THE UNION FOR WORKERS IN
RETAIL. FAST FOOD.WAREHOUSING

The Shop, Distributive and Allied Employees' Association
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NATIONAL PRESIDENT
Joe de Bruyn

NATIONAL SECRETARY
Gerard Dwyer

Fair Work Commission
Level 4
11 Exhibition Street
MELBOURNE 3000

21 May 2018

Dear Vice President,

Re: 4 YEARLY REVIEW OF MODERN AWARDS – GENERAL RETAIL INDUSTRY AWARD 2010

AM 2017/43

We enclose for filing the SDA's Outline of Submissions in the above matter.

In this proceeding, the SDA intends to rely on expert evidence to be given by Professor Jeff Borland from the University of Melbourne. We anticipate that his expert report will be submitted in the next 7-14 days. We will file and serve the report as soon as possible.

It is anticipated that Professor Borland's expert evidence will address the following topics:

1. The likely effects, if any, on the cost of labour in the retail sector, in the event that the variations to the Award proposed by the SDA are made.
2. The likely effects, if any, on aggregate employment in the retail sector, in the event that the variations to the Award proposed by the SDA are made.
3. His opinion about the views expressed by the Productivity Commission in the following paragraph of at page 497 of its report issued on 30 November 2015 entitled "Workplace Relations Framework":

> Take care in changing casual penalty rates
>
> However, a major proviso is that the current regulated pay levels set for casual employees are 'rough and ready' and may not take into account the generally

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

We will provide a copy of this correspondence to the other parties in this proceeding.

Yours sincerely,

GERARD DWYER

National Secretary - Treasurer

FAIR WORK COMMISSION
Matter No: AM 2017/43

4 YEARLY REVIEW OF MODERN AWARDS – GENERAL RETAIL INDUSTRY AWARD 2010

OUTLINE OF SUBMISSIONS OF THE SHOP DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION – CASUAL PENALTY RATES

Introduction

1. Under the *General Retail Industry Award 2010*, a full-time or part-time employee who works ordinary hours on a Saturday is entitled to be paid a penalty rate of 25% for those hours of work. However, a casual employee who works between 7:00am and 6:00pm on a Saturday is only entitled to be paid a penalty rate of 10%. And if the casual employee works after 6:00pm, he or she would have *no entitlement* to be paid *any penalty rate*, even though a full-time or part-time employees working ordinary hours at that time would be entitled to be paid a penalty rate of 25%.

2. Casual employees are subject to the same (or worse) inequity in treatment when working weekday evenings. Whereas full-time and part-time employees are entitled to a penalty rate of 25% for ordinary hours worked after 6:00pm Monday-Friday, casual employees are not entitled to *any* penalty rate when working ordinary hours at that time.

3. This differential treatment of permanent and casual employees in relation to penalty rates for weekday evenings and Saturday work is manifestly inequitable such that the Retail Award in its current terms cannot be said to provide a fair and relevant minimum safety net of terms and conditions, particularly given the large number of casual employees in the retail sector whose employment is covered by the Retail Award. The different treatment of permanent and casual employees is not justified by any cogent reason and may be contrasted with the neutral treatment of these groups of employees under the Retail Award at other times when penalty rates apply, such as on Sundays and public holidays.

Relevant provisions of the Retail Award and proposed variations

4. The SDA seeks that sub-clauses 29.4(a) and (b) of the Award be amended to provide as follows (amendments to current provision marked up):

29.4 Penalty payments

(a) Evening work Monday to Friday

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

(b) Saturday work

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

5. Clause 29.4 is expressed by reference to the ordinary hours worked by an employee. That matter (in respect of which no variation is proposed) is dealt with by sub-clause 27.2 of the Award which provides:

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

(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.

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

6. It is also relevant to note the provision made by sub-clause 13.2 in respect of the loading payable to casual employees:

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.

Argument

Penalty Rates Case[1]

7. In the *Penalty Rates Case*, a Full Bench gave extensive consideration to the provisions of the Retail Award prescribing penalty rates for work performed on Saturdays, Sundays and public holidays. It is of particular significance that the Full Bench was affirmatively satisfied: [2]

> … that the existing Saturday penalty rates for full-time and part-time employees in the retail award achieves the modern award's objective. They provide a fair and relevant minimum safety net.

8. In relation to weekend penalty rates for casual employees, the Full Bench concluded that the Retail Award provisions, including in respect of Saturday penalty rates, "*are plainly inconsistent and appear to lack logic and merit*".[3] The Full Bench continued:[4]

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

9. After referring to the "*even more curious*" position in respect of Sunday work, the Full Bench made the following statements of principle in respect of casual loadings and weekend penalty rates (emphasis added):[5]

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

In relation to this last observation, logically and as a matter of principle, the same analysis must apply at other times when penalty rates are payable, including Saturdays and weekday evenings nights; the 25% casual loading paid to casual employees is not paid in respect of the disutility of working at those times.

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1 [2017] FWCFB 1001.
2 At [1700].
3 At [1708].
4 At [1709].
5 At [1711]-[1713].

10. The Full Bench then referred to its preference for what the Productivity Commission referred to as the "*default*" approach to the interaction of casual loadings and weekend penalty rates pursuant to which the casual loading is added to the "*applicable*" weekend penalty rate when calculating the Saturday and Sunday rates for casuals.[6]

11. The Full Bench determined to adopt the "default" approach in respect of Sunday work performed by casual employees – under the Retail Award, those employees are to be paid the same penalty rate as permanent employees for Sunday work, plus the casual loading of 25%.[7] The current provisions of the Retail Award in respect of penalty rates for Saturday and weekday evening work are plainly incongruous with that approach.

12. The Full Bench identified that, if the same approach was applied to Saturday rates for casuals, those employees would be entitled to a loading of 150%, being what the Full Bench referred to as "*the standard Saturday loading*" of 125% plus the 25% casual loading for all hours worked on Saturday.[8]

13. The Full Bench then referred to the caution urged by the Productivity Commission in adopting the principle of neutrality in respect of casual employees and the Productivity Commission's statement that the Commission "*should make the presumption that casual penalty rates should fully take account of the casual loading, but should not adopt that principle without closely considering its impacts on such workers*".[9] The Full Bench then concluded that, "*despite the apparent merit of adopting a consistent approach to the application of weekend penalty rates to casuals we are conscious of the fact that no party in the present proceedings has advocated an increase in the Saturday rates for casuals*"[10] and that, in the event that such an application was made, it can be determined in the award stage of the four yearly review.[11]

Potential impact of proposed variations

14. There is no evidence that the variations to the Retail Award proposed by the SDA in respect of penalty rates for casual employees on Saturdays and weekday evenings are likely to have an

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6 At [1714].
7 At [1715]. After the full implementation of the prescribed transitional arrangements.
8 At [1716].
9 At [1719].
10 At [1720].
11 This statement by the Full Bench is inaccurate. On 2 March 2015 in AM2014/270, the SDA filed and served an Outline of Variations it proposed to be made to the Retail Award in the 4 yearly review. The Outline was filed in accordance with directions issued by the Commission that parties identify the nature of any changes they intended to seek during the 4 yearly review. Paragraphs 17-18 of the Outline identified that the SDA sought payment of the full casual loading for casual employees for evening and weekend work, on the basis that under the current award terms, the casual loading was wholly or partially absorbed by the penalty rate of 25 % for evening and Saturday work respectively.

adverse effect on employment in the retail sector. The SDA will respond to any such evidence or submissions in the event that such a case is advanced.

15. In any event however, any claimed adverse effects would presumably be premised on the suggestion by the Productivity Commission that the "*current regulated pay levels set for casual employees are "rough and ready" and may not take into account the generally lower average skills and experience of those employees*." This premise is unsound and misplaced.

16. *First*, it ignores the terms of clause 16.2 of the Retail Award which provides that (emphasis added):

> The classification [of an employee] by the employer must be according to the skill level or levels required to be exercised by the employee in order to carry out the principle functions of the employment as determined by the employer.

17. *Secondly*, as to the suggestion that casuals may have less experience, this is contrary to the finding by the Full Bench in the *Casuals Case*[12] that long-term casuals (those who had worked more than six months with the same employer) were a *majority* of all casuals in all industry sectors including the retail sector.[13] It is also contrary to the data relied on by the Full Bench in the *Penalty Rates Case* which identifies that approximately 87% of workers in the retail sector have been employed with their employer for six months or more.[14]

18. *Thirdly* and more generally in relation to the question of skills and experience of casual employees, it is relevant to note the following important findings of a Full Bench in the transitional review in respect of junior rates in the Award:[15]

    (a) most retail employees achieve a satisfactory level of proficiency and competency in respect of level 1 duties under the Award after six months in employment;[16] and

    (b) by age 20, a significant number of employees in the retail industry have at least three years' experience in the industry;[17]

19. The mechanism by which the Retail Award recognises differences in the skill and experience of employees is through the prescription of junior rates of pay. In the *Junior Rates Case* the Full Bench accepted that the rationale for junior rates was that they were needed "*as an "equal*

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12 [2017] FWCFB 3541.
13 At [360].
14 At [1443].
15 [2014] FWCFB 1846, (**the *Junior Rates case***). An application for judicial review of the Junior Rates case was dismissed in *National Retail Association v Fair Work Commission* (2014) 225 FCR 154.
16 At [95], [172].
17 At [95].

opportunity measure" and as a reflection of the "*true value of the work to the employer*".[18] Junior rates reflected "*the general lack of experience of young employers*".[19]

20. The suggestion by the Productivity Commission that differences in skill and experiences of employees may be reflected in different *types* of employment *categories* is unsound, inconsistent with the terms and framework of the Retail Award and finds no support in the authorities.

Disabilities are associated with particular work, not types of employment

21. The object of penalty rates is to compensate employees for the disabilities or disutility associated with particular work, or work performed at particular times. The assumption which underlies that proposition is that the disability or disutility to which an employee is subject is a product of the work performed by the employee, or the circumstances or time when it is performed. The level of disability or disutility to which an employee is subject is not however a product of the type of employment by which an employee is employed, be it full-time, part-time or casual. This is reflected in a number of recent decisions of the Commission.

22. One of the claims considered in the *Casuals Case*, including in respect of the Retail Award, was whether casual employees should have an entitlement to overtime penalty rates when working in excess of ordinary hours. The Full Bench upheld that claim and concluded that casual employees performing work in excess of ordinary hours "*are subject to the same disabilities as full-time employees – that is, fatigue and a general restriction of opportunities to engage in family, social, community and other activities*". This was a "*generally applicable proposition*".[20]

23. In the context of award modernisation, an application was made by employers to vary a provision of the *Fast Food Award 2010* to limit the payment of Saturday penalty rates to full-time and part-time employees.[21] In rejecting that claim, the Full Bench stated (emphasis added):[22]

> 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.

24. This conclusion was referred to with approval by the Full Bench in the *Casuals Case* which observed that it indicated (emphasis added):[23]

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18 At [100], [104].
19 At [105].
20 At [546], [548], [667].
21 [2010] FWAFB 379.
22 At [24].
23 [2017] FWCFB 354 at [670].

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

This is, with respect, unsurprising, given that "*casual employment ... is usually no more than a method of payment selected by the employer and accepted by the employee at the point of engagement*".[24]

Current penalty rate provisions for casuals unfairly distort the balance between types of employment

25. In the *Metals Casuals Case*, [25] a Full Bench of the AIRC undertook a comprehensive review of the casual employment provisions of the Metals Award. In considering the general approach to the components to be assessed in determining the casual loading, the Full Bench stated that casual employment "*should not be a cheaper form of labour, nor should it be made more expensive than the main counterpart types of employment*".[26] In determining to increase the casual loading to 25%, the Commission gave "*weight to the desirability of not producing different standards or reflecting preference for one type of employment over another.*" It applied the "*broad principle*" of translating the standard conditions of the award "*to achieve a fair and reasonable balance between the main types of employment*".[27]

26. These principles remain foundational and relevant as demonstrated by their recognition and application in both the *Casuals Case* and in award modernisation.[28] Subclauses 29.4(a)-(b) of the Retail Award are fundamentally inconsistent with the modern awards objective because they unfairly distort the balance between casual and permanent employment by making casual employment a significantly cheaper form of employment for Saturday and weekday evening work.

Absence of weeknight penalty rate for casuals contrary to Full Bench authority

27. Prior to the Retail Award commencing operation, retailers made application to vary its provisions in respect of ordinary hours. The Commission determined to increase the span of ordinary hours. However, the Commission also stated that (emphasis added):[29]

> 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.

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24 *Casuals Case* at [362].
25 *Re Metal, Engineering and Associated Industries Award, 1998 – Part 1* (Print T4991, 29 December 2000).
26 At [159].
27 At [202].
28 [2008] AIRCFB 1000 at [49]-[50].
29 [2010] FWAFB 305 at [14].

Significantly, in making this observation, the Full Bench did not distinguish between casual and permanent employees. The failure of the Retail Award to make *any provision* for payment to casual employees of penalty rates for weekday evening penalty rates is directly contrary to the above conclusion by the Full Bench in award modernisation.

Modern awards objective

28. The statutory framework in which the present matter falls to be determined is principally governed by ss 156, 138 and 134 of the *Fair Work Act*. In the *Penalty Rates Case*, the Full Bench summarised the task of the Commission in the conduct of the 4 yearly review as follows:[30]

> 1. The Commission's task in the Review is to determine whether a particular modern award achieves the modern awards objective. If a modern award is not achieving the modern awards objective then it is to be varied such that it only includes terms that are "necessary to achieve the modern awards objective" (s 138). In such circumstances regard may be had to the terms of any proposed variation, but the focal point of the Commission's consideration is upon the terms of the modern award, as varied.
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> 2. Variations to modern awards must be justified on their merits. The extent of the merit argument required will depend on the circumstances. Some proposed changes are obvious as a matter of industrial merit and in such circumstances it is unnecessary to advance probative evidence in support of the proposed variation. Significant changes where merit is reasonably contestable should be supported by an analysis of the relevant legislative provisions and, where feasible, probative evidence.
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> 3. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. For example, the Commission will proceed on the basis that *prima facie* the modern award being reviewed achieved the modern awards objective at the time it was made. The particular context in which those decisions were made will also need to be considered.
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> 4. The particular context may be a cogent reason for not following a previous Full Bench decision, for example:
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>   - the legislative context which pertained at that time may be materially different from the FW Act;
>   - 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.

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30 At [269], omitting footnotes

29. In undertaking the task of ensuring that modern awards, together with the NES, "provide a fair and relevant minimum safety net of terms and conditions," the Commission is required to take into account the matters set out in s 134(1) of the *Fair Work Act*. Each of those considerations is separately addressed below.

Section 134(1)(a) – relative living standards and the needs of the low paid

30. This consideration strongly favours the making of the proposed variations.

31. In the *Penalty Rates Case*, the Full Bench made the following two key findings in respect of award reliant employees generally in the retail industry: [31]

(a) that "*a substantial proportion of award-reliant employees covered by the Retail Award are 'low paid'*"; and

(b) that "*retail households face greater difficulties in raising emergency funds*," which suggested "*that their financial resources are more limited than those of other industry household*."

32. As to casual employees in the retail industry in particular, the Full Bench in the *Penalty Rates Case* found that about a third of workers in the retail sector are casual, being a higher proportion than across all industries.[32] This is broadly consistent with the evidence accepted by the Full Bench in the *Casuals Case* that, as at 2013, the casual employment density of the retail industry was 39.3%.[33]

33. In the *Casuals Case*, the Full Bench also identified the following feature of casual employment as being characteristic of casual employment across industry sectors including the retail industry (emphasis added):[34]

> Casual employees are <u>disproportionately award-reliant workers</u> and, both on a weekly and an hourly basis, <u>earn significantly less on average than permanent workers</u> notwithstanding that they are usually paid a casual loading. Most but not all of this "*pay gap*" is explicable by the fact that casuals are disproportionately employed in lower-paid industry sectors such as Accommodation, Food services, Contract cleaning and Retail and in lower-skilled positions.

34. The Commission can therefore proceed on the basis that casual employees are amongst the most low paid of employees in a low paid workforce and are subject to inferior living standards

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31 At [1656].
32 At [1440], [1442].
33 *Casuals Case* at [359].
34 At [357](3).

to employees generally including, but not limited to, other employees in the retail industry. By their nature, the variations sought by the SDA would directly ameliorate, to some extent, these disadvantages.

Section 134(1)(b) – the need to encourage collective bargaining

35. The current provisions of the Retail Award in respect of penalty rates for casual employees working on Saturdays and on weekday evenings do not encourage collective bargaining because they provide employers with a cheaper form of labour as compared to permanent employees. In their rational self-interest, employers have little reason to bargain when the Award distorts the price of labour in this way.

36. The variations if granted would remove this inequitable distortion with the consequence that employers would face cost neutrality as between different forms of labour. The removal of this distortion will encourage collective bargaining as it is likely to provide motivation for employers to seek to negotiate employment arrangements best suited to their particular operational requirements. Likewise, employees will be better able to collectively bargain where there is cost neutrality between different types of employees as compared to a situation where one form of labour is anomalously cheaper than the other.

Section 134(1)(c) – the need to promote social inclusion through increased workplace participation

37. Obtaining employment is the focus of s.134(1)(c).[35] It is submitted that this is a neutral consideration in the present matter because:

    (a) The variations if granted would be unlikely to result in anything other than small increases in total labour costs for retailers.

    (b) Any small increases in total labour costs resulting from these proposed variations will likely be offset or ameliorated by the substantial savings in total labour costs retailers will enjoy over time from the reductions in Sunday and public holiday penalty rates flowing from the *Penalty Rates Case*. Whereas the current application would result in increases in the hourly rate paid to casual employees only (from 125% to 150% for weeknights (inclusive of the casual loading) and from 135% to 150% for Saturdays (inclusive of the casual loading)), the *Penalty Rates Case* will result in a cut for casual employees from 200% to 175% (inclusive of casual loading) for Sundays and a very substantial cut in Sunday penalty rates for permanent employees (200% to 150%).

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35 *Penalty Rates Case* at [1834].

(c) It will be open to many retailers to avoid or minimise any cost increases occasioned by the variations now proposed by seeking the agreement of existing casual employees to instead be employed on a part time basis. In that regard there are important similarities between casual and part time employment under the Retail Award including that:

(i) both are subject to a minimum daily engagement of 3 hours;[36] and

(ii) the rostered hours of part time employees may be altered at any time by mutual agreement, or otherwise by the employer on 7 days' notice (48 hours in the case of an emergency).[37]

Section 134(1)(d) – the need to promote flexible modern work practices and the efficient and productive performance of work

38. This consideration favours the making of the variations for two reasons:

(a) The promotion of "flexible modern work practices" must be taken to include the promotion or availability of part time employment. For the reasons already outlined, the current provisions of the Retail Award unjustifiably distort the cost of labour in favour of casual and against part time employment. That distortion will be remedied by the grant of the variations.

(b) Likewise, the elimination of the distortion in the Retail Award in favour of casual employment over part time employment will aid the "efficient" performance of work by removing an inefficiency in the pricing signal for employers in respect of the costs of different types of labour.

Section 134(1)(da) – the need to provide additional remuneration for prescribed matters

39. One matter the Commission is required to take into account is the "*need*" to provide additional remuneration for, relevantly, employees working "*unsocial*" hours: s 134(1)(da)(ii).

40. As has been explained, under the current terms of the Retail Award, casual employees who work on weekday evenings do not have <u>any</u> entitlement to receive additional remuneration for performing those hours of work, as compared to what they are entitled to receive for working ordinary hours during the day. There can be no doubt that work performed after 6pm on a weekday is work at an "unsocial" hour (as is work performed on a Saturday).

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36 Clauses 12.2, 12.5 and 13.4.

37 Clause 12.8.

41. In the *Penalty Rates Case*, the Full Bench held that s 134(1)(da) is not a statutory directive that additional remuneration must be paid to employees working in the circumstances identified by the provision.[38] It is instead a consideration to be taken into account in the *Peko-Wallsend* sense of evaluating it and giving it due weight, having regard to all other relevant factors.[39] The Full Bench stated that an assessment of this consideration requires a consideration of a number of matters including:[40]

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

42. Applying the above principles, in the present case, s 134(1)(da)(ii) & (iii) weigh heavily in favour of the variations proposed by the SDA for the following reasons:

(a) As to the extent of the disutility in working at particular times:

(i) In respect of weekday evenings, no party in the 4 yearly review has sought a variation to the Retail Award to reduce the penalty rate of 25% paid to permanent employees for work at that time. The Commission may therefore proceed on the basis that it is generally accepted and not in contest that a penalty rate of 25% adequately compensates for the disutility of work at that time.

(ii) In respect of Saturdays, as has been noted, in the *Penalty Rate Case*, the Full Bench was affirmatively satisfied: [41]

> … that the existing Saturday penalty rates for full-time and part-time employees in the retail award achieves the modern award's objective. They provide a fair and relevant minimum safety net.

And as has been outlined in paragraphs 21-24, disutility is a function of particular work or work performed at particular times, not types of employment.

(b) As to whether the Retail Award already compensates casual employees for work performed on weekday evenings and on Saturdays, critically, casual employees do not receive *any* additional compensation for work at that time. And in that case of Saturdays, the award

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38 At [195].
39 Ibid. Quoiting
40 At [190].
41 At [1700].

does not provide for any additional compensation for work at that time other than the 10% penalty rate.

(c) As to the extent to which working on weekday evenings and on Saturdays is a feature of the retail industry, while it is acknowledged that Saturday work is a feature of the retail industry for some employees, that is not the case in respect of weekday evening work. Only about 6.3% of employees in the retail industry have as their work schedule a regular evening shift.[42]

Section 134(1)(e) – equal remuneration for equal work

43. This factor is likely to be a neutral consideration.

Section 134(1)(f) – the impact on business, including on employment costs and the regulatory burden

44. For the reasons given in paragraph 37 above, the proposed variations if granted may increase total labour costs to a small extent. However, for the reasons explained, there is considerable scope for retailers to ameliorate or wholly offset any such increases.

45. Further, the proposed variations if granted will likely ease the regulatory burden on employers because the effect of the variations would be to equalise the penalty rate entitlements of casual and permanent employees, thus obviating the need for different payroll, administrative and related arrangements between the two classes of employment.

Section 134(1)(g) – simple and easy to understand modern award system

46. This factor weighs in favour of the making of the proposed variations. The establishment of uniform penalty rate provisions for casual and permanent employees for Saturday and weekday evening work will further the objective of modern awards being simple and easy to understand.

Section 134(1)(h) – impact on employment growth, inflation etc

47. For the reasons given in paragraph 37 above, the proposed variations if granted may increase total labour costs to a small extent. However, for the reasons explained, there is considerable scope for retailers to ameliorate or wholly offset any such increases. As such, this factor is likely to be a neutral consideration.

48. In summary, for the reasons outlined above, the existing provisions of the Retail Award in respect of Saturday and weekday evening penalty rates for casual employees are neither fair nor relevant. Accordingly, the Commission should make the variations set out in paragraph 4 above.

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42 See data set out in the *Penalty Rates Case* at [1445].

21 May 2018

STEVEN MOORE QC

Counsel for the SDA