Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Final Reply Submissions – Hair and Beauty Industry Award 2010

Casual Employment

(AM2014/197)

20 October 2016

4 YEARLY REVIEW OF MODERN AWARDS

AM2014/197 CASUAL EMPLOYMENT

1. INTRODUCTION

1. A claim has been made by the Shop, Distributive and Allied Employees' Association (**SDA**) to vary four awards[1] in relation to the entitlements of casual employees whilst performing overtime. On 9 September 2016, the Fair Work Commission (**Commission**) issued directions requiring any party opposing the SDA's claim to file submissions and any evidence in reply.

2. The Australian Industry Group (**Ai Group**) files this submission on behalf of the Hair and Beauty Australia Industry Association (**HABA**), which has a significant interest in the *Hair and Beauty Industry Award 2010* (**Hair and Beauty Award** or **Award**); that being one of the four awards that the SDA seeks to vary. The submission relates specifically to the SDA's claim in relation to that Award. It is filed in response to the SDA's material of 17 July 2015 and 13 May 2016.

3. HABA opposes the SDA's proposed variations. The overarching basis for this opposition is that the SDA has failed to make out a case for the changes and that there are merit based considerations that tell against granting the claim.

4. In this submission we:

- Address the relevant statutory framework and the approach to the 4 yearly review
- Identify the nature of the claim and case advanced by the SDA
- Respond to each of the core arguments identified by the SDA in support of the claim

[1] The *Pharmacy Industry Award 2010*; the *General Retail Industry Award 2010*; the *Fast Food Industry Award 2010* and the *Hair and Beauty Industry Award 2010*.

- Address the relevant consideration associated with s.134(1)

2. THE STATUTORY FRAMEWORK

5. The SDA's claim is pursued in the context of the 4 yearly review of modern awards (**Review**), which is being conducted by the Commission pursuant to s.156 of the *Fair Work Act 2009* (**Act**).

6. In determining whether to exercise its power to vary a modern award, the Commission must be satisfied that the relevant award includes terms only to the extent necessary to achieve the modern awards objective (s.138).

7. The modern awards objective is set out at s.134(1) of the Act. It requires the Commission to ensure that modern awards, together with the National Employment Standards (**NES**), provide a fair and relevant minimum safety net of terms and conditions. In doing so, the Commission is to take into account a range of factors, listed at s.134(1)(a) – (h). The modern awards objective applies to any exercise of the Commission's powers under Part 2-3 of the Act, which includes s.156.

3. THE COMMISSION'S GENERAL APPROACH TO THE 4 YEARLY REVIEW

8. At the commencement of the Review, a Full Bench dealt with various preliminary issues that arise in the context of this Review. The Commission's *Preliminary Jurisdictional Issues Decision*[2] provides the framework within which the Review is to proceed.

9. The Full Bench emphasised the need for a party to mount a merit based case in support of its claim, accompanied by probative evidence (emphasis added):

> [23] 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.

[2] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788.

> We agree with ABI's submission that 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.[3]

10. The Commission indicated that the Review will proceed on the basis that the relevant modern award achieved the modern awards objective at the time that it was made (emphasis added):

> [24] In conducting the Review the Commission will also have regard to the historical context applicable to each modern award. Awards made as a result of the award modernisation process conducted by the former Australian Industrial Relations Commission (the AIRC) under Part 10A of the Workplace Relations Act 1996 (Cth) were deemed to be modern awards for the purposes of the FW Act (see Item 4 of Schedule 5 of the Transitional Act). Implicit in this is a legislative acceptance that at the time they were made the modern awards now being reviewed were consistent with the modern awards objective. The considerations specified in the legislative test applied by the AIRC in the Part 10A process is, in a number of important respects, identical or similar to the modern awards objective in s.134 of the FW Act. In the Review 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.[4]

The decision confirms that the Commission should generally follow previous Full Bench decisions that are relevant to a contested issue:

> [25] Although the Commission is not bound by principles of stare decisis it has generally followed previous Full Bench decisions. In another context three members of the High Court observed in Nguyen v Nguyen:
>
> > "When a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong. The occasion upon which the departure from previous authority is warranted are infrequent and exceptional and pose no real threat to the doctrine of precedent and the predictability of the law: see Queensland v The Commonwealth (1977) 139 CLR 585 per Aickin J at 620 et seq."
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> [26] While the Commission is not a court, the public interest considerations underlying these observations have been applied with similar, if not equal, force to appeal proceedings in the Commission. As a Full Bench of the Australian Industrial Relations Commission observed in Cetin v Ripon Pty Ltd (T/as Parkview Hotel) (Cetin):
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> > "Although the Commission is not, as a non-judicial body, bound by principles of stare decisis, as a matter of policy and sound administration it has generally followed previous Full Bench decisions relating to the issue to be determined, in the absence of cogent reasons for not doing so."

[3] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [23].

[4] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [24].

> [27] These policy considerations tell strongly against the proposition that the Review should proceed in isolation unencumbered by previous Commission decisions. In conducting the Review it is appropriate that the Commission 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.[5]

11. In addressing the modern awards objective, the Commission recognised that each of the matters identified at s.134(1)(a) – (h) are to be treated "as a matter of significance"[6] and that "no particular primacy is attached to any of the s.134 considerations"[7]. The Commission identified its task as needing to "balance the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net".[8]

12. Section 138 of the Act imposes a significant hurdle. This was recognised by the Full Bench in the following terms (emphasis added):

> [36] … Relevantly, s.138 provides that such terms only be included in a modern award 'to the extent necessary to achieve the modern awards objective'. To comply with s.138 the formulation of terms which must be included in modern award or terms which are permitted to be included in modern awards must be in terms 'necessary to achieve the modern awards objective'. What is 'necessary' in a particular case is a value judgment based on an assessment of the considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations. <u>In the Review the proponent of a variation to a modern award 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.</u>[9]

13. The frequently cited passage from Justice Tracey's decision in *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* was adopted by the Full Bench. It was thus accepted that:

> … a distinction must be drawn between that which is necessary and that which is desirable. That which is necessary must be done. That which is desirable does not carry the same imperative for action.

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[5] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [24] – [27].

[6] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [24] – [31].

[7] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [24] – [32].

[8] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [24] – [33].

[9] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [36].

14. Accordingly, the *Preliminary Jurisdictional Issues Decision* establishes the following key threshold principles:

- A proposal to significantly vary a modern award must be accompanied by submissions addressing the relevant statutory requirements and probative evidence demonstrating any factual propositions advanced in support of the claim;

- The Commission will proceed on the basis that a modern award achieved the modern awards objective at the time that it was made;

- An award must only include terms to the extent necessary to achieve the modern awards objective. A variation sought must not be one that is merely desirable; and

- Each of the matters identified under s.134(1) are to be treated as a matter of significance and no particular primacy is attached to any of the considerations arising from it.

15. In a subsequent decision considering multiple claims made to vary the *Security Services Industry Award 2010*, the Commission made the following comments, which we respectfully commend to the Full Bench: (underlining added)

> [8] While this may be the first opportunity to seek significant changes to the terms of modern awards, a substantive case for change is nevertheless required. The more significant the change, in terms of impact or a lengthy history of particular award provisions, the more detailed the case must be. Variations to awards have rarely been made merely on the basis of bare requests or strongly contested submissions. In order to found a case for an award variation it is usually necessary to advance detailed evidence of the operation of the award, the impact of the current provisions on employers and employees covered by it and the likely impact of the proposed changes. Such evidence should be combined with sound and balanced reasoning supporting a change. Ultimately the Commission must assess the evidence and submissions against the statutory tests set out above, principally whether the award provides a fair and relevant minimum safety net of terms and conditions and whether the proposed variations are necessary to achieve the modern awards objective. These tests encompass many traditional merit considerations regarding proposed award variations.[10]

[10] Re *Security Services Industry Award 2010* [2015] FWCFB 620 at [8].

16. The SDA's claim conflicts with the principles outlined in the aforementioned decisions and accordingly should be rejected.

4. THE SDA'S CLAIM

17. The union has filed a draft determination relating to the proposed changes to the Award. The variations are also identified in schedule A attached to their 13 May 2016 submission.

18. In order to demonstrate the nature of the proposed variation it is necessary to first outline the relevant current award provisions.

19. Clause 13.2 of the Award prescribes the amount payable for work performed by a casual employee between 7am and 9pm, Monday to Friday; that being the hourly rate payable to a full-time employee and an additional 25% loading calculated on that hourly rate. For all work performed outside those hours, pursuant to clause 13.3, a casual employee is to be paid the full-time hourly rate and an additional 50% loading. The provisions are set out below;

> **13.2** For all work between 7.00 am and 9.00 pm Monday to Friday, a casual will be paid both the hourly rate for a full-time employee and an additional 25% of the ordinary hourly rate.
>
> **13.3** For all work performed outside the hours in clause 28.2, except Sundays, a casual employee will be paid the hourly rate for a full-time employee in this award plus 50%. For Sundays, the additional loading will be 100%.

20. Clause 31.2 specifies different loadings that apply to casual employees (as well as part-time and full-time employees) when working on a Sunday or during certain hours on a Saturday;

"31.2 Overtime and penalty rates

(a) Overtime hours worked in excess of the ordinary number of hours of work prescribed in clause 28.2 are to be paid at time and a half for the first three hours and double time thereafter.

(b) Saturday work

A loading of 33% will apply for ordinary hours of work for full-time, part-time and casual employees within the span of hours on a Saturday.

(c) Sunday work

A 100% loading will apply for all hours of work for full-time, part-time and casual employees on a Sunday."

21. Clause 31.2(b) stipulates the amount payable to a casual employee within the span of hours on a Saturday. Having regard to clause 28.2(a), between the hours of 7am and 6pm, a casual employee is to be paid the full-time hourly rate and an additional 33% loading. No other loading is payable for this time.

22. Pursuant to clause 31.2(c), a casual employee is paid a 100% loading for all hours of work on a Sunday. This is consistent with clause 13.2 and clause 13.3, given that neither prescribes a loading that is payable for work performed on a Sunday.

23. Accordingly, the relevant rates payable for work performed at the following times by a casual employee under the Hair and Beauty Award can be summarised as follows:

Day/time	% of applicable minimum award rate
Monday – Friday, 7am – 9pm	125%
Monday – Friday, outside 7am – 9pm	150%
Saturday, 7am – 6pm	133%
Saturday, outside 7am – 6pm	150%
Sunday, all day	200%

24. Whilst clause 31.2(a) prescribes the overtime rate that is generally payable for hours worked in excess of the number of hours of work prescribed in clause 28.2. Clause 13.4 states that clause 31.2(a) does not apply to casual employees. This is consistent with the structure of the award, given;

- clause 13.3 prescribes the rate for all work performed by a casual employee outside of the hours in clause 28.2.

- In contrast to clauses 31.2(b) and 31.2(c), clause 31.2(a) does not contain any express reference to casual employees

25. The SDA seeks multiple variations to clause 31.2 of the Award, as marked below:

31.2 Overtime and penalty rates

(a) Overtime hours worked by a full-time, part-time or casual employee in excess of the ordinary number of hours of work prescribed in clause 28.2 are to be paid at time and a half for the first ~~three~~ two hours and double time thereafter.

(b) Saturday work

A loading of 33% will apply for ordinary hours of work for full-time~~,~~ and part-time ~~and casual~~ employees within the span of hours on a Saturday. A loading of 58% will apply for ordinary hours of work for casual employees within the span of hours on a Saturday.

(c) Sunday work

A 100% loading will apply for all hours of work for full-time~~,~~ and part-time ~~and casual~~ employees on a Sunday. A 125% loading will apply for all hours of work for casual employees on a Sunday.

(d) Employment on rostered day off

Where it is mutually agreed upon between the employer and the employee (such agreement to be evidenced in writing), an employee may be employed on their rostered day off at the rate of double time for all time worked with a minimum payment as for four hours' work.

26. The SDA do not explain the nature or effect of the changes they seek. Nor do they address the proper interpretation of the current award terms.

27. Nonetheless, in short, it appears that the SDA's claim seeks to deliver the following outcomes;

- Introduce an obligation to pay casual employees the penalty rates specified in clause 31.2(a), which currently do not apply to casuals. Depending upon the work patterns of employees, this may increase the rate of penalty that an employee gets paid (i.e. it would introduce an

obligation to pay at double time after a specified number of hours) and expand the circumstances in which the employee receives a penalty (i.e., introduce a penalty after 38 hours of work).

- An increase to the loading that a casual gets for working on a Sunday from 33% to 58%.

- An increase to the loading that a casual gets for working on a Sunday from 100% to 125%.

THE SDA'S CASE

28. The SDA has not advanced any submissions regarding the proper interpretation of the current provisions, nor does it appear to allege any ambiguity arising from them. We therefore proceed on the basis that the union's case is mounted on the basis that, as a matter of merit, casual employees covered by the Hair and Beauty Award should be entitled to the rates prescribed by the union proposed clauses. That is, we assume that it is common ground that the claim would increase employee entitlements.

29. The gravamen of the SDA's submission in support of its claim is that:

    - the 25% casual loading does not adequately compensate a casual employee for working overtime;

    - the absence of an entitlement to overtime rates for casual employees can be causally linked to increased casualisation;

    - s.134(1)(da) of the Act is not satisfied by the current award provisions;

    - the absence of an entitlement to overtime rates for casual employees undermines the integrity of the 38 hour week; and

    - casual employees cannot refuse to work overtime.

30. In the section below we deal with each of these propositions in turn.

The Casual Loading

31. The SDA submits that "the casual loading is not a 'magic pudding' which can be used to justify the absorption of penalties and loadings applicable for other incidents if employment, such as working long, inconvenient and/or unsociable hours"[11]. They contend that, "…it may be assumed that the payment of a casual loading is in lieu of those indicia which differentiate between a casual and a permanent employee…"[12]

32. It should not be accepted by the Commission that a casual employee should simply be afforded every entitlement that a permanent employee receives unless it can be identified that the absence of the particular entitlement has been directly accounted for in the context of the quantum of the award prescribed rate of pay for a casual employee.

33. The SDA's argument oversimplifies the Commission's task in this Review, which involves a consideration of the many relevant factors to which the Commission must have regard when determining whether a particular award entitlement should be extended to apply to casual employees. There may be a raft of reasons why penalty rates may, justifiably, be structured to apply differently to casual employees. This includes considerations of the circumstances of industry and the needs of employers to be able to engage casual employees in a more flexible manner than other types of employees.

34. There is no industrial imperative to align all award derived entitlements of casual and permanent employees. They are fundamentally different forms of employment and there is nothing inherently unfair about different entitlements applying to each category.

35. The SDA apparent assumption that the casual loading can be somehow unpacked to identify whether it account for all entitlements of permanent employees reflects a somewhat misguided approach given the AIRC decided in the Award Modernisation process to generally align the rate of casual loadings across the system of awards. This resulted in some awards increasing while in others the level of the loading decreased, relative to that contained in the

[11] SDA submission dated 13 May 2016 at paragraph 27.

[12] SDA submission dated 13 May at 23

relevant predecessor awards. In effect the decision reflects an assumption that the 25% casual loading is appropriate regardless of the other terms of the award. Regardless, we note that many awards adopt divergent approaches to whether (or the manner in which) a casual loading is included in the calculation of over-time payments or other penalty rates.

A Causal Link with Increased Casualisation

36. The SDA makes only the following brief submission regarding the alleged increase in reliance on casual employment:

> The non-payment of overtime rates of pay … creates a perverse incentive for some employers to increase casual employment to the detriment of permanent positions because work at these times and for longer hours becomes relatively cheaper.[13]

37. There is no evidence before the Commission to substantiate the proposition that the absence of an entitlement to overtime rates for casual employees encourages the engagement of employees on a casual basis in the fast food industry or in any other.

38. Furthermore, the SDA's submissions proceed on the basis that the engagement of employees on a casual basis is an adverse outcome, without establishing that this is in fact so. It should not be assumed that the engagement of casual labour is in some way illegitimate or inherently undesirable.

Section 134(1)(da) of the Act

39. Section 134(1) of the Act requires the Commission to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net. In making the requisite assessment, the Commission is to take into account specific factors identified by the legislature, which includes the following at s.134(1)(da):

> (da) the need to provide additional remuneration for:
>
> (i) employees working overtime; or

[13] SDA submission dated 13 May 2016 at paragraph 28.

(ii) employees working unsocial, irregular or unpredictable hours; or

(iii) employees working on weekends or public holidays; or

(iv) employees working shifts; and

40. The SDA's contention regarding s.134(1)(da) is summarised in the following paragraph of its submissions:

> The SDA submits that award provisions which do not provide for overtime rates of pay for casual employees for work in excess of 38 hours in any week or outside ordinary hours or which absorb part of a penalty rate because the employee is casual ipso facto do not satisfy this modern award objective.[14]

41. With respect, s.134(1)(da) is not, of itself, a "modern award objective"; it is but one of many considerations which the Commission must take into account in determining whether an award is providing a fair and relevant minimum safety net of terms and conditions; that being the "modern awards objective". The Act does not, however, require that s.134(1)(da), or any of the other matters there listed, be treated as absolute requirements or minimum standards that must necessarily be expressly provided for in an award. Further, as the Commission acknowledged in its *Preliminary Jurisdictional Issues Decision*: (emphasis added)

> [31] The modern awards objective is directed at ensuring that modern awards, together with the NES, provide a 'fair and relevant minimum safety net of terms and conditions' *taking into account* the particular considerations identified in paragraphs 134(1)(a) to (h) (the s.134 considerations). The objective is very broadly expressed. The obligation to take into account the matters set out in paragraphs 134(1)(a) to (h) means that each of these matters must be treated as a matter of significance in the decision making process. As Wilcox J said in *Nestle Australia Ltd v Federal Commissioner of Taxation*:
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> > "To take a matter into account means to evaluate it and give it due weight, having regard to all other relevant factors. A matter is not taken into account by being noticed and erroneously discarded as irrelevant."
>
> [32] 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.
>
> [33] There is a degree of tension between some of the s.134(1) considerations. The Commission's task is to balance the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions. The need to balance the competing considerations in s.134(1) and the

[14] SDA submission dated 13 May 2016 at paragraph 16.

diversity in the characteristics of the employers and employees covered by different modern awards means that the application of the modern awards objective may result in different outcomes between different modern awards.

[34] Given the broadly expressed nature of the modern awards objective and the range of considerations which the Commission must take into account there may be *no one set* of provisions in a particular award which can be said to provide a fair and relevant safety net of terms and conditions. Different combinations or permutations of provisions may meet the modern awards objective.[15]

42. Whilst we acknowledge that s.134(1)(da)(i) requires that the Commission must take into account the need to provide additional remuneration for employees working overtime, that consideration must be balanced against the many others identified at s.134(1), including the need to encourage collective bargaining (s.134(1)(b)); the need to promote flexible modern work practices and the efficient and productive performance of work (s.134(1)(d)); the likely impact on business including on employment costs (s.134(1)(f)) and the likely impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy (s.134(1)(h)).

43. Section 134(1)(da) does not mandate the inclusion of overtime rates for casual employees or those engaged on any other basis. It does not require that an award provide additional remuneration for work performed in the circumstances specified, nor does its recent inclusion in the Act render an award inconsistent with s.138 and the modern awards objective in the absence provisions that provide for additional remuneration for employees working overtime or in any of the other circumstances there described. Rather, to the extent that s.134(1)(da) lends support to the SDA's claim, it must be balanced against the aforementioned matters listed at s.134(1) that run contrary to it. Its application is by no means determinative of the matter.

44. The extent to which is also undermined by the fact that the award already provides additional payment for employees working on weekends or during un-social hours.

[15] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [31] – [34].

45. The extent to which weight could be attributed to s.134(1)(da) must also be considered in the context of the overarching necessity to ensure that the award represents a fair and *relevant* safety net of minimum terms and conditions. This includes consideration of the extent to which the current terms appropriately accommodate the unique or specific circumstances and needs of the hair and beauty industry.

46. It is very common for employers in the industry to operate on weekends, and in particular Saturdays. Indeed for many Saturdays are a particularly busy time and as such a time at which casuals are often engaged. As a consequence many employers close on Monday. The award derived obligation to afford employees (including casuals) with two consecutive days off per week reinforces this practice but also reflects the necessity for employees to work on weekends by affording an additional protection to such employees.[16]

47. In the hair and beauty industry weekend work is, to a large degree, the norm. Given this context, simply hitting employers with an additional penalty for performing work on weekends when such work has long been an existing industry practice cannot be considered *fair* to employers.

The 38 Hour Week

48. We do not agree with the SDA's proposition that award provisions that provide no additional remuneration for overtime "undermine the integrity of the 38 hour week"[17]. The integrity of the 38 hour week is appropriately maintained by the significant protections built into the safety net through ss.62(2) and 62(3) of the Act.

49. Having referred to ss.62(2) and 62(3) of the Act, the SDA submits: (emphasis added)

> The SDA notes that reading the relevant award provisions in conjunction with the statutory framework do not, unfortunately, confer an unqualified right to a casual employee to refuse to work overtime on the basis there is no additional remuneration.

[16] See clause 30.3 Consecutive days off

[17] SDA submission dated 13 May 2016 at paragraph 29.

Whilst Section 62(3)(d) of the Act requires that the payment of overtime rates etc. be a criteria to determine if the additional hours are reasonable, it is not the sole criteria.[18]

50. The SDA go on to conclude that, "*Therefore relatively lowly paid, powerless casual employees are abandoned*."[19]

51. The SDA submissions exaggerate the extent to which there is any limitation on the effectiveness of the protection afforded by s.62 in the context of casual employment. To the extent that there is an absence of any additional level of remuneration relating an expectation of working additional hours beyond those referred to in s.62(1), this would be a factor that would weigh in favour of an employee being able to refuse to work additional hours. Nonetheless, we accept that s.62(3)(d) does not afford an unqualified right for a casual to refuse to work over-time (or more than 38 hours in a week). However, there is nothing inherently unfair about this. Such an outcome is consistent with the operation of this element of the safety net as determined by the legislature.

52. Regardless, there is no evidence of any casual employee engaged in the hair and beauty industry being required to work excessive or unreasonable hours. Accordingly, it is simply not open to the Commission to conclude that this is a real problem in this industry.

53. The SDA observes that s.62 is, in essence, a reflection of the Reasonable Hours Test Case. It should be observed that the predecessor award upon which the modern award was largely based, exempted casuals from the Test Case derived clause regulating working hours.[20] Accordingly, as a product of NES, Casual employees working in this industry now have greater protection than they had under such an instrument. It is hard to see what cogent reason there could be for now enhancing such protections even further.

5. SECTION 138 AND THE MODERN AWARDS OBJECTIVE MORE BROADLY

[18] SDA submission dated 13 May 2016 at paragraph 38.

[19] Ibid at 39

[20] Hairdressing and Beauty Services - Victoria - Award 2001

54. A modern award must only include provisions that are *necessary* to ensure that it is achieving the modern awards objective. In the matter here before the Commission, the SDA has not so much as attempted to establish that the amended clauses it seeks are necessary in the relevant sense. Indeed the SDA has not dealt with the various relevant considerations identified at s.134(1) in any serious way.

55. The employer parties in these proceedings do not bear any onus to demonstrate that the claims will result in increased employment costs or have any other adverse impact. No adverse inference can or should be drawn from the absence of evidence called by employer parties.

56. The conduct of the Review differs from an inter-party dispute. Those responding to a claim do not bear an onus. Rather, it is for the proponent of a claim to establish that the variation proposed is "necessary" in order to ensure that an award is achieving the modern awards objective of providing a fair and relevant minimum safety net of terms and conditions. In determining whether a proponent has in fact established as much, the Commission will have regard to material before it that addresses the various elements of the modern awards objective, including those that go to employment costs, flexible work practices and the potential impact on engagement in collective bargaining. These considerations are both microeconomic and macroeconomic; they require evaluation with respect to the practices of individual businesses as well as industry at large.

57. The claim advanced is one that should be supported by an appropriate evidentiary case. It is not one that can be made out through purely merit based arguments framed by reference to the legislative scheme. Putting aside the extent to which the union relies on various unsubstantiated factual assertions, the claim is of such a nature that it requires consideration of various factual matters in order to assess the impact of the claim and the justification for the proposed clauses.

58. Nonetheless, the union has not advanced any evidence in support of its claim. It has not, for example, sought to present evidence in relation to the following relevant factual considerations;

- Work patterns within the industry (including hours and days of operation)
- The hours of work of casual employees and in particular whether, and the extent to which, they actually perform the hours of work that would attract the new or increased penalties
- The characteristics of employers in the industry (such as typical employer size and profitability)
- The characteristics of employees in the industry (this includes, for example, the extent to which casual employees in this sector may fall within the cohort of workers that are likely to prefer flexible forms of work, such as female workers with caring responsibilities or younger workers)
- The dynamics of the labour market within the hair and beauty industry
- The alleged "vulnerability" of casual employees in the industry
- The extent of casual employment within the hair and beauty Industry
- The capacity for employers to meet any increased costs flowing from the claim
- The anticipated impact of the claim
- The basis for the SDA assertion that current award terms relating to penalty rates have contributed to current levels of casual employment
- The broader context of the industry (such as, for example the extent to which employers in the industry compete on cost with small sole traders that are unaffected by award regulation)

59. The union has simply not mounted an evidentiary case that would enable the Full Bench to be satisfied that the proposed terms are necessary to ensure the Award achieves the modern awards objective.

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

60. The SDA has not undertaken the analysis required by s.134(1)(a), including:

- To the extent that award reliant casual employees covered by the Hair and Beauty Award are in fact "low paid"; an assessment of their ability to purchase the essentials for a decent standard of living and to engage in community life, considered in the context of contemporary norms; and

- A comparison between casual employees to whom the Hair and Beauty Award applies and are paid the minimum award rates and other groups of employees that are deemed to be relevant.

61. As a result, there is insufficient material before the Commission to enable it to reach a conclusion that this factor lends support to the SDA's claim.

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

62. The relevant provisions of the Award as they presently apply leave greater room for bargaining and may incentivise employers and employees to negotiate higher applicable rates. The insertion of the provisions proposed by the SDA would only serve to raise the minimum safety net, thus limiting the scope of matters that might otherwise encourage an employer and its employees to participate in the process of collective bargaining. There is certainly no evidence that the current provisions are having any adverse impact on engagement in collective bargaining.

63. The significance of this element of the modern awards objective is reinforced by s.3(f) of the Act, which emphasises the importance of enterprise bargaining.

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

64. A recent Full Bench decision gave consideration to the meaning and application of s.134(1)(c) of the Act. It stated: (emphasis added)

> [166] The first point is not relevant to the consideration identified in s.134(1)(c), namely the promotion of 'social inclusion *through* increased workforce participation'. The social inclusion referred to in this context is employment. In other words, s.134(1)(c) requires the Commission to take into account the need to promote increased employment.[21]

65. There is no material before the Commission that might allow it to conclude that the grant of the SDA's claim would have the effect of increasing employment. Indeed it can reasonably be inferred that significantly increasing the costs associated with engaging casual employees may in fact have an adverse impact on workforce participation, as employers may elect not to engage them. To this extent, the SDA's claim runs counter to s.134(1)(c).

66. It is likely that many employees in the hair and beauty industry value the flexibility of casual employment. This may include wanting to work on weekends. Such a phenomenon is referred to in the correspondence advanced by HABA. The claim may undermine the capacity of these employees to maintain employment in the industry if disincentives employers from engaging casual employees to work on weekends.

Section 134(1)(da) – the need to provide additional remuneration for employees working in certain circumstances

67. We have addressed this consideration earlier in these submissions.

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

68. This is not a relevant consideration to this matter.

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

[21] 4 yearly review of modern awards – Common issue – Award Flexibility [2015] FWCFB 4466 at [166].

69. The nature of the potential impact of the variation proposed on employment costs and business is self-evident. The change will potentially impose a significant additional employment cost. It will however not be possible for the Full Bench to identify the degree to which this impact will arises in practice given the SDA has failed to mount any evidentiary case relating to such matters.

70. The potential impact of the claim is highlighted by the correspondence from various employers that has been presented by HABA.[22] A consistent theme is strong concern over the financial impact of the claimed increase in weekend rates for casual employees.

71. Relevantly, the correspondence from the Owner of Australian Skin Clinics (ASC) Browns Plains states;

This proposal is not acceptable at all for our business. We will again not able to survive with this proposal due to unbearable financial pressures. This increase is not sustainable as it would add extra 47% wage loading to the cost of weekend casual staff. As our business located in a large shopping centre where both the rent we pay and lease terms already reflect the shopping centre's requirement for weekend trading. We have no doubt that this proposal will take us to closing our business and then of course our staff will lose their jobs. It seems that SDA has clearly failed to recognize the amount of financial pressure on our business.

72. Of course, the correspondence advanced by HABA does not constitute sworn evidence provided by a witness. Nonetheless, in the face of a complete absence of any evidence in support of the claim, it ought to be sufficient to dissuade the Full Bench from entertaining the SDA proposal.

73. The correspondence from the owners of SCA and the CEO of Hairhouse Warehouse also refer to requirement to trade over 7 days of the week when operating in a shopping centre, a further matter which reinforces the need for

[22] This includes the correspondence from persons connected to Australian Skin Clinics, Hairhouse Warehouse and the Beauty Oasis.

the Commission to not grant the claims absent a clear understanding of the anticipated cost implications for employers. Many employers in this industry operate in shopping centres. It is commonly a condition of the commercial lease with such centres that the businesses open during the hours in which the centre operates. Consequently, such employers do not have the capacity to simply not operate on a weekend should the award variations render them not profitable on those days. This context means that the claims will operate in a particularly unfair manner for employers that operate in shopping centres.

74. To the extent that the union proposed clause discourage employers from engaging casual employees (an implied objective of the union claim) or alters the way in which they are required to work due to the proposed inflexibilities, the impact of the variation may also be felt by way of a reduction in productivity. Either result cannot be reconciled with s.134(1)(f).

75. It is trite to observe that many businesses in the hair and beauty industry are relatively small enterprises. We note of course, that the need to have regard to the impact of any variation on small and medium enterprises is particularly pertinent and reinforced by s.3(g) of the Act. Small businesses are likely to be particularly dependent upon the use of casual employment in order to deliver a degree of numerical flexibility that cannot be otherwise achieved through spreading additional labour requirements across a larger workforce. They are also likely to be particularly challenged by increases in labour costs. It cannot sensibly be denied that labour represents a major component of such business's costs structure, given the inherently labour intensive nature of the industry.

76. The need for casual labour cannot be entirely overcome or even significantly moderated through greater use of permanent employment. There are periodic spikes in demand for the industry's services. These often occur at certain time of the year or in the context of certain events. For most businesses, there are also day to day fluctuations in demand.

77. The rostering arrangements in the award which apply to permanent employees are very restrictive.[23] HABA contends that they are difficult to reconcile with the inevitable unexpected variations in work flow, such as client cancellations, with such restrictions and increasing the cost of engaging a casual employee undermines a business's capacity to utilise casual employment as means of properly aligning their staff numbers with operating requirements.

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

78. The need for a stable system tells against varying awards in the absence of a proper evidentiary and merit based case which establishes that the proposed provision is necessary, in the sense contemplated by s.138.

79. The changes that the SDA propose are significant variations to the award. It asks the Full Bench to introduce new financial penalties that would impose significant additional costs, without there being any evidence that establishing a the Award does not presently provide a fair and relevant minimum safety net, is contrary to s.134(1)(g).

80. Moreover there is no evidence of the broader context of the industry so as to establish that the costs that would flow from the claim could be met by employers.

81. Given the evidentiary vacuum in which the claim is presented, the Full Bench could have no confidence that the proposed terms would be sustainable.

Section 134(1)(h) – the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and the competitiveness of the national economy

82. To the extent that the matters arising from ss.134(1)(b), 134(1)(d), 134(1)(f) and 134(1)(g) adversely impact employment growth, inflation and the

[23] See clause 29 – Notification of rosters

sustainability, performance and competitiveness of the national economy, the SDA's claim also conflicts with s.134(1)(h).

6. CONCLUSION

83. The SDA has not made out a case for introducing the award terms that it has proposed. The material before the Commission cannot lead it to conclude that the clauses sought are necessary to achieve the modern awards objective. Accordingly, its claim must be dismissed.