FEDERAL COURT OF AUSTRALIA

National Retail Association v Fair Work Commission [2014] FCAFC 118

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| Citation: | National Retail Association v Fair Work Commission [2014] FCAFC 118 |
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| Parties: | **NATIONAL RETAIL ASSOCIATION v FAIR WORK COMMISSION and SHOP, DISTRIBUTIVE & ALLIED EMPLOYEES ASSOCIATION** |
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| File number: | QUD 140 of 2014 |
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| Judges: | **COLLIER, BROMBERG AND KATZMANN JJ** |
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| Date of judgment: | 11 September 2014 |
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| Catchwords: | **INDUSTRIAL LAW** – judicial review of a decision of the Fair Work Commission (**FWC**) to vary a modern award pursuant to the transitional review of modern awards required by Item 6 of Schedule 5 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) – whether transitional review of a modern award requires a two-stage decision making process – whether in conducting the transitional review, the FWC was wrong to consider a proposed variation in isolation, rather than review the award as a whole – whether the FWC took into account irrelevant considerations – whether the FWC misunderstood its function by purporting to deal with an application to vary the award rather than conducting a review under Item 6 – whether the FWC failed to act logically and rationally in making factual findings – whether the FWC failed to properly consider whether the award was achieving the “modern awards objective” – no jurisdictional error found – discretion to grant relief discussed – application dismissed |
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| Legislation: | *Fair Work Act 2009*(Cth) ss 134(1); 138; 156; 156(3); 156(4); 157; 157(2); 284(1); 284(2); 284(3); 284(4); 562; 563; 570(1); 576; 576(2)(d); 577; 581; 582(1); 589(1); 590; 590(2); 591; 593; 612(1); 615(1)*Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) Schedule 2 (Part 1, Item 4(1)(b)); Schedule 5 (Part 2, Items 6; 6(2); 6(2)(a); 6(2)(b); 6(2A); 6(3) and 6(4))*Federal Court of Australia Act 1976* (Cth) ss 22, 23*Judiciary Act 1903* (Cth) s 39B; 39B(1A)(c)*Workplace Relations Act 1996* (Cth) Part 10A; s 576E(1); 576E(3); 576E(4) |
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| Cases cited: | *Modern Awards Review 2012 – General Retail Industry Award 2010 – Junior Rates* [2014] FWCFB 1846*Energy Australia Yallourn Pty Ltd v Construction, Forestry, Mining and Energy Union* [2014] FCAFC 8*Modern Awards Review 2012* [2012] FWAFB 5600*R v Hunt; Ex parte Sean Investments Ltd* (1979) 180 CLR 322*R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327*Yum! Restaurants Australia Pty Ltd v Full Bench of Fair Work Commission* (2012) 205 FCR 306*Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611*Re Refugee Review Tribunal; Ex Parte Aala* (2000) 204 CLR 82*Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146*R v Commonwealth Court of Conciliation & Arbitration; Ex parte Ozone Theatres (Aust) Limited* (1949) 78 CLR 389*Re McBain; Ex parte Australian Catholic Bishop’s Conference* (2002) 209 CLR 372  |
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| Date of hearing: | 4 August 2014 |
|  |  |
| Place: |  |
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| Division: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 125 |
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| Counsel for the Applicant: | Mr D Mahendra |
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| Solicitor for the Applicant: | NRA Legal |
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| Counsel for the First Respondent: | The First Respondent did not appear |
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| Counsel for the Second Respondent: | Mr SJ Moore with Mr DA Bruno |
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| Solicitor for the Second Respondent: | Macpherson + Kelley Lawyers as town agent for AJ Macken & Co |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| QUEENSLAND DISTRICT REGISTRY |  |
| FAIR WORK DIVISION | QUD 140 of 2014 |

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| BETWEEN: | NATIONAL RETAIL ASSOCIATIONApplicant |
| AND: | FAIR WORK COMMISSIONFirst RespondentSHOP, DISTRIBUTIVE & ALLIED EMPLOYEES ASSOCIATIONSecond Respondent |

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| JUDGES: | COLLIER, BROMBERG AND KATZMANN JJ |
| DATE OF ORDER: | 11 September 2014 |
| WHERE MADE: | BRISBANE |

THE COURT ORDERS THAT:

1. The applicant’s application be dismissed.
2. Within seven (7) days of these orders the parties confer on the question of costs and advise the Court whether costs are sought and, if so, what costs order is agreed upon. In default of agreement, the applicant file short submissions and, if appropriate, affidavit evidence in support of its application within 14 days of these orders and the second respondent file short submissions and, if appropriate, affidavit evidence in response within seven (7) days of being served with the applicant’s material.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| QUEENSLAND DISTRICT REGISTRY |  |
| FAIR WORK DIVISION | QUD 140 of 2014 |

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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | NATIONAL RETAIL ASSOCIATIONApplicant |
| AND: | FAIR WORK COMMISSIONFirst RespondentSHOP, DISTRIBUTIVE & ALLIED EMPLOYEES ASSOCIATIONSecond Respondent |

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| JUDGES: | COLLIER, BROMBERG AND KATZMANN JJ |
| DATE: | 11 September 2014 |
| PLACE: | BRISBANE |

**REASONS FOR JUDGMENT**

# THE COURT

1. On 21 March 2014, on the application of the Shop, Distributive and Allied Employees Association (**SDA**), a Full Bench of the Fair Work Commission (**FWC**) decided to vary the *General Retail Industry Award 2010* (**Retail Award**) to require that 20-year-old retail employees who had worked for an employer for more than six months be paid at adult rates. The National Retail Association (**NRA**) contends that the FWC’s decision is affected by jurisdictional error. The NRA applies for orders quashing the decision and requiring the FWC to hear and determine the proceedings afresh. For the following reasons, the application must be dismissed.

# BACKGROUND

1. From April 2008, an award modernisation process (**award modernisation**) was conducted by the Australian Industrial Relations Commission (**AIRC**), the predecessor of the FWC. Award modernisation was a process regulated by Part 10A of the former *Workplace Relations Act 1996* (Cth) (**WR Act**)*.* Broadly speaking, the award modernisation process resulted in more than 1500 industrial awards being reviewed by the AIRC and replaced with some 120 industry and occupation-based ‘modern awards’. The award modernisation process largely pre-dated the enactment of the *Fair Work Act 2009*(Cth) (**FW Act**). However, the commencement of the operation of the modern awards was timed to co-ordinate with the commencement of the scheme for award regulation enabled by the FW Act.
2. One of the awards made in the course of the award modernisation process was theRetail Award. That award, like all modern awards made under the award modernisation process, was deemed to be a modern award for the purposes of the FW Act by Item 4 of Schedule 5 (**Schedule 5**)of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth)(**Transitional Act**).
3. On 11 April 2014, a Full Bench of the FWC issued a determination (**the determination**) varying cl 18 of the Retail Award. The determination gave effect to a decision of the FWC made on 21 March 2014 and published as *Modern Awards Review 2012 – General Retail Industry Award 2010 – Junior Rates* [2014] FWCFB 1846 (**the decision**).
4. As originally made, cl 18 provided that 20-year-old employees be paid at 90% of the relevant adult rate prescribed by the Retail Award. By the determination, the FWC varied cl 18 so as to provide that a 20-year-old employee who had worked for an employer for more than six months would be entitled to be paid the full adult rate of pay. Mindful of the cost implications upon employers, the FWC phased in the variation so that 95% of the adult rate applied from the first pay period commencing on or after 1 July 2014, with 100% of the adult rate applying from the first pay period commencing on or after 1 July 2015.
5. In its application for judicial review the NRA seeks writs of certiorari and mandamus to quash the decision and the determination and to require the FWC to perform its function according to law.
6. In support of its application the NRA relies upon five grounds. Three of those grounds essentially assert that the FWC misunderstood its function and took into account irrelevant considerations. The fourth ground raises an issue as to whether the FWC was wrong to consider cl 18 in isolation, rather than to review the Retail Award as a whole. In the fifth and final ground the NRA asserts that the FWC failed to act logically and rationally in making certain factual findings.

# THE RELEVANT LEGISLATIVE PROVISIONS

1. There was no issue that this Court has jurisdiction to grant the relief sought by the applicant. As the NRA submitted, this Court’s jurisdiction arises from s 562 of the FW Act and ss 22 and 23 of the *Federal Court of Australia Act 1976* (Cth) (**Federal Court Act**). Section 562 of the FW Act confers jurisdiction on the Federal Court “in relation to any matter”, whether civil or criminal, arising under that Act. Section 563 then provides that certain matters are to be heard in the Fair Work Division of the Court. Included in the matters specified by s 563 is an application for a writ of mandamus against a person holding office under the FW Act. A writ of certiorari may be granted by the Federal Court as a “stand alone” remedy pursuant to s 39B(1A)(c) of the *Judiciary Act 1903* (Cth) (**Judiciary Act**) and s 23 of the Federal Court Act: *Energy Australia Yallourn Pty Ltd v Construction, Forestry, Mining and Energy Union* [2014] FCAFC 8 at [62] and [69] (Dowsett J, with whom North and Bromberg JJ agreed at [22]).
2. In order to consider whether the FWC erred in the performance of its statutory task, it is necessary to refer to the statutory provisions pursuant to which the FWC purported to exercise its power to make the determination. Those provisions are contained in Part 2 of Schedule 5. Part 2 is headed “The WR Act award modernisation process”. It begins with Item 2, which requires the AIRC to continue with and complete the award modernisation process. Item 3 deals with the termination of various industrial instruments upon modern awards coming into operation. As stated earlier, Item 4 has the effect of deeming modern awards made in the award modernisation process to be modern awards under the FW Act. Item 5 empowers the FWC to deal with minor or technical problems with a modern award attributable to the fact that the award modernisation process started prior to the enactment of the FW Act.
3. Item 6 (**Item 6**) deals with a review of modern awards. It states:

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

(1) 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.

(2) 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.

(3) 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).

(4) 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.

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

(6) 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).

1. Item 4(1)(b) of Part 1 of Schedule 2 of the Transitional Act provides that, unless a contrary intention appears, expressions used in the Schedules have the same meaning as they have in the FW Act. Accordingly, the meaning of “the modern awards objective” referred to in Item 6(2) is that which is set out in s 134(1) of the FW Act:

*What is the modern awards objective?*

(1) 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

(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***.

1. The minimum wages objective, to which Item 6(4) refers, is defined in s 284(1) of the FW Act as follows:

(1) The FWC must establish and maintain a safety net of fair minimum wages, taking into account:

(a) the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth; and

(b) promoting social inclusion through increased workforce participation; and

(c) relative living standards and the needs of the low paid; and

(d) the principle of equal remuneration for work of equal or comparable value; and

(e) providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability.

This is the ***minimum wages objective****.*

1. Section 138 of the FW Act is also relevant. It provides:

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.

1. Section 284(2) provides that the minimum wages objective applies to the performance or exercise of the FWC’s functions or powers under Part 2‑6 and also under Part 2‑3 “so far as they relate to setting, varying or revoking modern award minimum wages”.
2. “Modern award minimum wages” is relevantly defined in s 284(3) to mean “the rates of minimum wages in modern awards, including: (a) wage rates for junior employees…”.
3. “Varying modern award minimum wages” is defined in s 284(4) to mean “varying the current rate of one or more modern award minimum wages”.
4. It will be necessary to consider in detail a number of sub-items of Item 6 together with s 134 and s 284 of the FW Act. Before doing so, it is useful to explain where the Item 6 review process (**transitional review**) sits in the statutory scheme for the making and reviewing of modern awards.
5. At the outset, some broad observations should be made. The first is that in comparison to the traditional award-making functions of federal industrial tribunals, the function given to the AIRC to make modern awards was novel. Awards had traditionally been made at the instance of employee or employer organisations and through either a consent determination or by arbitration after formal and often lengthy contested hearings. In contrast, Part 10A of the WR Act required the AIRC to make modern awards in accordance with an “award modernisation request” made to the President of the AIRC by the Minister for Employment and Workplace Relations. The AIRC was given very wide discretion to determine both the content of modern awards and the procedure by which it would perform its award modernisation function. By s 576E(1) of the WR Act, the President of the AIRC was required to establish one or more Full Benches to carry out the award modernisation process. Section 576E(3) provided that, for the purpose of carrying out that process, and subject to any direction given by the President, “the procedure of a Full Bench is within the absolute discretion of the Full Bench”. Section 576E(4) provided that without limiting subs (3), a Full Bench could inform itself in any way it thought appropriate, including by undertaking or commissioning research or consulting with any person.
6. The absence of any requirement for formal hearings and any mandated role for the industrial parties affected, together with the mammoth task given to the AIRC and the relatively short period in which it was required to be completed, provide some indication of the underlying rationale for the transitional review.
7. That rationale was explained in the Second Reading speech to the Bill which became the Transitional Act. The Minister for Employment and Workplace Relations relevantly said:

Further, the Bill provides for Fair Work Australia to conduct a bedding-down review of modern awards after two years of their operation – that is, from 1 January 2012 – ahead of the regular four-yearly review cycle. This will allow any necessary refinements to modern awards to be made to ensure they are meeting the modern award objectives and are operating effectively without anomalies or technical problems.

This transitional review will complement the four-yearly review of modern awards set out in the substantive Fair Work legislation and will allow any operational difficulties to be identified and remedied swiftly.

1. The “regular four-yearly review cycle” referred to by the Minister is provided for by s 156 of the FW Act. In the four-yearly review, the FWC must review all modern awards and may vary, revoke, or make a modern award.
2. The capacity of the FWC to vary modern awards outside the four-yearly review is relevant to the issues in the present case. Section 157 of the FW Act states:
3. The FWC may:
	* + - 1. make a determination varying a modern award, otherwise than to vary modern award minimum wages or to vary a default fund term of the award; or
				2. make a modern award; or
				3. make a determination revoking a modern award;

if the FWC is satisfied that making the determination or modern award outside the system of 4 yearly reviews of modern awards is necessary to achieve the modern awards objective.

Note 1: The FWC must be constituted by a Full Bench to make a modern award (see subsection 616(1)).

Note 2: Special criteria apply to changing coverage of modern awards or revoking modern awards (see sections 163 and 164).

Note 3: If the FWC is setting modern award minimum wages, the minimum wages objective also applies (see section 284).

1. The FWC may make a determination varying modern award minimum wages if the FWC is satisfied that:

(a) the variation of modern award minimum wages is justified by work value reasons; and

1. making the determination outside the system of annual wage reviews and the system of 4 yearly reviews of modern awards is necessary to achieve the modern awards objective.

Note: As the FWC is varying modern award minimum wages, the minimum wages objective also applies (see section 284).

1. Section 576 of the FW Act identifies the functions which are conferred upon the FWC and includes, in s 576(2)(d), “any other function conferred on the FWC by a law of the Commonwealth”. The Transitional Act confers upon the FWC the function of conducting the transitional review. Whilst Item 6 has something to say about the process and procedure by which the FWC must perform that function, the usual procedural powers of the FWC, applicable to all of the FWC’s functions, also applied to the transitional review. As we later observe, the FWC was given significant latitude in relation to the process by which the transitional review would be conducted.
2. In that respect, s 577 of the FW Act states:

The FWC must perform its functions and exercise its powers in a manner that:

(a) is fair and just; and

(b) is quick, informal and avoids unnecessary technicalities; and

(c) is open and transparent; and

(d) promotes harmonious and cooperative workplace relations.

1. The President of the FWC is responsible for ensuring that the FWC performs its functions and exercises its powers in a manner that is efficient and adequately serves the needs of employers and employees alike (s 581). The President is empowered to give directions as to the manner in which the FWC is to perform its functions and exercise its powers (s 582(1)). The FWC may make decisions as to how, when and where a matter is to be dealt with (s 589(1)). Section 590 of the FW Act provides that, except as provided by the FW Act, the FWC may “inform itself in relation to any matter before it in such manner as it considers appropriate”. The holding of a hearing is one of a number of non-exclusive processes specified in s 590(2) by which the FWC may inform itself. Section 591 provides that the FWC is not bound by the rules of evidence and procedure in relation to a matter before it. Section 593 confirms that the FWC is not required to hold a hearing in performing functions or exercising powers, except as otherwise provided. Section 612(1) and s 615(1) provide the President with the capacity to direct that a function or power of the FWC be performed or exercised by either a single FWC member or by a Full Bench.

# FACTUAL CONTEXT

1. On 17 November 2011, the then President of the FWC, Giudice P, published a Statement that dealt with the process that the FWC intended to adopt for the transitional review. In that Statement ([2011] FWA 7975), his Honour said:

At this stage it is anticipated that the review will be conducted by members of Fair Work Australia sitting alone to deal with awards, including transitional provisions where appropriate, on an individual basis. A Full Bench may be constituted to deal with a matter or matters of general significance.

The review will be based mainly on applications to vary modern awards. In some cases Fair Work Australia may also propose variations. It is likely that these proposed variations will be limited to technical and drafting matters.

1. A further Statement ([2012] FWA 3514) was made on 27 April 2012 by Ross P, the current President of the FWC. In that Statement the President noted that, as at that time, the FWC had received some 282 applications to vary modern awards. His Honour further noted that a number of those applications dealt with common issues, by which we take his Honour to mean issues common to a number of modern awards. His Honour stated that a Full Bench would be constituted to deal with such common issues. One of the common issues identified related to penalty rates in the Retail Award as well as awards for the hospitality, fast food, restaurant, hair and beauty industries.
2. That Full Bench (presided over by Ross P) was called upon to determine a number of procedural issues relevant to the conduct of the transitional review. One of the issues raised was whether a review of a modern award had to be dealt with in the one proceeding or whether such a review could occur by a number of different proceedings in which different aspects of a modern award could be addressed. One of the parties before the FWC in that matter, the Restaurant and Catering Association Victoria (**RCAV**), contended that Item 6(2A), and in particular the phrase “in its own right”, required that each modern award “be reviewed holistically and in totality rather than in a piece meal fashion”. The NRA similarly submitted that the penalty rate provisions in each of the modern awards the subject of the application then before the FWC could not be examined “in isolation”, as the phrase “in its own right” required the FWC to conduct “a wider examination of all award matters raised within a modern award, not merely ensure that isolated award matters are dealt with on an industry body basis” (at [54]).
3. In a decision dated 29 June 2012 and published as *Modern Awards Review 2012* [2012] FWAFB 5600, the FWC determined the procedural issues. It rejected the contentions made by the RCAV and NRA at [56]‑[62]:

[56] We reject those submissions which contend that each modern award must be reviewed “holistically” by the same member or by the same Full Bench. Contrary to those submissions, we are satisfied that Review applications in respect of a modern award are capable of being dealt with in separate proceedings, provided that each modern award is reviewed in its own right.

[57] We note at the outset that Item 6 does not prescribe how the Tribunal is to be constituted for the purpose of conducting the Review. This may be contrasted with the 4 yearly reviews of modern awards provided for in s.156 of the FW Act and the award modernisation process under Part 10A of the Workplace Relations Act 1996 (WR Act). The legislation relating to those proceedings provides that the Tribunal must be constituted by a Full Bench. The flexibility as to the constitution of the Tribunal for the Review is an indication that the legislature did not intend to limit the way in which the Tribunal conducts the Review.

[58] Further, as we have already mentioned, the Tribunal’s usual procedural powers apply to the conduct of the Review. The FW Act provides the Tribunal with considerable flexibility as to how, when and where a matter is to be dealt with (for example see ss.589, 591, 593, 599 and 600). Sections 612(1) and 615(1) provide that a Tribunal function may be performed by a single member or a Full Bench, as directed by the President.

[59] It is also important to note that the Tribunal is required to deal with the Review expeditiously (see Item 6(1) of Schedule 5 of the Transitional Provisions Act and s.577(b) of the FW Act) and efficiently (s.581 of the FW Act).

[60] If the “holistic” approach proposed by the RCAV was adopted then all of the applications relating to a particular award would have to be dealt with together, either by the same single member or by the same Full Bench. Such a process is simply unworkable.

[61] Some 283 Review applications have been received seeking to vary the terms of one or more modern awards. Some of these applications propose common variations to a large number of modern awards. For example one application deals with public holidays and seeks to insert the same model clause into 111 modern awards. It is impractical and inefficient to deal with such an application on an award by award basis. It is a much more efficient use of the resources of both the Tribunal and the parties to have a Full Bench deal with such an application. Yet if the submissions of the RCAV and the NRA were accepted the same Full Bench would be obliged to then review each of the 111 modern awards to avoid the review of a particular award being conducted on a “piecemeal” basis. This is simply impractical and does not efficiently utilise the Tribunal’s resources.

[62] We are not persuaded that there is any substance in the point advanced by the RCAV and the NRA. In our view it is a matter for the Tribunal to determine the most appropriate procedure for conducting the Review having regard to its obligations under ss.577 and 578 of the FW Act. While each modern award must be reviewed in its own right there is no impediment to aspects of that review being conducted by a Full Bench and other aspects by a single member. Accordingly, the Tribunal as presently constituted, will continue to deal with those aspects of the matters before us which seek changes to penalty rates and related issues. However, we note that the taking of evidence in relation to one or more of these applications could be delegated to individual members of the Tribunal as contemplated by s.590(2)(e) of the FW Act.

1. As part of the transitional review, 12 separate applications were made to the FWC seeking over 80 variations to a number of clauses of the Retail Award. Some of those applications were withdrawn.
2. At the time the FWC commenced to hear the SDA’s application to vary cl 18, hearings for all of the pending applications concerning the Retail Award had already begun. All of the other applications (save for one consequential aspect of one decision) were dealt with by the FWC before the publication of the decision the subject of the present application.
3. In that context, both the NRA and the SDA acknowledged to this Court that it was their common understanding that, as at the time of the substantive hearing before the FWC of the SDA’s application to vary cl 18, the issue raised by that application was the only remaining issue in the transitional review of the Retail Award.
4. Finally, we note that in a Statement made on 14 November 2013 ([2013] FWC 8933), Ross P observed that some 296 applications had been lodged as part of the transitional review, of which 36 were later withdrawn. Nine of those applications were applications to vary all or multiple awards (see at [3]). Some 38 modern awards were not the subject of any specific variation application (beyond the applications which related to multiple or all modern awards). Those 38 awards were reviewed by the FWC on its own initiative and a small number of technical and drafting variations were made (see at [7]).
5. The President’s Statement concluded at [54] with the following:

All modern awards have been reviewed pursuant to Item 6 of Part 2, Schedule 5 to the Transitional Act. With the exception of certain residual issues and appeals mentioned above, and the determination of applications related to Superannuation, the Transitional Review has been completed.

# THE SDA’S APPLICATION AND THE DECISION

1. By an application dated 8 March 2012, the SDA applied for cl 18 of the Retail Award to be varied by adding the single sentence:

From the 1st July 2013, employees 20 years of age will receive 100% (adult rate).

1. The SDA contended that the rates of pay for 20-year-old employees had not been the subject of any particular consideration as part of the award modernisation process. It submitted that the Retail Award was not achieving the modern awards objective and that a variation in the terms sought by the SDA was necessary to remedy that failure.
2. In its decision the FWC began by observing that it was concerned with an application made by the SDA “in the context of the review of all modern awards as required by Item 6”. The nature of the variation sought was then identified (at [1]). The FWC noted at [2] that the President of the FWC had determined that it was in the public interest for the application to be dealt with by a Full Bench. At [4], it again noted that the review of the Retail Award was being conducted under Item 6, the terms of which were extracted in full.
3. The Full Bench then set out the terms of the modern awards objective and of the minimum wages objective. It observed at [8] that the SDA had contended that it was appropriate for the FWC to consider its application “as part of this review of the Award”.
4. At [9], the FWC summarised the contentions of the various employer associations which had opposed the variation sought by the SDA. Those employer associations had contended that, when the Retail Award was first made, consideration had been given to the rates to be paid to junior employees and that there were no cogent reasons warranting any reconsideration of those rates. They further contended that there was no basis to find that the Retail Award was not achieving the modern awards objective or not operating effectively without anomalies or technical problems arising from the Part 10A process. For those reasons, the employer associations submitted that the need had not been shown for “any variation to remedy any issues in accordance with sub-item (3) of Item 6”.
5. The Full Bench rejected both the first and the second of those contentions. As to the first, it accepted the SDA’s submission that at the time of the making of the Retail Award the substance of the SDA’s claim had not been considered (at [42]-[45]).
6. The FWC then proceeded to examine whether the award was achieving the modern award objective. At [45], it stated:

It is necessary however for the SDA to establish a case on merit that the Award is not meeting the modern awards and minimum wages objectives.

1. The FWC noted that in support of its case the SDA did not rely upon Item 6(2)(b) to contend that the Retail Award was not operating effectively, without anomalies or technical problems arising from the Part 10A award modernisation process.
2. At this point in its reasons the FWC summarised the evidence led by the SDA from some 20 employees employed in the general retail industry. It noted (at [47]) that all except one of those witnesses gave oral evidence and was cross-examined. It summarised that evidence at [47]-[67].
3. At [68]-[91], the FWC summarised the evidence of the seven witnesses called by the employer associations.
4. At [94], the FWC set out its comments and findings in relation to the 10 principal conclusions that the SDA submitted the evidence had established:
* It accepted that at the age of 20 a significant number of employees in the retail industry have at least three years of experience in the industry. That conclusion was consistent with the evidence called by both the SDA and the employer associations.
* It accepted that the evidence supported the conclusion that most people mature as they get older, although questioned the relevance or utility of that conclusion. Further, it accepted that experience was more important than maturity.
* It found that the evidence from both parties supported a general conclusion that there is no difference in the work performed by, and the duties of, a 20-year-old Retail Employee Level 1 when compared to a 21-year-old Retail Employee Level 1.
* It found that the evidence of both parties established that most retail employees achieve a satisfactory level of proficiency in respect of Retail Employee Level 1 duties and responsibilities after about six months of employment.
* It found that most witnesses called by the SDA were covered by an enterprise agreement, not the Retail Award.
* It agreed with the SDA’s submission that there was little employer evidence that concentrated on 20-year-old employees who were the focus of the application, as opposed to all junior employees or those aged 18, 19 and 20.
* It accepted that the evidence established that most employees received training at the commencement of their employment, rather than that the provision of training was based on an employee’s age.
* It accepted that there was little evidence to suggest that a 20-year-old, with some experience, required any supervision and certainly not close supervision.
* It found that there was no probative evidence that paying the full adult rate to 20-year-old employees would have any material or significant adverse effect on the viability of retail businesses (the issue of the cost impact of the SDA’s application was addressed later in the decision in the context of the FWC’s consideration of the modern awards and minimum wages objectives, which the FWC observed that it was required to take into account).
* Finally, the FWC stated that there was no probative evidence that employers preferred 21-year-old employees to 20-year-old employees.
1. Under the heading “Is the Award achieving the modern awards and minimum wages objectives?”, the FWC referred to ss 134 and 284 of the FW Act (at [115]). The FWC stated that in its opinion, because the SDA’s claim was for an increase in the minimum rate payable to a 20-year-old, the claim met the description of a variation which “relates” to the Retail Award’s minimum wages. Accordingly, the Full Bench determined that Item 6(4) required that it consider the minimum wages objective. The FWC noted that a number of the considerations specified in each of the minimum wages objective and the modern awards objective “are in the same or very similar terms”.
2. At [116], the FWC noted that the parties had made both general submissions about whether the Retail Award was achieving the modern awards objective and specific submissions by reference to the factors listed in s 134(1) of the FW Act “which we must take into account”.
3. At [117], the FWC noted a submission made by the SDA (which was supported by the Commonwealth and the ACTU) that cl 18 did not constitute a fair and relevant minimum safety net. It further noted the SDA’s submission that cl 18 was unfair because it discriminated against 20-year-olds solely on the basis of age. It noted other submissions made by the SDA, set out in the second and third bullet points at [45] above. At [118], the FWC stated that those submissions of the SDA were consistent with the conclusions which the FWC had earlier found to be open on the evidence. The FWC stated that those matters were appropriate for it to take into account.
4. From [115] to [167] and under a number of subheadings referable to the two objectives, the FWC set out its specific evaluation of each of the factors listed in paragraphs (a)-(h) of s  134(1) (the modern awards objective) and paragraphs (a)-(e) of s 284(1) (the minimum wages objective). The Full Bench ordered its evaluation of those factors by grouping together those paragraphs which, in its view, dealt with the same or similar subject matter. The subheadings used, which identify the broad subject matters under consideration, were as follows:
* Sections 134(1)(a) and 284(1)(c): Relative living standards and the needs of the low paid;
* Section 134(1)(b): Need to encourage collective bargaining;
* Sections 134(1)(c) and 284(1)(b): Promote social inclusion through increased workforce participation;
* Section 134(1)(d): Promote flexible modern work practices and the efficient and productive performance of work;
* Sections 134(1)(e) and 284(1)(d): Equal remuneration for work of equal or comparable value;
* Section 134(1)(g): Simple, easy to understand, stable and sustainable modern award system etc; and
* Sections 134(1)(f) and (h) and 284(1)(a): Impact on business, productivity, employment costs, employment growth, inflation etc.
1. The ultimate conclusions of the FWC were set out at [169]-[174]:

[169] We have decided that the Award is not achieving the modern awards and minimum wages objectives. We consider that the discounted rate for all 20 year old retail employees is not a fair and relevant minimum safety net. In reaching this conclusion the witness and documentary evidence specific to the retail industry has been of primary importance.

[170] The SDA submitted that we should draw various conclusions based on the evidence presented in this case. Our comments and findings on the evidence are set out earlier in this decision. In general we are of the view that the evidence, considered in the context of the modern awards and minimum wages objectives, predominantly weighs in favour of adjusting the rates of pay for 20 year old retail employees. In particular we have decided that the adjustment is appropriate and is necessary for those objectives to be achieved.

[171] The evidence presented by both the SDA and the employers generally supports a conclusion that most junior retail employees achieve a satisfactory level of proficiency in their roles after about six months in employment. Further, much of the evidence suggests that there is little difference in the duties and responsibilities assigned to 20 and 21 year old retail employees or in the level of supervision required in relation to those employees.

1. At [172], the Full Bench explained why it had concluded that it was appropriate that 20-year-old employees should be entitled to the adult rate of pay provided that they had worked for their employer for more than six months. At [174], the decision dealt with the phasing in of the variation the Full Bench determined to make.

# CONSIDERATION

1. The NRA’s submissions did not closely correspond with the grounds of challenge specified in the affidavit filed in support of its application. To some extent the specified grounds overlap. To some extent the submissions of the NRA strayed beyond the propositions propounded by those grounds. It is convenient, however, that we deal with the issues for determination principally by reference to the grounds identified in the affidavit which accompanied the NRA’s application.
2. The five grounds specified by the NRA in that affidavit were as follows:
	* + - 1. The FWC had asked itself the wrong question by considering cl 18 of the Retail Award in isolation, rather than reviewing the Retail Award as a whole, as required by Item 6(2) (**ground (i)**).
				2. The FWC misunderstood its function under Item 6(2) by disaggregating Item 6(2)(a) from Item 6(2)(b) in its review and inserting, in place of Item 6(2)(b), a reference to s 284 of the FW Act in circumstances where s 284 considerations were not relevant to the FWC’s task until the review, in accordance with Item 6(2), had concluded that variations to the Retail Award were necessary (**ground (ii)**).
				3. The FWC misunderstood its function by approaching the matter as though it was dealing with an application to vary the Retail Award under s 157 of the FW Act rather than conducting a review under Item 6(2) (**ground (iii)**).
				4. The FWC took into account irrelevant considerations (described as “work value reasons”) (**ground (iv)**).
				5. The FWC failed to act logically and rationally in making certain factual findings (**ground (vi)**).

## Does Item 6 require a two-stage decision making process?

1. It is convenient to deal first with the NRA’s overarching contention that Item 6 requires a two-stage decision making process in which separate decisions are required at each stage. The approach essentially involved dividing the item into two distinct processes: the first – the review stage – regulated by Item 6(2) and (2A), and the second – the variation stage – regulated by Item 6(3) and (4). This construction of Item 6 was fundamental to ground (ii) and also taken up by ground (i).
2. We reject this contention.
3. It is apparent from its terms that, of itself, Item 6(2) neither poses any questions nor requires any questions to be answered. What Item 6(2) requires is that the FWC “consider” the Item 6(2) objectives. The statutory direction that a decision-maker “must consider” or “have regard to” a matter is a directive to a decision-maker to take that matter into account and give weight to it “as a fundamental element in making its determination”: *R v Hunt; Ex parte Sean Investments Ltd* (1979) 180 CLR 322 at 329 (Mason J); *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 333 (Gibbs CJ).
4. Item 6 only confers upon the FWC the power to make one kind of decision or determination. That is a determination varying a modern award “to remedy any issues identified in the review”: Item 6(3). That sub-item is the central provision in Item 6. It is that provision which contains the substantive power conferred on the FWC by Item 6. It also expresses the essence of the function conferred upon the FWC, namely, to decide whether to “make a determination varying any of the modern awards in any way that [FWC] considers appropriate to remedy any issues identified in the review”. While the exercise of the power to make a determination pursuant to Item 6(3) necessarily involves the identification of any issues to be remedied, there is but one process of decision-making which culminates in a determination to vary the award or to leave it as it is.
5. The identification of the issues to be remedied is not a separate function. It is a facilitative part of the single function conferred upon the FWC to consider whether a variation is necessary. There is no warrant, in our view, for dissecting the function of the FWC into separate decisional stages.
6. That conclusion is bolstered by the fact that Item 6 provides a single criterion for the exercise of the FWC’s power. If two separate functions were intended, then Item 6 would likely have provided one criterion for the ‘review stage’ and a different criterion for the ‘variation stage’. However, the central criterion specified in Item 6(2) plainly applies to both the review and identification of any issues to be remedied and to the decision about whether or not to make a variation. The primary purpose of Item 6(4) is to address the content of any variation which the FWC determines to make. But the requisite content of any variation that may be made is also a consideration of relevance to the question of whether a variation ought to be made: cf *Yum! Restaurants Australia Pty Ltd v Full Bench of Fair Work Commission* (2012) 205 FCR 306 at [21] (Lander, Flick and Jagot JJ).
7. There is no discernible basis in either the specification of the applicable criteria or otherwise for the view that two separate decision-making processes were intended.

## Ground (ii)

1. Pivotal to ground (ii) is its contention that a two-stage decisional making process is required by Item 6. Ground (ii) is based on the proposition that the minimum wages objective specified in s 284(1) of the FW Act is only relevant to the second and not the first stage of that process. As s 284(1) considerations were taken into account by the FWC in what the NRA contended to be the first stage of the requisite process, the NRA asserted that the FWC took into account irrelevant considerations.
2. That contention must be rejected because, as we have explained, Item 6 confers upon the FWC a single undivided function.
3. We should add, however, that even if we had accepted the NRA’s contention that Item 6 involved two separate decision making stages, we would not have accepted its contention that the minimum wages objective set out in s 284(1) was an irrelevant consideration in assessing, as part of a separate first stage, whether the Retail Award achieved the modern awards objective.
4. The modern awards objective deals with the content of modern awards and addresses the goal of providing fair and relevant minimum conditions of employment. The terms and conditions of employment contemplated by the modern awards objective must have been intended to include those terms or conditions which provide for minimum wages. One of the primary, if not the primary, term or condition of employment is the provision for the payment of wages. There is no basis for any suggestion that the object of establishing and maintaining “a safety net of fair minimum wages” is not a necessary element in achieving “a fair and relevant minimum safety net of terms and conditions”. Accordingly, the minimum wages objective must be regarded as not only relevant to, but an inherently important consideration in, any assessment of whether, by reference to the minimum wages provided by a modern award, that award achieves the modern awards objective. The intended integral connection of the minimum wages objective to the modern award objective is expressed in Item 6(4) and also in s 138 of the FW Act. It is also reflected in the substantial commonality of matters that need to be taken into account in the pursuit of each of the two objectives, as specified in ss 134(1) and 284(1) of the Act.
5. We accept that the FWC took into account the minimum wages objective in assessing whether the minimum wages provision in cl 18 of the Retail Award was achieving the modern awards objective. So much is apparent from our summary of the decision. Irrespective of whether a single or dual task was required of the FWC by Item 6, the minimum wages objective was not irrelevant to the FWC’s function and the FWC did not misconstrue its function by taking it into account.
6. Accordingly, we reject this aspect of ground (ii).
7. We also reject the proposition that the FWC should have, but failed to, consider Item 6(2)(b). That suggestion is also raised by ground (ii) although it was only faintly pressed on the appeal. It is convenient that we explain why we reject that contention when we address the extent of the scope of the review required of the FWC by Item 6. We will do when we come to ground (i).

## Ground (iii)

1. Section 157(2) of the FW Act empowers the FWC to vary the minimum wages provided for by a modern award where the FWC is satisfied that:
2. the variation is justified by “work value reasons”; and
3. the making of the variation outside the system for annual wage reviews and the four yearly reviews of modern awards is necessary to achieve the modern awards objective.
4. Relevant considerations for the determination of a s 157(2) variation application is the minimum wages objective specified by s 284(1) and “work value reasons”. The phrase “work value reasons” is defined by s 156(4) of the FW Act as follows:

(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.

1. As will be apparent from the summary of the decision set out above, the FWC expressly recognised on a number of occasions that it was dealing with an Item 6 review. The decision does not refer to s 157 of the FW Act at all. Nor does the decision use the phrase “work value reasons” or even the expression “work value”.
2. Despite this, the NRA contended that the reliance of the FWC on s 284(1) considerations and evidence which the NRA characterised as “work value reasons”, as well as the FWC’s analysis by reference to those considerations, demonstrated that the FWC had purported to apply s 157 of the FW Act and deal with the application before it as though it were an application made under s 157, rather than conduct an Item 6 review.
3. This contention essentially rested on the NRA’s contentions that:
4. the FWC gave inordinate focus to s 284(1) considerations, those considerations being central to a s 157(2) application; and
5. evidence capable of being characterised as “work value reasons” is evidence relevant to a s 157(2) application but irrelevant to an Item 6 review.
6. In rejecting ground (ii), we have already explained why s 284(1) considerations are not irrelevant to an Item 6 review in which the FWC is considering a variation to a modern award minimum wage. Indeed, Item 6(4) renders those considerations mandatory. We do not accept that the reliance placed by the FWC on s 284(1) considerations suggests that it misunderstood its function.
7. We will explain when dealing with ground (iv) why evidence capable of being encompassed within the s 156(3) definition of “work value reasons” is also evidence capable of being relevant to an Item 6 transitional review.
8. We therefore reject ground (iii).

## Ground (iv)

1. By ground (iv), the NRA contended that jurisdictional error was established because the FWC took into account irrelevant considerations.
2. The NRA contended that the evidence from witnesses called by the SDA almost exclusively related to “work value reasons” including (i) the nature of the work performed by the individuals as retail employees; (ii) the level of skill or responsibility involved in doing the work; and (iii) the conditions under which the work was done, including the level of training and supervision provided to the employees.
3. The NRA then referred to the findings made by the FWC about the evidence before it based upon the 10 principal conclusions that the SDA submitted the evidence had established. Those findings are summarised at [45] above. The NRA contended that the FWC had particular regard to the third, fourth, seventh and eighth dot points in that summary in reaching its determination. In the NRA’s submission, as all those matters could only be relevant to a consideration of “work value reasons” in the context of an application to vary an award under s 157 (or s 156) of the FW Act, by relying on those matters as the basis for a variation made pursuant to Item 6, the FWC had relied on irrelevant material that affected the exercise of its power to vary the Retail Award.
4. We would accept, noting that the SDA did not contend to the contrary, that each of the matters pointed to by the NRA as having been relied upon by the FWC was capable of being related to the “nature of the work”, “the level of skill or responsibility involved in doing the work” or the “conditions under which the work [of retail employees] is done” within the meaning of those expressions in the definition of “work value reasons” in s 156(4). Those matters are therefore capable of being “work value reasons” and, by reference to the s 156(4) definition, capable of being “reasons justifying the amount that employees should be paid for doing a particular kind of work”.
5. But it does not follow that the impugned matters were irrelevant to a consideration of whether the Retail Award was achieving the modern awards objective for the purpose of an Item 6 transitional review.
6. As we have already observed, whether a modern award contains fair minimum wages is relevant to whether the award is achieving the modern awards objective. The kind of matters that are encompassed by the definition of “work value reasons” are, as the definition of that phrase and s 156(3) and s 157(2) make clear, relevant to the amount that employees should be paid in the determination of the minimum wages payable under a modern award.
7. It is axiomatic that matters of that kind are capable of being relevant to a consideration of whether the minimum wages payable under a modern award are consistent with the modern awards objective. Accordingly, the NRA’s contention that matters which fall within the definition of “work value reasons” must be matters which are irrelevant to whether wage rates in a modern award are achieving the modern awards objective is unsustainable.
8. For those reasons, we reject ground (iv).

## Ground (i)

1. By ground (i), the NRA contended that Item 6 required that the entirety of each modern award be assessed holistically against Item 6(2) considerations. In support of its contention that a holistic assessment was mandated, the NRA relied upon the terms of Item 6(2A) and in particular the phrase “in its own right”. The NRA contended that the phrase “in its own right” was intended to impose a requirement that a modern award be reviewed “in its entirety to determine the two questions” posed by Item 6(2). This was the very contention the FWC rejected in the 2012 decision to which we referred above at [28]‑[29]. Here, the NRA argued that the FWC did not review the entirety of the Retail Award but only the part of cl 18 that dealt with the rates of pay of 20-year-old employees.
2. Read in its proper context, the phrase upon which the NRA relies does not have the meaning that the NRA ascribes to it. The context is the transitional review of all modern awards. The purpose of the requirement to review a modern award “in its own right” is to ensure that the review is conducted by reference to the particular terms and the particular operation of each particular award rather than by a global assessment based upon generally applicable considerations. In other words, the requirement is directed to excluding extra-award considerations. It is not directed to the manner in which intra-award considerations are to be dealt with.
3. That the review of each modern award must focus on the particular terms and the particular operation of the particular award does not suggest that the review of that award was intended to be confined to a single holistic assessment of all of its terms. The conclusion that a modern award fails to comply with the modern awards objective may be based upon a single offending provision. There is no reason in principle why the FWC could not come to that conclusion without reviewing the entire award. Nor can we discern any reason why the review of a modern award was intended to be confined to a single holistic exercise. In fact, there are a number of reasons why we consider that such a course was not intended.
4. First, the words of Item 6(3) empower the FWC to “remedy any issues identified in the review”. The emphasis there given to the rectification of “any issues” does not support the proposition that a holistic rather than an issues-based approach was intended. More relevantly, those words do not suggest that an issues-based approach was intended to be excluded. Further, the phrase “identified *in* the review” (emphasis added) is more suggestive of the power conferred being exercisable in the course of the review rather than it being unavailable until the review of the whole award has been completed.
5. Secondly, a requirement for a single holistic assessment of each modern award would create the practical problems which the FWC identified in the passage from *Modern Awards Review 2012,* which we have set out at [29] above. It should not be assumed that, in requiring the FWC to conduct the very substantial task of reviewing all modern awards, Parliament intended to impose practical constraints upon the manner in which that task was to be performed, unless such constraints served a useful purpose. No such purpose is apparent to support the constraint for which the NRA contends. Further, the very wide procedural discretion conferred on the FWC, to which we referred at [18], suggests that Parliament intended to confer upon the FWC a great deal of flexibility in the way the transitional review was to be conducted.
6. It is clear from the factual context we set out at [30]‑[31] that the FWC’s review of the Retail Award was conducted through a number of different hearings in which different applications dealing with different aspects of the award were determined. It is apparent from the content of the decision in the present case that the FWC understood that, as part of the transitional review of the Retail Award, it was tasked with determining whether or not it should vary the Retail Award pursuant to the power conferred upon it by Item 6. It is also apparent from the decision that the focus of the FWC’s review of the Retail Award was on cl 18 and that the ultimate conclusion it reached that the Retail Award was not achieving the modern awards and minimum rates objectives (at [169] of the decision) was based upon its opinion that the rate of pay for 20-year-old employees provided by cl 18 was not “a fair and relevant minimum safety net”.
7. Whilst it is clear that, by the decision under challenge, the FWC did not review the entirety of the Retail Award, we are not persuaded that the approach taken by the FWC was inconsistent with the statutory task required of it by Item 6.
8. We therefore reject ground (i).
9. We also reject so much of ground (ii) that sought to suggest that the FWC failed to consider, in accordance with Item 6(2)(b), whether the Retail Award was operating effectively without anomalies or technical problems arising from the Part 10A award modernisation process. We do so for two reasons.
10. First, it has not been shown that the FWC did not consider that matter in the course of the transitional review. As we have stated, the decision under challenge dealt with only a part of that exercise.
11. Secondly, a fair reading of the decision in the context of the nature of the controversy before the FWC suggests that the FWC was conscious of the consideration set out in Item 6(2)(b) and was satisfied that, by reason of *that* consideration, there was no basis for a conclusion that cl 18 should be varied. That was entirely uncontroversial. It reflected the position taken by the NRA and the other employer parties and it was not disputed. The controversy was all about Item 6(2)(b), that is to say, about whether the award did or did not achieve the modern awards objective. Although the FWC did not expressly say so, it may safely be assumed that, in the context described, the FWC held the view that Item 6(2)(b) did not provide a basis for a remedial variation of cl 18.

## Did the FWC fail to act logically and rationally?

1. The NRA’s fifth ground (**ground (v)**) was in the following terms:

The Full Bench failed to act logically and rationally in finding that:

1. most junior retail employees achieve a satisfactory level of proficiency in their roles after about six months in employment;
2. there is little difference in the duties and responsibilities assigned to 20 and 21 year old retail employees; and
3. there is little difference in the level of supervision required in relation to 20 and 21 year old retail employees.

(**the impugned findings**)

1. The NRA submitted that, in making the impugned findings, the FWC relied upon the evidence of 20 individuals selected by the SDA and applied conclusions drawn from that evidence to reach conclusions about the entire population of 20-year-old retail employees in the absence of any evidence of the statistical validity of the sample of individuals chosen. For that reason, the NRA contended that the FWC had treated the evidence from the SDA’s witnesses as survey evidence. Given the nature of that evidence, the NRA submitted that there was no reliable basis upon which the FWC could make findings in respect of the entire population of 20- and 21-year-old retail employees. Indeed, the NRA submitted that no rational or logical decision-maker could make the same factual findings as the FWC did on the same evidence.
2. Both parties accepted that the correct approach to determining whether illogicality or irrationality is sufficient to give rise to jurisdictional error in the present context is set out in the reasons for judgment of Crennan and Bell JJ in *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611. As their Honours said at [130], a jurisdictional error of that kind is:

one at which no rational or logical decision maker could arrive on the same evidence. In other words, accepting, for the sake of argument, that an allegation of illogicality or irrationality provides some distinct basis for seeking judicial review of a decision as to a jurisdictional fact, it is nevertheless an allegation of the same order as a complaint that a decision is “clearly unjust” or “arbitrary” or “capricious” or “unreasonable” in the sense that the state of satisfaction mandated by the statute imports a requirement that the opinion as to the state of satisfaction must be one that could be formed by a reasonable person.

1. At [133], their Honours further observed that “the correct approach is to ask whether it was open to the Tribunal to engage in the process of reasoning in which it did engage and to make the findings it did make on the material before it”. As their Honours went on to say (at [135]):

A decision might be said to be illogical or irrational if only one conclusion is open on the evidence, and the decision maker does not come to that conclusion, **or if the decision to which the decision maker came was simply not open on the evidence or if there is no logical connection between the evidence and the inferences or conclusions drawn**…

(Emphasis added.)

1. The first problem with the NRA’s contention is that it misstates the evidentiary basis upon which the impugned findings were made.
2. In relation to the first impugned finding, the FWC stated (at [94]‑[95]) that it relied upon the evidence of both the employees and the employers. As to the second impugned finding, the FWC stated (also at [94]‑[95]) that much of the employer evidence was also supportive of the conclusion it reached. As to the third impugned finding, whilst a finding in similar terms was sought by the SDA, the finding actually made was that “[t]here was little evidence to suggest a 20 year old, with some experience, required any supervision” (see [94]‑[98]). That finding seems to have been made on the basis of all the evidence, rather than merely the evidence called by the SDA.
3. Secondly, it was open to the FWC to treat evidence of the particular circumstances of the employees called as reflective or representative of the circumstances applicable to the general population of 20- or 21-year-old retail employees. The SDA called 20 young employees, all of whom were employed in the general retail industry. The employer groups called seven employers from a range of different retail businesses. One employed 25 employees, of whom 14 were under the age of 21, another 1000 employees, 60 of whom were under 21 and 58 between 18 and 20. One of the employers’ witnesses was the chief executive officer of a company which owns 70 independent supermarkets and liquor stores trading under the IGA banner. That company employed over 6000 employees and a substantial portion of that number were under the age of 21.
4. A significant number of employees were called. They were employed at a variety of retail outlets. Their evidence was regarded as consistent. There was no evidence to the contrary and the employers’ evidence was confirmatory. The reasoning applied by the FWC was not only open to it, but it was entirely rational.
5. It follows that this ground must also be dismissed.

## Did the FWC properly consider whether the Retail Award was achieving the modern awards objective?

1. Although not expressly encapsulated in its grounds, the NRA also raised two further arguments each of which challenges the approach taken by the FWC in assessing whether the Retail Award was achieving the modern awards objective.
2. First, the NRA submitted that, in order for the FWC to have been satisfied under Item 6(2)(a) that the Retail Award was not achieving the modern awards objective, the FWC had to make a finding that the award failed to satisfy one or more of the considerations listed in (a)-(h) of s 134(1).
3. There is no merit in this submission.
4. The unstated premise of the submission is that a finding that a modern award is not achieving the modern awards objective or not operating effectively, without anomalies or technical problems arising from the Part 10A process, is an essential pre-condition to the FWC’s capacity to exercise its power to make a determination under Item 6(3). For the purpose of dealing with the argument we will make that assumption but we are unconvinced that it is valid. Item 6(2) contains matters that must be considered. It does not erect pre-conditions to the exercise of the power to make a determination. The proposition that Item 6(2) was intended to foreclose the circumstances in which power conferred by Item 6(3) could be exercised is not supported by the wide terms in which the power is expressed.
5. In any case, at [169] of the decision the FWC did make a finding that the Retail Award was not achieving the modern awards objective. The NRA submitted, however, that the finding at [169] was made without the FWC first taking into account the matters listed in (a)‑(h) of s 134(1), because there was no finding “in respect of any matter” set out in the section “that the award, as it exists, was not meeting any of those objectives”.
6. It is apparent from the terms of s 134(1) that the factors listed in (a)‑(h) are broad considerations which the FWC must take into account in considering whether a modern award meets the objective set by s 134(1), that is to say, whether it provides a fair and relevant minimum safety net of terms and conditions. The listed factors do not, in themselves, however, pose any questions or set any standard against which a modern award could be evaluated. Many of them are broad social objectives. What, for example, was the finding called for in relation to the first factor (“relative living standards and the needs of the low paid”)? Furthermore, it was common ground that some of the factors were inapplicable to the SDA’s claim.
7. The relevant finding the FWC is called upon to make is that the modern award either achieves or does not achieve the modern awards objective. The NRA’s contention that it was necessary for the FWC to have made a finding that the Retail Award failed to satisfy at least one of the s 134(1) factors must be rejected.
8. The NRA also submitted that when the FWC assessed whether the Retail Award was achieving the modern awards objective, it did so not by reference to the content of the award but, instead, by reference to the content of the proposed variation. That was characterised by the NRA as a failure by the FWC to properly assess whether the Retail Award was achieving the modern awards objective.
9. It is true that the FWC expressed its opinion about some of the s 134(1) factors at least in part by reference to the merit of the proposed variation. For instance, at [122], when considering s 134(1)(a), the FWC said:

In our opinion each of the considerations in the above paragraphs weighs in favour of the variation sought by the SDA.

1. It is not surprising that the FWC’s assessment of whether the Retail Award was achieving the modern awards objective included some consideration of the proposed variation. The proposed variation was being put forward by the SDA as the solution which addressed the alleged failure of the Retail Award to achieve the modern awards objective. In that context, the FWC’s observations about whether particular considerations weighed in favour or weighed against the proposed variation to the Retail Award are also to be understood as observations about the extent to which the Retail Award was, or was not, already achieving the modern awards objective. To say that certain considerations support the proposed variation is another way of saying that the award in its present form is not achieving the modern awards objective.
2. The observations made by the FWC about the proposed variation do not suggest that the FWC failed to properly take into account the s 134(1) factors in considering whether the Retail Award was achieving the modern awards objective.

# DISCRETION

1. The SDA contended that, if the Court was satisfied that the decision of the FWC was tainted by jurisdictional error, the relief sought by the NRA should nevertheless be refused in the exercise of the Court’s discretion. In support of that submission, the SDA relied on delay and on the failure of the NRA to raise before the FWC the grounds upon which the NRA relied upon in this application.
2. It is well accepted that relief under s 39B of the Judiciary Act is discretionary. It is also established that the discretion should not be exercised lightly against the grant of relief, particularly where it is sought against administrative decision-makers and there is no avenue of appeal: *Re Refugee Review Tribunal; Ex Parte Aala* (2000) 204 CLR 82 (***Aala***) at [55] (Gaudron and Gummow JJ); *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 at [91] (Kirby J). In *Aala* at [56], Gaudron and Gummow JJ cited with approval the following passage from the judgment of Gibbs CJ in *R v Commonwealth Court of Conciliation & Arbitration; Ex parte Ozone Theatres (Aust) Limited* (1949) 78 CLR 389 (***Ozone Theatres***) at 400, where examples were provided of where a court may exercise its discretion not to issue a constitutional writ:

For example the writ may not be granted if a more convenient and satisfactory remedy exists, if no useful result could ensue, if the party has been guilty of unwarrantable delay or if there has been bad faith on the part of the applicant, either in the transaction out of which the duty to be enforced arises or towards the court to which the application is made. The court’s discretion is judicial and if the refusal of a definite public duty is established, the writ issues unless circumstances appear making it just that the remedy should be withheld.

1. Gaudron and Gummow JJ introduced the above passage from *Ozone* *Theatres* by noting that it provides “[s]ome guidance, though it cannot be exhaustive” as to the circumstances which may attract an exercise of discretion adverse to an applicant.
2. Here, it is common ground that the arguments put by the NRA in relation to grounds (i), (ii) and (iii) of the application were not put to the FWC. As we have already observed and as is apparent from the passages set out at [29] above, the argument raised by ground (i) was put by the NRA in an earlier proceeding before the FWC, which also dealt (in part) with the transitional review of the Retail Award. The FWC rejected that argument in its decision of 29 June 2012. No application was made by the NRA (or any other party for that matter) to review that decision.
3. It is also common ground that the argument raised by ground (iv) was indirectly raised in the proceeding before the FWC, but not in the terms set out in ground (iv), and not by the NRA. There is a disagreement between the parties, which we are unable to resolve on the material filed, as to whether the substance of the argument raised by the NRA’s ground (v) was raised before the FWC.
4. If the NRA had established jurisdictional error by reference to ground (i), we would have been minded to deny relief based upon that ground. In our view, the failure of the NRA to challenge, long before the application in this Court, the FWC’s rejection in June 2012 of the argument raised by ground (i), constitutes unwarrantable delay of the kind which provides a justifiable basis upon which relief should be declined.
5. We accept that the failure to advance an argument before the initial decision-maker may provide a sound discretionary basis for a court to decline to act on that argument for the first time in an application for judicial review: *Re McBain; Ex parte Australian Catholic Bishop’s Conference* (2002) 209 CLR 372 at (228) (Kirby J).
6. However, grounds which assert jurisdictional error are, by their very nature, grounds which assert a miscarriage of the task required of the decision-maker whose decision is the subject of judicial review. It will often be the case that the miscarriage of the task required of a decision-maker will not have become apparent until the decision-maker has made its decision and provided its reasons.
7. Whether the failure to raise an argument before the decision-maker as to an impending miscarriage of a decision-maker’s task should be a basis for the reviewing court’s refusal to act on that argument will depend upon a range of considerations. One consideration will be the extent to which a real opportunity arose to raise such an argument. Another consideration may be the extent to which the failure to raise the argument can be said to have led to the miscarriage of the decision-maker’s task.
8. Those considerations were not sufficiently explored before us and, given that it is not necessary for us to reach a conclusion on this matter, we will refrain from expressing a view as to the extent to which the NRA’s failure to raise arguments which might have been raised before the FWC would justify the exercise of the Court’s discretion to refuse the relief it seeks.

# CONCLUSION

1. None of the grounds upon which the FWC’s decision was challenged has been made out. Consequently, the NRA’s application must be dismissed. We presume that because of the operation of s 570(1) of the FW Act, the SDA does not seek costs. In the event that our presumption is wrong, we direct the parties to confer on the question of costs with a view to informing the Court of the parties’ agreed position and in the absence of consent, file and exchange any affidavits and short submissions within 14 days. We will deal with any application on the papers.

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| I certify that the preceding one hundred and twenty-five (125) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Collier, Bromberg and Katzmann. |

Associate:

Dated: 10 September 2014