

IN THE FAIR WORK COMMISSION

Fair Work Act 2009 (Cth)

FWC Matter No: AM2016/32

4 YEARLY REVIEW OF MODERN AWARDS

Review of the *Road Transport and Distribution Award 2010*

OUTLINE OF SUBMISSIONS OF COLES IN RESPONSE TO THE TWU'S PROPOSED VARIATION

A. Introduction

1. These submissions are filed on behalf of Coles Supermarkets Australia Pty Ltd (**Coles**). These submissions are made in response to the materials filed by the Transport Workers' Union of Australia (**the TWU**) on 18 January 2017 in support of the TWU's proposed variations to the *Road Transport and Distribution Award 2010* (**the RTD Award**) (**TWU submissions**).
2. Coles' interest is confined to the TWU's proposal that a definition of "driver" be included in clause 3.1 of the RTD Award (**the Proposal**).¹
3. Coles relies on these submissions and the witness statements of Christopher Paul Gardner dated 2 March 2017 and Bradley Shane Foenander dated 2 March 2017.

B. Summary

4. The Fair Work Commission (**the Commission**) should not vary the RTD Award in the manner sought.
5. The TWU has failed to adduce evidence or put forward arguments which adequately demonstrate that the Proposal is "necessary" in order to ensure that the RTD Award meets the modern awards objective in s.134 of the *Fair Work Act 2009* (**the FW Act**).²

C. The history behind the TWU's proposal and submission

6. As will be set out below, the TWU is using these modern award variation proceedings as a means to achieve an outcome that it has been unable to achieve through other litigation.

¹ Outline of Submissions filed by the Transport Workers' Union of Australia on 18 January 2017, [3].

² *Fair Work Act 2009* (Cth), s.138.

7. Coles and the TWU were involved in litigation between 2012 and 2014 before Fair Work Australia, a Full Bench of Fair Work Australia, the Federal Magistrates Court and a Full Court of the Federal Court. This related to whether Customer Service Agents (**CSAs**) who are employed by Coles as part of its online business were most appropriately covered by the *General Retail Award 2010 (Retail Award)* or the RTD Award (**the proceedings**).³
8. On 28 February 2014, the (then) Federal Magistrates Court handed down a decision in respect of the proceedings.⁴ As part of the decision, that Court found that the award classification in the Retail Award that covers CSAs is the most appropriate classification (ahead of the RTD Award), in light of the work performed by the CSAs and the environment in which the CSAs normally perform their work (when compared against the relevant classification in the RTD Award).⁵ Relevantly, the Court said that:

*“... [T]he Retail Award applies to employees of retailers even though their jobs comprise a substantial degree of driving and delivery functions. Further, the Road Transport Award was not intended to be the award which necessarily covered employees who performed any form of driving duties irrespective of the circumstances.”*⁶
9. A critical factor in making this finding was that the background of the award modernisation proceedings favoured the Retail Award as being the award which most appropriately covered Coles’ CSAs (even though their jobs comprise driving and delivery functions).⁷
10. The matter was the subject of an appeal by the TWU to a Full Court of the Federal Court. By decision dated 3 November 2014, the Court upheld the decision of the (then) Federal Magistrates Court regarding the appropriate award coverage for Coles’ CSAs (**Full Court’s decision**).⁸
11. The TWU has now made an application to vary the RTD Award. It is readily apparent that the TWU is simply trying to effect a change to the RTD Award to remedy those features of the RTD Award identified by the Courts as leading to a conclusion that the most appropriate award covering CSAs is the Retail Award.⁹

D. Legal principles

12. Section 134(1) of the FW Act states that:

“The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

- (a) relative living standards and the needs of the low paid; and*
- (b) the need to encourage collective bargaining; and*
- (c) the need to promote social inclusion through increased workforce participation; and*
- (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and*

³ See the Witness Statement of Christopher Paul Gardner for a general background in relation to the proceedings.

⁴ *Transport Workers’ Union of Australia v Coles Supermarkets Australia Pty Ltd* [2014] FCCA 4.

⁵ *Transport Workers’ Union of Australia v Coles Supermarkets Australia Pty Ltd* [2014] FCCA 4, [227].

⁶ *Transport Workers’ Union of Australia v Coles Supermarkets Australia Pty Ltd* [2014] FCCA 4, [238].

⁷ *Transport Workers’ Union of Australia v Coles Supermarkets Australia Pty Ltd* [2014] FCCA 4, [227], [234]-[238].

⁸ *Transport Workers’ Union of Australia v Coles Supermarkets Australia Pty Ltd* [2014] FCAFC 148.

⁹ This is clear from [14]-[19] of the Outline of Submissions filed by the Transport Workers’ Union of Australia on 18 January 2017.

- (da) *the need to provide additional remuneration for:*
 - (i) *employees working overtime; or*
 - (ii) *employees working unsocial, irregular or unpredictable hours; or*
 - (iii) *employees working on weekends or public holidays; or*
 - (iv) *employees working shifts; and*
- (e) *the principle of equal remuneration for work of equal or comparable value; and*
- (f) *the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and*
- (g) *the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and*
- (h) *the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.*

This is the modern awards objective."

13. Section 138 of the FW Act provides that 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.
14. The principles applicable to the Commission's current four-yearly review of all modern awards were set out by a Full Bench in *Re 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 and more recently in *4 Yearly Review of Modern Awards – Penalty Rates* [2017] FWCFB 1001. These principles are:
 - a. The modern awards objective in s.134(1) is essential to the review. "Fairness" is to be assessed from the prospective of the employees and employers covered by the modern award in question. The word "relevant" is intended to convey that a modern award should be suited to contemporary circumstances;¹⁰
 - b. The Commission must have regard to the nine specified factors in s.134.¹¹ No particular primacy is attached to any of the s.134 considerations.¹² There is a degree of tension between some of the s.134 considerations. The Commission's task is to balance the various considerations and ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions;¹³
 - c. Variations to modern awards should be founded on merit-based arguments. The extent of the argument and material required will depend on the circumstances;¹⁴
 - d. Where significant change is proposed as part of the review, it "*must be supported by a submission which addresses the relevant legislative provisions and **be accompanied***

¹⁰ *4 Yearly Review of Modern Awards – Penalty Rates* [2017] FWCFB 1001, [37] and [117]-[120].

¹¹ *Fair Work Act 2009* (Cth), s.134(1) and (2).

¹² *Re 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788, [32]-[34] and *4 Yearly Review of Modern Awards – Penalty Rates* [2017] FWCFB 1001, [115].

¹³ *4 Yearly Review of Modern Awards – Penalty Rates* [2017] FWCFB 1001, [163].

¹⁴ *4 Yearly Review of Modern Awards – Penalty Rates* [2017] FWCFB 1001, [111].

by probative evidence properly directed to demonstrating the facts supporting the proposed variation” (emphasis added);¹⁵

- e. The review will not proceed in isolation, “unencumbered” by previous decisions. The Commission will take into account relevant previous decisions having regard to the context in which they were made, and in the absence of cogent reasons no to do so, **previous Full Bench decisions should generally be followed** (emphasis added);¹⁶
- f. However, it is necessary to consider the context in which those decisions were made. The particular context may be a cogent reason for not following a previous Full Bench decision, such as:
 - i. 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 be relevant to the weight to be accorded to the previous decision; and
 - ii. The extent of the Full Bench’s consideration of the contested issue. The absence of detailed reasons in the previous decision may be a factor in considering the weight to be accorded to the decision;¹⁷
- g. The Commission will have regard to the historical context applicable to each modern award.¹⁸ 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;¹⁹
- h. A modern award may include terms that it is permitted to include, only to the extent *necessary* to achieve the modern awards objective and (where applicable) the minimum wages objective. The proponent of the variation must demonstrate that if the modern award is varied in the manner proposed, then it would only include terms to the extent necessary to achieve the modern awards objective. In this sense, a distinction must be drawn between that which is “*desirable*” and that which is “*necessary*”. That which is desirable does not carry the same imperative for action;²⁰
- i. Reasonable minds may differ as to whether a particular award term or proposed variation is necessary as opposed to merely desirable. What is necessary to achieve the modern awards objective is a value judgment taking into account the s.134 considerations to the extent that they are relevant, the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence.²¹ In assessing the necessity of a proposed variation, the focus is on the

¹⁵ *Re 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788, [23].

¹⁶ *Re 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788, [23].

¹⁷ *4 Yearly Review of Modern Awards – Penalty Rates* [2017] FWCFB 1001, [255].

¹⁸ *Re 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788, [24] and *4 Yearly Review of Modern Awards – Penalty Rates* [2017] FWCFB 1001, [111].

¹⁹ *Re 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788, [24] and *4 Yearly Review of Modern Awards – Penalty Rates* [2017] FWCFB 1001, [111] and [253].

²⁰ *Re 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788, [35]-[36] and *4 Yearly Review of Modern Awards – Penalty Rates* [2017] FWCFB 1001, [138].

²¹ *4 Yearly Review of Modern Awards – Penalty Rates* [2017] FWCFB 1001, [136].

terms of the modern award as varied, rather than on the terms of a proposed variation alone.²² However, regard may be had to the terms of the proposed variation in making this assessment;²³

- j. It is not necessary to satisfy the Commission that in order to vary the terms of a modern award there has been a material change in circumstances pertaining to the operation or effect of the award such that the modern award is no longer meeting the modern awards objective.²⁴

E. The modern awards objective

15. The modern awards objectives relevant to this proceeding are those contained in ss.134(1)(b), 134(1)(d) and 134(1)(g).

Section 134(1)(g) – The need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards

16. Currently, the RTD Award does not contain a definition of “driver”. Rather, clause 15 sets out the wages of employees covered by the RTD Award according to their classification (as set out in Schedule C). In Schedule C of the RTD Award, drivers are classified according to the nature of the vehicle that they are required to operate. In this respect, the current classifications in Schedule C of the RTD Award provide a short and simple way of classifying employees covered by the RTD Award.
17. The question of overlap between two modern awards covering an employee is dealt with by clause 4.8 of the RTD Award, which requires an assessment of which award is “most appropriate” having regard to the work performed by the employee and the environment in which the work is normally performed by the employee. This is the mechanism which has been adopted by the Commission and courts to deal with inevitable questions of overlap of modern awards. In the context of CSAs, this question has now been resolved by the Full Court’s decision, which has provided certainty to all relevant parties.
18. Contrary to the TWU’s submissions, the TWU’s Proposal will not lead to a “simple, easy to understand” modern award system.²⁵ Instead, the TWU Proposal would lead to the reverse – new terms of an RTD Award which will re-open the issue of the overlap between the RTD Award and the Retail Award in respect of drivers.
19. More specifically, it is highly likely that the TWU’s Proposal, if adopted by this Commission, would lead to a re-agitation of issues regarding award coverage of Coles’ CSAs, a question which has already been determined by the Courts.²⁶ In this respect, the Proposal would, if adopted, undermine the stability of the modern award system.

²² 4 Yearly Review of Modern Awards – Penalty Rates [2017] FWCFB 1001, [139].

²³ 4 Yearly Review of Modern Awards – Penalty Rates [2017] FWCFB 1001, [141].

²⁴ 4 Yearly Review of Modern Awards – Penalty Rates [2017] FWCFB 1001, [263].

²⁵ See paragraphs [13]-[19] of the Outline of Submissions filed by the Transport Workers’ Union of Australia on 18 January 2017.

²⁶ See the Witness Statement of Bradley Shane Foenander,[14].

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

20. During 2011, Coles engaged in the process of negotiating an enterprise agreement with various unions representing Coles' employees, including the TWU. During these negotiations, a significant dispute arose between Coles and the TWU as to which modern award was the appropriate award for the purposes of the BOOT in relation to CSAs. This dispute was unable to be resolved during these negotiations and was the cause of the significant litigation between the TWU and Coles. Bargaining ended as a result of the dispute between the parties.²⁷
21. If bargaining commenced for a new enterprise agreement, it is likely that this dispute between Coles and the TWU will again arise if the TWU Proposal to amend the RTD Award in this proceeding is accepted by the Commission. This is because the TWU is very likely to assert that it is now not required to accept the Federal Magistrates Court (as it then was) and Federal Court's decision about the most appropriate award covering CSAs due to the new definition of "driver" in the RTD Award. The issue of which modern award covering CSAs for the purposes of undertaking the BOOT will therefore be re-agitated. This is likely to result in the same dispute that took place in the previous round of enterprise bargaining negotiations.
22. By reason of the above, an acceptance by the Commission of the TWU Proposal will not facilitate the need to encourage collective bargaining as between Coles and the TWU.

Section 134(1)(d)

23. If, as discussed above, the TWU re-agitates the issue of which modern award CSAs are covered by, and are successful in establishing that that modern award is the RTD Award, there are many provisions in the RTD Award that, in respect of Coles, would not promote flexible modern work practices, nor the efficient and productive performance of the work of a CSA.
24. For example, all ordinary hours performed on a Saturday and Sunday under the RTD Award can only be worked by an employee by agreement with the employer (contrary to the Retail Award, which does not require such agreement). CSAs regularly perform deliveries on Saturdays and Sundays during ordinary hours. If agreement could not be reached between individual CSAs and Coles in relation to working those hours, this would significantly impair Coles Online delivering supermarket goods to customers during those periods.²⁸ Other issues in this respect are dealt with in **Annexure A** to these submissions.

F. Nature of award modernisation proceedings

25. As discussed above, the Commission has made it plain that these review proceedings are not a forum to advance arguments that have otherwise been put forward and considered as part of prior award modernisation processes. Despite this, the TWU is seeking to rely on

²⁷ See the Witness Statement of Christopher Paul Gardner, [8] - [9].

²⁸ See the Witness Statement of Bradley Shane Foenander, [16] - [18].

arguments that the Commission has already rejected in making both the RTD Award and the Retail Award, rather than contending that the circumstances have changed for drivers such that the RTD Award is no longer meeting the modern awards objective. Indeed, the evidence filed by the TWU as part of these proceedings indicates that delivery drivers were required to perform a range of non-driving duties prior to the award modernisation proceedings.²⁹ These duties have largely remained the same.

Making of the RTD Award

26. The RTD was made by the Full Bench in *Award Modernisation* [2009] AIRCFB 345. In those proceedings, the TWU did not contend that the RTD Award include a definition of a “driver”.
27. Rather, as part of the RTD Award modernisation proceedings, the TWU put forward a proposal for a classification structure based on five transport worker grades. The structure proposed by the TWU recognised that “drivers” who would be covered by the RTD Award may perform the following non-driving duties:
 - a. Cleaning (Transport Worker Grade 1);
 - b. Vehicle washing (Transport Worker Grade 1);
 - c. Loading and unloading goods onto or from road vehicles, rail trucks and shelving (Transport Worker Grade 2);
 - d. Checking and sorting loads and checking and sorting goods in a depot (Transport Worker Grade 2); and
 - e. Clerical duties, including the compilation of manifests and load summaries (Transport Worker Grade 2).³⁰
28. There is clearly some overlap in the types of non-driving duties that the TWU is now seeking to have recognised as part of its Proposal, and the non-driving duties outlined above.
29. However, the Full Bench rejected the TWU’s proposed classification structure as part of the award modernisation proceedings, and did not see the need for the proposed RTD Award to recognise the various non-driving duties which may be performed by a driver.³¹
30. In rejecting the TWU Proposal to recognise in the RTD Award a classification structure based on five transport worker grades, the Full Bench said at [171]-[172]:

“We also gave consideration to a number of other matters. Even though the RT&D modern award is an industry award it is clear that the practical effect of the various existing private transport awards it encompasses is that they operate by reference to a structure of types, models and classes of vehicle and, it follows, to the driver of those vehicles thereby having occupational coverage ...

We turn next to the classification structure. We have retained the classification structure which was in an exposure draft which, as we have earlier observed, was based on the Transport Workers Award 1998. Similar classifications or a sub-set of them were also in many of the other

²⁹ See for example the Statement of Charles Nichols dated 13 January 2017 and the Statement of Mitchell O’Brien dated 16 January 2017.

³⁰ See Annexure TWU1 to the materials filed by the Transport Workers’ Union of Australia on 9 December 2008 (http://www.airc.gov.au/awardmod/databases/private_road/Exhibits/20081209_TWU-PT-1.pdf).

³¹ See *Award Modernisation* [2009] AIRCFB 345.

pre-reform transport awards. In our statement of 23 January 2009 we asked the parties to confer in relation to a proposed variation to the classification structure introduced by the TWU late in the consultation process. ... In a Full Bench post-exposure draft consultations we were informed that no agreement about either of these matters could be reached. In those circumstances, and as foreshadowed by us, we have decided to retain the long-standing existing classification structure."

31. In the *Transport Workers' Award 1998*, there was no definition of "driver".³² Clause 15 of the *Transport Workers' Award 1998* had a classification structure which set out various grades determining rate of pay, again primarily based on the nature of the vehicle that was driven. There was no further definition of a "driver" in this classification structure.
32. As to the balance of the non-driving duties which the TWU is seeking to have recognised as part of the Proposal (namely, refueling vehicles, the operation of on-board computer equipment and basic vehicle maintenance tasks), at no stage prior to these proceedings has the TWU sought to have these duties recognised in the RTD Award. However, as outlined above, the TWU's evidence and TWU submissions make it plain that the duties performed by a delivery driver (and, in particular, the non-driving duties) have not changed in any meaningful way since the RTD Award was made.³³ In the circumstances, the TWU has failed to displace the presumption that the RTD Award as originally made by the Full Bench is no longer meeting the modern awards objective.

Retail Award

33. As part of the award modernisation proceedings, in making the Retail Award, the Full Bench was required to consider whether retail roles which encompassed driving functions should be covered by the Retail Award, or alternatively, the RTD Award.³⁴ In particular, as part of those proceedings, the TWU initially contended that the Retail Award should specifically exclude drivers.³⁵ The TWU later submitted that a shop assistant who occasionally performs deliveries should be subject to a Retail Award whereas an employee engaged to perform driving tasks on a consistent basis should be covered by the RTD Award. In this respect, the TWU submitted that that the phrase "driver" should be excised from the list of indicative titles and that the phrase "delivery of goods" should be prefaced by the word "occasional" such that it read "occasional delivery of goods".³⁶ However, the TWU's submissions were not accepted by the Commission.

³² Note that in clause 4.8 of that Award there was a definition of "driver – sales person" which was "an employee who is entrusted by the employer with goods or articles for sale and is required to exercise sales skills in competition with other sales people in respect of such good or articles in the normal course of duty, and who is not in receipt of a commission upon goods or articles sold. The term 'driver – sales person' shall not include a driver who is entrusted with goods or articles for delivery to customers in quantities as such customer shall require."

³³ See the Outline of Submissions filed by the Transport Workers' Union of Australia on 18 January 2017, [9] - [11].

³⁴ *Award Modernisation* [2008] AIRCFB 1000.

³⁵ See the Outline of Submissions filed by the Transport Workers' Union of Australia dated 1 August 2008, (http://www.airc.gov.au/awardmod/databases/retail/Submissions/TWU_submission.pdf).

³⁶ See the Outline of Submissions filed by the Transport Workers' Union of Australia dated 7 November 2008 in respect of the exposure draft of the *General Retail Industry Award*, (http://www.airc.gov.au/awardmod/databases/retail/Submissions/TWU_submission_retail.pdf).

G. Conclusion

34. The evidence and arguments relied on by the TWU fail to demonstrate that the variation sought is "necessary" to ensure that the RTD Award achieves the modern awards objective.³⁷ The Commission cannot be satisfied on the material before it that the Proposal would assist in the RTD Award to achieve the modern awards objective.
35. In all of the circumstances, when proper consideration is given to the matter, it can be seen that the RTD Award as presently drafted remains appropriate in the context of a modern industry award.

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2 March 2017

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³⁷ *Fair Work Act 2009* (Cth), s.138.

Annexure A
Award Comparison

1. This annexure sets out terms and conditions that will impact upon business should the *Road Transport and Distribution Award 2010 (RTD Award)* apply to employees instead of the *General Retail Industry Award 2010 (Retail Award)*.
2. This annexure does not assume that the insertion of the "driver" definition, as agitated by the Transport Workers' Union, would have the effect of changing award application to any of Coles' employees.

Entitlement	Retail Award	RTD Award	Detrimental effect of RTD Award
REMUNERATION AND HOURS OF WORK			
Ordinary hours (span of hours)	<ul style="list-style-type: none"> • <u>Monday to Friday:</u> 7.00am to 11.00pm • <u>Saturday:</u> 7.00am to 11.00pm • <u>Sunday:</u> 9.00am to 11.00pm¹ 	<ul style="list-style-type: none"> • <u>Monday to Friday:</u> 5.30am to 6.30pm • <u>Saturday:</u> By agreement only • <u>Sunday:</u> By agreement only² 	<p>Significant overtime implications</p> <p>Hours or work arrangements do not align with:</p> <ul style="list-style-type: none"> • The retail operating hours in Coles' supermarkets • The work performed by CSAs (which is connected with the supermarkets) • Customer demand for deliveries to occur after hours and on weekends <p>To the extent that overtime is payable for work outside of the span of hours, it will be more prevalent under the RTD Award</p>
Penalty rates	<ul style="list-style-type: none"> • <u>Work after 6.00pm Monday to Friday (excluding casuals):</u> Time and a quarter • <u>Saturdays (full time and part time employees):</u> Time and a 	<ul style="list-style-type: none"> • <u>Midnight Friday to midnight Saturday:</u> Time and a half • <u>Midnight Saturday and midnight Sunday:</u> Double time 	<p>Penalty rates are generally higher</p>

¹ Clause 27.2.

² Clause 22.

Entitlement	Retail Award	RTD Award	Detrimental effect of RTD Award
	<ul style="list-style-type: none"> • <u>quarter</u> • <u>Saturdays (for casuals between 7.00am and 6.00pm):</u> Additional 10 per cent • <u>Sundays:</u> Double time³ • <u>Public holidays:</u> Time and a half (plus 25 per cent loading for casuals)⁴ 	<ul style="list-style-type: none"> • <u>Public holidays (excluding Christmas day and Good Friday):</u> Time and a half • <u>Public holidays falling on a day outside of ordinary working time (excluding Christmas day and Good Friday):</u> Double time and a half • <u>Casuals for public holidays (excluding Christmas day and Good Friday):</u> Double time and a half (plus casual loading)⁵ 	
Casuals and overtime	No equivalent entitlement	Casual employees are paid an additional 10% per hour of overtime worked ⁶	Additional cost for business
Variation of rosters	Rosters (but not hours of work) for part time employees are capable of variation on 7 days' notice or 48 hours' notice in the case of an emergency ⁷	No equivalent entitlement	Less flexibility to vary rosters of part time employees

³ To be reduced to time and a half for full time and part time employees and time and three quarters for casual employees in accordance with the Full Bench's decision in 4 Yearly Review of Modern Awards - Penalty Rates [2017] FWCFB 1001.

⁴ Clause 29.4. To be reduced to time and a quarter (plus 25 per cent loading for casuals) in accordance with the Full Bench's decision in 4 Yearly Review of Modern Awards - Penalty Rates [2017] FWCFB 1001.

⁵ Clause 28.

⁶ Clause 12.5.

⁷ Clause 12.8.

Entitlement	Retail Award	RTD Award	Detrimental effect of RTD Award
Minimum engagement for part time employees	Minimum engagement of 3 hours ⁸	Minimum payment of 4 hours ⁹	Less flexibility in rostering of part time employees
Minimum engagement for casual employees	Minimum engagement of 3 hours ¹⁰	Minimum payment of 4 hours ¹¹	Less flexibility in rostering of casuals
OTHER MATTERS			
Casual conversion	No equivalent entitlement	Casuals employed for 12 months have a right of conversion to full time or part time employment ¹²	Capacity to engage casuals is restricted (which is an essential part of Coles' business, particularly when operating outside of ordinary hours)
Dispute resolution training leave	No equivalent entitlement	Entitlement to paid leave up to maximum of 5 days per employee representative ¹³	Cost impact and disruptive to business

⁸ Clause 12.5.

⁹ Clause 12.5(f).

¹⁰ Clause 13.

¹¹ Clause 12.5.

¹² Clause 12.6.

¹³ Clause 11.

Witness statements:

- [Bradley Shane Foenander](#)
- [Christopher Gardner](#)