FEDERAL COURT OF AUSTRALIA

Shop, Distributive and Allied Employees Association v The Australian Industry Group [2017] FCAFC 161

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| File numbers: | VID 684 of 2017VID 685 of 2017 |
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| Judges: | **NORTH, TRACEY, FLICK, JAGOT AND BROMBERG JJ** |
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| Date of judgment: | 11 October 2017 |
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| Catchwords: | **INDUSTRIAL LAW** – ss 134 and 156 of the *Fair Work Act 2009* (Cth) (**Fair Work Act**) – four yearly review of modern awards – judicial review of decision of Full Bench of Fair Work Commission (**FWC**) determining that penalty rates in various modern awards were inconsistent with the modern awards objective – whether decision affected by jurisdictional error – whether the FWC’s task miscarried because it failed to appreciate that “the review” of awards required by s 156 of the Fair Work Act is conditional on there being a material change in circumstances since the conduct of an earlier review – no warrant in the text or its context to confine the meaning of “review” to, or condition the power to vary on, a material change in circumstances – whether the FWC properly understood the nature of the inquiry required under s 134 of the Fair Work Act which specifies the modern awards objective – where 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 the various factors specified at s 134(1)(a)-(h) – whether specified factors exhaustive and whether FWC misconstrued “relevant” in the phrase “fair and relevant minimum safety net” – whether FWC failed to take into account relative living standards and needs of the low paid as required under s 134(1)(a) – whether the FWC improperly delegated its task of considering the needs of the low paid – whether the FWC’s decision was legally unreasonable – the FWC’s decision read as a whole reveals no jurisdictional error in its construction or application of s 134 of the Fair Work Act – application dismissed.  |
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| Legislation: | *Acts Interpretation Act (1901)* (Cth) s 25D*Conciliation and Arbitration Act 1904* (Cth)*Fair Work Act 2009* (Cth) ss 3, 134, 138, 156, 157, 284, 589, 598, 601, 603, 617*Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) Sch 5*Workplace Relations Act 1996* (Cth)  |
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| Cases cited: | *Alexandra Private Geriatric Hospital Pty Ltd v Blewett* [1985] FCA 313; (1985) 7 FCR 341*Assistant Treasurer and Minister for Competition Policy and Consumer Affairs v Cathay Pacific Airways Ltd* [2009] FCAFC 105; (2009) 179 FCR 323*Attorney-General (NSW) v XY* [2014] NSWCA 466*Australian and International Pilots Association v Fair Work Australia* [2012] FCAFC 65; (2012) 202 FCR 200*Australian Education Union v Lawler* [2008] FCAFC 135; (2008) 169 FCR 317*Bannister v See* [1982] FCA 109; (1982) 42 ALR 78*Bodruddaza v Minister for Immigration and Multicultural Affairs* [2007] HCA 14; (2007) 228 CLR 651*Central Queensland Services Pty Ltd v Construction,* *Forestry, Mining and Energy Union* [2017] FCAFC 43*Colpitts v Australian Telecommunications Commission* [1986] FCA 1; (1986) 9 FCR 52*Construction, Forestry, Mining and Energy Union v Anglo American Metallurgical Coal Pty Ltd* [2017] FCAFC 123*Corporation of the City of Enfield v Development Assessment Commission* [2000] HCA 5; (2000) 199 CLR 135*Craig v The State of South Australia* [1995] HCA 58; (1995) 184 CLR 163*JJ Richards & Sons Pty Ltd v Fair Work Australia* [2012] FCAFC 53;(2012) 201 FCR 297*Legal Services Commission v Turner* [2012] VSC 394*Lu v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 340; (2004) 141 FCR 346*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24*Minister for Immigration and Border Protection v Singh* [2014] FCAFC 1; (2014) 231 FCR 437*Minister for Immigration and Citizenship v Li* [2013] HCA 18;(2013) 249 CLR 332*Minister for Immigration and Citizenship v SZJSS* [2010] HCA 48;(2010) 243 CLR 164*Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; (2001) 206 CLR 323*National Retail Association v Fair Work Commission* [2014] FCAFC 118; (2014) 225 FCR 154*Re Patterson; Ex parte Taylor* [2001] HCA 51; (2001) 207 CLR 391*R v Alley; Ex parte New South Wales Plumbers and Gas Fitters Employees’ Union* [1981] HCA 61; (1981) 153 CLR 376*R v Williams; Ex parte The Australian Building Construction Employees’ and Builders Labourers’ Federation* [1982] HCA 68; (1982) 153 CLR 402*Sevdalis v Director of Professional Services Review (No 2)* [2016] FCA 433*Sevdalis v Director of Professional Services Review* [2017] FCAFC 9*Taulahi v Minister for Immigration and Border Protection* [2016] FCAFC 177; (2016) 246 FCR 146*Teys Australia Beenleigh Pty Ltd v Australasian Meat Industry Employees Union* [2015] FCAFC 11; (2015) 230 FCR 565*Unitedglobalcom, Inc v The Industrial Relations Commission* [2005] NSWCA 131  |
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| Date of hearing: | 26-28 September 2017 |
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| Registry: | Victoria |
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| Division: | Fair Work Division |
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| National Practice Area: |  |
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| Category: | Catchwords |
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| **VID 684 of 2017**  |  |
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| Counsel for the Applicant: | Mr H Borenstein QC with Mr S Moore QC |
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| Solicitor for the Applicant: | AJ Macken & Co |
|  |  |
| Counsel for the First Respondent: | Mr H Dixon SC with Mr A Gotting  |
|  |  |
| Solicitor for the First Respondent: | Ai Group Workplace Lawyers |
|  |  |
| Counsel for the Second and Third Respondents: | Mr Y Shariff |
|  |  |
| Solicitor for the Second and Third Respondents: | Australian Business Lawyers & Advisors |
|  |  |
| Counsel for the Fourth Respondent: | Mr A Duc |
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| Counsel for the Fifth and Seventh Respondents: | Mr S Wood QC with Mr P Wheelahan and Mr B Jellis |
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| Solicitor for the Fifth, and Seventh Respondents: | FCB Workplace Lawyers |
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| Counsel for the Sixth Respondent: | Mr A Herbert |
|  |  |
| Solicitor for the Sixth Respondent: | NRA Legal |
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| Counsel for the Eighth Respondent: | Mr M Seck |
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| Solicitor for the Eighth Respondent: | Meridian Lawyers |
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| Counsel for the Ninth Respondent: | The Ninth Respondent filed a submitting notice |
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| **VID 685 of 2017** |  |
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| Counsel for the Applicant: | Mr H Borenstein QC with Mr C Dowling |
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| Solicitor for the Applicant: | United Voice |
|  |  |
| Counsel for the First and Second Respondents: | Mr M Seck  |
|  |  |
| Solicitor for the First and Second Respondents: | Meridian Lawyers |
|  |  |
| Counsel for the Third Respondent: | Mr A Duc |
|  |  |
| Counsel for the Fourth and Fifth Respondents: | Mr Y Shariff |
|  |  |
| Solicitor for the Fourth and Fifth Respondents: | Australian Business Lawyers & Advisors  |
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| Counsel for the Sixth Respondent: | The Sixth Respondent filed a submitting notice  |

ORDERS

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|  | VID 684 of 2017 |
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| BETWEEN: | SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES ASSOCIATION Applicant |
| AND: | THE AUSTRALIAN INDUSTRY GROUPFirst RespondentAUSTRALIAN BUSINESS INDUSTRIALSecond RespondentNSW BUSINESS CHAMBER LIMITED (ACN 000 014 504) Third Respondent (and others named in the Schedule) |

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| JUDGES: | NORTH, TRACEY, FLICK, JAGOT AND BROMBERG JJ |
| DATE OF ORDER: | 11 OCTOBER 2017 |

THE COURT ORDERS THAT:

1. The originating application be dismissed.

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

ORDERS

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|  | VID 685 of 2017 |
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| BETWEEN: | **United Voice** Applicant |
| AND: | Australian Hotels AssociationFirst Respondent Accommodation Association of Australia Pty Ltd (ACN 088 943 239)Second Respondent Restaurant & Catering Industrial Third Respondent (and others named in the Schedule) |

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| JUDGEs: | north, tracey, flick, jagot and bromberg jj |
| DATE OF ORDER: | 11 October 2017 |

THE COURT ORDERS THAT:

1. The originating application be dismissed.

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

REASONS FOR JUDGMENT

THE COURT:

## The applications

1. These reasons for judgment explain why the applicants’ case that various determinations of the Fair Work Commission (**FWC**) are invalid must be rejected.
2. On 21 June 2017 the Full Bench of the FWC made determinations varying five modern awards (the Fast Food Industry Award 2010, the General Retail Industry Award 2010, the Pharmacy Industry Award 2010, the Hospitality Industry (General) Award 2010, and the Restaurant Industry Award 2010) under s 156(2)(b)(i) of the *Fair Work Act 2009* (Cth) (**Fair Work Act**). The effect of the determinations was to reduce Sunday and public holiday penalty rates and other entitlements for employees to whom the awards applied.
3. By originating applications filed on 23 June 2017 the applicants seek writs of certiorari quashing each of the determinations and mandamus requiring the FWC to conduct a review of the awards under s 156 according to law.
4. Before the determinations were made the FWC published three decisions. Each determination was said to be “[f]urther to the decisions issued by the Fair Work Commission”. Those decisions were:
* a decision published on 23 February 2017: *4 yearly review of modern awards - Penalty Rates* [2017] FWCFB 1001; (2017) 265 IR 1 (referred to below as the **primary reasons**);
* a decision published on 17 March 2017: *4 yearly review of modern awards - Penalty rates - Late night penalties* [2017] FWCFB 1551; and
* a decision published on 5 June 2017: *4 yearly review of modern awards – Penalty Rates – Transitional Arrangements* [2017] FWCFB 3001 (referred to below as the **further reasons**).
1. The so-called decisions are not subject to challenge in this proceeding. It is the determinations which the FWC made on 21 June 2017 varying the awards which alone are the subject of the challenges. This reflected the applicants’ acceptance of the fact that none of the decisions affected any immediate right or interest of the applicants; the determinations alone had that effect.

## The Court’s role

1. There is no dispute that to obtain relief the applicants must establish that the determinations are affected by jurisdictional error(*Central Queensland Services Pty Ltd v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 43 at [2] per Jessup J, at [44] per Tracey and Reeves JJ). This also follows from the nature of the relief sought by the applicants, namely an order in the nature of certiorari (*Bodruddaza v Minister for Immigration and Multicultural Affairs* [2007] HCA 14; (2007) 228 CLR 651 at [61]-[64]). And it is the party seeking a writ in the nature of certiorari and who asserts an absence or excess of jurisdiction who bears the onus of proof (*R v* ***Alley****; Ex parte New South Wales Plumbers and Gas Fitters Employees’ Union* [1981] HCA 61; (1981) 153 CLR 376 at 392 per Mason J, *Unitedglobalcom, Inc v The Industrial Relations Commission* [2005] NSWCA 131 at [2] per Handley JA, and *Australian Education Union v Lawler* [2008] FCAFC 135 at [219]; (2008) 169 FCR 317 at 401 per Jessup J (Moore and Lander JJ agreeing)).
2. It was common ground that jurisdictional error need not be exposed on the face of the determinations, as may have been the case in respect of an error of law, but could be exposed by reference to the reasons for the decisions as identified above.
3. Accordingly, whatever the unquestionable importance of the determinations to a large number of people, the applications must be resolved according to established principles which limit the role of the courts in reviewing for administrative error. The Court may not enter into the merits of the determinations. The FWC alone was vested with the responsibility for assessing all relevant matters and reaching all of the conclusions necessary to decide whether or not to make the determinations. The Court’s task is confined to the ascertainment or not of jurisdictional error. This does not entail reviewing the correctness of the FWC’s conclusions. The Court’s task is restricted to reviewing the process by which the FWC arrived at those conclusions (*Minister for Immigration and Citizenship v SZJSS* [2010] HCA 48;(2010) 243 CLR 164 at [36]). In this case, the process was provided for by the Fair Work Act including the terms of s 134(1).
4. No exhaustive definition can be provided as to what constitutes jurisdictional error. In *Craig v The State of South Australia* [1995] HCA 58;(1995) 184 CLR 163 at 179 the High Court said:

If … an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal’s exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.

1. But this list is not exhaustive. In *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; (2001) 206 CLR 323 at [82] McHugh, Gummow and Hayne JJ observed (citations omitted):

“Jurisdictional error” can thus be seen to embrace a number of different kinds of error, the list of which, in the passage cited from *Craig*, is not exhaustive. Those different kinds of error may well overlap. The circumstances of a particular case may permit more than one characterisation of the error identified, for example, as the decision-maker both asking the wrong question and ignoring relevant material. What is important, however, is that identifying a wrong issue, asking a wrong question, ignoring relevant material or relying on irrelevant material in a way that affects the exercise of power is to make an error of law. Further, doing so results in the decision-maker exceeding the authority or powers given by the relevant statute. In other words, if an error of those types is made, the decision-maker did not have authority to make the decision that was made; he or she did not have jurisdiction to make it. Nothing in the Act suggests that the Tribunal is given authority to authoritatively determine questions of law or to make a decision otherwise than in accordance with the law.

1. An administrative decision which lacks “an evident and intelligible justification” may also be vitiated for jurisdictional error (*Minister for Immigration and Border Protection v* ***Singh*** [2014] FCAFC 1; (2014) 231 FCR 437 at [44] per Allsop CJ, Robertson and Mortimer JJ citing *Minister for Immigration and Citizenship v* ***Li***[2013] HCA 18; (2013) 249 CLR 332 at [76] per Hayne, Kiefel and Bell JJ). The test of unreasonableness is an objective one (*Alexandra Private Geriatric Hospital Pty Ltd v Blewett* [1985] FCA 313; (1985) 7 FCR 341 at 357 per Sheppard J).
2. Accordingly there remains vested in the decision-maker an “area of decisional freedom” or an “area within which a decision-maker has a genuinely free discretion”. In *Li* French CJ stated the principle at [28] as:

After all the requirements of administrative justice have been met in the process and reasoning leading to the point of decision in the exercise of a discretion, there is generally an area of decisional freedom. Within that area reasonable minds may reach different conclusions about the correct or preferable decision. However, the freedom thus left by the statute cannot be construed as attracting a legislative sanction to be arbitrary or capricious or to abandon common sense.

1. Hayne, Kiefel and Bell JJ in *Li* expressed the required approach at [63] and [66] in the following terms:

[63] Because s 363(1)(b) contains a statutory discretionary power, the standard to be applied to the exercise of that power is not derived only from s 357A(3), but also from a presumption of the law. The legislature is taken to intend that a discretionary power, statutorily conferred, will be exercised reasonably.

…

[66] This approach does not deny that there is an area within which a decision-maker has a genuinely free discretion. That area resides within the bounds of legal reasonableness. The courts are conscious of not exceeding their supervisory role by undertaking a review of the merits of an exercise of discretionary power. Properly applied, a standard of legal reasonableness does not involve substituting a court’s view as to how a discretion should be exercised for that of a decision-maker. Accepting that the standard of reasonableness is not applied in this way does not, however, explain how it is to be applied and how it is to be tested.

1. The applicants contend that the determinations are affected by jurisdictional error on seven grounds. Both proceedings were heard together. The groundsrelied upon by each of the applicants in the two proceedings are the same.
2. It is convenient to identify the statutory provisions which governed the making of the determinations and the reasoning of the FWC in the context of each ground, as relevant. Before doing so, however, some other observations should be made as a result of the fact that the FWC published its reasons over a period of four months, gave the parties the opportunity to make further submissions arising from its primary reasons, and did not make any determinations until 21 June 2017. Until the decision-making process was complete by the making of the determinations, it remained open to the FWC to consider further submissions and review any conclusions earlier reached.

## Ground 1

1. The applicants contend that the FWC misconstrued its powers under ss 156(1) and (2) of the Fair Work Act by exercising the power to make a determination to vary the awards without having satisfied itself that, since the making of the awards the subject of the review or the last review of them, there had been a material change in circumstances such that the award, in each case, no longer met the “modern awards objective”.
2. Section 156 provided that:
3. The FWC must conduct a ***4 yearly review of modern awards*** starting as soon as practicable after each 4th anniversary of the commencement of this Part.
4. In a 4 yearly review of modern awards, the FWC:

(a) must review all modern awards; and

(b) may make:

(i) one or more determinations varying modern awards; and

(ii) one or more modern awards; and

(iii) one or more determinations revoking modern awards; and

(c) must not review, or make a determination to vary, a default fund term of a modern award.

1. In a 4 yearly review of modern awards, the FWC may make a determination varying modern award minimum wages only if the FWC is satisfied that the variation of modern award minimum wages is justified by work value reasons.
2. ***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. A 4 yearly review of modern awards 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.
2. Section 134, which describes the “modern awards objective”, was in these terms:
3. 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 modern awards objective applies to the performance or exercise of the FWC’s ***modern award powers***, which are:

(a) the FWC’s functions or powers under this Part; and

(b) the FWC’s functions or powers under Part 2-6, so far as they relate to modern award minimum wages.

1. Sections 134 and 156 are in Pt 2-3 of Ch 2 of the Fair Work Act and thus the modern awards objective applies to the FWC exercising its functions to make a determination to vary an award under s 156(2)(b)(i) of the Fair Work Act.
2. Section 138 is also relevant. It provided that:

A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.

1. Section 157 is also relevant to ground 1. It too is in Pt 2-3 of Ch 2 and thus is subject to the modern awards objective. Section 157 provided that:

(1) The FWC may:

(a) 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

(b) make a modern award; or

(c) 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.

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

(b) 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.

(3) The FWC may make a determination or modern award under this section:

(a) on its own initiative; or

(b) on application under section 158.

1. Section 284 should be noted. It is in Pt 2-6 dealing with minimum wages. It provided that:
2. 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. The minimum wages objective applies to the performance or exercise of:

(a) the FWC’s functions or powers under this Part; and

(b) the FWC’s functions or powers under Part 2-3, so far as they relate to setting, varying or revoking modern award minimum wages.

…

1. The applicants put the same argument to the FWC, that is, the FWC had no power to make a determination to vary the awards without having satisfied itself that there had been a material change in circumstances such that the award in each case no longer met the “modern awards objective”. The FWC rejected the argument in the primary reasons at [230]-[268]. In short, the FWC considered that a determination varying an award may be warranted if it is established that there has been a material change in circumstances since the making of the award under review, but the FWC’s power to do so is not conditioned on it being satisfied that there has been such a change in circumstances.
2. The FWC’s conclusion in this regard is correct.
3. **First**, it may be accepted that the word “review” takes its meaning from its context and may mean merely “reconsideration in the light of changed circumstances” (*Bannister v See* [1982] FCA 109; (1982) 42 ALR 78 at 81). This, however, is not the natural and ordinary meaning of the word which is simply “survey, inspect, re-examine or look back upon” (Macquarie Concise Dictionary, 3rd ed). In *Colpitts v Australian Telecommunications Commission* [1986] FCA 1; (1986) 9 FCR 52 at 63 Burchett J considered the meaning of “review” and noted at 63-64 that:

In the Shorter Oxford English Dictionary the first meaning given of the word “review” is “the act of looking over something (again), with a view to correction or improvement”, but the meaning in law is also given: “Revision of a sentence, etc., by some other court or authority.”

…

It may be conceded that, in an appropriate context, the word “review” could have a quite amorphous meaning; but the word is here used in an Act to describe a challenge, to be brought by “application”, to administrative action, provision for which is to be made by regulations. In such a setting a legal signification is suggested.

1. The present context is different. The FWC is not called upon to consider or reconsider the decision of another body by s 156. It is reviewing modern awards. The modern awards provisions of the Fair Works Act commenced on 1 January 2010. By item 4 of Schedule 5 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (the **TPCA Act**) awards made under Pt 10A of the *Workplace Relations Act 1996* (Cth) were deemed to be modern awards. By item 6 of Schedule 5 to the TPCA Act, Fair Work Australia was required to conduct a review of all modern awards and, in so doing, was required to consider whether modern awards achieved the modern awards objective. This review was to be conducted as soon as practicable after the second anniversary of the commencement of the modern award provisions (that is, after 1 January 2012).
2. It is apparent from s 156(1) that the next review was required to start as soon as reasonably practicable after each fourth anniversary of the commencement of Pt 2-3 of Ch 2. Thus, the statutory scheme required a review starting in 2012 and again in 2014 (followed by another review starting on 1 January 2018 and so on).
3. In other words, under s 156 the FWC is necessarily reviewing awards that it (or its predecessor) had already reviewed. In this context, it is the FWC which is in control of every review as required. There is nothing in this context to justify giving “review” a more confined meaning than its natural and ordinary meaning given that the review process is always controlled by the FWC.
4. **Second**, nothing in the text of s 156 supports the meaning which the applicants give to “review”. The word appears as part of a composite phrase in s 156(1) (4 yearly review of modern awards) and in s 156(2). By s 156(1) a duty is imposed on the FWC to conduct a 4 yearly review. Section 156(2) prescribes what must, may and must not be done in conducting the 4 yearly review which s 156(1) requires. The applicants’ case is that the powers under s 156(2) are conditioned on the FWC having complied with s 156(2)(a) (“…must review all modern awards”). So much may be accepted. The relevant point for present purposes is that the powers in s 156(2)(b) are not expressed to be conditional on the FWC having reached any state of satisfaction. Nor does s 156(2)(a) impose any obligation on the FWC to reach a particular state of satisfaction in the conduct of the review.
5. **Third**, no other provisions of the Fair Work Act indicate that the FWC must be satisfied that there has been a material change in circumstances since the award under review was made or reviewed before the power under s 156(2)(b)(i) is engaged. The modern awards objective in s 134(1) applies to any such exercise of power (by s 134(2)(a)) but s 134(1) also does not identify any state of mind the FWC must hold. Rather, it imposes a function on the FWC to ensure that modern awards satisfy the requirements of that provision (that is, together with National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions taking into account (a)-(h)).
6. **Fourth**, the context otherwise provides but scant support for the applicants’ case. The applicants contend that it is highly unlikely that, a review having been conducted in 2012, Parliament intended a *de novo* review in 2014. This, the applicants said, would be inconsistent with the element of the modern awards objective in s 134(1)(g) insofar as it refers to the need for a stable modern award system. Section 157, according to the applicants, supports this unlikelihood. Section 157(1) enables the FWC to vary, make or revoke a modern award outside of the 4 yearly review if the FWC is satisfied that making such a determination “is necessary to achieve the modern awards objective”. If “review” in s 156(2) does not take the meaning for which the applicants contend then, it was submitted, there is no difference between the two provisions. It is apparent, however, that the four yearly review under s 156 has a more confined role to play, as the applicants put it, because it is required to be carried out on a four yearly basis. Otherwise, it was said the system for modern awards would be in “a constant state of flux with one review running into the next”, as has occurred in the present case, which is an incongruous and inconvenient result.
7. The problem with this analysis is that it attributes an intention to Parliament (to confine the circumstances in which a power to make a determination may be exercised under s 156(2)) based on context in circumstances where the context is equally capable of supporting a contrary imputed intention. It is a fundamental tenet of statutory construction that the intention of Parliament is to be discerned from the statutory provisions, not from pre-conceived value judgments including those about the potential inconvenience of awards being subject to repeated or overlapping reviews. The fact that the statutory scheme required reviews commencing in 2012 and 2014 (and on a four yearly cycle thereafter) does not suggest that “review” should be given a more confined meaning than its natural and ordinary meaning. The requirement is equally explicable by an imputed Parliamentary intention to require two reviews, in effect, to commence within the first four years of the commencement of the new statutory scheme. It is also equally explicable by an imputed Parliamentary intention to ensure that awards are subject to regular and frequent review. None of these imputed intentions have any greater validity than the other because they are not founded in the language of the statutory provisions.
8. The reference in s 134(1)(g) to the “need to ensure a simple, easy to understand, stable and sustainable modern award system” does not support the applicants. That is a matter which the FWC must take into account as part of the modern awards objective. It is thus a matter for the FWC to determine the weight to be given to the value of stability in the particular review it is conducting, along with the weight to be given to all other matters it must take into account, cognisant of its duty (which itself involves an evaluative assessment of potentially competing considerations) to ensure that modern awards, together with the National Employment Standards, provide the required fair and relevant minimum safety net. It is not legitimate to take one element in the overall suite of potentially relevant considerations to the discharge of the FWC’s functions, such as stability, and discern from that one matter a Parliamentary intention that the scheme as a whole is to be construed with that end alone in mind.
9. Further, there is no basis for imputing to Parliament an intent to give stability, a consideration that the FWC must take into account, priority over the FWC’s ultimate task of ensuring that “modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions”. The applicants’ contention would constrain the capacity of the FWC to maintain an award’s compliance with the modern awards objective. That could only be done if a material change of circumstance was first established. It should not be readily presumed that Parliament intended to impose constraints upon the achievement of an objective that it has mandated. A modern award may be found to be non-compliant for reasons other than changed circumstances, including where considerations, which were extant but unappreciated or not fully appreciated on a prior review, are properly brought to account.
10. Accordingly, it is neither legitimate nor possible by reference to anything in the text or context to divine some intention on the part of Parliament to confine the powers of the FWC in the manner for which the applicants intend. Further, the fact that ss 156(2)(b) and 157(1) enable the same determinations to be made in two different circumstances also does not support any such conclusion. There is no incongruity or disharmony in the statutory scheme even if “review” in s 156(2)(a) is given its natural and ordinary meaning.
11. **Fifth**, the applicants’ approach may itself be seen as introducing incongruity and disharmony into the statutory scheme. By ss 156(1) and (2)(a) the FWC must conduct a review. The applicants’ argument is said to depend on the meaning of the word “review”. That word appears as part of a composite phrase (4 yearly review) in s 156(1) and as an obligation which the FWC must fulfil in s 156(2)(a) in conducting the 4 yearly review. If the applicants’ argument, in truth, turned on the meaning of “review” it ought to be possible to substitute that meaning in the statutory provisions for the word “review”. If this is done, however, s 156(2)(a) becomes unintelligible unless it is re-drafted. This is because the applicants’ argument is not simply giving one possible meaning to the word “review” as it appears in s 156(2)(a). In that provision “review” is simply the action the FWC must carry out. The applicants’ argument is not directed to the action the FWC must carry out. It is not about the meaning of the verb “review” at all. It is that, the review having been carried out, the power under s 156(2) may be exercised only if the result of the review is a conclusion by the FWC that there has been a material change in circumstances since the award was made or last reviewed.
12. For these reasons the applicants’ denial that their argument depends on reading words into s 156(2) is unsustainable. The argument depends on reading a qualification into the power provision which is in s 156(2)(b) by reference to the result or outcome of the review. In common with the applicants’ approach to intentions imputed to Parliament in purported reliance on text and context, this too is an impermissible approach to statutory interpretation (*JJ Richards & Sons Pty Ltd v Fair Work Australia* [2012] FCAFC 53; (2012) 201 FCR 297 at [51] per Flick J).
13. The meaning of s 156(2) is clear. The FWC must review all modern awards under s 156(2)(a). In that context “review” takes its ordinary and natural meaning of “survey, inspect, re-examine or look back upon”. Consequential upon a review the FWC may exercise the powers in s 156(2)(b). In performing both functions the FWC must apply the modern awards objective as provided for in s 134(2)(a).
14. The FWC was correct to reject the applicants’ argument below that it could not exercise its powers under s 156(2)(b)(i) unless it was satisfied that there had been a material change in circumstances since the previous review.
15. Ground 1 must be rejected for these reasons.

## Ground 2

1. Ground 2 contains two sub-grounds. The first may readily be dismissed. It is that the FWC wrongly bifurcated the modern awards objective so that it discharged its duty to ensure that “modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions” separately from the taking into account of the matters in s 134(1)(a)-(h).
2. The short answer to this contention is that the FWC’s reasons do not indicate that it conducted the review in the manner which the applicants suggest. The applicants rely particularly on [128] of the FWC’s primary reasons which stated that:

The proposition advanced relies on dictionary definitions of some individual words within s.134(1). But the argument advanced pays scant regard to the fact the modern awards objective is a composite expression which requires that modern awards, together with the NES, provide ‘a fair and relevant minimum safety net of terms and conditions’. The joint employer reply submission gives insufficient weight to the statutory directive that the minimum safety net be ‘fair and relevant’. Further, in giving effect to the modern awards objective the Commission is required to take into account the s.134 considerations, one of which is ‘relative living standards and the needs of the low paid’ (s.134(1)(a)). The matters identified tell against the proposition advanced in the joint employer reply submission.

1. The contention fails to recognise that in [128] the FWC is rejecting a submission put to it. In rejecting the submission the FWC expressly recognised that the modern awards objective is a composite expression. The FWC’s description of its functions in [128] does not separate the duty of ensuring the provision of the minimum safety net from consideration of the matters to be taken into account. The applicants place more weight on the sentence “in giving effect to the modern awards objective the Commission is required to take into account the s 134 considerations” to support the contention of error than it can possibly bear. It is true that the modern awards objective includes the taking into account of the matters in s 134(1)(a)-(h). As such, strictly speaking it is correct that, in discharging its duty to “ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions”, the matters in s 134(1)(a)-(h) must be taken into account and together these functions constitute the modern awards objective. At worst, however, the statement in [128] of the FWC’s reasons involves some imprecise syntax. Even from [128] alone it is apparent that the FWC understood that it had to take into account the matters in s 134(1)(a)-(h) in giving effect to the duty to “ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions”. Many other parts of the reasons support the conclusion that the FWC did not commit the error alleged including:
2. at [37]: “[t]he modern awards objective in s.134(1) of the FW Act is central to the Review. The modern awards objective is to ‘ensure that modern awards, together with the National Employment Standards (NES) provide a *fair* and *relevant* minimum safety net of terms and conditions’, taking into account the particular considerations identified in sections 134(1)(a) to (h)…”;
3. at [115]: “[t]he modern awards objective is to ‘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 the particular considerations identified in sections 134(1)(a) to (h) (the s.134 considerations). The objective is very broadly expressed. The obligation to take into account the s.134 considerations means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision making process. No particular primacy is attached to any of the s.134 considerations and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.”; and
4. at [116]: “[w]hile the Commission must take into account the s.134 considerations, the relevant question is whether the modern award, together with the NES, provides a fair and relevant minimum safety net of terms and conditions…”
5. Other parts of the primary reasons on which the applicants rely must be considered in context. For example, at [816] the FWC did say that it proposed to deal with the s 134 considerations “first”. But the FWC had to structure its reasons in some form. It did not mean that the consideration was to be disengaged from the overall functions which the FWC was performing under s 134(1) as a whole. Further, the FWC did say at [1689] that the “central issue in these proceedings is whether the existing Sunday penalty rate provides a ‘fair and relevant minimum safety net’”. But the FWC did not say that this was to be assessed without regard to the s 134(1)(a)-(h) matters. Nor did it proceed to do so, as the applicants submit. For example, at [1701], the FWC refers to the “reasons given”, which must include all of the reasons given to that point (which includes the taking into account of the s 134(1) matters) and at [1702] it refers to the “evidence before us and taking into account the particular considerations identified in paragraphs 134(1)(a) to (h)”. Both [1701] and [1702] appear in the FWC’s conclusions about the General Retail Industry Award 2010. Faced with this, the submission that the reasons expose the asserted error is unpersuasive. The same conclusion applies to each of the other awards in respect of which the FWC’s reasons adopt a similar structure.
6. As explained in *Construction, Forestry, Mining and Energy Union v* ***Anglo American*** *Metallurgical Coal Pty Ltd* [2017] FCAFC 123 at [28]-[29] by Allsop CJ, North and O’Callaghan JJ:

[28] The terms of s 156(2)(a) require the Commission to review all modern awards every four years. That is the task upon which the Commission was engaged. The statutory task is, in this context, not limited to focusing upon any posited variation as necessary to achieve the modern awards objective, as it is under s 157(1)(a). Rather, it is a review of the modern award as a whole. The review is at large, to ensure that the modern awards objective is being met: that the award, together with the National Employment Standards, provides a fair and relevant minimum safety net of terms and conditions. This is to be achieved by s 138 — terms may and must be included only to the extent necessary to achieve such an objective.

[29] Viewing the statutory task in this way reveals that it is not necessary for the Commission to conclude that the award, or a term of it as it currently stands, does not meet the modern award objective. Rather, it is necessary for the Commission to review the award and, by reference to the matters in s 134(1) and any other consideration consistent with the purpose of the objective, come to an evaluative judgment about the objective and what terms should be included only to the extent necessary to achieve the objective of a fair and relevant minimum safety net.

1. With this in mind, the second aspect of ground 2 requires more detailed consideration. To the extent that the applicants contended that the FWC was required to but did not consider whether there had been a material change in circumstances, we have already explained above that the FWC’s power was not conditioned on any such finding. In any event, it is apparent from the FWC’s reasons that it was aware of the potential relevance of changing circumstances, as one of its key findings at [689] was that the disutility associated with weekend work which is “much less than in times past”.
2. Otherwise, the applicants contend that s 134(1)(a)-(h) is a code so that the FWC, in applying the modern awards objective to the review (as required by s 134(2)(a)), was required to consider all of the s 134(1)(a)-(h) matters and was precluded from considering any other matter. This was said to be supported by the fact that, in contrast to other provisions of the Fair Work Act, s 134(1) does not refer to the FWC being able to consider any other matter it considers relevant.
3. This submission should be rejected. It fails to recognise that the modern awards objective requires the FWC to perform two different kinds of functions, albeit that the modern awards objective embraces both kinds of function. 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” and in so doing, must take into account the s 134(a)-(h) matters. What must be recognised, however, is that the duty of ensuring that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions itself involves an evaluative exercise. While the considerations in s 134(a)-(h) inform the evaluation of what might constitute a “fair and relevant minimum safety net of terms and conditions”, they do not necessarily exhaust the matters which the FWC might properly consider to be relevant to that standard, of a fair and relevant minimum safety net of terms and conditions, in the particular circumstances of a review. The range of such matters “must be determined by implication from the subject matter, scope and purpose of the” Fair Work Act (*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24 at 39-40).
4. This construction of s 134(1) necessarily rejects the applicants’ argument that the words “fair and relevant” qualify the considerations in s 134(1)(a)-(h) and not the minimum safety net of terms and conditions. This submission is untenable. It is apparent that “a fair and relevant minimum safety net of terms and conditions” is itself a composite phrase within which “fair and relevant” are adjectives describing the qualities of the minimum safety net of terms and conditions to which the FWC’s duty relates. Those qualities are broadly conceived and will often involve competing value judgments about broad questions of social and economic policy. As such, the FWC is to perform the required evaluative function taking into account the s 134(1)(a)-(h) matters and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance. It is entitled to conceptualise those criteria by reference to the potential universe of relevant facts, relevance being determined by implication from the subject matter, scope and purpose of the Fair Work Act.
5. Accordingly, the applicants’ submissions that what is fair and relevant is to be determined by weighing the matters in s 134(1)(a)-(h), with no other facts, matters or circumstances being permitted to be taken into account, should not be accepted. The statutory criteria of “fair and relevant” qualify the nature of the safety net which is the subject of the duty. They inform the taking into account of the matters in s 134(1)(a)-(h) but are not confined by those matters. They are confined only by implication from the subject matter, scope and purpose of the Fair Work Act.
6. These conclusions also necessarily reject the applicants’ submission that there is “no statutory text from which a “contemporary circumstances” criterion can be derived”. The applicants’ submission to this effect fails at all levels. For one thing, many, perhaps all, of the s 134(1)(a)-(h) matters themselves permit, indeed require, consideration of “contemporary circumstances”; the range of “needs” and “impacts” these matters identify necessarily include needs and impacts assessed by reference to contemporary circumstances. This is not to say that contemporary circumstances exhaust the universe of considerations mandated by s 134(1)(a)-(h). But it is to say that a consideration of those matters without having in mind the circumstances as they exist at the time the function is performed is likely to miscarry. The matters in s 134(1)(a)-(h) embrace this criterion. The objects of the Fair Work Act in s 3 implicitly embrace this criterion. Indeed, it is inconceivable that contemporary circumstances are immaterial to those objects being achieved. It could hardly be otherwise given that the operation of the objects is ambulatory. Thus, it is also the case that the “fair and relevant” safety net criteria which dictate the quality of any modern award embrace the concept of “fair and relevant” having regard to contemporary circumstances, that conception being within the subject matter, scope and purpose of the Fair Work Act.
7. The real issue which emerged during the course of the hearing is that the FWC said this (emphasis added):

[116] As to the proper construction of the expression ‘a fair and relevant minimum safety net of terms and conditions’ we would make three observations.

[117] First, fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question …

[120] Second, the word ‘relevant’ is defined in the Macquarie Dictionary (6th Edition) to mean ‘bearing upon or connected with the matter in hand; to the purpose; pertinent’. In the context of s.134(1) *we think the word ‘relevant’ is intended to convey that a modern award should be suited to contemporary circumstances*. As stated in the Explanatory Memorandum to what is now s.138:

527 … the scope and effect of permitted and mandatory terms of a modern award must be directed at achieving the modern awards objective of a fair and relevant safety net that accords with community standards and expectations.’ …

[121] Finally, as to the expression ‘minimum safety net of terms and conditions’, the conception of awards as ‘safety net’ instruments was introduced by the *Industrial Relations Reform Act 1993* (Cth) (the **1993 Reform Act**)…

1. For the reasons already given it cannot be doubted that the perspectives of employers and employees and the contemporary circumstances in which an award operates are circumstances within a permissible conception of a “fair and relevant” safety net taking into account the s 134(1)(a)-(h) matters. The issue is this: did the FWC confine its conception of a fair and relevant safety net to one that was suited to contemporary circumstances having regard to the perspective of employers and employees and, if so, was that an impermissible approach to the performance of its functions?
2. The FWC’s primary reasons consist of 462 pages of text. It follows that a focus on individual paragraphs, in isolation from the reasons as a whole, would be improper. It is necessary to consider the reasons as a whole. It is apparent that the FWC carefully structured its reasons which are divided into 12 chapters. Chapter 1 is an introduction. Chapter 2 identifies the decision. In Chapter 3 the FWC identified the statutory context. The statements at [116] to [121] are within Chapter 3. Within this part also the FWC considered the historical rationale for weekend penalty rates and the continuing relevance of that rationale. It may be inferred to have done so because at [111] the FWC expressly adopted an approach specified in earlier reasons in these terms:

The scope of the Review was considered in the *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues Decision* [[2014] FWCFB 1788 at [19]–[24]]. We adopt and apply that decision and in particular the following propositions:

(i) The Review is broader in scope than the Transitional Review of modern awards completed in 2013.

(ii) In conducting the Review the Commission will have regard to the historical context applicable to each modern award.

(iii) The Commission will proceed on the basis that *prima facie* the modern award being reviewed achieved the modern awards objective at the time it was made.

(iv) Variations to modern awards should be founded on merit based arguments. The extent of the argument and material required will depend on the circumstances.

1. The FWC thus expressly accepted that it was required to have regard to “the historical context applicable to each modern award”.
2. The historical rationale for penalty rates was described as compensating employees for working outside normal hours and deterring employers from scheduling work outside normal hours (at [143]). The FWC’s assessment of the rationale preceded reference to the statutory criteria of a “fair and relevant” safety net and the s 134(1) matters. It is also apparent that, although it referred to its conception of a “fair and relevant” safety net in this context, it not only considered contemporary circumstances, but also had regard to the s 134(1) matters and noted at [270] that as the parties were in dispute about the significance of the historical context, the issue would be dealt with later in its reasons. In the course of its reasons the FWC said:
3. at [173]: “the variation of a modern award which has the effect of reducing the earnings of low-paid employees will have a *negative* impact on their relative living standards and on their capacity to meet their needs”;
4. at [180]: “the level of penalty rates in a modern award may impact upon an employee’s remuneration and hence their capacity to engage in community life and the extent of their social participation”;
5. at [191]: “the extent of the disutility of working at such times or on such days … includes an assessment of the impact of such work on employee health and work-life balance, taking into account the preferences of the employees for working at those times”; and
6. at [195]: “s.134(1)(da) is a relevant consideration, it is *not* a statutory directive that additional remuneration must be paid to employees working in the circumstances mentioned in paragraphs 134(1)(da)(i), (ii), (iii) or (iv)”.
7. The FWC then set out in Chapter 4 the background to modern awards including that the transitional review commenced in 2012. In Chapter 5 of its reasons the FWC moved to the submissions of the parties. Chapter 6 sets out an overview of weekend work. On the basis of its consideration of this material the FWC concluded at [689] that there is a disutility associated with weekend work and a reduction in penalty rates is likely to have some positive employment effects which were difficult to quantify.
8. In chapter 7 the FWC dealt with the hospitality sector. In so doing the FWC again considered the s 134(1)(a)-(h) matters both by reference to its earlier assessment and the specific context of the hospitality sector. The FWC, having done so, said that:

[866] The modern awards objective is to ‘ensure 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). We have taken into account those considerations insofar as they are relevant to the matter before us.

[867] The central issue in these proceedings is whether the existing Sunday penalty rate provides a ‘fair and relevant minimum safety net’.

[868] The Hospitality Employers’ principal contention is that the existing penalty rate acts as a deterrent to employment and as such the current penalty rates are neither fair nor relevant. In short, the existing Sunday penalty rate is not ‘proportional to the disability’. In this context the Hospitality Employers point to the fact that the existing Sunday loading (75 per cent) is three times the loading for Saturday work (25 per cent).

[869] As set out earlier, the Hospitality Employers propose that the Sunday penalty rate be reduced from 175 per cent to 150 per cent for all employees (inclusive of the 25 per cent loading for casual employees). No change is proposed to Saturday penalty rates.

[870] The change proposed by the Hospitality Employers is said to be fair and relevant for the contemporary hospitality industry, having regard to the following matters:

(a) the availability of labour;

(b) the willingness of employees to work and a preference for Sunday, especially from amongst casual employees;

(c) consumer activity on weekends;

(d) workforce composition;

(e) hospitality industry business trading hours; and

(f) the frequency of work on weekends and public holidays.

…

[883] As set out in Chapter 6, there is a disutility associated with weekend work, above that applicable to work performed from Monday to Friday. Further, generally speaking, for many workers Sunday work has a higher level of disutility than Saturday work, though the extent of that disutility is much less than in times past.

[884] We are satisfied that the existing Saturday penalty rates in the Hospitality Award achieve the modern awards objective – they provide a fair and relevant minimum safety net.

1. As to the Sunday penalty rate the FWC said that:

[885] For the reasons given we have concluded that the existing Sunday penalty rate is neither fair nor relevant. As mentioned earlier, fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question. The word ‘relevant’, in the context of s.134(1), is intended to convey that a modern award should be suited to contemporary circumstances.

[886] Based on the evidence before us and taking into account the particular considerations identified in paragraphs 134(1)(a) to (h), insofar as they are relevant, we have decided to reduce the Sunday penalty rate for full-time and part-time employees, from 175 per cent to 150 per cent.

1. It might be concluded that this expression of its reasons indicates that the FWC decided that Sunday penalty rates were not suited to contemporary circumstances and thus had to be varied, the extent of the variation alone being decided by reference to the s 134(1)(a)-(h) matters. This, however, is not a fair reading of the reasons. The “reasons given” as referred to at the start of [885] are all of the reasons which precede that paragraph. Those reasons include the historical context, the contemporary context, the competing submissions, the evidence, and the s 134(1)(a)-(h) matters. The conclusion that Sunday penalty rates were not “fair and relevant” is necessarily understood as one reached for all of the reasons given before [885]. It is also to be understood as a shorthand reference to the FWC’s conclusion that existing Sunday penalty rates did not 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” the s 134(1)(a)-(h) matters which, given the FWC’s stated approach, necessarily included the historical context of those rates.
2. Given this, it cannot be said that the FWC gave to the concept of “contemporary circumstances” a role not permitted by the statutory scheme. The FWC did not merely decide whether existing rates were suitable for contemporary circumstances and then vary the rate by reference to the s 134(1)(a)-(h) matters. By reference to a wide range of matters it considered were relevant, the FWC concluded that the existing Sunday rates did not ensure the provision of a fair and relevant safety net taking into account the s 134(1)(a)-(h) matters. This is what the FWC was required to do.
3. This analysis demonstrates why it would be wrong to read, for example, [885] and [886] of the primary reasons in isolation and without regard to the opening words “[f]or the reasons given” with which [885] commences. It must be recognised that these (and similar paragraphs dealing with the other sectors) record a mental process which the FWC has carried out explaining the conclusions reached. The mental process is explained by everything which precedes the conclusions. The conclusions are the outcomes or results of that mental process. The outcomes are expressed in separate paragraphs referring to “fair and relevant” in [885] and the s 134(1)(a)-(h) matters in [886]. But this is to ensure that the conclusions are logically structured. Read in context, it is apparent that having regard to all factors it considered relevant (all of which were permissible and which included the historical context) the FWC considered that, as to Sunday penalty rates, the application of the modern awards objective as a whole required a variation of the rate in the Hospitality Industry (General) Award 2010 in the amount identified.
4. The FWC thereafter dealt with the other awards in the same permissible manner.
5. Accordingly, the FWC did not confine its conception of a fair and relevant safety net to one that was suited to contemporary circumstances having regard to the perspective of employers and employees. While it said at [120] that “the word ‘relevant’ is intended to convey that a modern award should be suited to contemporary circumstances” and repeated that (for example at [885]) its actual application of the modern awards objective was not so confined. Had the FWC, in substance, done nothing more than decide that Sunday penalty rates were not suited to contemporary circumstances and thus had to be varied then, no doubt, its discharge of its functions would have miscarried. It would have given too narrow a meaning to “fair and relevant” which embraces a broad universe of considerations confined only by the particular function being performed in the context of the subject matter, scope and purpose of the Fair Work Act. It also would have failed to take into account the s 134(1)(a)-(h) matters in the task of ensuring that “modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions”. For the reasons given, however, it is apparent the FWC did no such thing.
6. As such, this is not a case in which the FWC misapplied the statutory provisions. Its description of “relevant” as meaning “suited to contemporary circumstances” at [120] and elsewhere is too narrow if it is to be read literally as meaning suited to modern circumstances. As discussed “fair and relevant”, which are best approached as a composite phrase, are broad concepts to be evaluated by the FWC taking into account the s 134(1)(a)-(h) matters and such other facts, matters and circumstances as are within the subject matter, scope and purpose of the Fair Work Act. Contemporary circumstances are called up for consideration in both respects, but do not exhaust the universe of potentially relevant facts, matters and circumstances. But, as we have tried to demonstrate, the primary reasons when read as a whole amply demonstrate that the function, as in fact performed by the FWC, was not confined by reference to the criterion of contemporary circumstances. Nor, do the reasons demonstrate that, as a criterion, contemporary circumstances were elevated or given undue priority. This suggests that by “contemporary circumstances” the FWC may have simply meant “present circumstances” or, in other words, the circumstances at hand.
7. It follows that this is not a case which discloses a decision-maker applying the wrong test (at least on this ground), with the consequence that relief should follow unless there was no possibility of a different result. This line of authority (for example, *Lu v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 340; (2004) 141 FCR 346) simply does not arise.
8. Ground 2 should be rejected for these reasons.

## Grounds 3 to 6

1. These grounds concern the way in which the FWC treated the relative living standards and the needs of the low paid, which is a matter the FWC must take into account as part of the modern awards objective as specified in s 134(1)(a).
2. The high point of the applicants’ case is the FWC’s statement at [823] in relation to its consideration of the Hospitality Industry (General) Award (which is repeated elsewhere in the primary reasons in relation to the other awards) that:

The ‘needs of the low paid’ is a consideration which weighs against a reduction in Sunday penalty rates. But it needs to be borne in mind that the primary purpose of such penalty rates is to compensate employees for the disutility associated with working on Sundays rather than to address the needs of the low paid. The needs of the low paid are best addressed by the setting and adjustment of modern award minimum rates of pay (independent of penalty rates).

1. The applicants contend that, as a result, the FWC wrongly decided that it was not necessary to take into account the relative living standards and the needs of the low paid, wrongly decided that these matters were best addressed by the setting and adjustment of modern award minimum rates of pay, misconceived the limits and functions of the annual wage review under Div 3 of Pt 2-6 of the Fair Work Act, and failed to take into account the relative living standards and the needs of the low paid.
2. The first matter which must be appreciated is that the primary reasons themselves do not stand alone. The FWC gave other reasons for the making of the determinations including on 5 June 2017 in the further reasons. As noted, the determinations were made on 21 June 2017. The primary reasons given on 23 February 2017 cannot be read in isolation from the further reasons given on 5 June 2017, both of which (along with another set of reasons dealing with late night penalties) informed the making of the determinations on 21 June 2017.
3. The applicants contend that the primary reasons must stand or fall on their own, as they are the reasons for the decision to vary penalty rates and when it gave the further reasons the FWC knew that the applicants alleged that it had failed to consider the s 134(1)(a) matter and of a foreshadowed judicial review proceeding to quash the decision.
4. However, the function which the FWC was performing was the 4 yearly review, as a result of which the FWC had a power under s 156(2)(b), relevantly, to “make one or more determinations varying modern awards”. The FWC did not make any determination on 23 February 2017 when it published its primary reasons. It is true that the reasons, on the title page, bear the title “DECISION”. It is also true that at [53] of the primary reasons the FWC said:

We have decided that the existing Sunday penalty rates in 4 of the modern awards before us (the *Hospitality*, *Fast Food*, *Retail* and *Pharmacy Awards*) do not achieve the modern awards objective, as they do not provide a fair and relevant minimum safety net.

1. But it is equally true that the so-called decision on 23 February 2017 had no operative effect of any kind.
2. Relevantly, s 601 provided:

(1) The following decisions of the FWC must be in writing:

(a) a decision of the FWC made under a Part of this Act other than this Part;

(b) an interim decision that relates to a decision to be made under a Part of this Act other than this Part;

(c) a decision in relation to an appeal or review.

(2) The FWC may give written reasons for any decision that it makes.

…

1. Section 601 draws a clear distinction between the “reasons” for a decision and the “decision” itself (*Teys Australia Beenleigh Pty Ltd v Australasian Meat Industry Employees Union* [2015] FCAFC 11; (2015) 230 FCR 565 at [35]-[36]). In commenting upon s 601 in *Anglo American*, Allsop CJ, North and O’Callaghan JJ observed at [30]:

 … It is important to appreciate that by s 601, the Commission was not required to give written reasons, though under s 601(2) it may do so. Naturally, to the extent that reasons given display a misunderstanding of the statutory task, that may ground a conclusion of jurisdictional error. If, however, such reasons as are given do not completely explain the conclusion reached, jurisdictional error is not demonstrated by such inadequacy.

1. In its further reasons (also described as a “decision”), at [31], the FWC proceeded on the basis that its decision of 23 February 2017 was a decision under Pt 2-3 of the Fair Work Act and that it could not vary or revoke its decision having regard to the terms of s 603(3)(a). Section 603 provided that:
2. The FWC may vary or revoke a decision of the FWC that is made under this Act (other than a decision referred to in subsection (3)).

...

(3) The FWC must not vary or revoke any of the following decisions of the FWC under this section:

(a) a decision under Part 2-3 (which deals with modern awards);

…

1. If the decision of 23 February 2017 was a decision within the meaning of s 603 (about which we received no submissions), it is nevertheless the case that the applicants’ challenge is to the determinations. The primary and the further reasons are the reasons for the determinations. Accordingly, the principle that a decision-maker is bound by the reasons it gives for its decision applies, in the present case, to the operative exercises of power, which are the determinations. It is the primary reasons and the further reasons which explain the making of the determinations. It would be wrong to disregard the further reasons in these circumstances.
2. Nor can the applicants’ submissions that what was put to the FWC after the primary reasons were published means that little weight can be given to the further reasons be accepted. The FWC had not exercised the relevant power to make any determination as at 5 June 2017. It sought further submissions, which were made and taken into account. The notion that the reasons reflecting this process are not entitled to any real weight is misconceived. The applicants’ approach fails to appreciate that it is the determinations which are subject to challenge, not what the FWC described as its decision on 23 February 2017. That decision was a step along the way to the determinations but it had no operative effect in and of itself.
3. This said, how is [823] to be understood given that it is one paragraph amongst 2084 paragraphs in the primary reasons and another 281 in the further reasons?
4. **First**, considerable care must be exercised in seeking to discern error in but one paragraph of lengthy reasons for decision. Although error may be exposed in a single paragraph, it would be wrong for a reviewing court to construe that one paragraph in isolation and divorced from the much broader scope of consideration being undertaken by the decision-maker.
5. **Second**, the FWC knew it had to consider the s 134(1)(a) matter and made extensive findings about the impact of a reduction of penalty rates on the low paid including as follows in the primary reasons (citations omitted):
6. at [84]: “A substantial proportion of award-reliant employees covered by these modern awards are low paid and the reductions in Sunday penalty rates we have determined are likely to reduce the earnings of those employees who currently work on Sundays”;
7. at [128]: “in giving effect to the modern awards objective the Commission is required to take into account the s.134 considerations, one of which is ‘relative living standards and the needs of the low paid’ (s.134(1)(a))”;
8. at [165]: “[s]ection 134(1)(a) requires that we take into account ‘relative living standards and the needs of the low paid’. This consideration incorporates two related, but different, concepts…”;
9. at [173]: “[i]n the 2015–16 *Annual Wage Review* decision the Expert Panel also observed that increases in modern award minimum wages have a *positive* impact on the relative living standards of the low paid and on their capacity to meet their needs. It seems to us that the converse also applies, that is, the variation of a modern award which has the effect of reducing the earnings of low-paid employees will have a *negative* impact on their relative living standards and on their capacity to meet their needs”;
10. at [180]: “we also accept that the level of penalty rates in a modern award may impact upon an employee’s remuneration and hence their capacity to engage in community life and the extent of their social participation. The broader notion of promoting social inclusion is a matter that can be appropriately taken into account in our consideration of the legislative requirement to ‘provide a fair and relevant minimum safety net of terms and conditions’ and to take into account ‘the needs of the low paid’ (s.134(1)(a))”;
11. at [817]: “[s]ection 134(1)(a) of the FW Act requires that we take into account ‘relative living standards and the needs of the low paid’. A threshold of two-thirds of median full-time wages provides a suitable benchmark for identifying who is ‘low paid’, within the meaning of s.134(1)(a). As shown in Chart 24 (see paragraph [735]) a substantial proportion of award-reliant employees covered by the *Hospitality Award* are ‘low paid’”;
12. at [818]: “[a]s stated in the PC Final Report, a reduction in Sunday penalty rates will have an adverse impact on the earnings of those hospitality industry employees who usually work on a Sunday. It is likely to reduce the earnings of those employees, who are already low paid, and to have a negative effect on their relative living standards and on their capacity to meet their needs”;
13. at [823] as set out above at [69];
14. at [1136]: “[i]n deciding to vary clause 34.2(a)(ii) in the manner set out above, we have taken into account the s.134 considerations and note that:
* a substantial proportion of award-reliant employees covered by the *Restaurant Award* are low paid and the variation will reduce the earnings of those employees, but not to a significant extent. The variation will only apply to those employees who work between 6.00 am and 7.00 am and will only reduce their earnings for that hour of work (s.134(1)(a))”;
1. at [1356]: “[o]n the basis of the O’Brien Report and Chart 27 (see [738] above) we are satisfied that a substantial proportion of Fast Food industry employees are ‘low paid’; are more likely to reside in a lower income households and are more likely to experience financial difficulties”;
2. at [1357]: “[a] reduction in Sunday penalty rates will have an adverse impact on those Fast Food industry employees who usually work on a Sunday. It is likely to reduce the earnings of those employees, who are already low paid and to have a negative effect on their relative living standards and on their capacity to meet their needs”;
3. at [1358]: “[w]hile s.134(1)(a) is a consideration against the reduction in Sunday penalty rates, it needs to be borne in mind that the primary purpose of such penalty rates is to compensate employees for the disutility associated with working on Sundays, it is not designed to address the needs of the low paid. As we have mentioned, the needs of the low paid are best addressed by the setting and adjustment of modern award minimum rates of pay (independent of penalty rates)”;
4. at [1656]: “[a]s shown in Chart 54 (see [1458]) a substantial proportion of award-reliant employees covered by the *Retail Award* are ‘low paid’. Further, retail households face greater difficulties in raising emergency funds. This suggests that their financial resources are more limited than those of other industry households”;
5. at [1660]: “[t]he ‘needs of the low paid’ is a consideration which weighs against a reduction in Sunday penalty rates. But it needs to be borne in mind that the primary purpose of such penalty rates is to compensate employees for the disutility associated with working on Sundays rather than to address the needs of the low paid. The needs of the low paid are best addressed by the setting and adjustment of modern award minimum rates of pay (independent of penalty rates)”;
6. at [1826]: “[a]s shown in Chart 55 (see [1459]) a substantial proportion of award-reliant employees covered by the *Pharmacy Award* are ‘low paid’…”;
7. at [1927]: “[a]s mentioned earlier, a substantial proportion of award-reliant employees covered by the *Hospitality and Retail Awards* are ‘low paid’”;
8. at [1928]: “[t]he extent to which lower wages induce a greater demand for labour on public holidays (and hence more hours for low-paid employees) will somewhat ameliorate the reduction in income, albeit by working more hours. But it is improbable that, as a group, existing workers’ hours would rise sufficiently to offset the income effects of the penalty rate reduction”;
9. at [1929]: “[t]he ‘needs of the low paid’ is a consideration which weighs against a reduction in public holiday penalty rates. However, the primary purpose of such penalty rates is to compensate employees for the disutility associated with working on public holidays rather than to address the needs of the low paid”;
10. at [1998]: “[a] substantial proportion of the employees covered by the modern awards which are the subject of these proceedings are ‘low paid’ (within the meaning of s.134(1)(a)). The award variations we propose to make are likely to reduce the earnings of those employees and have a negative effect on their relative living standards and on their capacity to meet their needs”;
11. at [2003]: “[a] substantial proportion of award-reliant employees covered by these modern awards are low paid and the reductions in Sunday penalty rates are likely to reduce the earnings of those employees who currently work on Sundays. As observed in the PC Final Report, the extent of the reduction in earnings depends on the …”;
12. at [2028]: “[a] substantial proportion of award-reliant employees covered by the *Fast Food* and *Restaurant Awards* are low paid and the variations to the late night penalty provisions will reduce the earnings of those employees, but not to a significant extent. The variations will only effect those *Fast Food* and *Restaurant Award* employees who work between 6.00 am and 7.00 am, and those *Fast Food Award* employees who work between 9.00 pm and 10.00 pm Further, the variations will only reduce the earnings of those employees for the hours worked between 9.00 pm and 10.00 pm, and between 6.00 am and 7.00 am”; and
13. at [2040]: “[w]e have not reached a concluded view on the form of these transitional arrangements but have expressed the following *provisional* views:

(i)

…

The Productivity Commission suggests that a 12 month delay would allow the affected employees to ‘review their circumstances’ so that they ‘can seek other jobs, increase their training and make other labour market adjustments’.

As we have mentioned, the employees affected by these changes are low paid and have limited financial resources. It is unlikely that they will be able to afford the costs associated with increasing their training.

…

(iii) The reductions in Sunday penalty rates should take place in a series of annual adjustments on 1 July each year (commencing 1 July 2017) to coincide with any increases in modern award minimum wages arising from Annual Wage Review decisions …”.

1. These findings make it plain that the s 134(1)(a) considerations were brought into account. They weighed against a decision to reduce penalty rates but, on balance, did not prevail.
2. **Third**, the FWC at [2041], in respect of its provisional views about transitional arrangements as set out in [2040], said:

We seek submissions from interested parties in respect of the above provisional views. Further, as mentioned at [2019] it is unclear whether ‘take home pay orders’ are an available option to mitigate the impact of the reductions in Sunday penalty rates we propose. We would be assisted by submissions from interested parties in respect of this issue and, in particular, the Commonwealth (given that the issue raises a question as to the proper construction of the statutory framework).

1. **Fourth**, in its further reasons the FWC repeated its conclusion that a substantial proportion of employees covered by the awards are low paid and a reduction in penalty rates would likely reduce the earnings of some of these employees and have a negative effect on their relative living standards and capacity to meet their needs (at [9]).
2. The FWC noted at [10] that the submissions before it at the time of the primary reasons gave little attention to the implementation of any variations to penalty rates which is why it invited further submissions. The FWC considered the further submissions including one from United Voice to the effect that the reductions to penalty rates should not be implemented given that the FWC had found that a substantial proportion of employees covered by the awards are low paid and a reduction in penalty rates would likely reduce the earnings of some of these employees and have a negative effect on their relative living standards and capacity to meet their needs (at [16]). The FWC rejected the submission and the proposition that it had not taken into account the relative living standards and needs of the low paid as required by s 134(1)(a) (at [34]).
3. In so doing, the FWC identified those parts of its primary reasons which considered the s 134(1)(a) matter, some but not all of which are set out above. It said:

[34] The first proposition is that the *Penalty Rates decision* gave either no weight or insufficient weight to the impact on the affected employees of cutting penalty rates. In essence, it is said that the Full Bench failed to take into account the ‘relative living standards and the needs of the low paid’, as it was required to do by s.134(1)(a). In our view, there is no substance to this proposition.

[35] Chapter 3.2 of the *Penalty Rates decision* deals with the statutory framework and, relevantly, the Full Bench observes that:

* the modern awards objective applies to the Review (at [113]); and
* s.134(1)(a) requires that the Commission take into account ‘relative living standards and the needs of the low paid’ (at [165]).

[36] Further, the impact of the proposed reductions in penalty rates upon affected employees was expressly considered in the context of each of the relevant modern awards:

* the *Hospitality Award*
* United Voice’s lay witness evidence: [784]–[815];
* s.134(1)(a): [817]–[824] and [886].
* the *Fast Food Award*
* the SDA called no lay witness evidence in respect of the impact upon employees of the proposed reduction in penalty rates;
* s.134(1)(a): [1356]–[1359].
* the *Pharmacy Award*
* SDA and APESMA lay witness evidence: [1815]–[1821];
* s.134(1)(a): [1826]–[1830].
* the *Retail Award*
* SDA lay witness evidence: [1623]–[1654];
* s.134(1)(a): [1656]–[1661].
1. At [37] the FWC said this:

In addition to the fact that s.134(1)(a) was expressly considered and taken into account, it needs to be borne in mind that the Act accords no particular primacy to any one of the s.134 considerations and, further, while the Commission must take into account the matters set out at s.134(1)(a)–(h), the relevant question is whether the modern award, together with the NES, provides a fair and relevant minimum safety net of terms and conditions. In respect of the *Hospitality*, *Fast Food*, *Retail* and *Pharmacy Awards*, the *Penalty Rates decision* determined that the existing Sunday penalty rates did not achieve the modern awards objective, as they did not provide a fair and relevant minimum safety net.

1. The FWC continued in these terms:

[42] The third line of argument is that there are no transitional arrangements which could ameliorate the impact of the penalty rates reductions so as to prevent significant disadvantage to the employees affected.

[43] We accept that while the transitional arrangements determined in this decision will ameliorate the adverse impact of our decision upon the employees affected, it will not remove that impact and the implementation of the variations we propose (albeit over an extended time period) are still likely to reduce the earnings of the employees affected. The phased reductions in Sunday penalty rates that we intend to make will be implemented at the same time as the implementation of any increases arising from the Annual Wage Review decision. This will usually mean that the affected employees will receive an increase in their base hourly rate of pay at the same time as they are affected by a reduction in Sunday penalty rates. As such, the take home pay of the employees concerned may not reduce to the same extent as it otherwise would – but it is also important to acknowledge that they will receive a reduction in the earnings they would have received but for the implementation of the *Penalty Rates decision*. Accordingly, any Annual Wage Review increase cannot be said to ameliorate the impact of our decision. It is the phased implementation of the Sunday penalty rate cuts which provides a degree of amelioration.

[44] However, while we accept that the reductions we have determined will adversely impact employees, that is a matter that we have already considered and balanced in the *Penalty Rates decision* and it is not a basis upon which we would propose to ‘set aside’ or ‘not implement’ the *Penalty Rates decision*. Nor are we persuaded that the range of other considerations advanced in support of the general proposition provide a sufficiently cogent basis for adopting the course proposed. Each of these matters was considered in the *Penalty Rates decision*.

1. How are these aspects of the further reasons (particularly the observations made at [43] of the further reasons) to be understood given what is said in [823] (and elsewhere) in the primary reasons that “[t]he needs of the low paid are best addressed by the setting and adjustment of modern award minimum rates of pay (independent of penalty rates)”? It may be accepted that tension exists between the statements. But, in reasons which must be read together because the determinations were not made until 21 June 2017, and which were prepared some three months apart and extend over thousands of paragraphs, the existence of potential tension is not a cause for criticism, let alone a source of error. The inescapable fact is this – before it made the determinations the FWC was invited to and did reconsider its decisions as recorded in the primary reasons including on the basis that its approach meant that it had not taken into account the s 134(1)(a) matter. In so doing, it accepted that its decision to reduce penalty rates would negatively impact on the low paid in terms of their relative living standards and capacity to meet their needs. As explained at [43] it considered this negative impact would be ameliorated to some extent but not completely by transitional arrangements because the earnings of the affected employees would still be affected. It also accepted that any annual wage review cannot be said to have an ameliorative effect despite the fact that affected employees will likely receive an increase in their minimum rates of pay from an annual wage review at the same time that the reductions to penalty rates are implemented.
2. At one level, the FWC’s ultimate overall analysis acknowledges that, contrary to [823] of the primary reasons, the needs of the low paid are not best addressed by the setting and adjustment of modern award minimum rates of pay. At another level, the analysis merely recognises that there is a relevant interaction between the extent of the impact its decision will involve when implemented and adjustments to minimum wages. The recognition is accurate. Contrary to the applicants’ submissions, [44] of the FWC’s reasons does not indicate that the FWC, as at 23 February 2017, had decided to reduce penalty rates and, by reason of such, had closed its mind to any further consideration. Read as a whole and in context, [44] records the fact that the FWC had considered the issue of s 134(1)(a) again but saw no reason to alter the view it had reached in the primary reasons despite recognising that the adverse impacts a reduction of penalty rates would have on the relative living standards and needs of the low paid would not be fully ameliorated by the phased implementation.
3. In the face of this consideration, ground 3, which asserts that the FWC found that it was not necessary to take into account the relative living standards and needs of the low paid, cannot be sustained. The FWC appreciated at all times it was necessary to take that matter into account. It is also apparent that the FWC did not confine its consideration of the needs of the low paid; it also focused upon the relative living standards of the low paid as required by s 134(1)(a).
4. The answer to ground 4, that the FWC erred by deciding that the needs of the low paid are best addressed by the setting and adjustment of modern award minimum rates of pay (independent of penalty rates), is that this proposition in [823] and elsewhere of the primary reasons cannot be read in isolation from the further reasons. When the reasons are read as a whole, as they must be, it is apparent that the FWC’s analysis was more nuanced than [823], read alone, would suggest. When read as a whole, it is apparent that the FWC understood the negative effect that a reduction of penalty rates would impose on the relative living standards and needs of the low paid, considered that some part of that negative impact could be ameliorated by phasing the implementation to accord with wage rises, but accepted that, one way or another, reducing penalty rates necessarily reduced earnings of the affected employees. Once the whole of the FWC’s analysis is considered, the submission that, by the statement at [823] and elsewhere in the primary reasons, it impermissibly delegated its function to the expert panel responsible for conducting an annual wage review, as provided for in s 285(1) of the Fair Work Act, is unsustainable. There is no meaningful analogy to a case such as *Legal Services Commission v Turner* [2012] VSC 394 in which a disciplinary body decided that the requirement of general deterrence was satisfied by other circumstances.
5. It must also be appreciated that the FWC had found that the purpose of weekend penalty rates was compensatory (at [143]-[160] of the primary reasons) and that the disutility associated with working on weekends “is much less than in times past” (for example, at [689] of the primary reasons). Those findings were also relevant to the application of the modern awards objective. In other words, the fact the FWC found negative impacts on the living standards and needs of the low paid from any reduction in penalty rates could not of itself dictate any particular outcome. Section 134(1)(a) was one relevant factor but, as discussed, there were other factors. The FWC was cognisant of this, having stated at [115] of the primary reasons and elsewhere (citations omitted):

The obligation to take into account the s.134 considerations means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision making process. No particular primacy is attached to any of the s.134 considerations and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.

1. The fact that the FWC did not attempt to explain the relative weight it gave to the competing considerations in reaching its overall conclusions is immaterial. It is difficult to know how the FWC might meaningfully have done so given the nature of the decisions it was making and the broad scope of facts, matters and circumstances which fed into the conclusions (*National Retail Association v Fair Work Commission* [2014] FCAFC 118;(2014) 225 FCR 154 at [109]). Nothing in the statutory scheme or otherwise required the FWC to attempt to explain the relative weight it gave to the competing considerations in reaching its overall conclusions. What is apparent is that the FWC found that the relevant considerations did not all point in the same direction. They pulled in different directions, which is to be expected given the nature of the task. Provided the relevant matters were considered, the attribution of weight was wholly a matter for the FWC. That the FWC may be taken from the determinations to have given more weight to matters other than the relative living standards and needs of the low paid does not mean the FWC abdicated its responsibility for considering those matters or failed to consider them. Ground 4 thus fails.
2. One answer to ground 5, that the FWC misunderstood the annual wage review under Div 3 of Pt 2-6 of the Fair Work Act, is that given the FWC’s overall analysis, any such misunderstanding was immaterial. Another answer is that the further reasons, as discussed above, disclose no such misunderstanding. It is also relevant that the FWC in [823] of its primary reasons did not refer to the annual wage review under Div 3 of Pt 2-6 (which, by s 617(1), is to be conducted “by an Expert Panel constituted for the purposes of the review”). It referred more generally to “setting and adjustment of modern award minimum rates of pay” which can occur through an annual wage review, a 4 yearly review under s 156, or at any time under s 157. It cannot be gainsaid that the FWC’s finding at [43] of the further reasons, that the adverse impacts of any reduction of penalty rates on the low paid could be ameliorated to some extent by phased implementation matched to increases to wages arising from the annual wage review, was reasonably open. The applicants’ attempt to rely only on [823] of the primary reasons in support of ground 5 should not be accepted.
3. For these reasons no analogy may be drawn with *Re Patterson; Ex parte Taylor* [2001] HCA 51; (2001) 207 CLR 391. The FWC, having regard to the reasons as a whole, did not rely on a misunderstanding of the operation of the Fair Work Act as part of its decision-making process. To the contrary, the FWC correctly understood that its determinations would have adverse impacts on the low paid. It correctly understood that there was no way to completely ameliorate such impacts, but that phased implementation could provide some ameliorating effect. And the FWC nevertheless made the determinations. It did so not because it misunderstood the annual wage review but because taking into account the s 134(1)(a) matters it considered the variations necessary to ensure the awards, “together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions”. Ground 5 thus fails.
4. Ground 6, for the same reasons, cannot succeed. The notion that the FWC did not take into account the s 134(1)(a) matter cannot be sustained. The argument appears to depend on the asserted impermissible abdication of the FWC’s functions, rejected above. The FWC did not merely record the competing submissions about the issue or merely advert to or pay lip service to it. To discharge its function the FWC did not have to expressly attribute relative weight to any or every relevant fact, matter or circumstance. Its reasons disclose that it considered the s 134(1)(a) matter. The relative weight it gave to that matter, compared to other matters, was a matter for the FWC alone. For the reasons already given it is also apparent that the submission that the FWC failed to consider relative living standards is unpersuasive. This was part of its overall consideration as the discussion above discloses. The suggestion that the FWC did not genuinely engage with the s 134(1)(a) matter cannot survive a fair reading of the reasons as a whole.
5. To the extent that ground 6 was intended to give rise to a separate argument as to the adequacy of the reasons provided by the FWC, this argument is also rejected. Such an argument must necessarily start from the proposition that there is no generally applicable legislative mandate to the FWC that it must publish “reasons” for its decision (Fair Work Act, s 601). And, in the absence of any requirement to provide reasons, there is no statutory imperative for the FWC to set forth its “findings on material questions of fact and refer to the evidence or other material on which those findings were based” (s 25D of the *Acts Interpretation Act* (1901) (Cth)). This does not mean that the reasons, having been given, are immune from scrutiny. Reasons volunteered can be scrutinised by this Court to determine if they expose error (*Assistant Treasurer and Minister for Competition Policy and Consumer Affairs v Cathay Pacific Airways Ltd* [2009] FCAFC 105; (2009) 179 FCR 323 at [51], *Taulahi v Minister for Immigration and Border Protection* [2016] FCAFC 177; (2016) 246 FCR 146 at [72]). However, the mere fact that the reasons do not completely explain the conclusion reached does not expose jurisdictional error (*Anglo American* at [30]). Even reasoning which is “almost entirely conclusory and does little to enlighten the reader at anything but the most general level” may not disclose error (*Sevdalis v Director of Professional Services Review (No 2)* [2016] FCA 433 at [157] per Mortimer J, an appeal from which was dismissed in *Sevdalis v Director of Professional Services Review* [2017] FCAFC 9).
6. It is also pertinent in the present case to keep in mind the task which the FWC was performing, involving the application of a standard “fair and relevant minimum safety net” which, as discussed, necessarily involves broad questions of social and economic policy. In this context, the observations of Basten JA in *Saville v Health Care Complaints Commission* [2006] NSWCA 298 at [52] are apt:

It has been said on more than one occasions, and in more than one context, that matters of evaluation and judgment are not readily explained in rational terms. Various imprecise and amorphous, but relevant, considerations may need to be weighed in the balance in determining where, across a range of possibilities, the appropriate result should be found. In the joint judgment in *Ex parte Palme* 216 CLR 212 at [40] Gleeson CJ, Gummow and Heydon JJ stated:

There are some issues for decision which are of such a nature that, as Kitto J put it [in *Re Wolanski’s Registered Design* (1953) 88 CLR 278 at 281), with reference to statements by Lord Herschell and Eve J:

[I]t is not to be expected that [the judge] will be able, at any rate satisfactorily to the litigants or to one of the litigants, to indicate in detail the grounds which have led him to the conclusion.

In a footnote to that passage, their Honours also referred to the passage in *Dinsdale v The Queen* (2000) 202 CLR 321 at [9] where Gleeson CJ and Hayne J noted that “the ground of appeal which was agitated before the Court of Criminal Appeal (manifest inadequacy) was a ground which did not require, or even admit of, expansive elaboration of a process of reasoning which leads to its acceptance or rejection”. The purpose underlying the obligation to give reasons is in part the discipline of rationality, being the antithesis of arbitrariness, which follows from the exercise of justifying a conclusion, together with the transparency of decision-making, which permits the parties and the public to understand the result reached. However, this purpose must be given practical effect in particular circumstances.

1. Ground 6, accordingly, must also be rejected.

## Ground 7

1. The applicants contend that in dealing with the s 134(1)(a) matter in the way that it did, the FWC made determinations which are plainly unjust or unreasonable.
2. Given that the applicants’ submissions about s 134(1)(a) have been rejected, this ground cannot be sustained. It simply cannot be said that the determinations lacked “an evident and intelligible justification” (*Li* at [76]).
3. The applicants’ challenge on this ground strays into impermissible merits review. The applicants’ characterisation of the FWC’s reasoning as providing a “meagre” foundation for the determinations varying the awards discloses this impermissible approach. From beginning to end, the FWC alone was responsible for the attribution of weight to the relevant considerations. Given the broadly evaluative nature of the task, and the fact that the weight to be given to the range of relevant facts, matters and circumstances will be contestable of its nature, characterising the foundation for the determinations as “meagre” does not advance the applicants’ challenge which is confined to jurisdictional error.
4. Each determination remained within that area of “decisional freedom” or within that area of decision-making where the FWC had “a genuinely free discretion” as referred to in *Li* at [66].

## Another observation

1. In *Corporation of the City of* ***Enfield*** *v Development Assessment Commission* [2000] HCA 5; (2000) 199 CLR 135 Gleeson CJ, Gummow, Kirby and Hayne JJ observed at [47] (citations omitted):

The weight to be given to the opinion of the tribunal in a particular case will depend upon the circumstances. These will include such matters as the field in which the tribunal operates, the criteria for appointment of its members, the materials upon which it acts in exercising its functions and the extent to which its decisions are supported by disclosed processes of reasoning. A similar view appears to be taken by the Supreme Court of Canada.

1. Gaudron J, in a concurring judgment, concluded at [59] (citations omitted):

Once it is appreciated that it is the rule of law that requires the courts to grant whatever remedies are available and appropriate to ensure that those possessed of executive and administrative powers exercise them only in accordance with the laws which govern their exercise, it follows that there is very limited scope for the notion of "judicial deference" with respect to findings by an administrative body of jurisdictional facts. Of course, other considerations apply with respect to non-jurisdictional facts for there is no legal error involved if an administrative body simply makes a wrong finding of fact. And, again, different considerations apply where what is in issue is not a jurisdictional fact, but the decision-maker’s opinion as to the existence of that fact…

1. In *Attorney-General (NSW) v XY* [2014] NSWCA 466 at [159] Basten JA concluded that a “restrained approach” should be exercised when reviewing findings made by a tribunal “having expertise in making assessments in relation to psychiatric conditions”. This did not involve deferring to the tribunal’s understanding of its statutory mandate but to “accord deference to the legislative intention” to entrust to the tribunal the task of being “satisfied” of certain matters (at [160]).
2. This general acknowledgment that a statutory context may indicate a legislative intention that the assessment of an expert decision-maker may be accorded “greater weight” upon an application for judicial review has been embraced in the industrial law context (for example, *Alley* at 390). When referring to a decision of the Commission established under the former *Conciliation and Arbitration Act 1904* (Cth), Mason J observed:

The weight to be given to the Commission’s decision will depend on the circumstances. If the evidence remains the same, if the Full Bench on appeal has confirmed the decision at first instance and if the issue of fact is one in the resolution of which the Commission’s knowledge of industry specially equips it to provide an answer, greater weight will be accorded than in cases in which one or more of these factors is absent.

1. This passage was subsequently endorsed by Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson J in *R v Williams; Ex parte The Australian Building Construction Employees’ and Builders Labourers’ Federation* [1982] HCA 68; (1982) 153 CLR 402 at 411. Subject to a qualification as to the evidence being “in all significant respects … substantially the same”, the passage was also endorsed by Gleeson CJ, Gummow, Kirby and Hayne JJ in *Enfield* at [49]. See also to the same effect *Australian and International Pilots Association v Fair Work Australia* [2012] FCAFC 65; (2012) 202 FCR 200 at [126] per Buchanan J.
2. In the context of the present decision-making statutory regime, judicial recognition can be given to the expertise of the FWC, especially in circumstances where the legislature has expressly left to the FWC the task (for example) of “ensur[ing] that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions” (s 134(1)). The task of ensuring that modern awards comply with the standards set by s 134(1) and the task of making a judgment as to what is “fair and relevant” is not entrusted by the legislature to this Court.
3. Whilst retaining ultimate judicial oversight of decisions of statutory decision-makers, “great weight” can be given to the factual assessments made by the Full Bench in the present matter.

## Conclusions

1. The applicants’ grounds of challenge must all be rejected. The originating applications should be dismissed.

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| I certify that the preceding one hundred and thirteen (113) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices North, Tracey, Flick, Jagot and Bromberg. |

Associate:

Dated: 11 October 2017

SCHEDULE OF PARTIES

|  |  |
| --- | --- |
|  | VID 684 of 2017 |
| Respondents |  |
| Fourth Respondent: | RESTAURANT & CATERING INDUSTRIAL |
| Fifth Respondent: | THE AUSTRALIAN RETAILERS ASSOCIATION  |
| Sixth Respondent: | NATIONAL RETAIL ASSOCIATION LIMITED (ACN 009 664 073) |
| Seventh Respondent: | MASTER GROCERS AUSTRALIA LIMITED (ACN 004 063 263) |
| Eighth Respondent: | THE PHARMACY GUILD OF AUSTRALIA  |
| Ninth Respondent: | FAIR WORK COMMISSION  |

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|  | VID 685 of 2017 |
| Respondents |  |
| Fourth Respondent: | AUSTRALIAN BUSINESS INDUSTRIAL |
| Fifth Respondent: | NSW BUSINESS CHAMBER LIMITED (ACN 000 014 504) |
| Sixth Respondent: | FAIR WORK COMMISSION  |