% on top of the casual rate.~~

~~(c) Sunday work~~

~~(i) A 50% loading will apply for all hours of work on a Sunday for full-time and part-time employees.~~

~~(ii) A 75% loading will apply for all hours of work on a Sunday for casual employees, inclusive of the casual loading.~~"

NRA proposal

[106] The NRA also sought to vary clause 26.5(a)(ii) to specify the time at which penalty rate ceases (5.00am).[38]

[107] The NRA sought deletion of clauses 26.5(b) and (c) which provide for penalty rates on the weekend as follows:

"26.5 Penalty rates

(a) Evening work Monday to ~~Friday~~ Sunday ~~(excluding shiftwork)~~

(i) A loading of 10% will apply for ordinary hours of work within the span of hours between 10~~9~~.00 pm and midnight, and for casual employees this loading will apply in addition to their 25% casual loading.

(ii) A loading of 15% will apply for ordinary hours of work after midnight and before 6.00am, and for casual employees this loading will apply in addition to their 25% casual loading.

~~(b) Saturday work (excluding shiftwork)~~

~~**(i)** A loading of 25% will apply for ordinary hours of work within the span of hours on a Saturday, and for casual employees an additional 25% on top of the casual rate.~~

~~(c) Sunday work~~

~~**(i)** A 50% loading will apply for all hours of work on a Sunday for full-time and part-time employees. A 75% loading will apply for all hours of work on a Sunday for casual employees, inclusive of the casual loading.~~"

BIAQ proposal

[108] BIAQ sought the following:

- Variation to clause 26.5(a)(ii) to specify the time at which penalty rate ceases (5.00am). (same as Ai Group proposal)

- Clause 26.5 be renumbered as new clause 26 or placed under clause 25 - Hours of Work.
  (Sought by BIAQ.)

- Variation to clauses 26.5(a) and (b) to remove reference to shiftwork in heading.

Group Training Australia proposal

[109] Group Training Australia (GTA) sought a variation to clause 26.5(a)(ii) to specify the time at which penalty rate ceases:

"(ii) A loading of 15% will apply for ordinary hours of work after midnight and before 6.00 am, and for casual employees this loading will apply in addition to their 25% casual loading."

Clause 13: Minimum Daily Engagement - Casuals

[110] The existing provision reads as follows:

"13.4 The minimum daily engagement of a casual is three hours."

[111] The NRA proposed to vary clause 13.4 to reduce minimum daily engagement from three hours to two hours:

"13.4 The minimum daily engagement of a casual is ~~three~~ two hours."

[112] The NRA also sought to insert a new clause 13.5 to provide for minimum daily engagement of 1.5 hours for certain secondary students in line with clause in the *General Retail Industry Award 2010* as follows:

"13.5 The minimum daily engagement of a casual is two hours, provided that the minimum engagement period for an employee will be 1.5 hours if all of the following circumstances apply:

(a) the employee is a full-time secondary school student; and

(b) the employee is engaged to work on a day which they are required to attend school; and

(c) the employee agrees to work, and a parent or guardian of the employee agrees to allow the employee to work, a shorter period than three hours; and

(d) employment for a longer period than the period of the engagement does not meet the needs of either party because of the operational requirements of the employer or the unavailability of the employee."

3.5 *Hair and Beauty Industry Award 2010*

New Clause: Annualised salaries

[113] The Hair and Beauty Industry Association (HBIA) sought a new clause 21 permitting an employer to pay an employee an annual salary in lieu of wages, allowances, penalty payments, overtime, shiftwork payments and annual leave loading, subject to a no disadvantage caveat and annual review:

"21. Annualised salaries

21.1 An employer may pay an employee an annual salary in satisfaction of any or all of the following provisions of the award:

(i) clause 17 & 18—Minimum weekly wages and Junior Rates;
(ii) clause 20—Allowances;
(iii) clause 27—Hours of Work
(iv) clause 29—Overtime and penalties;
(v) clause 30—Shiftwork; and
(vi) clause 32.3—Annual leave loading.

21.2 Where an annual salary is paid the employer must advise the employee in writing of the annual salary that is payable and which of the provisions of this award will be satisfied by payment of the annual salary.

21.3 Annual salary not to disadvantage employees

(a) The annual salary must be no less than the amount the employee would have received under this award for the work performed over the year for which the salary is paid (or if the employment ceases earlier over such lesser period as has been worked).

(b) The annual salary of the employee must be reviewed by the employer at least annually to ensure that the compensation is appropriate having regard to the award provisions which are satisfied by the payment of the annual salary.

21.4 Base rate of pay for employees on annual salary arrangements

(a) For the purposes of the NES, the base rate of pay of an employee receiving an annual salary under this clause comprises the portion of the annual salary equivalent to the relevant rate of pay in clauses 17, 18, 19 and 20 —Minimum weekly wages and excludes any incentive-based payments, bonuses, loadings, monetary allowances, overtime and penalties.

21A Alternative Remuneration System

An employer and employee may agree to implement an alternative system of remuneration to that provided by clauses 17, 18, 19 and 20 subject to the following conditions:

(a) the employee's duties include the sale of products or services;

(b) penalty rates in clause 31 of this award will not be payable to employees who are employed under this system of remuneration;

(c) the commission arrangement must be clearly defined and include projection of what commission the employee may earn if particular sales targets are met;

(d) the terms of the alternative remuneration system must be fully explained to the employee before implementation including a statement of the wage component forgone and an estimate of penalty rate earnings forgone;

(e) the employee must agree to be remunerated under the alternative system;

(f) the employee must be able to opt out of the alternative system after the system has been in place for a period of 12 months and at 12 monthly intervals after that;

(g) the alternative remuneration system must comprise a base rate component and a commission component;

(h) the base rate component for an employee 21 years and over shall be not less than the adult minimum wage. The base rate component for an employee under 21 years shall be the same proportion of the adult minimum wage as set out in the junior rates scale.

(i) For the purposes of annual leave, personal leave and overtime payments employees will be paid the base rate of pay which would otherwise."

Clause 31: Overtime and weekend penalties

[114] The current clause 31.2 in the award is:

"31.2 Overtime and penalty rates

(a) Overtime hours worked in excess of the ordinary number of hours of work prescribed in clause 28.2 are to be paid at time and a half for the first three hours and double time thereafter.

(b) Saturday work

A loading of 33% will apply for ordinary hours of work for full-time, part-time and casual employees within the span of hours on a Saturday.

(c) Sunday work

A 100% loading will apply for all hours of work for fulltime, part-time and casual employees on a Sunday."

[115] HBIA sought a variation to reflect the application of overtime provisions to full–time employees only, and removal of clauses 31.2(b) and (c) which provide penalty rates for work performed on weekends (currently 33% on Saturdays and 100% on Sundays). The proposed amendments to the clause would read as follows:

"31.2 Overtime and penalty rates

(a) Overtime hours worked by full time employees in excess of the ordinary number of hours of work prescribed in clause 28.2 are to be paid at time and a half for the first three hours and double time thereafter.

~~(b) Saturday work~~

~~A loading of 33% will apply for ordinary hours of work for full-time, part-time and casual employees within the span of hours on a Saturday.~~

~~(c) Sunday work~~

~~A 100% loading will apply for all hours of work for full-time, part-time and casual employees on a Sunday."~~

4. THE EVIDENCE AND FINDINGS

4.1 General observations

[116] Various parties have led evidence in relation to these matters. That evidence is set out in the following reports provided to this Full Bench:[39]

- *Report to the Full Benches in relation to the Hospitality Industry (General) Award 2010* by Gooley C;[40]
- *Report to the Full Benches in relation to the General Retail Industry Award 2010 and the Food, Beverage and Tobacco Manufacturing Award 2010* by Hampton C;[41] and

- *Report to the Full Benches in relation to the Fast Food Industry Award 2010 and the Hair and Beauty Industry Award 2010* by Jones C.[42]

[117] We have had regard to those reports, including the submissions of the parties reflected therein, and to the final submissions made to us.

[118] In assessing the evidence in these matters we have also been mindful of the approach adopted by the Full Bench in *Victorian Employers' Chamber of Commerce and Industry*.[43] Although in a different statutory context, the following observation is apposite to our task:

> "[13] In *National Retail Association Limited* (2010) 199 IR 258) a Full Bench upheld a decision of Vice President Watson rejecting an application under s.157(1) on the basis that there was insufficient evidence to establish that the variation sought was necessary to achieve the modern awards objective.
>
> [14] That is also the case with the evidence here. Although the rules of evidence do not apply to Fair Work Australia that means only that there is less constraint on Fair Work Australia, than exists in the Courts, on the range of evidence that it may admit. The Tribunal nevertheless requires evidence (or uncontested submission - *R v Commonwealth Conciliation and Arbitration Commission and Others; Ex parte The Melbourne and Metropolitan Tramways Board* (1965) 113 CLR 228 at 243 (per Barwick CJ) and 252 (per Menzies J)) sufficient to allow it to make any jurisdictional findings that condition the exercise of power sought in the originating application."

[119] The need to advance probative evidence in support of an application to vary a modern award is particularly important in the context of the Transitional Review. The Transitional Review does not involve a fresh assessment of modern awards unencumbered by previous Tribunal authority, and, as we set out in section 2 of this decision, many of the aspects of the applications before us were the subject of consideration by the AIRC in the award modernisation process. It is also important to recognise that we are dealing with a system in transition. The transitional arrangements in modern awards continue to operate until 1 July 2014. The fact that the transition to modern awards is still occurring militates against the adoption of broad changes to modern awards as part of the Transitional Review. Such changes are more appropriately dealt with in the 4 year review, after the transition process has completed. As we have indicated the Transitional Review is narrower in scope than the 4 yearly reviews provided in s.156 of the Act and, as the June 2012 Full Bench stated, in the context of the Transitional Review:

> "...the Tribunal is unlikely to revisit issues considered as part of the Part 10A award modernisation process unless there are cogent reasons for doing so, such as a significant change in circumstances which warrants a different outcome."[44]

[120] In this regard it is important to observe at the outset that in respect of some of the applications before us, little or no probative evidence was led in support of those applications.

[121] There was no evidence led in relation to the AAA application concerning the Hospitality Award or the P&P and BIAQ applications concerning the General Retail Award and the Food Manufacturing Award.

[122] There is little or no evidence dealing with aspects of the penalty rates and hours of work/overtime elements of the applications other than the proposed reduction in some of the existing penalty rates in relation to the General Retail and Fast Food awards.

[123] There is little or no evidence dealing with the proposed penalty rate reductions in the Hospitality, Food Manufacturing, and Hair and Beauty awards.

[124] We propose to first set out the scope of the evidence before us and then canvass that evidence under the following themes:

- nature and circumstances applicable to each industry;
- the impact of 'unsociable hours' on employees;
- the impact of the modern award penalty rates upon employers; and
- penalty rates in relevant enterprise instruments.

4.2 Scope of the evidence

[125] In relation to the hospitality, retail and fast food industries, the employer interests led evidence primarily from owners, managers or human resources personnel from a variety of employers, including employers from some regional locations. Evidence was also led from a hairdressing employer in Victoria.

[126] The ARA and Ai Group also led expert evidence regarding various aspects touching upon these applications.

[127] The evidence from the SDA in the retail industry was predominately made up of the experience, observations and views of senior officials of the union based upon their dealings with the retail industry and the interests of their members. That evidence in particular went to the issue of the voluntary nature of work on public holidays under legislation, primarily in NSW, and under most collective industrial instruments negotiated by the SDA.[45]

[128] The SDA led evidence from one of its members in the retail industry.

[129] The SDA and United Voice also led expert evidence regarding various aspects touching upon these applications.

[130] All of the evidence is outlined in the reports of Gooley C, Hampton C and Jones C and we do not intend to repeat it here. We would however make the following general observations.

[131] The direct evidence from the employers, although limited, is relevant and of assistance. Some of that evidence was speculative and in our view tended to overstate the extent of the financial impact of some of the modern awards. However, there is evidence that illustrates some of the employment and operational responses that have been, or will be, taken given the changing penalty rates regimes in at least some of the awards being considered.

[132] The SDA evidence from the various officials is of assistance in terms of the discrete issues dealt with.

[133] In relation to the expert evidence and reports provided by the parties we would observe that a number of parties provided what might be described as attitudinal surveys from members. This includes material provided by both the AHA and United Voice in relation to the Hospitality Award, the ARA in relation to the General Retail Award and elements of the Deloitte report for the Ai Group. This material is of some assistance in providing some broad context to our consideration of the various claims but we are not persuaded that the material is sufficiently rigorous such as to provide a basis for making any substantive findings.

[134] The Ai Group Deloitte Access Economics report[46] had two major elements:

- a survey focussed on businesses directly covered by the Fast Food Award - typically smaller sized businesses not covered by a collective agreement; and

- consultations focussed on businesses indirectly affected by the Fast Food Award through the workplace bargaining process - typically larger sized companies and franchises that are covered by collective or other agreements.

[135] The survey responses indicated that for around a third of respondents the modern award had resulted in reduced employment and hours of employment, with a majority of respondents indicating no change (or to a limited degree an increase) in employment , with around 10% responding don't know. The report records that 49% of respondents reported "some" or "a lot" of impact on business viability, with 51% reporting "little" or "no" impact.

[136] The consultations outcomes reported indicated that those consulted (representatives of McDonalds, KFC and Pizza Hut, Hungry Jacks and Red Roster, Chicken Treat and Oporto) considered that the Fast Food Award is substantially more generous than the set of state and territory and enterprise level awards that existed prior to its introduction, expressing a concern that the Fast Food Award penalty rate provisions for evening and weekend work, would set a more generous benchmark than previous arrangements. Such an impact needs to be considered in the context of the package of terms and conditions reflected within agreements. Those consulted speculatively reported 'potential strategies' for dealing with cost impacts arising from the award, each involving risks and challenges.

[137] The Deloitte Access Economics report provides useful broad information but the results should be considered with caution in light of:

- methodological uncertainties,[47] including potential respondent bias;

- an element of speculative response in relation to the impact of the modern award, for example, in circumstances where it has no current application to respondents in light of the continuing operation of enterprise agreements and employer perceptions of the reasons their employees undertake work at particular times;

- an inability to distinguish, where relevant and particularly in relation to the consultations undertaken, between the impact of the modern award against pre-modern award instruments, on one hand, and the terms of operative enterprise agreements approved or certified in the past.

[138] We would add that the research material contained in the report from Dr Sands, the Deloitte report and the evidence of Mr Kirchner and Professor Gordon for the SDA does contain some objective evidence which is relevant for present purposes.

[139] In terms of the evidence of Dr Woodman, Professor Craig and Associate Professors Charlesworth and Strazdins for the SDA, this is relevant material concerning the impact upon employees of working at different times.

[140] In relation to the conflict in the evidence of some of the experts, some of Professor Gordon's criticisms of the report provided by Dr Sands were overly critical and his commentary on the Deloitte report reflected a different conceptual approach to the assessment of survey material.

[141] The Ai Group and SDA also tendered reports of IBISWorld concerning takeaway food retailing, the fast food industry and hairdressing and beauty salons in Australia.

[142] We now turn to our consideration of the evidence under the various themes previously identified.

4.3 Nature and circumstances applicable to each industry

(i) Hospitality Industry Award 2010

[143] There is little cogent evidence going to the overall nature and circumstance of this industry. There is some 'attitudinal' survey evidence from the AHA about the impact of additional public holidays (Giuseppe and Sweetman) and part-time employment provisions (Sweetman).

(ii) General Retail Industry Award 2010

[144] Many of the employers who are covered by the modern award are subject to increasing Sunday penalty rates through the transitional arrangements. There is no evidence as to how the particular different levels of the transitional arrangements have impacted upon employment, costs, and profitability.

[145] Sunday trading is now well established as part of normal trading arrangements for many sectors of the retail industry. This was the case at the time of the making of the General Retail Award but now operates more broadly.

[146] There is some conflict between the evidence of Dr Sands and Mr Kirchner. That conflict goes in particular to the degree to which some relatively recent decline in the retail industry is part of an ongoing negative trend (Sands) or a correction following abnormally high growth in earlier years (Kirchner). In reality, this depends upon the segment of the retail industry being considered where differential performance is evident particularly between the food retailers and some of the specialist non-grocery sectors.

[147] The retail industry remains broadly robust and generally profitable. There have been some changes in the retail industry generally, including as a result of some incremental increase in online sales and more recent economic challenges facing the Australian economy

more generally. This has led to pressure on prices and overall sales volumes (with the exception of food retailers whose volumes have generally increased) and upon employment growth when compared to previous trends.

[148] Although trading conditions have tightened for many retailers in recent years, there has not been any severe deterioration in overall economic conditions in the retail industry since the General Retail Award commenced operation in 2010.

(iii) Fast Food Industry Award 2010

[149] Most of the major employers in the industry are currently subject to pre-modern enterprise based industrial instruments and the modern award is yet to apply to them.

[150] The major employers are dominated by franchise arrangements or operate under a common trademark that operates throughout Australia.

[151] The fast food industry generally operates seven days a week and on public holidays, and sometimes 24 hours a day. Peak periods for the fast food industry are often during times and on days when penalty rates apply.

[152] There are large numbers of young people employed on a casual basis in the fast food industry.

[153] There would not appear to be any significant changes in the fast food industry not contemplated at the time of the award modernisation process.

(iv) Hair and Beauty Industry Award 2010

[154] There is little evidence concerning the general trading, employment and other circumstances applying in this industry.[48]

[155] There is no evidence of any significant change since the making of the modern award.

4.4 The impact of 'unsociable' hours on employees

[156] For many employees in the community, the performance of work on evenings, nights and weekends does have some adverse effects and consequences for their personal, family and social lives and for the community generally. The adverse effects and consequences will vary depending upon individual circumstances and there is some evidence that for some employees these are most pronounced in relation to late evening and night work (particularly shiftwork) and Sunday work. [49]

[157] Young people are not immune from such adverse effects and consequences associated with the performance of work on evenings, nights and weekends. However, the availability and preference for work of young people at these times is impacted by personal circumstances and any study commitments.

[158] Given the nature of the evidence, it is difficult to draw more definitive conclusions about the impact on employees covered by the particular awards before us.

[159] There are significant numbers of young employees engaged in each of the modern awards under consideration.

[160] There is evidence to indicate that existing penalty rates for Sundays, including those presently applying due to transitional arrangements, are adequate to attract sufficient staff.

4.5 The impact of the modern award penalty rates upon employers

[161] Employers have and will adjust staffing numbers, utilise non-award employees in family businesses, use a higher proportion of junior employees, and modify trading hours and services where feasible to reduce the cost impact of trading on days and at times when penalty rates apply.

[162] The higher the costs of employment, the greater the incentive to adopt such strategies. However, there is no evidence regarding the impact of the different penalty payments that have been applying as a result of the transitional provisions of the awards. Further, there is no reliable evidence allowing an assessment to be made as to whether a particular reduction in the Sunday (or other) penalties under the relevant modern awards would be sufficient to influence the outcomes observed above.

[163] The General Retail Award has increased the relative cost of employment on Sundays for many retail employers, particularly in NSW and Queensland.

[164] There have also been some reductions in other relative employment costs as a result of the General Retail Award, in particular for casual employees in Victoria and in most States where employees are engaged in the evenings (beyond the traditional late trading night previously contemplated by most former instruments). In this respect we note that the SDA report[50] provided a useful summary of the different hours of work and penalty provisions applying prior to the General Retail Award. However, we observe that some of the rosters overstate the extent of evening work and understate the extent of Sunday work when considered in the context of normal retail trading patterns. As a consequence we have exercised caution in considering the overall cost assessment conclusions from that material.

[165] The full application of the Fast Food Award will increase the relative cost of employment on weekends for many of the major employers who are currently subject to preserved enterprise awards or agreements. The transitional provisions of the Award will also mean that many other employers in this industry are facing increasing relative costs for this work.

[166] There is little material allowing an overall assessment of the impact of the Hospitality Award.

[167] There is little material allowing an overall assessment of the impact of the Hairdressing and Beauty Award.

4.6 Penalty rates in relevant enterprise instruments

[168] Most of the enterprise agreements negotiated by the SDA in the retail industry provide Sunday penalties of 50%. These penalties generally apply to base rates that are higher than the General Retail Award. This usually means that the rates paid on Sundays are lower than the

General Retail Award Sunday rates, however the overall package is more beneficial to employees. Many of the 'SDA' agreements have been negotiated in the context of enterprise awards or other transitional instruments having different conditions than the General Retail Award

[169] Flat 'loaded' rates of pay are a common feature of negotiated outcomes between major industry players and the SDA in the fast food industry. The above observations in relation to comparative level of weekend penalties and the role played by safety net instruments other than the modern award also generally apply to many enterprise agreements made in the fast food sector.

[170] Many of the transitionally preserved enterprise awards and collective agreements applying to major employers in both the retail and fast food industry have effective weekend loadings that are less than those in the relevant modern awards. These arrangements do not generally apply to the rest of the industry.

5. CONSIDERATION

[171] We propose to firstly deal with those claims which featured most prominently in the evidence and submissions of the parties. It is convenient to refer to these claims as the 'substantive claims'. These claims involve the reduction of penalty rates in the General Retail and Fast Food awards. We will then deal with the other claims before us.

[172] In approaching all of these matters we have considered in particular whether the modern awards concerned achieve the modern awards objective. Further, we have also considered whether the awards are operating effectively, without anomalies or technical problems arising from the Part 10A award modernisation process.

5.1 The substantive claims

[173] The substantive penalty rate claims by the employers, and the position of the SDA and other major parties on each, are as follows.

General Retail Industry Award 2010 - Clause 29.4(a) Evening and Sunday penalties and *Fast Food Industry Award 2010* - Clause 26.5 Penalty Rates

[174] The NRA claim regarding the General Retail Award seeks to remove the existing 25% penalty payments for evening work that presently applies to all non-casual hours and the employers generally seek to provide a penalty of 50% for Sunday work in lieu of the current 100%.

[175] The substantive claims in respect of the Fast Food Award are as follows:

- Varying clause 26.5(a)(i) to alter the span of hours for penalty rates applying to evening work from Monday to Sunday such that a loading of 10% applies between 10.00pm and midnight and 15% between midnight and 5.00am (currently 10% between 9.00pm and midnight and 15% after midnight applies Monday to Friday).

- Deletion of clauses 26.5(b) and (c) which provide for penalty rates on the weekend (currently Saturdays - 25% and Sundays - 50%).

- Variation to clause 26.5(a)(ii) to specify the time at which penalty rate ceases (5.00am/6.00am).

[176] The primary cases in relation to the employers' applications in relation to the General Retail Award were provided by the ARA, NRA and MGA. These organisations contended that the award is not meeting the modern awards objective in relation to penalty rates and should be varied.

[177] In particular, the employers contended that the evidence demonstrated that the existing Sunday penalty rate had the consequence that employers were engaging fewer employees than they would prefer to employ on a Sunday and that the mix of employees engaged on Sundays was less than optimal, in terms of age and experience. It was also submitted that the evidence demonstrated that if the Sunday penalty rate was reduced from 100% to 50% then employers would:

- be willing to offer more hours of work on Sundays; and
- engage employees who actively seek Sunday work.

[178] It was also submitted that in circumstances where the applicable Sunday penalty was lower than that prescribed in the award, employers had no difficulty getting employees to undertake Sunday work.

[179] The employers also contended that the evidence supported the notion that those employers who would be moving to the higher Sunday penalty under the existing transitional arrangements would reduce overall labour hours, the businesses would implement operational changes to minimise the loss of hours, but that those operational changes would represent a less than optimal operational model for those businesses.

[180] It was further submitted that we should place substantial weight on the contents of the Productivity Commission report[51] as it relates to the issue of penalty rates. In that regard the employers contended that penalty rates should be revised to a level where they were sufficient to compensate for the disadvantage of working on Sunday and to encourage sufficient employees to work on that day. In that context, it was suggested that the evidence supported the notion that a 50% penalty rate on Sundays has the greatest impact on employee satisfaction.

[181] The employers also contended that the evidence of the SDA experts regarding the impact of weekend and evening work upon employees was not retail specific and did not support the notion that specific disabilities were experienced by employees in the retail industry in comparison to the wider community. Indeed, they proposed that some of the limited evidence regarding retail employees was more consistent with a finding that retail employees who regularly work on weekends experienced a lower level of work and life interference than the general population who regularly work on weekends.

[182] The ARA, in its final written submissions contended that we should be mindful that despite the procedure of the Transitional Review being application based, the identification of the fair and relevant minimum safety net for retail employees is the function of this Full

Bench. On that basis, it is submitted that we were not precluded from reaching a conclusion on a fair and relevant Sunday penalty rate that lies somewhere between the existing 100% and the 50% penalty sought by the ARA.[52] For our part we agree with the proposition that we are not required to make a decision in relation to an application in the terms provided for (see s.599 of the Act).

[183] An extensive case was advanced in respect of the Fast Food Award, particularly by the Ai Group. The Ai Group accepted that many of the variations it now seeks involve matters that were considered and determined by the AIRC and FWA during the award modernisation process. However, it contends that there are cogent reasons to now make the variations proposed including:[53]

- The Commission was in error when it determined that the NFFR Award was the fast food industry standard when making the Award.

- The Tribunal has material before it now which is considerable and persuasive in nature, and which was not before it in any of the previous proceedings. That evidence shows that:

    - the award has failed to encourage collective bargaining, and to many fast food operators it is a disincentive;

    - the award has failed to promote social inclusion through increased workforce participation, and instead has reduced and will reduce employment opportunities in the industry;

    - the Award has failed to promote flexible modern work practices, and instead is counterintuitive to modern work practices in the Fast Food industry;

    - the Ai Group's proposed amendments will have a positive impact on business in the fast food industry, including on productivity, employment costs and the regulatory burden, and the Award has failed to promote the efficient and productive performance of work; and

    - the Ai Group's proposed amendments will have a positive effect on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

- The ongoing and potential impacts of the award are affecting the viability of businesses in the fast food industry.

- Fast food operators have no effective means of coping with the impacts of the award and the present award was such that the major employers were unable and unwilling to bargain for enterprise agreements with it operating as the safety net.

[184] As a result, the Ai Group contended that the award did not meet the modern awards objective.

[185] In terms of the approach to penalty rates, the Ai Group accepted that the Commission needed to consider both the interests of the employees and those of industry and take a

balanced approach. Further, it contended that the only matter which needs to be determined in this case was whether the proposed variations were justified given the impact of weekend and other work upon the employees in light of their circumstances. In that context, it argued that in the case of the employees in the fast food industry, their demographics were such that penalty rates were not appropriate. Those demographics, and the implications arising from them, were said to include:[54]

- the fast food industry is predominantly made up of young people employed on a casual basis;
- the fast food industry is predominantly made up of young people who are studying, which affects their availability to work;
- because of their out of work commitments, many fast food employees prefer to work evenings and weekends;
- unlike other demographic groups, young people's commitments outside work are related to non-discretionary school activities and other discretionary activities; and
- young people are contributory income earners, not dependent income earners.

[186] The NRA, MGA and some other employer organisations made submissions broadly consistent with the Ai Group position on these matters.

[187] The SDA opposed all elements of these claims.

[188] The primary submission of the SDA in respect of all of the applications made in relation to the relevant awards was that the employers have failed to make out a case for any of the variations proposed. That position was based upon the following contentions:

- Most of the variations proposed concern matters which were dealt with in the award modernisation process or in subsequent applications to vary the terms of the General Retail and Fast Food awards.
- The June 2012 Full Bench decision required the applicants to show that there are cogent reasons for departing from the previous Full Bench decision, such as a significant change in circumstances, which warrant a different outcome. This principle should apply equally in relation to variations sought, the substance of which were dealt with by previous Full Bench decisions in relation to variation applications made subsequent to the making of the modern awards.
- The employers have not adduced evidence of any significant change in circumstances relating to the retail, fast food or hair and beauty industries between when the respective modem awards were made (or when previous award variation applications were determined) and the present time.
- In the absence of establishing a significant change of circumstances, the employers must establish the existence of 'cogent reasons for departing from the previous Full Bench decision.'

- In order to establish 'cogent reasons' of this type, the employers must demonstrate that the previous Full Bench decision, in which the subject of a proposed variation was dealt with, was clearly wrong.

- In order for a Full Bench to conclude that a previous Full Bench decision was clearly wrong, it must form a strong conviction that the earlier decision was erroneous and that the nature of the error can be demonstrated with a degree of clarity by the application of correct legal analysis.

- The employers have not attempted to demonstrate that the previous Full Bench decisions were clearly wrong in the sense described above. There is in any event no such basis for the Full Bench as presently constituted so concluding.

[189] The SDA also submitted that in any event we should be satisfied that the penalty rate provisions which are in issue in this proceeding, are achieving the modern award objective of providing a fair and relevant minimum safety net of terms and conditions, taking into account the matters prescribed by the Act.

[190] The SDA also contended that the fact that an increasing number of employees in one industry may be required to work in evenings and weekends says nothing about the extent and nature of the impact of such work upon those employees. Given the compensatory purpose served by penalty rates, the relevant issue and inquiry is the effect of such hours of work on employees, not the extent to which employers trade at such times.

[191] In relation to the impact upon employees, the SDA contended that work performed on weekday evenings and weekends has adverse consequences and disadvantages employees, their families and the wider community. It argued that the level of interference with work-life balance caused by evening and weekend work does not vary between workers in the retail industry and workers in other industries. The SDA also contended that the nature of these impacts may be different for young employees but they are of the same character, namely: the difficulty generated by such work in enabling workers to synchronise their social and family time with significant others.

[192] These considerations were said to undercut the suggestion by the employers that the nature of work in the retail and fast food industry justifies the elimination or reduction of penalty rates for work performed in the evenings and on weekends.

[193] In relation to the General Retail industry, the SDA contended that there had been no significant changes to the industry since 2010 that would warrant a change in penalty rates. It submitted that the overall economic situation of the retail industry remains very strong and there was no evidence of structural change impacting upon these considerations. Further, it argued that the economic fluctuations of the industry were considered as part of the establishment of the modern award and provided no basis for granting the variations sought.

[194] In relation to the specific issues relating to the Fast Food award, the SDA contended that the reliance placed by the AIRC upon the NFFR Award was appropriate given that it was made in terms which specifically reflected the conditions that applied in New South Wales. In 2003, the NFFR Award was applied as a common rule in Victoria. The fact that at the time of award modernisation the provisions of the NFFR Award were the conditions which applied or

reflected the terms and conditions in the two 'most populous States' was said to be indicative that it reflected industry standards at the time.

[195] The SDA further contended that the NFFR was the product of disputation and litigation over six years following the service of a log of claims in 1994.[55]

[196] In relation to the enterprise awards in the fast food sector, the SDA contended that in the award modernisation process the AIRC chose not to adopt the approach of some of the enterprise awards that contained higher base rates but little or no penalties. It suggested that this was a decision open to the Full Bench on the material before it. The argument for using the enterprise awards in the award modernisation process was 'loud, detailed and clear - but unsuccessful'.[56]

[197] The approach taken by the SDA was adopted by the Australian Council of Trade Unions (ACTU) and the Australian Workers' Union of Employees, Queensland (AWUQ) who also made supporting submissions.

[198] The Australian Government made general submissions applicable to all of the matters before us. It contended that notwithstanding changes in working hours, penalty rates for working unsociable hours and weekends have formed part of Australian workplace regulation for almost 100 years and the central rationale for payment of penalty rates for work performed during unsociable hours, such as on evenings, nights and weekends, remained to compensate employees for the disabilities to which workers who work such hours are subject.

[199] It further contended that at the most general level, those disabilities concern the way in which the performance of work at such times interferes with the personal, social and family life of workers.

[200] The Australian Government submitted that there were not compelling reasons to depart from the current principle that penalty rates should be provided to compensate employees for working these hours, whilst acknowledging the detail of particular provisions is a matter to be determined by the Commission.

[201] The Government further submitted that penalty rates currently specified in modern awards largely reflect provisions found in state awards pre award modernisation. Current penalty rate provisions therefore did not represent a new entitlement or a significant departure from previous award protections.

[202] The Government asserted that in assessing the level of penalty rates for inclusion in modern awards, the AIRC acted in accordance with the modern awards objective, by giving careful consideration to the operational requirements of industries; prevailing arrangements under existing state and federal awards; and the views of employer, employee and industry stakeholders, including through the release of consultation drafts of modern awards, oral and written submissions. It also contended that the AIRC and other State tribunals had not accepted that the deregulation of trading hours of itself justified the elimination or diminution of penalty rates.

[203] Further, as penalty rates were said to represent a significant component of the remuneration of low paid and award-reliant Australian employees, the Government submitted that reducing penalty rates would result in a disproportionate decrease in the remuneration for

these workers and would undermine the longstanding principle of compensation for working unsociable or irregular hours.

[204] The Transitional Review is an opportunity to consider how modern awards are being applied in practice with a view to considering whether they continue to meet the modern award objective. In our assessment of these claims we have considered whether the *General Retail Award 2010* and the *Fast Food Industry Award 2010* achieve the modern awards objective in s.134 and whether they are operating effectively, without anomalies or technical problems arising from the award modernisation process.

[205] For the reasons which follow we are not persuaded that a case has been made to vary the *General Retail Award 2010* or the *Fast Food Industry Award 2010*, in the manner sought by the employers.

[206] Although described in the modern awards as penalty rates, they are in reality a loading which compensates for disabilities. In the modern award context these loadings must recognise the disabilities of working at unsociable times; be sufficient to induce people with appropriate skills to voluntarily work the relevant hours, and be set having regard to whether employers in the particular industry concerned normally trade at such times. These factors and the elements of the modern awards objective need to be balanced and weighed accordingly.

[207] There is evidence that the demand for employees to work on Sundays and at other times when penalties apply remains strong and is increasing in certain sectors. However, to grant the claims advanced here would require a substantial re-balancing of the considerations adopted by the AIRC in the award modernisation process. It would give the operational requirements of the employers primacy over the other elements of the modern awards objective which the Commission is required to take into account, including the needs of the low paid.

[208] The industries under review have relatively low base rates of pay and the remuneration package as a whole arising from the relevant modern awards cannot be properly described as excessive.

[209] We note that in the course of oral argument the Ai Group submitted that s.134(1)(a) was not relevant as there was no evidence that the employees in the Fast Food industry were low paid. This submission was advanced, in part, on the basis that a 'high proportion' of the employees in this industry are 'contributory earners' as opposed to 'dependent earners.' The Ai Group submitted:

> "We accept that there are a lot of award-reliant employees in the industry. However, there are a lot of employees in that industry who are contributory earners to their household and not dependent earners. The distinction is very important because if we're looking at the impact of the award on working families and the impact of the award on people to be able to bring in an income to support themselves, that does not apply to people who are contributory earners; in other words, young people."[57]

[210] Ai Group relied on the evidence of Ms Toth[58] in relation to the high incidence of young employees in the fast food industry. Her evidence, drawn from Australian Bureau of Statistics (ABS) data,[59] was that, as of June 2011, there were 1.3 million Australians aged 15-24 years who were studying full-time, were financially dependent on their parents and lived

with their parents, 559,000 (43%) of whom were employed as well as studying. Another 840,000 Australians aged 15-24 years were nor not financially dependent on their parents and may not have been living with them, 663,000 (79%) of whom were working with an unknown proportion studying full or part-time.

[211] The Australian Retailers Association, whilst conceding that there is a high level of award reliance, did not concede that general retail industry employees are low paid.[60]

[212] We are satisfied that a high proportion of employees in the accommodation and food services and retail industries are low paid. The evidence before us establishes that:

- the incidence of award reliance amongst employees covered by the awards before us is higher than for employees generally, particularly so in relation to the accommodation and food services industries; and

- actual incomes for full-time adults within the relevant industries are at the level of around 70% of average earnings, with employees relatively low paid by comparison to employees generally. This is more pronounced in relation to employees reliant on minimum award wages and occurs notwithstanding the relatively high incidence of work on weekends of employees in the accommodation and food services and retail industries.

[213] We are not persuaded by the Ai Group's submission that s.134(1)(a) is not relevant because a 'high proportion' of the employees concerned are 'contributory earners'. Two points may be made in this regard.

[214] First, despite a high number of 'contributory earners' amongst 15-24 year olds, the ABS evidence cited by Ms Toth establishes that a majority of working 15-24 year olds are not financially dependent upon their parents.

[215] Second, it is not possible or appropriate to determine minimum wages or other terms and conditions of employment by reference to the variety of household circumstances in which employees are found or to make assumptions as to the meeting of the needs of low paid workers within their households. In this regard we note that the Full Bench in *United Voice and the Australian Workers' Union of Employees, Queensland*[61] rejected an employer submission that it should take account of salary packaging arrangements which are widely available to employees in the aged care sector, in determining whether such employees were low-paid.

[216] A consideration of the 'relative living standards and the needs of the low paid' as required by s.134(1)(a) of the Act is clearly relevant in determining the applications before us, to be balanced against the other factors within the modern awards objective.

[217] There is evidence of the impact of the increase in penalty rates arising from the award modernisation process but that impact is the inevitable result of the swings and roundabouts approach of that process and not the result of changes since the modern awards were made.

[218] There is also evidence to support the continuation of 'penalty' payments for work on weekends and, where already established, on late evenings, in that there are disabilities

associated with work at unsociable times and recognition through additional rates is generally warranted as part of the modern award safety net.

[219] We have considered whether the level of 'penalty' for work on Sundays in the Retail Award is disproportionate to the disability suffered by employees in comparison to other times (such as on Saturdays). The level of penalty may also be having an impact on the manner in which the employers are conducting their businesses and this in turn has some impact on employment opportunities. There is also evidence which suggests that 'double time' on Sundays is not necessarily required as an incentive for employees to work on Sundays.

[220] These considerations are all directly relevant to the modern awards objective and accordingly we have taken them into account.

[221] The fact that the transitional arrangements are still unfolding is also a relevant consideration. As stated in the June 2012 Full Bench decision:

> "[91] It is important to recognise that we are dealing with a system in transition. Item 6 of Schedule 5 forms part of transitional legislation which is intended to facilitate the movement from the WR Act to the FW Act. The Review is a "one off" process required by the transitional provisions and is being conducted a relatively short time after the completion of the award modernisation process. The transitional arrangements in modern awards continue to operate until 1 July 2014. The fact that the transition to modern awards is still occurring militates against the adoption of broad changes to modern awards as part of the Review. Such changes are more appropriately dealt with in the 4 year review, after the transition process has completed. In this context it is particularly relevant to note that s.134(1)(g) of the modern awards objective requires the Tribunal to take into account:
>
> > "the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia...[62]"

[222] Any significant change to award provisions during the transition period has the potential to further complicate the transition process and add to the regulatory burden upon business (ss.134(1)(f) and (g)).

[223] Importantly in terms of the present exercise, the penalty rates form part of the package determined at the time of the making of these modern awards. The differential impact being experienced particularly in NSW and the ACT, and to some extent in Queensland, on the Sunday penalty rates in the General Retail Award is a result of the removal of interstate differentials and a direct consequence of the award modernisation process. For the larger employers in the retail and fast food industries, the basic complaint is that their previous enterprise awards had more beneficial arrangements and the operation of the transitional provisions of the Act will mean that those benefits are to be lost in favour of the modern award industry standard.

[224] The framework of the transitional provisions for enterprise instruments is provided by the Transitional Provisions Act and the continuation of these preserved instruments is a matter to be considered within that framework.[63]

[225] There is some indication that the general economic climate is having an impact in the particular industries under review. Trading conditions are tight and this is having an impact upon margins and employment levels. While these matters are relevant to our consideration of the modern award objective they can also be considered as part of the Annual Wage Review.

[226] In the submissions advanced in support of the variations to the Fast Food award there was a particular focus on the role played by the NFFR Award in the award modernisation process and the various enterprise awards which apply to some of the major employers.

[227] As outlined earlier, the appropriateness of the NFFR Award and the relevance of the enterprise awards were matters expressly considered by the AIRC and FWA when making the Fast Food Award. We have considered whether the issues now raised by the employers demonstrate cogent reasons to revisit that approach but we are not persuaded that the earlier AIRC and FWA Full Benches were wrong in their reference to the NFFR Award when establishing the Fast Food Award.

[228] There was also considerable tension between the parties in the General Retail Award as to the import of the 'SDA' enterprise agreements in the retail sector.

[229] The approach adopted in enterprise agreements and preserved enterprise awards are relevant considerations in this Transitional Review, however we also note that care should be exercised when assessing that material in the context of reviewing the modern award safety net. Enterprise agreements are negotiated by parties and approved by the Commission against various statutory criteria. These include the better off overall test in s.193. However many of the instruments being referred to in these proceedings are based on safety net instruments other than the relevant modern awards. Further, and in any event, in approving agreements the Commission is not making an assessment as to whether the instrument meets the modern awards objective or would be appropriate in circumstances other than those applying at the enterprise concerned.

[230] In terms of collective agreements made under former statutory arrangements, the existence of enterprise awards in the periods 1993-2006 meant that the no disadvantage test was assessed against these awards. In the period 2006-2007 agreements could effectively exclude all protected award conditions. Between 2007 and 2009 a fairness test applied and between 2009 and 2010 a no disadvantage test applied, but again often based on the relevant enterprise awards.

[231] We are also conscious of the fact that s.134(1)(b) requires us to take into account the need to encourage collective bargaining. Some employer submissions, particularly in relation to the Fast Food Award, asserted that the current award provisions acted as a disincentive to collective bargaining. To a significant extent these submissions are speculative as the award is yet to apply to all employers. The fact that the system is in transition makes it difficult to assess the actual impact of the Fast Food Award on collective bargaining.

[232] Various employer submissions contended that the award variations sought would have a positive impact on employment growth (and hence promote social inclusion through increased workforce participation); productivity; competitiveness and the efficient and productive performance of work. These are all relevant considerations and are embraced within the factors we are required to take into account as part of the modern awards objective.

[233] The essence of the employers contentions, (particularly in the retail sector), was that the existing penalty rate provisions had the consequence that employers were engaging fewer employees than they would prefer to employ on a Sunday and that the mix of employees engaged on a Sunday, in terms of age and experience, was less than optimal. It was submitted that if the Sunday penalty rate was reduced then employers would be willing to offer more hours of work on Sundays and the mix of employees engaged would better promote the efficient and productive performance of work.

[234] While there is some evidence in support of elements of these contentions, it is far from compelling. There is a significant 'evidentiary gap' in the cases put. It is particularly telling that there is no reliable evidence regarding the impact of the differing Sunday (or other) penalties when applied upon actual employer behaviour and practice. This is a most unfortunate omission given that the transitional provisions, which rely upon the differing NAPSA entitlements, provide an opportunity for evidence to be led from employers operating in multiple States to provide these comparisons. There is also no reliable evidence about the impact of the existing differential Saturday and Sunday penalties upon employment patterns, operational decisions and business performance.

[235] We are not persuaded that a sufficient case has been made out to warrant varying the relevant awards in the manner proposed by the employers. While aspects of the applications before us are not without merit - particularly the proposals to reassess the Sunday penalty rate in light of the level applying on Saturdays - the evidentiary case in support of the claims was, at best, limited.

[236] The 4 yearly review of these awards is to commence in 2014. That review will be broader in scope than the Transitional Review and will provide an opportunity for the issues raised in these proceedings to be considered in circumstances where the transitional provisions relating to the relevant awards will have been fully implemented. In the event that the claims before us are pressed in the 4 yearly review we would expect them to be supported by cogent evidence. We would be particularly assisted by evidence regarding the matters referred to above and the likely impact upon employment levels, the organisation of work and employee welfare of any change in the penalty rates regimes.

[237] We now turn to deal with the other claims for each of the modern awards.

5.2 The other claims

[238] The claims for the introduction of annualised salaried provisions are common to all awards before us, other than the Hospitality Award, and we will deal with that issue separately.

(i) Hospitality Industry (General) Award 2010

Clause 12.7: Overtime for part-time employees

[239] The AHA seeks a variation to clause 33.2 to provide for overtime to be paid if the employee works in excess of their guaranteed number of hours or on either of their two nominated days off. This variation is directly related to matters that are currently before Deputy President Sams,[64] and in particular, a variation to clauses 12.2-12.8 sought by the AHA to introduce flexible part-time arrangements into the award and an associated

allowance. It is appropriate that the variation in respect of overtime be dealt with as part of those broader part-time employment matters and we remit it to Deputy President Sams for that purpose.

Clause 32.1: Penalty rates

[240] The AAA seeks reduction in certain penalty rates, in clause 32.1, as recorded in section 2 of this decision.

[241] Apart from the application itself, neither the AAA, nor any other party, provided further submissions or evidence or participated in proceedings in relation to the penalty rates aspects of these matters. No cogent reasons have been provided to warrant a departure from the provisions established as part of the award modernisation process.

[242] No variation to this award will be made regarding penalty rates as a result of the Transitional Review.

(ii) General Retail Industry Award 2010

Clause 13.2: Casuals on Saturdays

[243] This proposal by Business SA seeks clarification of the penalty paid to a casual employee on Saturdays. This is essentially a drafting issue and was not opposed by any party.

[244] In our view the variation sought will remove a technical problem arising from the award modernisation process and on that basis we propose to vary the award in the terms sought.

Clause 27.2: Ordinary hours for bakers

[245] The claim to extend ordinary hours for bakers to 5.00am[65] seeks to adopt the same provision as currently applying to Newsagencies. We note that there are existing shift provisions for bakery production employees in clause 30.4 which permit work to commence at 2.00am as part of ordinary time, but with penalties.

[246] The employers are seeking the insertion of what was said to be a more conventional shift commencing at 5.00am to reflect that applying in the baking industry under the *Food, Beverage and Tobacco Manufacturing Award 2010*.[66]

[247] The SDA oppose the application on the basis that no cogent reasons have been advance to vary the current provision.

[248] The issue of the hours of work and shift arrangements for bakeries operating under the General Retail Award was extensively considered by the AIRC and FWA in the award modernisation process. On 18 March 2010, the Tribunal determined an application that had been made in much the same terms as that presently before us. It found that baking production employees who commence work prior to 6.00am should be considered to be shift workers for the purposes of the award and a variation was made to that end.[67] We note that the Award Modernisation Full Bench also reduced the shift penalty proposed up until that time, as part of the final award provisions.

[249] Although some retail bakery employers gave evidence in these matters, that evidence did not generally deal with this issue and the limited material before us is insufficient to support the change at this stage.

[250] No variation to the General Retail Award concerning this matter will be made as part of this Transitional Review.

Clause 27.2(b)(iii): Application of extended trading hours to 11 pm

[251] The SDA is seeking that the span of ordinary hours to 11.00pm within clause 27(b)(iii) apply only to 'Special Category Shops.' This proposal would in effect mean that only shops in the business of selling foodstuffs and groceries which are not employing more than 20 full-time equivalents would be covered by the relevant provision.

[252] The SDA contend that the capacity for ordinary hours until that time throughout the week applied under only some of the former awards and NAPSAs and even then, only to certain categories of stores. In that light, it contended that the present provision represented an anomaly that should be rectified.

[253] The employers opposed this claim on the basis that the extended hours provision was specifically established by the AIRC as part of the award modernisation process and no reasons had been established to revise that position. Further, the employers contended that there was no basis to consider that the present position was an anomaly or created any technical problem.

[254] We agree with the submissions advanced by the employers and do not propose to make the variation sought by the SDA as part of this Transitional Review.

[255] On 29 January 2010, the Award Modernisation Full Bench determined an application by the NRA to vary the General Retail Award in the following terms:

> "Hours of work
>
> [13] The NRA seeks variations to the hours of work provisions for retailers who traditionally trade longer hours by allowing ordinary hours to be worked until 11pm when trading hours extend beyond 9pm Monday to Friday or 6pm on Saturdays and Sundays. It relies on provisions of pre-reform awards and NAPSAs which provide for flexibility in hours limitations depending on the nature of the shops and their trading hours. Unfortunately the pre-reform Awards and NAPSAs are not uniform – or even broadly consistent. The flexibility in hours in the modern award is confined to newsagents and video shops. Other employer groups support the application. The SDA submits that such a reconsideration of matters determined during the award modernisation process should not be permitted.
>
> [14] We accept the logic that business needs reflected in the trading hours of the business should be a factor in establishing the limits on working of ordinary hours. We have accepted the concept in providing flexibility for newsagents and video stores. In a variety of ways it is also reflected in previous instruments. It is appropriate that a late night penalty applies to compensate for the social inconvenience of such hours, but

> requiring normal trading hours to be worked only on an overtime basis is generally not appropriate. We will insert a new cl.26.2(b)(iii) in line with the NRA application."[68]

[256] It is evident that clause 27.2(b)(iii) was one of the 'swings and roundabouts' considered by the AIRC during the award modernisation process. There were differences in the approach evident in the former awards and NAPSAs in respect of this matter and a provision was established to operate in conjunction with the relevant penalty loading.

[257] Given the evidence that it before us, including that relating to the nature of modern retailing, we are not persuaded that cogent reasons have been provided to reduce the scope of this provision.

[258] No variation to the General Retail Award concerning this matter will be made as part of the Transitional Review.

Clause 28.13: Employees regularly working Sundays

[259] Some of the employer groups sought to remove the existing provision which provides that, subject to a contrary written agreement, an employee who regularly works Sundays will be rostered so as to have three consecutive days off each four weeks and the consecutive days off will include Saturday and Sunday.

[260] The applicant employers contended that the existing provision is an unwarranted restriction on rostering employees given the nature and regularity of work on Sundays under this award.

[261] The SDA opposed the variation on the basis that a change was not warranted, some restrictions on Sunday work were necessary, and sufficient flexibility already existed.

[262] The only evidence regarding this matter[69] acknowledged that the capacity to make a contrary written agreement was not unreasonable or unworkable.[70]

[263] We are not persuaded that cogent reasons have been provided to modify the application of this provision in the manner sought. No variation to the General Retail Award concerning this matter will be made as part of this Transitional Review.

Clause 28.14: Notification of rosters

[264] The current provision provides that a short notice (non-permanent) change in a roster will be treated as overtime.

[265] The NRA seeks the removal of the obligation to pay overtime where a roster variation at short notice is agreed and to provide that rosters may not be varied with the sole intent of avoiding loadings and penalties. The NRA contends that additional flexibility should be introduced and where there is consent, no penalty should be paid.

[266] The SDA opposed the proposed variation.

[267] There is little, if any, evidence or other material before us dealing with this issue. We are not persuaded that cogent reasons have been provided to modify the application of this

provision. No variation to the General Retail Award concerning this matter will be made as part of this Transitional Review.

Clause 29.2: Overtime

[268] The SDA seek to modify the overtime provisions of the award in two respects. Firstly, to provide that the double time penalty operate after two hours, rather than three hours as currently operating and secondly, to provide overtime payments for casuals who work in excess of 38 hours. The General Retail Award does not presently provide overtime payments for casuals in those circumstances.

[269] The SDA contend that these variations are appropriate as the current provisions represent an anomaly. On the basis that the majority of the former NAPSAs provided that overtime applied to casuals for work beyond 38 hours per week. The absence of such a provision was said to be anomalous given the treatment of full-time employees under this award and the overtime provisions under many other modern awards.

[270] Further, the SDA contended that the provision of double time after two hours of overtime was a common entitlement under most modern awards and the former NAPSAs applying in this sector.

[271] The employers opposed the claim and contended that no anomaly existed in that various former instruments, and in particular the *Shop Distributive and Allied Employees Association Victorian Shops Interim Award 2000*[71] (Victorian Shops Award), (which was described by the ARA as being the predominate award used by the AIRC),[72] contained provisions largely in the same terms as that now found in the modern award. The employers also contended that the SDA was in effect seeking to re-litigate an issue determined by the AIRC in the award modernisation process.

[272] We agree with the submissions advanced by the employers and do not propose to make the variation sought by the SDA.

[273] There were different provisions in the various awards considered by the AIRC on these issues including the Victorian Shops Award and the various former NAPSAs. Most of the former NAPSAs provided overtime for casuals working beyond 38 hours whereas the Victorian Shops Award did not. There was no common pattern to the number of hours of overtime to be worked before double time was payable.

[274] The modern award also adopted a casual loading of 25%, which for many parties represented an increased loading. It is evident that the overtime provisions within the modern award were established as part of the 'swings and roundabouts' considered by the AIRC during the award modernisation process.

[275] The intended application of overtime for casual employees, along with other provisions, was also confirmed by the Tribunal in December 2010 as part of various applications pursuant to s 160 of the Act to remove an ambiguity in the award. The Tribunal found:

> "[16] The SDA seeks to ensure that the clause creates an entitlement to overtime for casuals who work more than 38 hours. In my view there is no such entitlement in the

> current provision and the current clause is not ambiguous. In any event I am not persuaded that it would be appropriate to make the change even if there was an ambiguity in the clause.[73]

[276] We are not persuaded that cogent reasons have been provided to modify the application of this provision. No variation to the General Retail Award concerning this matter will be made as part of the Transitional Review.

Clause 29.2: Overtime and shiftworkers

[277] This proposal seeks to make it clear that overtime, for work outside the normal hours of work in clause 27 and 28, does not apply to shiftworkers who are entitled to shift payments at those times.

[278] We consider that the intended operation of the award in this respect is sufficiently clear. No variation to the General Retail Award concerning this matter will be made as part of the Transitional Review.

Clause 29.2: Overtime and non-full-time employees

[279] The NRA have sought that overtime under the award is only to apply to full-time employees.

[280] No substantive basis was advanced by the NRA in relation to this claim.

[281] As we have mentioned earlier, it is evident that the provisions concerning overtime, including those applying to part-time and casual employees, were considered as part of the swings and roundabouts approach of the AIRC during the award modernisation process. We also consider that the intended operation of the award in this respect is sufficiently clear. No variation to the General Retail Award concerning this matter will be made as part of the Transitional Review.

Clause 29.3: Time off in lieu of overtime

[282] The BIAQ seeks to provide 'time for time' for overtime where mutually agreed or requested by an employee. The BIAQ did not participate in these proceedings nor did it provide material in support of its application.

[283] In these circumstances, we are not persuaded that cogent reasons have been provided to modify the application of this provision. No variation to the General Retail Award concerning this matter will be made as part of the Transitional Review.

Clause 30.4: Early morning shifts

[284] VANA seeks in effect to add newspaper delivery drivers to the early morning shift provisions.

[285] There are existing early morning start arrangements for newsagencies in clause 27.2(b) of the award that extend the commencement of ordinary time for these shops to 5.00am.

[286] VANA's submission in support of its application states:

> "Newspaper delivery drivers who are employed by newsagents tend to work overnight or start very early in the morning. This is not shift-work as there is not a continuous shift available and it is not overtime as these hours are the only hours offered for this line of work. In fact, many newspaper delivery drivers work hours that are similar to those worked by bakers. For this reason, we recommend that the award be varied to provide for the same shift loadings for newspaper delivery drivers as bakers."[74]

[287] VANA did not adduce relevant evidence about these matters, nor did it advance any detailed material in support of its claims, despite having witnesses from this sector as part of its evidentiary case.

[288] There is nothing before us to support the need for a change at this stage. No variation to the General Retail Award concerning this matter will be made as part of the Transitional Review.

Clause 30.4: Early morning bakery shift

[289] The ARA seeks to vary clause 30.4 to provide that the 12.5% loading for the early morning shift in relation to bakeries only applies between 2.00 am and 5.00 am. The current provision operates until 6.00 am. This is related to the claim to provide early start arrangements for bakers commencing at 5.00 am.

[290] We have rejected the related claim and we are not persuaded that this consequential variation is necessary.

(iii) Fast Food Industry Award 2010

Clause 26: Overtime

[291] We note that many aspects of this provision were comprehensively considered by the then Fair Work Australia in November 2011[75] in the context of an application by the SDA to vary the award.

[292] It is convenient to deal firstly with those matters exclusively raised by BIAQ, namely:

- overtime pay be amended to time and a half for the first three hours (currently two hours) and double time thereafter;
- insertion of new clause providing that overtime is not compounded;[76] and
- where time off in lieu is substituted for overtime by mutual agreement or at the request of an employee, it is paid at ordinary hours (currently penalty equivalent).

[293] The BIAQ did not participate in these proceedings and nor did it provide any material in support of its application despite the fact that the changes proposed are significant.

[294] In these circumstances, we are not persuaded that cogent reasons have been provided to modify the application of this provision in the manner sought. No variation to the Fast Food Award concerning these matters will be made as part of the Transitional Review.

[295] We turn now to a series of proposals made by the NRA to clarify the operation of this provision, namely:

- deletion of the reference to public holiday rates of pay for casual employees on the basis that this should be dealt with in the public holidays clause;

- the variation of clauses 26.1(b) and (c) to provide consistent terms throughout the award (in particular, the inclusion of the word 'rostered' in lieu of 'regular' and 'prescribed' in reference to the application of overtime); and

- variation to clause 26.1 to clarify that overtime is calculated on a daily basis.[77]

[296] Other than the proposed variation to clause 26.1(b) and (c), we do not consider that there is any need to clarify the operation of this provision in the manner sought. In terms of the remaining proposal, the clause currently provides as follows:

> "26.1 An employee shall be paid overtime for all work as follows:
>
> (a) In excess of:
>
> (i) 38 hours per week or an average of 38 hours per week averaged over a four week period; or
>
> (ii) five days per week (or six days in one week if in the following week ordinary hours are worked on not more than four days); or
>
> (iii) eleven hours on any one day; or
>
> (b) Before an employee's regular commencing time on any one day; or
>
> (c) After the prescribed ceasing time on any one day; or
>
> (d) Outside the ordinary hours of work; or
>
> (e) Hours worked by part-time employees in excess of the agreed hours in clause 12.2 or as varied under clause 12.3."

[297] This issue was not dealt with by the Tribunal in its November 2011 decision and in our view there is some uncertainty as to the application of the concepts of 'regular commencing time' and 'prescribed ceasing time' in the present clause, particularly in the context of casual employment.

[298] However there is little material on this issue before us and in our view care should be taken to avoid unintended consequences of any variation.

[299] We propose to refer this matter to Deputy President Smith to further consider and determine this aspect of the NRA's application.

[300] The NRA also proposed a more substantive variation to clause 26, and a consequential variation to clause 25-Hours of Work, to provide that overtime provisions do not apply to casual employees.

[301] There was no substantive material advanced concerning this matter and given the relatively recent decision[78] of the Tribunal dealing with this matter, there is no basis to make the change sought as part of the Transitional Review.

Clause 26.5: Penalty rates (other claims)

[302] The BIAQ seeks to amend the award as follows:

- Clause 26.5 be renumbered as new clause 26 or placed under clause 25 - Hours of Work.

- Variation to clauses 26.5(a) and (b) to remove reference to shiftwork in the sub-headings.[79]

[303] There is little material before us concerning this matter, however the issues raised are seeking clarification of the award provisions and fall within the scope of Item 6(2)(b) of the Transitional Provisions Act.

[304] Clause 26.5 deals with work in ordinary hours and is probably not best located under the heading of overtime. This could be dealt with by renaming the clause or moving it as suggested by the BIAQ.

[305] The reference to shiftwork in that context is also problematic given that the award does not contain any shiftwork provisions.

[306] We consider that these proposals have merit and we will refer this matter to Deputy President Smith for further consideration and determination.

Clause 13: Minimum Daily Engagement - Casuals

[307] The NRA seeks to vary clause 13 in two respects:

- vary clause 13.4 to reduce minimum daily engagement from three hours to two hours; and

- insert a new clause 13.5 to provide for minimum daily engagement of 1.5 hours for certain secondary students in line with the clause in the General Retail Award.

[308] This first element of the NRA's claim seeks to adopt a general minimum engagement of two hours, said to be in line with that formerly applying under the *Restaurant Industry Award 2010*.

[309] The issue of the minimum engagement for casual employees under this award was considered by the Full Bench as part of the final stages of the award modernisation process. In 2010, the Full Bench varied the award to include a three hour minimum shift length on the basis that it was reasonable and consistent with existing provisions.[80]

[310] The NRA provided no cogent material or evidence in support of its claim. There is no basis to make this change as part of the Transitional Review.

[311] The second variation clearly seeks to replicate the change made by the Tribunal to the General Retail Award in 2011. The context for that variation was set out in the decisions of Vice President Watson[81] and the subsequent Full Bench[82] respectively.

[312] The variation in the General Retail Award allowed a minimum engagement period of 1.5 hours in certain limited circumstances including where it was not feasible to provide longer shift periods due to the inability of the secondary school attending employees and the operational hours of the business.

[313] There was no evidence or material before us which demonstrated that the variation was necessary to meet the modern award objective in terms of this award. In particular, there is no relevant material or evidence regarding the particular circumstances of school age employment under this award and the operational requirements of fast food employers that would equate to the circumstances dealt with under the General Retail Award. Nor is there any evidence that fast food employers are not generally trading at least three hours after the completion of normal secondary school hours. Indeed the contrary is likely to be the case.

[314] No cogent basis has been established to make this change as part of the Transitional Review.

(iv) Hairdressing and Beauty Industry Award 2010

Clause 31: Overtime and weekend penalties

[315] The HBIA application seeks to vary clause 31.2 to reflect the application of overtime provisions to full-time employees only. Further, it seeks the removal of clauses 31.2(b) and (c) which provide penalty rates for work performed on weekends (currently 33% on Saturdays and 100% on Sundays).

[316] The first variation of clause 31 potentially affects part-time and casual employees. Part-time employees under the existing award are subject to the overtime provisions and no basis to modify that approach was advanced in the proceedings before us. In the case of casual employees, clause 13.4 of the award indicates that clause 31.2(a), which provides overtime hours in excess or the number of ordinary hours are to be paid at overtime rates, does not apply to such employees. The additional rates for Saturday and Sunday work in clause 31.2(b) and (c) apply to casuals.

[317] Nothing of substance was put to us to justify the change sought.

[318] The second variation seeks to remove the weekend penalties. Despite the fact that such a variation would represent a major change to this award nothing of substance was put to us to

justify such a change. No cogent reason has been established for altering the penalty rate provisions determined by the Award Modernisation Full Bench.

[319] There is no basis to vary clause 31 of this award as part of the Transitional Review.

(v) Annualised Salaries

[320] As mentioned earlier, there are various claims concerning the insertion of an annualised salaries provision in each of the General Retail, Fast Food, and Hair and Beauty Industry awards. There is no claim in terms of the Hospitality Award and we note that it already contains a similar concept.[83]

[321] Although there is some minor variation in terms,[84] each claim involves the insertion of a new provision permitting an employer to pay an employee an annual salary in lieu of wages, allowances, penalty payments, overtime, shiftwork payments and annual leave loading. This arrangement would be subject to a no disadvantage provision and annual review.

[322] As with many of the matters raised by the employers that do not directly deal with penalty rates, there was little if any attention given to this issue in either the evidence or in submissions.

[323] Some employer parties referred us to the insertion of annualised salary provisions in the *Clerks Private Sector Award 2010*.[85]

[324] The issue of an annualised salary provision was considered by the AIRC and Fair Work Australia as part of the award modernisation process. In 2010, the Full Bench considered an application by the NRA which was largely in the same form as that before us. It found:

> "[68] A number of parties suggested that annualised wage and salary arrangements are a desirable flexibility for employees and should be introduced as a matter of course. It was also suggested that the reference to such arrangements in the WR Act is a clear indication that such arrangements are desirable. There are arguments of convenience which must be taken into account. Employers and some employees might prefer the predictability of regular uniform payments. It has also been suggested that productivity might improve if a salaried approach is adopted. While there is some force in these submissions we are not prepared to adopt annualised payment arrangements as a general standard. There are a number of reasons.
>
> [69] Although annualised wage and salary provisions are a common feature of workplace agreements they are very rare in the Commission's awards. By far the predominant method of calculating entitlements is weekly, based on ordinary hours, penalties, overtime etc. This is a system with which employees, particularly employees who are safety net dependent, are familiar. No doubt many employees arrange their affairs on that basis. While employers invoked the need for flexibility there is always the potential for employee disadvantage which through fear of reprisal or ignorance employees are unable to correct. There are also some practical problems associated with the concept in industries in which short hour employment is common and in which working hours may vary unpredictably. While flexibility might be important, when safety net entitlements are at issue employers would be required to keep a record

> of hours in any event to ensure that the annualised pay was sufficient to meet those entitlements. Finally, in some industries employers may be able to implement annualised pay arrangements without breaching the award. We assume that this occurs in many areas of employment already. Annual salaries are of course also a feature of many workplace agreements.
>
> [70] As indicated we have decided not to adopt a standard provision for annualised wages and salaries in modern awards. Where such provisions already exist in relevant awards we have maintained them. The matter could be revisited in one of the regular award reviews which have been foreshadowed. We also note that the *Clerks—Private Sector Award 2010* will include an overtime exemption provision which will go part of the way to addressing claims for annualised salaries in that award. We deal with this later. The parties to the *Rail Industry Award 2010* agreed that the award should contain an annualised wage and salary provision but could not agree on all of the terms. We deal with that matter later also."[86]

[325] Despite the opportunity afforded by the Transitional Review, the employers have not advanced the argument beyond what was put in the previous proceedings. It is also evident from the approach adopted by the AIRC that a history of similar provisions in the former awards and/or as part of common law practices was a significant factor.

[326] There was no evidence which suggests the widespread use of common law contracts with annualised salaries in any of the industries to which the awards apply. Nor was any evidence called to suggest there was any demand for annualised salaries.

[327] As with the earlier Full Bench, there is some merit in these concepts being considered in an appropriate context, but given the scope of the Transitional Review we are not persuaded that the introduction of the proposed annualised salary arrangements should be made to these awards as part this Transitional Review. It is also relevant that in industries which are subject to seasonal fluctuations in the demand for labour the introduction of annualised salaries may create practical implementation problems.

[328] While we are not persuaded that it is appropriate to vary the relevant awards to introduce annualised salaries we are conscious of the need to take into account regulatory burden and to ensure that modern awards are simple and easy to understand. (see s.134(1)(f) and (g)). In that context the existing penalty rate regime in the awards before us does give rise to some complexity in the application of the award provisions. This may pose a particular challenge for small businesses.

[329] As a means of addressing these issues we consider that there is merit in the parties discussing the concept of incorporating loaded rates within the General Retail and Fast Food awards.

[330] Any such loaded rates would need to recognise the application of the existing penalty rates regime and apply fairly across the range of employees and working hours patterns that might be considered as applicable to the concept. Subject to those considerations, our preliminary view is that the establishment of loaded rates within these awards would have the capacity to reduce the complexity of their application, particularly for small businesses.

[331] In order to explore this concept further, the Commission will facilitate some conciliation discussions between the major parties with a view to seeking a degree of consensus. Commissioner Hampton will convene a conference for this purpose in the near future.

[332] Any agreement arising from these discussions would, of course, be of significance in our further consideration of this issue.

6. CONCLUSIONS

[333] For reasons outlined above, we have found that only a limited number of the proposed variations should be made as part of the Transitional Review.

[334] Those matters will be referred to individual Members of the Commission as indicated to deal with in accordance with this decision, with recourse to this Full Bench if required.

[335] We note that the issues considered in this decision have been determined within the specific context of the Transitional Review. In addition, many of matters were not subject to any significant focus from the parties given the concentration on the substantive claims to reduce certain penalty rates.

[336] To the extent that these and other issues may be subject to further consideration as part of any subsequent review, those parties seeking to advance propositions should ensure that they are in a position to provide relevant supporting materials and probative evidence in support of their claims.

PRESIDENT

Appearances:

T. Babu for the Accommodation Association of Australia.
G. Liggins for the Aged and Community Services Assocation.
L. Weber and *E. McCoy* for the Australian Council of Trade Unions.
S. Forster for the Australian Federation of Employers and Industries.
T. Evans and *O. Webb* for the Australian Hotels Association.
L. Berry and *P. Cully* for the Australian Government.
P. Salewicz for the Australian Industry Group.
N. Tindley for the Australian Retailers Association.
T. McKernan Australian Workers' Union of Employees, Queensland.
K. Van Gough and *H. Wallgren* for the SA Employers' Chamber of Commerce and Industry Inc t/as Business SA.
D. Sztrajt for the Master Grocers Association.
S. Eliffe for the National Retailers Association.
S. Moore of counsel for the Shop, Distributive and Allied Employees' Association.
S. Hills for the South Australian Wine Industry Association.

A. Dansea for the State and Northern Territory Local Government.
C. Young for the United Services Union.
J. Nolan and *N. Swancott* for United Voice.
E. Watt for the Victorian Association for Newsagents.

Hearing details:

Before Commissioner Gooley:
2012.
Melbourne, Sydney, Brisbane and Adelaide (video hearing):
October 18.

Before Commissioner Hampton:
2012.
Melbourne (with video links at various times to Sydney, Brisbane, Adelaide, Canberra, Perth, Newcastle, Orange, Coffs Harbour and Griffith):
October 18;
November 1, 2, 20, 21, 22 and 30.

Before Commissioner Jones:
2012
Melbourne
18 October; and
13, 15, 22 and 30 November 2012.

2012
Brisbane, Melbourne and Sydney (video hearing):
8 and 20 November.

2012
Sydney
12 November.

Before the Full Bench:
2012.
Melbourne, Sydney and Adelaide (video hearing):
18 and 19 December.

Final written submissions:

24 December 2012.

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[1] Fair Work Australia became the Fair Work Commission on 1 January 2013.

[2] The Review does not include modern enterprise awards or State reference public sector modern awards.

[3] [2012] FWAFB 5600.

[4] Ibid at para 85.

[5] MA000003.

[6] MA000073.

[7] MA000004.

[8] MA000005.

[9] MA000009.

[10] MA000019.

[11] MA000119.

[12] As contemplated by s.590 of the Act.

[13] The draft statement was published on the FWA website on 28 June 2012, with the final statement issued on 5 July 2012. See [2012] FWA 5721.

[14] [2012] FWA 5373 issued on 4 July 2012.

[15]See Directions issued on 9 July 2012, amended and consolidated directions were issued on 19 September 2012. The *Restaurant Industry Award 2010* was, with the support of the parties, referred in total to a single member.

[16] [2012] FWA 9522.

[17] Gooley C Report [2012] FWA 10322.

[18] Hampton C Report [2012] FWA 10008.

[19] Jones C Report [2012] FWA 10200.

[20] The original award modernisation request under s.576C(1) of the *Workplace Relations Act 1996* was made on 28 March 2008 and was varied on a number of occasions. A consolidated version of the request is available from the FWC website.

[21] Section 576T(2) of the WR Act in effect permitted State-based differences as part of the award modernisation process but only for a limited period designed to allow for transitional arrangements.

[22] Schedule 6 of the Transitional Provisions Act.

[23] [2008] AIRCFB 1000 at paras 283-287.

[24][2009] AIRCFB 800 at paras 4, 5, 17 and 92.

[25] [2010] FWAFB 305.

[26] Ibid at para 3.

[27] Ibid at para 18.

[28] [2008] AIRCFB 1000 at para 286.

[29] AP806313CRV

[30] [2009] AIRCFB 800 at para 91.

[31] Ibid.

[32] [2010] FWAFB 379.

[33] Ibid at para 4.

[34] Ibid at paras 23 to 26.

[35] A related claim by the ARA, which also raised the issue of Saturday penalty rates, was discontinued.

[36] In this decision we have referred to Sunday penalties in the same manner as the General Retail Award; namely, as an additional loading (such as a 50% or 100% additional loading). Some parties have expressed their positions by reference to the total payment (such as 150% and 200%).

[37] This is related to the claim to provide early start arrangements for bakers commencing at 5.00am.

[38] This is 6.00am in the case of the GTA application.

[39] These reports were also provided to the Public Holidays Full Bench.

[40] [2012] FWA 10322.

[41] [2012] FWA 10008.

[42] [2012] FWA 10200.

[43] [2012] FWAFB 6913.

[44] [2012] FWAFB 5600 at para 99.

[45] This evidence is being considered by the Full Bench dealing with the public holidays matters.

[46] Industry impacts of provisions of the *Fast Food Industry Award 2010* Final Report 4 April 2012, Ai Group 12 November 2012 submission.

[47] See evidence of Professor Ian Gordon, in SDA reply submission of 17 December 2012 and responsive evidence of the Ai Group, in AIG-J7 in attachment E to the report of Commissioner Jones.

[48] There are some assertions in HBIA - J1 (submissions of HBIA).

[49] The evidence of Associate Professor Craig and others called by the SDA (we note that some of this material is predominately based upon shift work and emphasis has been given to parental responsibilities and not necessarily upon retail or fast food employment patterns) and the AWALI research. There is some evidence (from the AWALI and VicWAL research) that the degree of impact of Sunday work upon employees in the retail industry is actually less than that generally applying in the community. The sample sizes on an industry basis are very small in that regard and we consider that little weight can be given to this aspect for present purposes.

[50] Exhibit SDA-H10

[51] Productivity Commission Inquiry Report, Economic Structure and Performance of the Retail Industry, No. 56, 4 November 2011; Exhibit - ARA - H4.

[52] ARA final written submission, December 2012 at para 79.

[53] Ai Group final written submissions, December 2012.

[54] Ibid.

[55] SDA written submissions, dated 8 October 2012.

[56] Ibid.

[57] Transcript, 18 December 2012 at PN 4144.

[58] Exhibit AIGJ9.

[59] *ABS Labour Force Australian Labour Characteristics of Families,* Catalogue Number 6224.0.55.001.

[60] Transcript, 18 December 2012, at PN 4226.

[61] [2011] FWAFB 2633.

[62] [2012] FWAFB 5600.

[63] Schedule 6 to the Transitional Provisions Act requires an enterprise instrument modernisation process to be conducted with applications being made prior to 31 December 2013.

[64] AM2012/22 and others, which includes the AHA application in AM2012/215.

[65] In the case of one of the applicants, P&P, it sought that the ordinary hours for bakers be 4.00am to 9.00pm Monday to Friday inclusive and 4.00am to 6.00pm on Saturdays and Sundays. It also sought the introduction of a shift allowance (unspecified) for work before 4.00am on all days and an associated claim to remove two 10 minute crib breaks.

[66] Under the Food Manufacturing Award, the ordinary hours for bakers (and others) may by agreement commence at 5.00am (clause 30.2). Early shift provisions, with a penalty payment, apply before that time or before 6.00am if there is no agreement (clause 31).

[67] [2010] FWAFB 1958 at paras 10 - 20.

[68] [2010] FWAFB 305.

[69] Mr Smith, witness for the BMIA, see witness statement dated 13 August 2012 and Transcript, 2 November 2012 at PN2166.

[70] Transcript, 2 November 2012, at PN 2166.

[71] AP796250CRV

[72] ARA written submission dated 13 September 2012.

[73] [2010] FWA 8806.

[74] VANA submission dated 13 August 2012.

[75] [2011] FWA 6865.

[76] This in effect seeks that the casual loading not be included as part of any other penalty payments. It presently applies to the Saturday and Sunday rate.

[77] The actual variation proposed by the NRA deals only with Sunday overtime standing alone for the purposes of the minimum engagement.

[78] [2011] FWA 6865.

[79] This is editorial as the award does not contain express shiftwork provisions.

[80] [2010] FWAFB 379 at para 12.

[81] [2011] FWA 3777.

[82] [2011] FWAFB 6251.

[83] Clause 27 *Annualised Salary Arrangements*. That clause provides that by agreement between the employer and the employee, an employee may be paid at a rate equivalent to an annual salary of at least 25% or more above the prescribed base rate.

[84] While most of the applications seek to apply annualised salaries to all classifications the MGA sought to limit the application of annualised salaries to those employees on skill levels 6 ,7 or 8.

[85] [2009] AIRCFB 922.

[86] [2008] AIRCFB 1000.