

**From:** Chambers - Ross J  
**Sent:** Thursday, 9 August 2018 9:58 AM  
**To:** 'Sue-Anne Burnley'; nrt@fcbgroup.com.au  
**Cc:** AMOD  
**Subject:** AM2017/43 - General Retail Award - penalty rates

Dear parties,

The attached document has been prepared to assist in the hearing of the penalty rates claims in the *General Retail Industry Award 2010*. If there is general agreement as to the content of the document then there will be no need for any party to spend time during their oral submissions dealing with the legislative framework relevant to the Review.

Parties will be invited to comment on the document at the commencement of the proceedings on Tuesday 14<sup>th</sup> August.

Regards,

**Casey Sutton**  
**Associate to The Hon. Justice IJK Ross**  
**President**

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*This document has been prepared to assist in the hearing of the penalty rates claims in respect of the General Retail Industry Award 2010. It does not represent the concluded view of the Commission on any issue.*

## The Review

[1] Section 156 deals with the conduct of the Review and s.156(2) provides that the Commission *must* review all modern awards and *may*, among other things, make determinations varying modern awards. In this context ‘review’ has its ordinary and natural meaning of ‘survey, inspect, re-examine or look back upon’.<sup>1</sup> The discretion in s.156(2)(b)(i) to make determinations varying modern awards in a Review, is expressed in general, unqualified, terms.

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

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

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

[5] The modern awards objective is very broadly expressed.<sup>3</sup> It is a composite expression which requires that modern awards, together with the NES, provide ‘a fair and relevant minimum safety net of terms and conditions’, taking into account the matters in ss.134(1)(a)–(h).<sup>4</sup> Fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question.<sup>5</sup>

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<sup>1</sup> *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [38]

<sup>2</sup> *O’Sullivan v Farrer* (1989) 168 CLR 210 at p. 216 per Mason CJ, Brennan, Dawson and Gaudron JJ

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

<sup>4</sup> [2017] FWCFB 1001 at [128]; *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [41]–[44]

<sup>5</sup> [2018] FWCFB 3500 at [21]–[24].

[6] The obligation to take into account the s.134 considerations means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision-making process.<sup>6</sup> No particular primacy is attached to any of the s.134 considerations<sup>7</sup> and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.

[7] It is not necessary to make a finding that the award fails to satisfy one or more of the s.134 considerations as a prerequisite to the variation of a modern award.<sup>8</sup> Generally speaking, the s.134 considerations do not set a particular standard against which a modern award can be evaluated; many of them may be characterised as broad social objectives.<sup>9</sup> In giving effect to the modern awards objective the Commission is performing an evaluative function taking into account the matters in s.134(1)(a)–(h) and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance.

[8] Nor is it necessary for the Commission to conclude that the award, or a term of it as it currently stands, does not meet the modern awards objective. Rather, it is necessary for the Commission to review a particular modern award and, by reference to the s.134 considerations and any other consideration consistent with the purpose of the objective, come to an evaluative judgment about the objective and what terms should be included only to the extent necessary to achieve the objective of a fair and relevant minimum safety net.<sup>10</sup>

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

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

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

**‘138 Achieving the modern awards objective**

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

<sup>7</sup> *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [33]

<sup>8</sup> *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [105]-[106]

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

<sup>10</sup> *Ibid* at [28]-[29]

<sup>11</sup> *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161

<sup>12</sup> *Ibid* at [48]

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

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

‘The words “only to the extent necessary” in s.138 emphasise the fact that it is the minimum safety net and minimum wages objective to which the modern awards are directed. Other terms and conditions beyond the minimum are to be the product of enterprise bargaining, and enterprise agreements under Pt 2-4.’<sup>13</sup>

[12] What is ‘necessary’ to achieve the modern awards objective in a particular case is a value judgment, taking into account the s.134 considerations to the extent that they are relevant having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence.<sup>14</sup>

[13] In *4 Yearly Review of Modern Awards - Penalty Rates (Hospitality and Retail Sectors) decision* (the *Penalty Rates Case*)<sup>15</sup> the Full Bench summarised the general propositions applying to the Commission’s task in the Review, as follows:

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

2. Variations to modern awards must be justified on their merits. The extent of the merit argument required will depend on the circumstances. Some proposed changes are obvious as a matter of industrial merit and in such circumstances it is unnecessary to advance probative evidence in support of the proposed variation. Significant changes where merit is reasonably contestable should be supported by an analysis of the relevant legislative provisions and, where feasible, probative evidence.

3. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. For example, the Commission will proceed on the basis that *prima facie* the modern award being reviewed achieved the modern awards objective at the time it was made. The particular context in which those decisions were made will also need to be considered.

4. The particular context may be a cogent reason for not following a previous Full Bench decision, for example:

- the legislative context which pertained at that time may be materially different from the *Fair Work Act 2009* (Cth);

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<sup>13</sup> *CFMEU v Anglo American Metallurgical Coal Pty Ltd* [2017] FCAFC 123 at [23]; cited with approval in *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [45]

<sup>14</sup> See generally: *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)* (2012) 205 FCR 227

<sup>15</sup> [\[2017\]FWCFB 1001](#)

- the extent to which the relevant issue was contested and, in particular, the extent of the evidence and submissions put in the previous proceeding will bear on the weight to be accorded to the previous decision; or
- the extent of the previous Full Bench's consideration of the contested issue. The absence of detailed reasons in a previous decision may be a factor in considering the weight to be accorded to the decision.<sup>16</sup>

[14] Where an interested party applies for a variation to a modern award as part of the 4 yearly review, the proper approach to the assessment of that application was described by a Full Court of the Federal Court in *Anglo American* as follows:<sup>17</sup>

‘[28] The terms of s 156(2)(a) require the Commission to review all modern awards every four years. That is the task upon which the Commission was engaged. The statutory task is, in this context, not limited to focusing upon any posited variation as necessary to achieve the modern awards objective, as it is under s 157(1)(a). Rather, it is a review of the modern award as a whole. The review is at large, to ensure that the modern awards objective is being met: that the award, together with the National Employment Standards, provides a fair and relevant minimum safety net of terms and conditions. This is to be achieved by s 138 – terms may and must be included only to the extent necessary to achieve such an objective.

[29] Viewing the statutory task in this way reveals that it is not necessary for the Commission to conclude that the award, or a term of it as it currently stands, does not meet the modern award objective. Rather, it is necessary for the Commission to review the award and, by reference to the matters in s 134(1) and any other consideration consistent with the purpose of the objective, come to an evaluative judgment about the objective and what terms should be included only to the extent necessary to achieve the objective of a fair and relevant minimum safety net.’

[15] In the same decision the Full Court also said: ‘...the task was not to address a jurisdictional fact about the need for change, but to review the award and evaluate whether the posited terms with a variation met the objective.’<sup>18</sup>

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<sup>16</sup> Ibid at [269]

<sup>17</sup> *CFMEU v Anglo American Metallurgical Coal Pty Ltd* [2017] FCAFC 123

<sup>18</sup> Ibid at [46]