
Fair Work Commission: 4 yearly review of modern awards

AM2017/60

**4 YEARLY REVIEW OF MODERN AWARDS
GENERAL RETAIL AWARD 2010**

SUBSTANTIVE ISSUES

AUSTRALIAN BUSINESS INDUSTRIAL

and -

THE NSW BUSINESS CHAMBER LTD

27 AUGUST 2019

1. INTRODUCTION

- 1.1 These submissions are filed on behalf of Australian Business Industrial (**ABI**) and the New South Wales Business Chamber Ltd (**NSWBC**) pursuant to Directions dated 12 February 2019. These submissions reply to the submissions of the Shop Distributive and Allied Employees Association (**SDA**) filed 6 June 2019 (**SDA Submission**).
- 1.2 The SDA Submissions were filed in support of the SDA's proposed variation to the General Retail Industry Award 2010 (**Award**) to limit the application of junior rates to Level 1 employees only (**SDA Claim**).
- 1.3 ABI and NSWBC oppose the SDA Claim for the reasons outlined in this submission.

2. LEGISLATIVE FRAMEWORK OF THE FOUR YEARLY REVIEW

- 2.1 The legislative framework applicable to the 4 Yearly Review has been considered in detail in *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 and *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001.
- 2.2 The Full Bench in the *Preliminary Jurisdictional Issues Decision* set out this framework as follows:

[3] The Review is broader in scope than the Transitional Review of modern awards completed in 2013. The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a 'stable' modern award system (s.134(1)(g)). The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. Some proposed changes may be self evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation. In conducting the Review the Commission will also have regard to the historical context applicable to each modern award and will take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so. The Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made.

- 2.3 More recently, the legislative framework applicable to the 4 Yearly Review was considered in *4 yearly review of modern awards – plain language re-drafting –*

standard clauses [2018] FWCFB 4177 issued on 18 July 2018 and usefully summarised in *4 yearly review of modern awards – Alpine Resorts Award* [2018] FWCFB 4984 (**Alpine Resorts Decision**).

2.4 In the Alpine Resorts Decision, the Full Bench summarised the general main propositions as follows (footnotes removed):

General principles

[52] The principles applicable to the conduct of the 4-yearly review have been stated comprehensively in a number of Full Bench decisions, most recently in the 4 yearly review of modern awards – plain language re-drafting – standard clauses decision issued on 18 July 2018. The main propositions may be summarised as follows:

- *section 156(2) provides that the Commission must review all modern awards and may, among other things, make determinations varying modern awards;*
- *“review” has its ordinary and natural meaning of “survey, inspect, re-examine or look back upon”;*
- *the discretion in s.156(2)(b)(i) to make determinations varying modern awards in a review, is expressed in general, unqualified, terms, but the breadth of the discretion is constrained by other provisions of the FW Act relevant to the conduct of the review;*
- *in particular the modern awards objective in s 134 applies to the review;*
- *the modern awards objective is very broadly expressed, and is a composite expression which requires that modern awards, together with the NES, provide “a fair and relevant minimum safety net of terms and conditions”, taking into account the matters in ss.134(1)(a)–(h);*
- *fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question;*
- *the obligation to take into account the s.134 considerations means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision-making process;*
- *no particular primacy is attached to any of the s 134 considerations and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award;*
- *it is not necessary to make a finding that the award fails to satisfy one or more of the s 134 considerations as a prerequisite to the variation of a modern award;*
- *the s 134 considerations do not set a particular standard against which a modern award can be evaluated; many of them may be characterised as broad social objectives;*
- *in giving effect to the modern awards objective the Commission is performing an evaluative function taking into account the matters in s 134(1)(a)–(h) and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance;*

- *what is necessary is for the Commission to review a particular modern award and, by reference to the s 134 considerations and any other consideration consistent with the purpose of the objective, come to an evaluative judgment about the objective and what terms should be included only to the extent necessary to achieve the objective of a fair and relevant minimum safety net;*
- *the matters which may be taken into account are not confined to the s 134 considerations;*
- *section 138, in requiring that 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, emphasises the fact it is the minimum safety net and minimum wages objective to which the modern awards are directed;*
- *what is necessary to achieve the modern awards objective in a particular case is a value judgment, taking into account the s 134 considerations to the extent that they are relevant having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence;*
- *where an interested party applies for a variation to a modern award as part of the 4 yearly review, the task is not to address a jurisdictional fact about the need for change, but to review the award and evaluate whether the posited terms with a variation meet the objective.*

3. GROUNDS OF OPPOSITION TO THE SDA CLAIM

3.1 ABI and NSWBC oppose the SDA Claim and the merit arguments supporting it on 3 primary grounds:

- (a) there is insufficient evidence to support the SDA Claim. This opposition is on two bases:
 - (i) the SDA Claim seeks to vary modern award minimum wages, requiring the Full Bench to be satisfied that such variation is justified by work value reasons - no evidence whatsoever has been filed establishing that work value reasons exist;
 - (ii) the SDA Claim seeks a significant change which is required to be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation. The evidence as filed (such as it is) does not demonstrate the facts supporting the proposed variation, only

establishing the number of employees that the proposed variation may affect;

- (b) the SDA's reliance on s 134(1)(e) of the *Fair Work Act 2009* (Cth) (**FW Act**) is entirely misconceived as that provision is irrelevant to the SDA Claim; and
- (c) the SDA's contestation that the Award prima facie met the modern award objective when made appears to take issue with a matter already determined by the Full Bench.

4. REQUIREMENT FOR WORK VALUE REASONS AND THE EXISTENCE OF PROBATIVE EVIDENCE DIRECTED TO DEMONSTRATING THE FACTS SUPPORTING THE PROPOSED VARIATION

4.1 Evidence in support of the SDA Claim is limited to one report which seeks to establish the number of employees who are under 21 years of age and engaged in the retail industry at a level above Level 1 of the Award.

4.2 Section 156(3) of the FW Act states:

(3) In a 4 yearly review of modern awards, the FWC may make a determination varying modern award minimum wages only if the FWC is satisfied that the variation of modern award minimum wages is justified by work value reasons.

(4) Work value reasons are reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:

- (a) the nature of the work;*
- (b) the level of skill or responsibility involved in doing the work;*
- (c) the conditions under which the work is done.*

4.3 Modern award minimum wages are defined by s 284(3) as follows:

(3) Modern award minimum wages are the rates of minimum wages in modern awards, including:

- (a) wage rates for junior employees, employees to whom training arrangements apply and employees with a disability; and*
- (b) casual loadings; and*
- (c) piece rates.*

- 4.4 Section 12 of the FW Act states that a *junior employee* means a national system employee who is under 21.
- 4.5 Having regard to the above definitions, for the SDA Claim to be granted, s 156(3) requires that the Full Bench be satisfied that there work value reasons exist justifying the payment of adult rates to junior employees at levels above Level 1 having regard to:
- (a) the nature of the work;
 - (b) the level of skill or responsibility involved in doing the work;
 - (c) the conditions under which the work is done.
- 4.6 There is, with respect, no evidence before the Full Bench:
- (a) which establishes that the value of the work performed by junior employees at Levels 2-8 of the Award is equivalent to that of adult employees;
 - (b) which establishes the level of skill or responsibility undertaken by junior employees at levels 2-8 in comparison with adult employees; or
 - (c) which establishes that the conditions under which junior employees in levels 2-8 work are equivalent to adult employees.
- 4.7 Given the above, with respect, it is not possible for the Full Bench to make findings that a junior employee at Levels 2-8 is performing work of the equivalent value to an adult employee. Given the operation of s 156(3), without work value reasons, the SDA Claim should not be granted.
- 4.8 The SDA Submission appears to place considerable importance on the assertion that a junior employee would not be promoted above Level 1 unless they were competent and therefore, on the basis of that competence, they would be doing work equivalent to that of an adult employee and are therefore entitled to adult rates. This assertion, in the submission of ABI and NSWBC, is not sufficient to satisfy s 156(3).
- 4.9 The relevant question is whether work value reasons justify an increase to junior rates in the Award. It is entirely possible (in fact likely) that many junior employees are promoted beyond Level 1 of the Award for reasons other than reasons relating to the value of their work value and whether they perform the equivalent work of an adult employee. By way of obvious example, many junior employees may be promoted above Level 1 of the Award on the simple basis that current junior rates are more economical than adult rates. In such a scenario, the work performed by

the junior employee may be of less value than the same work performed by an adult employee, however the employer prefers to engage the junior employee because of the lower rate of pay. Alternatively, such a decision may be made with a view to try and give the junior employee relevant experience or an opportunity at a higher classification.

- 4.10 While it is acknowledged that ABI and NSWBC do not rely on any evidence filed in these proceedings to support these scenarios, they are in no way any less feasible than the alternative SDA assertion which is also unsupported by evidence.
- 4.11 It should not be in contention that the modern award minimum wages increases sought by the SDA Claim are substantial.
- 4.12 Under the current terms of the Award, the effective wage increase for junior employees when elevated up the classification scale is outlined in the below table. With two exceptions, the table assumes that a junior employee will be elevated one classification Level at a time. For completeness, the Table also includes the relevant increases from Level 1 straight to Level 3 and Level 4.

Current % Pay Increase When Junior Employee Elevated to a higher Level									
	Level 1 to Level 2	Level 1 to Level 3	Level 1 to Level 4	Level 2 to Level 3	Level 3 to Level 4	Level 4 to Level 5	Level 5 to Level 6	Level 6 to Level 7	Level 7 to Level 8
Under 16 years	2.38%	3.98%	6.01%	1.56%	1.95%	4.12%	1.45%	5.02%	4.06%
16 years	2.38%	3.98%	6.01%	1.56%	1.95%	4.12%	1.45%	5.02%	4.06%
17 years	2.38%	3.98%	6.01%	1.56%	1.95%	4.12%	1.45%	5.02%	4.06%
18 years	2.38%	3.98%	6.01%	1.56%	1.95%	4.12%	1.45%	5.02%	4.06%
19 years	2.38%	3.98%	6.01%	1.56%	1.95%	4.12%	1.45%	5.02%	4.06%
20 years < 6 mon	2.38%	3.98%	6.01%	1.56%	1.95%	4.12%	1.45%	5.02%	4.06%
20 years > 6 mon	2.38%	3.98%	6.01%	1.56%	1.95%	4.12%	1.45%	5.02%	4.06%

4.13 Using the same method, the effective pay increases applying to junior employees elevated under the SDA Claim would be:

% Increase if SDA Claim Granted									
	Level 1 to Level 2	Level 1 to Level 3	Level 1 to Level 4	Level 2 to Level 3	Level 3 to Level 4	Level 4 to Level 5	Level 5 to Level 6	Level 6 to Level 7	Level 7 to Level 8
Under 16 years	127.52%	131.07%	135.58%	125.69%	126.56%	131.37%	125.44%	133.37%	131.23%
16 years	104.77%	107.96%	112.02%	103.12%	103.90%	108.23%	102.90%	110.03%	108.11%
17 years	70.64%	73.30%	76.68%	69.27%	69.92%	73.53%	69.08%	75.03%	73.43%
18 years	46.26%	48.55%	51.44%	45.09%	45.64%	48.74%	44.93%	50.02%	48.65%
19 years	27.98%	29.98%	32.51%	26.95%	27.44%	30.14%	26.81%	31.27%	30.07%
20 years old									
20 years < 6 mon	3.76%	15.54%	17.79%	2.85%	13.28%	15.68%	12.72%	16.68%	15.62%
20 years > 6 mon	2.38%	3.98%	6.01%	1.56%	1.95%	4.12%	1.45%	5.02%	4.06%

4.14 The increases to the relevant pay rises applying when a junior employee changes levels under the SDA Claim are in all cases material.

4.15 As a significant variation, the SDA Claim requires the support of probative evidence, which does not exist in these proceedings.

4.16 It is useful to compare the case put by the SDA in these proceedings with the case run by the SDA in *Modern Awards Review 2012 - General Retail Award 2010- Junior Rates* [2014] FWCFB 1846.

4.17 In that case, in support of a relatively modest (relative to the current claim before the Full Bench) claim to provide adult rates to 20 year old employees, the SDA filed 20 witness statements, while employer parties filed 7 witnesses statements.

4.18 This evidence provided a basis for that Full Bench to make findings as to:

- (a) the difference in the work and duties performed by a 20 year old retail employee as compared to a 21 Year old retail employee; and
- (b) the time required for most retail employees to reach a satisfactory level of proficiency in relation to Level 1.

- 4.19 No equivalent evidence exists in this case which can be relied upon to support the SDA Claim.
- 4.20 In addition to the jurisdictional requirements of s 156(3), the Preliminary Issues Decision requires that where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.
- 4.21 No such evidence exists in this case.
- 4.22 While a similar claim has recently been dealt with in relation to the Pharmacy Industry Award in [2017] FWCFB 3540, that variation, by way consent and without any detailed consideration by the Full Bench, does not provide a basis to make accept the SDA Claim.

5. RELIANCE ON THE PRINCIPLE OF EQUAL REMUNERATION

- 5.1 At [27] the SDA Submissions places emphasis on s 134(1)(e) of the FW Act which identifies the principle of equal remuneration for work of equal or comparable value as a part of the modern awards objective.
- 5.2 For the definition of "*equal remuneration for work of equal or comparable value*", s 12 Dictionary refers to subsection 302(2) which states:

Equal remuneration for work of equal or comparable value means equal remuneration for men and women workers for work of equal or comparable value.

- 5.3 As found by the Penalty Rates Full Bench¹:

Section 134(1)(e) requires that we take into account the principle of equal remuneration for men and women workers 'for work of equal or comparable value'.

- 5.4 Given this limb of the modern awards objective is confined to addressing equal remuneration between men and women, it is therefore a neutral consideration in these proceedings and does not support the making of the SDA Claim in the manner sought by the SDA.
- 5.5 Equally the two international conventions called in support of the SDA Claim do not assist.

¹ [2017] FWCFB 1001at [215]-[216]

5.6 Article 1 of the 'Equal Remuneration Convention, 1951 (No. 100)' states:

For the purpose of this Convention--

...

(b) the term equal remuneration for men and women workers for work of equal value refers to rates of remuneration established without discrimination based on sex.

5.7 This convention makes no reference to age discrimination.

5.8 Unsurprisingly, 'the Convention on the Elimination of All Forms of Discrimination against Women' is also directed to the issue of sex discrimination rather than age discrimination.

5.9 It is unclear precisely what relevance the SDA are ascribing to instruments (the conventions and s 134(1)(e)) which are directed solely to sex discrimination.

5.10 In the submission of ABI and NSWBC, these instruments have no relevance to proceedings concerning junior rates.

5.11 In the event that the SDA wish to reframe this submission at a broader level, without reliance specifically on s 134(1)(e) or the referenced conventions but rather on some other, more general, principle of equal pay for equal work, ABI and NSWBC submit as follows.

5.12 The terms of the FW Act clearly contemplate and allow for the setting of junior rates. The FW Act presently provides for the making of special national minimum wage orders for junior employees² and that a term of a modern award or an enterprise agreement will not be taken to discriminate against an employee merely because it provides wages for junior employees or a class of junior employees³.

5.13 Contrary to the SDA Submission at [64], there is no basis to suggest that an absolute principle of equal work for equal pay forms part of the modern awards objective or the objects of the FW Act.

6. THE AWARD PRIMA FACIE MET THE MODERN AWARDS OBJECTIVE

6.1 Paragraph 17 of the SDA Submissions asserts that '*key issues with past decisions relating to the making of the [Award] ... shows that the award cannot be accepted to 'prima facie' have met the modern awards objective at the time it was made*'.

² See s.294(1) of the FW Act.

³ See ss.153(3) and 195(3) of the FW Act.

6.2 As noted above, the Preliminary Issues Decision determined that the Full Bench will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made.

6.3 This position was developed in the Full Bench's Penalty Rates Decision [2017] FWCFB 1001 at [254]:

the adoption of the prima facie position that the modern award being reviewed achieved the modern awards objective at the time it was made is but an example of the general proposition that previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so.

6.4 At [759], the Full Bench in the Penalty Rates Decision expanded further:

it is appropriate that the Commission take into account previous decisions relevant to any contested issue and 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 extent of a previous Full Bench's consideration of a contested issue is relevant to assessing the weight to be attributed to that decision.

6.5 With the above context, a number of submissions arise in response to [17] of the SDA Submission.

6.6 Firstly, at a threshold level, the SDA's submission that the Award cannot be said to have prima facie met the modern awards objective when made should not be accepted.

6.7 The principle that Awards as made 'prima facie' met the modern awards objective is a central principle of the Award review process and it is a finding of construction that has confirmed by the Commission (and repeated by the parties) a great number of times since the Preliminary Decision was published. This finding should not be departed from in these proceedings.

6.8 This is not to say that the 'prima facie' presumption cannot be disturbed: by way of trite definition, a 'prima facie' position is something that has been proven or assumed to be true unless there is evidence presented to the contrary. As the Full Bench's comments in the Penalty Rates Case makes clear, an assessment of the previous Full Bench's consideration of a contested issue is relevant to assessing the weight to be attributed to that decision - or, more relevantly, the extent of probative evidence required to displace the 'prima facie' position.

- 6.9 The fact that an issue may not have been comprehensively (or in the submission of an aggrieved party, appropriately) considered during Award Modernisation does not mean that the Award should not be considered to have prima facie satisfied the modern awards objective. It simply bears upon the question of how and whether the prima facie position should be disturbed. With respect, the SDA Claim should not (and cannot) be determined as an effective ‘appeal’ of the 2008 modernisation decision. It must be prosecuted in accordance with the principles of the 4 Yearly Review as identified above.
- 6.10 The difficulty for the SDA in these proceedings is that even if the SDA’s submissions regarding the award modernisation process in respect of junior rates were to be accepted, this would not establish its claim for two reasons developed above:
- (a) no sufficient case has been prosecuted in relation to work value reasons to establish the SDA Claim; and
 - (b) no probative evidence, sufficient to satisfy the requirements of the Preliminary Issues Decision, has been filed.
- 6.11 Simply put, the case supporting the SDA Claim is not sufficient to disturb the prima facie position that the Award satisfies the modern awards objective or to satisfy the requirements of the FW Act.
- 6.12 Further, as identified by the SDA, the issue of junior rates in retail was also raised in the 2012 Review of Modern Awards (**2 Yearly Review**).
- 6.13 Having regard to the legislative context of the 2 Yearly Review and the findings of the Full Bench in the Penalty Rates Decision outlined above, ABI and NSWBC submit that the Full Bench should also proceed on the basis that, prima facie, the Award also met the modern awards objective at the completion of the 2 Yearly Review. This flows from Item 6 of Schedule 5 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth), being the provision under which that process was undertaken:

6 Review of all modern awards (other than modern enterprise awards and State reference public sector modern awards) after first 2 years

(2) As soon as practicable after the second anniversary of the FW (safety net provisions) commencement day, the FWC must conduct a review of all modern awards, other than modern enterprise awards and State reference public sector modern awards. Note: The review required by this item is in

addition to the annual wage reviews and 4 yearly reviews of modern awards that the FWC is required to conduct under the FW Act.

(3) In the review, the FWC must consider whether the modern awards:

(a) achieve the modern awards objective; and

(b) are operating effectively, without anomalies or technical problems arising from the Part 10A award modernisation process.

(2A) The review must be such that each modern award is reviewed in its own right. However, this does not prevent the FWC from reviewing 2 or more modern awards at the same time.

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

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

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

(6) The FWC may advise persons or bodies about the review in any way the FWC considers appropriate.

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

6.14 Again, no sufficient case has been brought which would warrant a departure from the position that following the conclusion of the 2 Yearly Review, the Award satisfied the Modern Awards objective.

7. MERIT ARGUMENT FOR RETENTION

7.1 Notwithstanding that the lack of probative evidence before the Full Bench in support of the SDA Claim warrants, in of itself, the dismissal of the claim, a number of persuasive merit arguments also arise against the SDA Claim.

7.2 We provide a brief outline of these below.

- 7.3 Firstly, the existence of junior rates is specifically contemplated by the FW Act and the rationale for the existence of junior rates remains relevant, particularly so in the retail industry.
- 7.4 In [2014] FWCFB 1846 from [96]-[106], the Full Bench outlined a relevant history of junior rates and a number of relevant findings.
- 7.5 Having regard to those findings, ABI and NSWBC submit that:
- (a) the FW Act presently provides for the making of special national minimum wage orders for junior employees and that a term of a modern award or an enterprise agreement will not be taken to discriminate against an employee merely because it provides wages for junior employees or a class of junior employees.⁴
 - (b) as a general proposition, the rationale for junior rates of pay remains relevant, particularly so in the retail industry given the large number of juniors who are employed in it;⁵
 - (c) the productivity of young workers and value to employers being less than that of adult employees has been long accepted by Federal and State industrial tribunals. Junior rates reflect the general lack of experience of young employees and can act as an incentive or encouragement to employers to engage young persons, thereby allowing young persons to get a start or foothold in employment when they might otherwise struggle to compete against older applicants. Further, it is generally the case that the engagement of young persons will be associated with additional costs to the employer because of training and supervision needs.⁶ This point, in the context of the present claim will be developed further below.
- 7.6 In the submission of ABI and NSWBC, the mere fact that a junior employee is classified at a level above Level 1 does not mean that the productivity or work value of that junior employee (or junior employees more generally) is equivalent to an adult employee.
- 7.7 Likewise the promotion of a junior employee to a higher level than Level 1 does not necessarily constitute recognition that the junior employee is performing the equivalent work of an adult employee at that higher level. Practical considerations suggest that junior employees are classified above Level 1 for various reasons

⁴ See [2014] FWCFB 1846 at [102]

⁵ See [2014] FWCFB 1846 at [103]

⁶ See [2014] FWCFB 1846 at [104]

including:

- (a) save for a proportion of 20 year olds, the applicable rate of pay for junior employees is lower than adult employees;
- (b) an employer may not have any available adult employees to fill the higher classification; and
- (c) the employer may wish to give a junior employee an opportunity to perform a more senior role in circumstances where when the junior employee might otherwise struggle to compete against older applicants.

7.8 ABI and NSWBC also **do not** concede that:

- (a) merely because a junior employee rises above Level 1, that the employee requires the equivalent supervision or oversight of an adult employee;
- (b) there is no merit basis to incentivise employers to engage junior employees at levels higher than Level 1;
- (c) applying junior percentages to levels above Level 1 in the Award diminishes the additional monetary compensation provided for in recognition of higher skills competencies and responsibilities.

7.9 With respect to the requirements of the Modern Awards Objective, ABI and NSWBC submit in summary:

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

7.10 There is no evidence before the Full Bench which bears upon the question of the living standards of junior employees. Practical experience suggests that the younger the employee, the more likely that the employee may live with or be supported by parents or carers (and the less likely that those employees will be parents or carers themselves).

7.11 While this will not apply in every case, it appears to be a reasonable practical presumption.

7.12 The correlation between wages paid to junior employees and their living standards is therefore more complex than is the case with adult employees. In the absence of evidence, it is difficult for the Full Bench to make findings as to the relative living standards and needs of the low paid junior employees.

7.13 That being said, given that junior rates increase proportionally with adult rates, ABI and NSWBC contest the SDA's submission at [27(ii)] that notwithstanding that "*their cost of living pressures and caring responsibilities have also increased in*

line with the general population there is little recognition or amelioration of the realities faced by many young workers” .

- 7.14 Further, as noted above, in the absence of any evidence to the contrary, there appears to be reasonable presumption that the cost of living pressures and caring responsibilities of junior employees are not the same as adult employees.

134(1)(b) - the need to encourage collective bargaining

- 7.15 This limb is likely to be a neutral consideration.

134(1)(c)- the need to promote social inclusion through increased workforce participation

- 7.16 ABI and NSWBC submit that an increase in junior wages in line with the SDA Claim will self-evidently remove the existing incentive for employers to employ junior employees on classifications higher than Level 1. This will make it less likely that such roles will be offered to junior employees, decreasing the workforce participation of junior employees and denying them the higher wages that these levels currently provide (relative to junior rates on Level 1). This tends against the granting of the SDA Claim.

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

- 7.17 This limb is likely to be a neutral consideration.

134(1)(e) - the principle of equal remuneration for work of equal or comparable value

- 7.18 As detailed above, this limb is likely to be a neutral consideration.

134(1)(f) -the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden

- 7.19 The SDA Claim will unambiguously increase costs for employers engaging junior employees on levels higher than Level 1. This tends against the granting of the SDA Claim.

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; and

- 7.20 Given that junior rates will be retained at Level 1 even under the terms of the SDA Claim, this limb is likely to be a neutral consideration.

134(1)(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.

- 7.21 As detailed above, the SDA Claim will unambiguously increase costs for employers engaging junior employees on levels higher than Level 1, and will remove the incentive for employees to engage junior employees in that way.
- 7.22 More detailed submissions on this issue can be made following the acceptance of the SDA's report into evidence.
- 7.23 For the purposes of this submission, it is sufficient to note:
- (a) the 'consequences' of the Commission's decision to increase the relevant rate for 20 year olds in [2014] FWCFB 1846 is not a relevant comparison (as suggested by the SDA Submission at [29(i)]). The SDA Claim is broader than that sought in the 2 Yearly Review, applies to a more diverse group of employees and is unsupported by probative evidence;
 - (b) it is not relevant to consider whether the SDA Claim will be '*equitable for all employers thus retaining a competitive and level playing field*⁷'. The relevant question under this limb is whether the national economy will remain competitive; and
 - (c) without evidence, it is not correct to assume that "*irrespective of the levels of remuneration for young workers, overall employment will not change*" particularly in circumstances where currently employers engage junior employees on junior rates in positions which would not be sustainable on adult rates.

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⁷ See SDA Submission at [29(iii)]