



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**COMMISSIONER HAMPTON**

**C2019/1**

**s.285 - Annual wage review – Junior Rates of Pay in Modern Awards**

**Annual wage review  
(C2019/1)**

**Sydney**

**2.00 PM, WEDNESDAY, 15 MAY 2019**

PN1

THE COMMISSIONER: Good afternoon, all. This is a conference that I have convened on behalf of the expert panel to deal with an issue that's arisen in relation junior rates under some modern awards. We will be making a transcript so in that context I want to take appearances. I'm happy for parties to remain seated. My only caveat on that is that those that are in the back row will need to come forward so we capture your contributions, so I'll start in Sydney.

PN2

MS N DABARERA: If the Commission pleases, Dabarera, initial N, for United Voice.

PN3

THE COMMISSIONER: Thank you.

PN4

MR G MILLER: If it please, Miller, initial G, for the AMWU.

PN5

THE COMMISSIONER: Right.

PN6

MR A SAGE: Can I say Sage, initial A, for the AWU.

PN7

THE COMMISSIONER: Mr Sage, yes.

PN8

MR T CLARKE: Trevor Clarke, ACTU.

PN9

THE COMMISSIONER: Mr Clarke.

PN10

MR A BAUMGARTNER: Commissioner, Baumgartner, initial A, for the Motor Traders Association of New South Wales and also the Motor Trade Association of South Australia.

PN11

THE COMMISSIONER: Right, thank you.

PN12

MR S SMITH: Mr Smith, initial S, of the Australian Industry Group.

PN13

THE COMMISSIONER: Thank you, Mr Smith. All right, anyone in the back row wanting to appear? Yes.

PN14

MS A AMBIPAIHAR: May it please the Commission, Ambipaihar, initial A, from the CEPU.

PN15

THE COMMISSIONER: Ms Ambipaihar, yes.

PN16

MS A DEVASIA: May it please the Commission, Devasia, A, for the AMWU.

PN17

THE COMMISSIONER: Very well.

PN18

MS E SARLOS: Sarlos, initial E, for the CFMEU, mining and energy.

PN19

THE COMMISSIONER: Thank you.

PN20

MR A ODGERS: If the Commission pleases, Odgers, initial A, for the IEU.

PN21

THE COMMISSIONER: Mr Odgers.

PN22

MR T WARNES: Commissioner, Warnes, initial T, for the Australian Rail, Train and Bus Industry Union.

PN23

THE COMMISSIONER: Mr Warnes.

PN24

MR G MISTLER: Grant Mistler for St Vincent De Paul Society in New South Wales.

PN25

THE COMMISSIONER: Thank you.

PN26

MR H HARRINGTON: Harrington, initial H, for the AI Group.

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THE COMMISSIONER: Mr Harrington. All right, and that's it, so Melbourne.

PN28

MS V WILES: Commissioner, it's Wiles, initial V, for the CFMEU manufacturing division.

PN29

THE COMMISSIONER: Ms Wiles.

PN30

MR W CHESTERMANN: Commissioner, it's Chestermann, W, appearing on behalf of the Victorian Automobile Chamber of Commerce.

PN31

THE COMMISSIONER: Thank you, Mr Chestermann. All right. Look helpfully I think for myself and hopefully the parties, the staff of the Commission recently issued a background paper which sort of summarises the issue, in particular that the Australian Workers' Union raised a matter involving, if I can use the shorthand term, the Vehicle Industry Award. The background paper also sets out the submissions that the AWU made in that context.

PN32

It also records submissions that were made in response from the MTA Group and AiG and I note in that context that with some differences of degree there was at least some sort of common elements in those positions. The Commission has, however, confirmed that a number of other modern awards with the same issue apparently arises and in that context the background paper sort of sets out those awards and, at least in general terms, their circumstances.

PN33

Again, usefully for my perspective at least, there are two tables which summarise the circumstances in table one of four awards. As I understand it, those awards use the same adult reference point as the national minimum wage special order three but they have lower percentages applying to the age groups. Table two has 15 awards which have a higher adult reference point but because of the lower percentages which are adjusted in some or all, and in most cases it's mainly some of the age categories, the ultimate rate is lower than NMW3. That's by way of background.

PN34

Without, in any way, limiting the matters the parties want to raise with the panel, the background paper also sets out some issues at paragraph 22. Amongst other matters that you might want to address the panel on, you should at least deal with those. I also note that most recently the RTBU filed a submission which is also available on the website. That submission raises a different issue, I'm not saying we won't deal with it today but it raises a different issue but, Mr Warnes, you won't mind if we deal with that at the back end of the conference.

PN35

MR WARNES: Yes, of course. Thanks, Commissioner.

PN36

THE COMMISSIONER: All right, okay, so that's the background. Who'd like to lead off? Mr Sage, I think everyone's looking at you, so.

PN37

MR SAGE: Yes, Commissioner. I think perhaps it's useful to separate out the Vehicle Award just from the rest of the awards identified in the background paper because I think we're at something of a consent position at least in relation to the matters, the two tables noted in our submission. My friends from the AMWU have raised this morning the fact that there's a further wages table and I think my friend and I just want to speak to that and I believe it might be a consent position just to clarify that it's all three of the tables which we want varied.

PN38

THE COMMISSIONER: Okay.

PN39

MR MILLER: Thank you, Commissioner, yes. I do just need to point out the AWU's submission, the tables in the AWU's submission collated the junior rates with respect to the classifications in I think it was 33.7(a) and 52.1. However, we have done our own calculations with respect to the junior rates which are in 33.7(c) and there does appear to be some issue there as well with some age groups falling also below the national minimum wage which is an issue that, as I mentioned, wasn't picked up in the AWU's submission nor does it appear to have been picked up in the background paper which was produced by the Commission. I've got a table with our calculations here which I can actually hand up.

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THE COMMISSIONER: All right.

PN41

MR MILLER: But the crux of the issue is that it appears that the rate for a junior under 17 years old covered by a classification in 33.7(d) is 48 cents less than the minimum wage for a 17 year old under the equivalent national minimum wage and with respect to a junior under 20, it's 20 cents less than the minimum wage equivalent. I have had some discussion with my friends from the employer parties just prior to this conference starting. Without wanting to pre-suppose their views, I understand there might be some commonality of positions subject, I think, to the AiG wanting to do their own checking of the calculations.

PN42

THE COMMISSIONER: All right. Well, perhaps you outline your position and we'll confirm whether it's the common one or not.

PN43

MR MILLER: Yes, of course, Commissioner. Look our position would be that the simplest way to resolve that issue would be to adjust the percentages in that table in 33.7(c), just in respect to those age groups, just to raise them to the equivalent in the national minimum wage which, I think, would - for the 17 year old group, would bring it to 57.8 per cent and for the 20 year old group, would bring that to 97.7 per cent.

PN44

MR SAGE: Yes, well I think actually perhaps I misunderstood my friend from the Motor Trades Association, I think the proposal might have been that the junior percentages for both paragraphs (a) and (c) of clause 33.7 be identical and they both be raised such that none of them are below the level of the national minimum wage order.

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THE COMMISSIONER: Yes, by adopting the percentages from the national minimum wage order.

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MR SAGE: Where they are presently higher. I'm not sure if I'm misquoting the MTA there.

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THE COMMISSIONER: All right.

PN48

MR SAGE: But I think the view was that it would be anomalous for there to be two separate sets of percentage rates for level four juniors versus level one juniors, so if that's the position - I took it that that was the position they had taken.

PN49

THE COMMISSIONER: All right. Perhaps we might deal with that issue immediately.

PN50

MR BAUMGARTNER: Just briefly, we are consenting to the change as proposed. I do note in our submission, which was put forward by Mr Sheehan from the Motor Traders Association of South Australia, we did not address the 33.7(d) rates in that submission and, to be honest, I haven't been able to contact them to discuss this further so we probably do need to confirm the position but from a logical point of view, I feel we probably should have the same percentages in both but that's a matter we'd have to discuss rather than having percentages that look a little anomalous between the two tables.

PN51

But the difference is the rate of pay, obviously, which puts them higher, but that's a skill based issue and it seems to me the distinction for some juniors is their level of skill and so that would relate to the relevant rate that they're attached to, so we did accept, as an industry, that we should adjust the junior percentages, so from an initial position based on this most recent proposition, we'd tender the view that we should have the same percentages in both. But I will need to confirm that with Mr Chestermann and Mr Sheehan who have been involved in this process on behalf of the industry.

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THE COMMISSIONER: All right. Mr Smith.

PN53

MR SMITH: Thank you, Commissioner. If I could just make some preliminary points about the broader issue and then go to the - - -

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THE COMMISSIONER: Sure.

PN55

MR SMITH: - - - vehicle issue. There's nothing to say in the Act that award covered juniors need to have rates of pay that are no less than award free juniors. We're talking about two very different groups in that there are hundreds of thousands of award covered juniors, probably more than a million, and there are next to no award free juniors because juniors tend to be employed in award

covered industries and the big industries, of course, are retail, hospitality, et cetera, that employ very large numbers of juniors and Hatcher VP made this point today in the consultations that, in response to the position that the Catholics were putting, that there's nothing in the Act anywhere that his Honour could identify that requires that award free people be paid similar rates to award covered people.

PN56

I think it's informative to think about where those rates came from for award free juniors. Back in 2010-11, the issue came up of course there need to be a special minimum wage set and Ai Group did some work in looking at what award covered juniors were paid and we identified that rates of pay for award free juniors that were similar to the rates in the Graphic Arts Award would not cause the sorts of issues that we're talking about today because those rates were relatively low.

PN57

ABI put a position up that why not peg the rates to those in the Miscellaneous Award and without any detailed analysis, or without being critical of the expert panel, it was just a convenient way of coming up with a special minimum wage for award free juniors that the rates were pegged to the Miscellaneous Award. There was no consideration of the impact on awards because we were dealing with completely different people and it's a bit like the rates for award free apprentices.

PN58

There are probably virtually no award free apprentices because they tend to be award covered. Award free juniors, to the extent there are any or many, and the hundreds of thousands of award covered juniors are a disadvantaged group. They have high levels of unemployment and under-employment and if the rates were just simply moved up to those based on the Miscellaneous Award, clearly some people would get a 10 per cent wage increase in addition to the wage increase that's going to be awarded for the annual wage review this year, so we, as a proposition, see no problem at all with award covered juniors paid, in some cases, less than award free juniors.

PN59

The Miscellaneous Award only has four classifications and it doesn't have a classification that aligns with C14 or the national minimum wage so it's not at all surprising that the award free junior rates would, in some cases, be higher than the award covered junior rates. We do have a different position on this vehicle industry issue. As we said in our submission, we thought it will be inconsistent with where we had got to in a very lengthy difficult negotiation to bring the vehicle manufacturing employees into the Manufacturing Award to not support the outcome but we don't necessarily disagree with the position that the MTA New South Wales has put, that the two tables should have similar relativities, but we don't agree that the relativities should be moved up in the bottom table to those that align with the rates in the Miscellaneous Award and then suddenly the rates for a completely different group of employees who are paid on a different scale suddenly moved up just so that it's neat with the same relativity.

PN60

We just don't see any rationale for that. What we have said to the AMWU just a few moments before the conference started is we're happy to have a look at what's being proposed but we only heard about it five minutes before the conference started so we're happy to confirm our position but consistent with the broader position, we don't necessarily see any problem with rates that are different.

PN61

THE COMMISSIONER: All right. Perhaps let's just deal with the Vehicle Award for the moment then. It would seem to me be helpful, Mr Sage, if you or the union, two unions, involved might not put together a detailed a proposal, I don't think it would be all that difficult, put that and put it to the employer interest and then, as quickly as you can, form a view on that and then communicate that to the Commission because obviously we're on a pretty tight timeframe here if it is to be dealt with as part of this review. See any difficulties with that as a course of action?

PN62

MR SAGE: No, Commissioner.

PN63

THE COMMISSIONER: All right, okay. Perhaps Mr Smith has also helpfully raised the broader issue, the matter of principle. Perhaps we might dealt with that now and then any other particular circumstances that we should, so, Mr Clarke, do you want to launch?

PN64

MR CLARKE: Yes, thank you. Thank you, Commissioner. I think there are issues of principle and there are also issues of time, given that the practice of the Commission has been to attempt to give employers three or weeks kind of lead time to adjust to what the circumstance is likely to be from the orders that kick in on 1 July.

PN65

To pick up on the broader issue that Mr Smith was referring to, we don't think that it is appropriate that a junior at any age group covered by an award gets paid less than an award or agreement for a junior under the national minimum wage order. We think that's a problem. We don't point to an explicit section of the Act that says, there you go, you can't do it, although we would submit that the word, "minimum", has to mean something.

PN66

The Miscellaneous Award does in fact have a rate of pay that's pegged at C14. That's the entry rate there. And the national minimum wage order, of course, applies to percentages to that C14 rate. And if you go through and have a look at some of the rates of pay that we're looking at in the award that the Commission and its staff have helpfully identified, all with the exception of one are above C13. There's one above C11 that's only \$30 a week less than the qualified trades rate. We see a real systemic equity issue with telling somebody who's in a job that's almost valued as much as a skilled tradesperson rate, to say at 20 years old you should be paid less than the national minimum wage for a 20 year old which



is constructed on the basis that the person has zero work skills and zero work experience. We think that's inherently unfair.

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THE COMMISSIONER: Which award is that?

PN68

MR CLARKE: That is the one I've called, "unique 4" in my spreadsheet and I'll get to my spreadsheet in a moment. And this comes back to the issue of time because, yes, we do have principles, and the principles, we would like to have addressed. I think you all know we do have principles. And we think it needs to be addressed in a much more comprehensive way than we're capable of doing in this review in this timeframe. It may well be a matter that a panel constituted next year may consider having a preliminary hearing about, about how junior rates are constructed in awards given the disparities that you see.

PN69

But what we have attempted to do is build a model that ensures that each of the rates that have been identified in dollars terms as a problem in the attachments to the background paper are rectified so that the rate of pay is equal to, or no less than, what the national minimum wage order would specify for somebody of the same age.

PN70

The way that model works is to look at each of the award rates that are identified in the attachment as being problematic, and construct an upward relativity using C14 or the national minimum wage, as a hundred per cent. And then take each age level percentage, so for example, 36.8 for under 16, and divide that rate by the relativity and times it by a hundred. And so as you get to the higher skilled rates, you know, what starts out at 36.8 at C14 becomes, you know, 31.6 at C10, to bring about the result that the 16 year old at the approximately CT level doesn't get paid less than the national minimum wage order. And we've then - - -

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THE COMMISSIONER: So does that mean you adjust all the rates to retain some sense of existing relatively but so that at no point is it lower than the minimum wage?

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MR CLARKE: No. No, this is, for want of a better description, a half way short response to ensure that none of the rates that have been identified in the attachment are less than the national minimum wage order would prescribe for a person of the same age.

PN73

THE COMMISSIONER: Yes. But what I don't understand is whether you're adjusting other rates that are not currently lower.

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MR CLARKE: No.

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THE COMMISSIONER: No?

PN76

MR CLARKE: No. No, the only rates that would be adjusted would be the ones that are identified as being problematic, which are predominantly for 19 and 20 year olds.

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THE COMMISSIONER: All right.

PN78

MR CLARKE: The range of increases that that brings about are a .2 of a percent, to a 1.5 per cent but in some cases, higher as a 20 year old. For example, I think it was the Animal Care Award – no, that was a 3 per cent increase from 90 to 93, for the 20 year old. But there was one – yes. No, ACVSO, what did that stand for? Yes. No, so that is the Animal Care Veterinary, et cetera. So that would go from 90 per cent to 97.7 per cent for a 20 year old.

PN79

So we come here today with a specific proposal to change specific multipliers where they are a problem. And we do it on the basis of that mathematical model using the lowest rate as the comparison, the lowest rate in the award that's the problem, as a comparison. So for example, you might say in your table 1 or table 2, that the issue arises for a junior level 2 employee and a junior level 3 employee. Well, we apply the mathematics from that model to the junior level 2 employee because you have to do that to get the higher percentage to get them over.

PN80

Because the only alternative is to have a whole set of different percentages for the different skill levels for people that are junior too. And I haven't presented it in a particularly attractive way but I am happy to have it circulated or emailed and people can play with the numbers. The reason it's rounded up is just to make sure that nobody does fall behind because I note that these junior rates tend to be expressed, at the most, to one decimal place, so we've rounded up to one decimal place in each circumstance.

PN81

But as I say, this is an issue that's come across us. It has been unexpected. Its come very quickly but the manner in which we've approached it is that a minimum has got to be a minimum. And when you go back and have a look at the history of how we got to have the miscellaneous award that's the reference point in the first place, and there's a decision about that from the former Commission, [2009] AARCFB 945, it's described as, you know, it's entry rate is the national minimum wage and it's described as having basic conditions only, a basic safety net, and that it is there as essentially – not as a comprehensive safety net but in the words of the Commission it should contain basic conditions only, leaving room for the application of an appropriate safety net in and of an award in due course.

PN82

So it was only ever going to be the lowest of the low, of the low. And we don't think that a fair and relevant safety net of industry based awards with relatively high skilled people could result in those relatively high skilled people, even if they are less than 21, being paid less than what the Commission's described as the lowest of the lowest of the low, in skill level.

PN83

THE COMMISSIONER: So Mr Clarke, do I take it that you, though – because you put that forward as an interim arrangement, do you propose the process you alluded to earlier? That is, that perhaps as part of the next annual review the panel undertakes a more comprehensive view of junior rates, more generally?

PN84

MR CLARKE: We do think that that's desirable but not everybody who would have a view about that is not in the room today or sitting at the right desks at the moment.

PN85

THE COMMISSIONER: Yes.

PN86

MR CLARKE: And that might be something that the panel – you know, I mean, I remember I think when the – there's been a couple of occasions in the past where the panel has asked the question, here's this issue, should we have a closer look at it, should we start earlier, should we have a preliminary hearing. It seems to fall into that sort of a basket.

PN87

THE COMMISSIONER: Yes.

PN88

MR CLARKE: And we would want to have a more comprehensive look. We certainly would like to have a more comprehensive look at it but we just think it's impossible to do that in the two and a half weeks, if that, that we've got, before the hammer falls upon whatever decision that the panel will make.

PN89

THE COMMISSIONER: All right.

PN90

MR CLARKE: I might say that there is one complication. There is always a complication. And that is in relation to the Real Estate Industry Award, I believe, if I can find that in my list here. I'm sorry, just bear with me.

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THE COMMISSIONER: That's all right.

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MR CLARKE: Yes, it's the Real Estate Industry Award.

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THE COMMISSIONER: Yes.

PN94

MR CLARKE: If you were to apply what we're calling, our correction, you would end up in a situation – so I say it's only attacking the rates that are identified as ones where that dollar amount goes backwards – you would end up in a situation where a 21 year old, because perplexingly there is a 21 year old junior rate in the Real Estate Industry Award, you'd get paid more as a 20 year old than you would as a 21 year old. You'll fall backwards. But regrettably from our side of the ASU, I don't we're here to express a view about what might be done about that. But it is an anomaly. And the other, of course, I shouldn't take for granted, that the panel in full session has, with the exception of the first annual wage review – sorry, happy decade anniversary, I should say for the annual wage review – with the exception of the first one as applied percentage increases across the board, if they chose to do something different this time, this model would not work.

PN95

THE COMMISSIONER: So subject to that caveat do you have the model in a form that you could provide it to the Commission and to the other parties?

PN96

MR CLARKE: Unless any of my colleagues which me not to do so, I'm happy to just email the spreadsheet because it shows the calculations and people can play with it. It's a bit better than a Word document that says, here's the percentage, this is what we want. You can at least see the logic, you can look at the formulas and you can understand why we're proposing what we're proposing.

PN97

THE COMMISSIONER: All right. I'm just keen to make sure that everyone who has a proper interest in the matter has an opportunity to comment before the panel makes the decision both about the principle, and also if it decides to do something, and the options that might be available.

PN98

MR CLARKE: Yes.

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THE COMMISSIONER: All right. Mr Clarke - - -

PN100

MR CLARKE: I should say, it's not the form that's normally acceptable in a Commission proceeding.

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THE COMMISSIONER: Yes. Yes.

PN102

MR CLARKE: It's a spreadsheet. It doesn't - - -

PN103

THE COMMISSIONER: Yes. Yes.

PN104

MR CLARKE: But it's informative, at least.

PN105

THE COMMISSIONER: All right. Well, if you would provide that to my chambers, as soon as you're able to do that, then I'll make arrangements for it to go on the website which seems to be the normal mode of communications for the panel, so – okay. All right. Now there's the question about what order we might proceed here. Mr Smith, I can see that you want to respond to that and I'm happy to do that. I wondered though whether it might be useful to hear from the union interest, as a group, and in particular if there are any alternative – any other issues or particular award issues that anyone wants to raise, bearing in mind that a particular approach is proposed for the Vehicle Award. Is there anyone else want to - - -

PN106

MS DABERERA: We would support the ACTU's position, and then we just emphasise that it's difficult to see how the award could be meeting the modern award's objective and be fair and relevant if it has rates that are lower than the minimum award rate, and I support the ACTU's submission, as well, in terms of, "minimum", must have a meaning.

PN107

MR SAGE: Yes, we agree, yes, and we do have other awards apart from the Vehicle Award, which have been captured in the background paper, and I think for the same reasons, albeit they were brief reasons which we gave in our written submission, for the same reasons the approach that is proposed by the ACTU is in our view the only one consistent with the modern awards objective and the minimum wages objectives, at least as an interim step given the time constraints Mr Clarke has identified.

PN108

I also note and just echo what Mr Clarke said about the possibility of a further review next year which there will need to be further discussions about. But I do think it's - on our review it's probably not since the junior rates inquiry in 1999 that any sort of comprehensive review of the junior rates' approach has been undertaken and done since the advent of the Fair Work Act, which will be on around its tenth anniversary during the currency of the next review.

PN109

THE COMMISSIONER: Thank you.

PN110

Any dissenting views might be the easiest way to deal with it? In Sydney? No? No. In Melbourne, Ms Wiles, do you want to say anything?

PN111

MS WILES: Yes. Thank you, Commissioner. Look, the CFMMEU manufacturing division, we're appearing today in relation to three awards, the

Textile, Clothing, Footwear and Associated Industries Award, the Dry Cleaning and Laundry Award and also the Timber Industry Award. We support and adopt the submissions of Mr Clarke for the ACTU. We think that the proposed remedy is a sensible and practical one and also would be consistent with the modern award objective and the minimum wage objective. Look, I just want to point out there is one error in the background paper in relation to the TCF Award and that is in table 2 and in the third column. It says there in relation to clause 20.10(a) that:

PN112

*The weekly rate for juniors is the appropriate percentage of the level 10 rate in accordance with clause 15.1 -*

PN113

et cetera. It should actually refer to the percentage of the general skill level 2 rate and not the level 10 rate.

PN114

THE COMMISSIONER: Just hang on.

PN115

MS WILES: Other than - - -

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THE COMMISSIONER: Look, I'm sorry, can you repeat - - -

PN117

MS WILES: Sorry.

PN118

THE COMMISSIONER: Now that I've got it can you repeat it for me?

PN119

MS WILES: If we go to table 2.

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THE COMMISSIONER: Yes.

PN121

MS WILES: Sorry, I'll just find the page for you.

PN122

THE COMMISSIONER: Yes, I've got it.

PN123

MS WILES: So, yes, page 20.

PN124

THE COMMISSIONER: Yes.

PN125

MS WILES: It's referring to the Textile, Clothing and Footwear Award.

PN126

THE COMMISSIONER: Yes, what is the change you propose?

PN127

MS WILES: So in that third column from the left you'll see there that it refers to:

PN128

*The weekly rate for juniors is the appropriate percentage of the level 10 rate ...*

PN129

That's actually incorrect. It should refer to the general skill level 2 rate.

PN130

THE COMMISSIONER: And are the percentages that follow wrong or just that reference?

PN131

MS WILES: No, they're actually correct. So the percentages are correct. It's just that reference to level 10. There's no level 10 classification.

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THE COMMISSIONER: Yes.

PN133

MS WILES: In the TCF Award, either generally or in relation to juniors.

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THE COMMISSIONER: Yes.

PN135

MS WILES: Yes.

PN136

THE COMMISSIONER: Yes, I think if you look above, the box above, I think you'll see there's actually been a replication error.

PN137

MS WILES: Yes, okay. Yes, I hadn't seen that. Yes.

PN138

THE COMMISSIONER: They did this in very tight timeframes so I suspect a cut and paste is responsible for that, but thank you for drawing that to my attention.

PN139

MS WILES: But, Commissioner, other than those comments, yes, we support the submissions of the ACTU and the proposal to be put forward.

PN140

THE COMMISSIONER: Very well. All right, so perhaps then the employer interests again, dealing with the general matter of principle that's been in a sense the first question that was raised in the paper and, secondly, any particular award circumstances I should be aware of.

PN141

MR SMITH: Commissioner, just a couple of points. If I could just correct what I said before. The point I intended to make was not that the Miscellaneous Award doesn't have a rate of pay that is equivalent to the national minimum wage but that it only has four classifications, and in that decision that Mr Clarke was referring to it describes the scope of the bottom classification as not just one for the lowest level of skill but for lower levels of skill. So because it has only got four means necessarily - - -

PN142

THE COMMISSIONER: So broad bands.

PN143

MR SMITH: Broader, yes.

PN144

THE COMMISSIONER: Yes.

PN145

MR SMITH: And it also makes the point, not that this is an award that's supposed to be the absolute minimum but an award - and, you know, they say in that decision, the Full Bench:

PN146

*We agree with those who have suggested that the coverage of the award is very narrow and likely to be limited in time where emerging industries are concerned or where the expansion of coverage of a modern award is involved.*

PN147

So it was only ever intended to apply to a very narrow group of employees. It wasn't a bare bones minimum award. It was really just to cover this group of people that were generally award-covered under the pre-modern award system but slipped through the cracks, if you like. In terms of the proposal that Mr Clarke has raised, we don't have any objection to the idea of this being looked at in more detail next year, and agree that it's impossible to do justice to this issue this year. But we will consider that proposal in detail but just make one point, that this idea of moving up each classification to align with that creates a whole raft of problems because the relativities that have been carefully constructed within each individual award for juniors are then disturbed.

PN148

So it will create probably far more problems than it solves and, you know, in looking at this issue perhaps we need to also go back and determine whether or not a different approach should be made going forward, to the approach that was determined back in 2010/11. Because as I've said it had no detailed scrutiny at the time. It was just convenient to latch on to the Miscellaneous Award and we may well argue that our approach at that time has more merit because it wouldn't have caused all these problems if it had been adopted.

PN149



THE COMMISSIONER: So you're talking about a review of the Miscellaneous Award?

PN150

MR SMITH: No, a review of the special minimum wage for juniors and whether it's appropriate to use the Miscellaneous Award for the special minimum wage going forward.

PN151

THE COMMISSIONER: Okay. No, I understand.

PN152

MR SMITH: I'm not saying necessarily no, but if we're going to look at the issue we should have a good look at it from all directions. Because we don't accept the starting proposition that that was ever intended to set a minimum for award-covered employees, quite the opposite.

PN153

THE COMMISSIONER: Thank you.

PN154

All right, in Sydney anyone else want to deal with the broader issue? No? Okay, Mr Chesterman, did you want to say anything?

PN155

MR CHESTERMAN: Thanks, Commissioner. Look, at the moment I don't. I've got some views on this about the relevance of the Miscellaneous Award, given the background history of why it was introduced during the award modernisation process. But I would like to raise that with our colleagues in South Australia and New South Wales.

PN156

THE COMMISSIONER: Yes, sure.

PN157

MR SMITH: Thank you.

PN158

THE COMMISSIONER: All right. Are there any further submissions the parties want to make here? I'll confirm the process to follow in a moment. No? All right, so as I understand it there are some discussions going on about the Vehicle Award and I think at the moment, at least initially, that's going to be dealt with internally between the parties. And if some common views can be reached about that, that can be communicated to the panel. If a common view can't be reached about that then the parties can communicate their alternative propositions.

PN159

In relation to the matters more generally, the parties have put forward their positions in relation to the principle, which I will communicate both via transcript and more directly possibly in the form of a report to the panel. What the panel then does with it obviously is a matter for the panel more generally. Just in the

interests of time, Mr Clarke, I have requested that you provide your proposal which will then be put on the website, and accompanying that will be an invitation with a timeframe proposed at which to comment on it, to make those comments.

PN160

Now that shouldn't be taken that the panel has formed any view about the matter of principle, but because of the necessity of time we need to deal with all matters at once, including if we do decide to deal with how we might deal with that. So subject to that and the timeframes which will be subsequently confirmed, is there anything further? This end? No? Thank you, yes, I appreciate the non-verbal reminder, and in Sydney - sorry, Melbourne? No?

PN161

MS WILES: No thank you, Commissioner. Sorry - - -

PN162

MR WARNES: No, no, I'm fine, Commissioner. Thanks.

PN163

MS WILES: Yes.

PN164

THE COMMISSIONER: All right, so the RTBU.

PN165

MR WARNES: Thank you, Commissioner. Did you receive the submissions made by my colleague?

PN166

THE COMMISSIONER: I did indeed. I did indeed.

PN167

MR WARNES: These relate to I think quite a similar issue to what we've been dealing with in relation to junior rates. We've identified that none of our junior rates - by 'our' I mean the junior rates in the Rail Industry Award.

PN168

THE COMMISSIONER: Yes.

PN169

MR WARNES: Fall below those provided in the national minimum wages order or the Miscellaneous Award. But we did identify that there are a number of apprentice rates in national minimum wage order 4, I'll call it - I think it was in paragraph 9 of the national minimum wage order 2018 - that fall below the requisite rate. My colleague in the submissions has highlighted those rates in red on pages 2 and 3 of those submissions. It affects, as you'll see, Commissioner, quite a few classifications. For example pre 1 January 2014 in the Rail Industry Award every classification falls below those in NMW4. The same with after 1 January 2014, for non-completed Year 12, completed Year 12, third and fourth years, fall below and - - -

PN170

THE COMMISSIONER: Would there be any pre 1 July 2014?

PN171

MR WARNES: I doubt it.

PN172

THE COMMISSIONER: Adult apprentices?

PN173

MR WARNES: I doubt it, Commissioner. But they do exist for if someone does - well, I suppose they don't and they can't exist. I'd have to go back and look at that, but I can't imagine that they would.

PN174

THE COMMISSIONER: Unless you can suspend your apprenticeship.

PN175

MR WARNES: Yes. Yes, I'd have to get instructions but you're right, I think the elapsation of time probably takes the relevance out of that one. Then adult apprentices after 1 January 2014, you've got the fourth year fall below NMW4.

PN176

THE COMMISSIONER: Okay.

PN177

MR WARNES: So, I mean, it's quite a similar issue as has been raised in relation to the junior rates throughout the awards. In relation to fixing those, I mean obviously it's a matter of at least boosting those award rates up to what is stated in the national minimum wage order 4 or the Miscellaneous Award. How you do that, I would imagine I'd support my friend if I took it right from the AMWU, about adjusting the percentages. What flow-on effects would go from that I'm not sure.

PN178

THE COMMISSIONER: Okay.

PN179

MR WARNES: But as I said we don't have anyone, apart from the more generalist employee groups here to respond to the submissions we've made, so I acknowledge that limitation of the Commission today.

PN180

THE COMMISSIONER: What stage is the award up to in the review?

PN181

MR WARNES: How long is a piece of string, Commissioner? I'd have to come back to you on that.

PN182

THE COMMISSIONER: And this might be a difficult question for you to answer but are you aware or is anyone aware of whether this is an issue more generally, or a creation of the Rail Industry Award and its particular history?

PN183

MR WARNES: I can't answer that, sorry, Commissioner.

PN184

THE COMMISSIONER: No, I wasn't expecting you to do so, but.

PN185

MR SAGE: Commissioner, from the AMWU's perspective we haven't had the opportunity to do an audit of the apprentice rates in our award. So we couldn't comment at this stage.

PN186

THE COMMISSIONER: You're not sure?

PN187

MR SAGE: Yes.

PN188

THE COMMISSIONER: Yes, okay.

PN189

MR WARNES: Just on that point there's probably from the AMWU's perspective - and this is just sort of taking it on notice, that they've probably got a lot more apprentices affected as well. Like the rail industry isn't a massive user of apprentices anyway. I mean, they are out there. But, yes, there are other industries that more heavily use apprentices than in rail.

PN190

THE COMMISSIONER: So, Mr Smith, any light you can shed on that?

PN191

MR SMITH: Commissioner, we identified the problem of this in our submission about the vehicle industry issue and we made the point that, as I explained before, we accepted that outcome because it was consistent with what we'd negotiated in the Vehicle Award. But we did not accept the broader point because it's not just juniors, it's apprentices, it's trainees.

PN192

It was actually our proposal to peg the award-free apprentice rates to the Miscellaneous Award, but in putting forward that proposal we did not envisage that suddenly this was going to disturb the outcome of the massive apprentice case in the four yearly review and the smaller one in the - sorry, the two yearly review.

PN193

THE COMMISSIONER: Yes, I understood.

PN194

MR SMITH: And the smaller one in the four yearly review. So the whole premise of these alleged problems we just don't accept, and we don't mind it being looked at but we will not be accepting the proposition that somehow or other the Miscellaneous Award has turned into something it was never designed for, and I think the more this issue is looked at the more it will be seen that it is unworkable

to use those rates for apprentices, trainees, juniors, for a different, a completely different cohort of employees.

PN195

THE COMMISSIONER: All right.

PN196

MR CHESTERMAN: Commissioner, it's Bill - - -

PN197

THE COMMISSIONER: Yes?

PN198

MR CHESTERMAN: Sorry, Commissioner, it's Bill Chesterman from Melbourne.

PN199

THE COMMISSIONER: Yes, Mr Chesterman.

PN200

MR CHESTERMAN: Look, I'd have to concur with what Mr Smith said about apprentices because I was part of the case in 2013 which went for 12 months and was before a Full Bench, and that comprehensively examined rates of pay for apprentices and for that reason I'd say that to use the Miscellaneous Award rates to determine or question whether the apprenticeship rates fall below or above it would be entirely inappropriate.

PN201

As I've said earlier, my view was back in - and I was there - around 2008, 2009, was that the Miscellaneous Award was introduced simply to catch those employees that had fallen between the gaps, if you like, in terms of award coverage and it specifically excluded certain categories. So to undertake a review that goes well beyond what I thought we were coming here today to discuss, I think it's entirely inappropriate.

PN202

THE COMMISSIONER: All right. Thank you.

PN203

Anyone further on that general proposition? No? All right, thank you all for your attendance at the conference. I do note there's actually more in attendance at this conference than the panel consultation more generally, so I'm not sure what that says about the issue. But I appreciate your attendance and your assistance. So we'll deal with it on that basis. Thank you all and good afternoon.

**ADJOURNED INDEFINITELY**

**[3.02 PM]**