

Australian Industry Group

Application to vary the  
*Rail Industry Award 2020*

**Submission**  
(AM2024/7)

**31 May 2024**

**Ai**  
GROUP

## **AM2024/7 APPLICATION TO VARY THE *RAIL INDUSTRY AWARD 2020***

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## 1. INTRODUCTION

1. This submission of the Australian Industry Group (**Ai Group**) relates to an application made by Mr Matthew Wiffen (**Applicant**)<sup>1</sup> in the Fair Work Commission (**Commission**) on 19 January 2024, seeking a determination varying the *Rail Industry Award 2020* (**Rail Award** or **Award**)<sup>2</sup> (**Application**).
2. Our submission is filed in accordance with directions issued in the matter on 8 April 2024 (**8 April Directions**).
3. For the reasons outlined in this submission, Ai Group opposes the Application on the basis that the variations sought are neither:
  - (a) Necessary to meet the modern awards objective (**MAO**) or minimum wages objective (**MWO**); nor
  - (b) Justified by work value reasons.
4. Accordingly, Ai Group urges the Commission to dismiss the Application.

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<sup>1</sup> Mr Wiffen was substituted as the Applicant, in lieu of previous Applicant Mr Alexander Smith (**Previous Applicant**), following a case management hearing on 17 May 2024 and as subsequently confirmed by Vice President Asbury by [email correspondence](#) to the parties on the same date (**17 May 2024 Email**).

<sup>2</sup> Application at Part 2.1.

## 2. BACKGROUND TO THE PROCEEDING

5. The Application is one of eight applications filed with the Commission in or around the period December 2023 to January 2024, seeking variations to the Rail Award in similar terms to those sought by the Applicant.<sup>3</sup> All applications, other than the Application made by Mr Wiffen, have now been withdrawn.<sup>4</sup>
6. The Application is allocated to Vice President Asbury. It was the subject of case management proceedings before the Vice President on 15 January 2024, 23 February 2024, 5 April 2024 and 17 May 2024.
7. On 28 January 2024, a document was filed, containing a:
  - (a) *'List of tasks, procedures and requirements required by safe working personnel (Protection Officer)'*; and
  - (b) *'Companies found to be employing rail protection officers that can be publicly sourced'*,pursuant to a direction of Vice President Asbury issued on 15 January 2024 (**28 January Document**).
8. On 12 March 2024, the Previous Applicant (Mr Smith) filed material in support of the Application (**Applicant's Submission**) and a draft determination (**Draft Determination**) with the Commission, pursuant to Directions issued by Vice President Asbury on 28 February 2024.
9. The Applicant has confirmed that he adopts and relies on the 28 January Document and the material filed by the Previous Applicant in this matter.<sup>5</sup>

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<sup>3</sup> Being applications made in Commission Matter No.s AM2023/30, AM2023/32, AM2024/1, AM2024/2, AM2024/3, AM2024/4 and AM2024/5.

<sup>4</sup> The other applications were withdrawn during the Case Management hearing before Vice President Asbury on 5 April 2024. Refer to [transcript](#) at PN37 – PN47 inclusive.

<sup>5</sup> As discussed during a Case Management hearing before Vice President Asbury on 17 May 2024, and confirmed in the 17 May 2024 Email.

10. Subsequent to the case management hearing conducted on 5 April 2024, the Vice President issued the 8 April Directions, which directed each of the Rail, Tram and Bus Union (**RTBU**) and the Australian Services Union (**ASU**) to advise the Commission by no later than 19 April 2024 of their position with respect to the Application (including whether it supports, opposes or seeks to advance an alternative position to, the variations sought by the Applicant).
11. On 19 April 2024, the RTBU filed a submission with the Commission (**RTBU Submission**) stating it does not make any submissions regarding the merits of the proposed variations.<sup>6</sup> The RTBU Submission does, however, deal with the RTBU's position concerning the award coverage of Protection Officers. We discuss and respond to the RTBU Submission in Chapter 6 of this submission.
12. On 19 April 2014, the ASU also filed a submission stating it does not make any submissions regarding the merit of the proposed variations.<sup>7</sup>

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<sup>6</sup> RTBU Submission at [3].

<sup>7</sup> ASU Submission filed on 19 April 2024.

### 3. THE APPLICANT'S CASE

13. The Applicant has confirmed that the extent of materials relied upon by him in support of the Application are the:
- (a) 28 January Document;
  - (b) Applicant's Submission; and
  - (c) Draft Determination.<sup>8</sup>
14. Ai Group does not respond to any information contained in the seven applications earlier identified in this submission as having been withdrawn, nor do we understand that the Applicant seeks to rely on that information. Any information contained in the discontinued applications should not be taken into account by the Commission in determining the Application.

#### The Application

15. The Application does not identify whether it has been made pursuant to s.158 or s.160 of the Act, those being the only relevant legislative provisions upon which the Application could be advanced.
16. Part 2.4 of the Application contains the question '*What are the details of your application?*', in response to which the Applicant has answered:

Rail Protection Officers covered under the award have a safety critical role. This role has a great deal of responsibility for the lives & well being of workers on site. We protect the workers & worksite from rail traffic. It is high stress & involves a lot of travel. Therefore the role needs to be remunerated higher.<sup>9</sup>

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<sup>8</sup> This was confirmed by the Previous Applicant during a Case Management hearing before Vice President Asbury on 5 April 2024 (refer to [transcript](#) at PN76 – PN89 inclusive). During the Case Management hearing before Her Honour on 17 May 2024, the Applicant confirmed he adopted the email filed by the Previous Applicant in the matter (refer to the 17 May 2024 Email at paragraph 2).

<sup>9</sup> Part 2.4 of the Application.

17. Part 2.5 of the Application contains the question ‘*What are the grounds being relied on?*’, in response to which the Applicant has answered:

Higher wages will help attract higher quality candidates to this important & over looked role. The role is demanding & without sufficient remuneration we can’t get quality staff.<sup>10</sup>

18. Ai Group has proceeded on the basis that the Application has been made pursuant to s.158 of the Act. Neither the Application, nor the other material advanced, disclose any intention or effort to rely upon the proposition that the Award is ‘*ambiguous*’, is ‘*uncertain*’ or contains an ‘*error*’, as contemplated by s.160 of the Act. We observe that the Commission has also characterised the Application as being made under s.158 of the Act.<sup>11</sup>

### **The Proposed Variations**

19. Briefly stated, the Applicant seeks the following variations to the Rail Award:

(a) **Definitions** – Specifically, the Applicant seeks the inclusion of six new definitions for the terms ‘*Rail Safety*’, ‘*Safeworking*’, ‘*Track Protection*’, ‘*Handsignaller*’, ‘*Track Protection Officer*’ and ‘*Systems of Safeworking*’ (**Definitions Variations**).<sup>12</sup>

(b) **New Classifications and Rates of Pay for Protection Officers** – Specifically, the Applicant seeks the introduction of:

- (i) New subclause 15.1(d), which contains seven proposed ‘*Safeworking*’ classifications together with rates of pay expressed as a minimum hourly rate, minimum weekly rate (full-time employee) and annual salary equivalent (full-time employee);<sup>13</sup> (**Rates Variations**)

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<sup>10</sup> Part 2.5 of the Application.

<sup>11</sup> See paragraph 1 of each of the Directions made on 19 January 2024, 28 February 2024 and 8 April 2024.

<sup>12</sup> As set out at paragraph [1] of Part A of the Draft Determination.

<sup>13</sup> As set out at paragraph [2] of Part A of the Draft Determination.

- (ii) New 'Safeworking (SAF) Classifications', expressed as being proposed to be added to 'Clause A'; which we assume are intended to be inserted into Schedule A;<sup>14</sup> (**Classification Variations**); and
  - (iii) New summaries of ordinary and penalty rates of pay for full-time and part-time 'Safeworking (SAF) employees' and for casual 'Safeworking' employees in Schedule B.<sup>15</sup>
- (c) **Allowances** – Specifically, the Applicant seeks:
- (i) To replace existing clause 18.4(b)(i) of the Rail Award (which deals with a tool allowance) with a new clause, which would have the effect of changing the existing clause as indicated by underlining and strikethrough, below:  
  

A tradesperson or safeworking employee required to provide and maintain the tools or equipment ordinarily required by that ~~trade~~ job role in the performance of work as a tradesperson or safeworking employee must be paid a tool and equipment allowance of \$20.39 per week.
  - (ii) To insert as clause 18.5 of the Rail Award a new wage-related allowance for 'Multiple Job Roles';<sup>16</sup> and
  - (iii) To insert as clause 18.6 of the Rail Award five new expense-related allowances for 'site travel', 'living away from home allowance', 'travel allowance', 'mandatory recertification' and a 'phone allowance' (**Allowances Variances**).<sup>17</sup>

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<sup>14</sup> As set out at paragraph [5] of Part A of the Draft Determination.

<sup>15</sup> As set out at paragraph [6] of the Draft Determination.

<sup>16</sup> As set out at paragraph [4] of the Draft Determination.

<sup>17</sup> As set out at paragraph [4] of the Draft Determination.



## 4. RELEVANT LEGISLATIVE PROVISIONS AND EVIDENTIARY THRESHOLD

20. Section 157 of the Act provides as follows: (our emphasis)

### **157 FWC may vary etc. modern awards if necessary to achieve the modern awards objective**

(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 is necessary to achieve the modern awards objective.

Note 1: Generally, the FWC must be constituted by a Full Bench to make, vary or revoke a modern award. However, the President may direct a single FWC Member to make a variation (see section 616).

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

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

(2) 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 is necessary to achieve the modern awards objective.

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

21. In addition, s.138 of the Act states:

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.

22. Both the MAO and MWO are relevant in the context of this proceeding.

## **The Modern Awards Objective (Section 134)**

23. Section 134 contains the MAO, which applies to the performance or exercise of the Commission's powers pursuant to Part 2-3 of the Act.<sup>18</sup>

24. The MAO is as follows:

### **134 The modern awards objective**

*What is the modern awards objective?*

- (1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:
  - (a) relative living standards and the needs of the low paid; and
  - (aa) the need to improve access to secure work across the economy; and
  - (ab) the need to achieve gender equality in the workplace by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and providing workplace conditions that facilitate women's full economic participation; 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
  - (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

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<sup>18</sup> Section 134(2)(a) of the Act.

- (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*.

### **Minimum Wages Objective (Section 284)**

- 25. Section 284 of the Act contains the MWO, which applies to the performance of the Commission's functions or powers under both Part 2-6 of the Act and Part-2-3 (so far as the exercise of its powers relates to setting, varying or revoking modern award minimum wages).<sup>19</sup>
- 26. The MWO is relevant to the Rates Variations, and is as follows:

#### **284 The minimum wages objective**

*What is the minimum wages objective?*

- (1) The FWC must establish and maintain a safety net of fair minimum wages, taking into account:
  - (a) the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth; and
  - (aa) the need to achieve gender equality, including by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and addressing gender pay gaps; and
  - (b) promoting social inclusion through increased workforce participation; and
  - (c) relative living standards and the needs of the low paid; 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*.

### **Special provisions relating to modern award minimum wages (Section 135)**

- 27. Section 135 of the Act contains additional specific provisions relating to modern award minimum wages, and is also relevant to the Rates Variations.

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<sup>19</sup> Section 284(2) of the Act.

28. Section 135 provides: (our emphasis)

**135 Special provisions relating to modern award minimum wages**

- (1) Modern award minimum wages cannot be varied under this Part except as follows:
- (a) modern award minimum wages can be varied if the FWC is satisfied that the variation is justified by work value reasons (see subsection 157(2));
  - (b) modern award minimum wages can be varied under section 160 (which deals with variation to remove ambiguities or correct errors) or section 161 (which deals with variation on referral by the Australian Human Rights Commission).

Note 1: The main power to vary modern award minimum wages is in annual wage reviews under Part 2-6. Modern award minimum wages can also be set or revoked in annual wage reviews.

Note 2: For the meanings of **modern award minimum wages**, and **setting** and **varying** such wages, see section 284.

- (2) In exercising its powers under this Part to set, vary or revoke modern award minimum wages, the FWC must take into account the rate of the national minimum wage as currently set in a national minimum wage order.

29. In assessing whether s.135 of the Act applies to the Application, it is first necessary to characterise the Rates Variations as either ‘*setting*’ or ‘*varying*’ modern award minimum wages.<sup>20</sup>

30. Having regard to the definitions of both terms contained in s.284 of the Act, and the proposed Rates Variations, they would appear to result in the ‘*setting*’ of wages, being ‘*the initial setting of one or more new modern award minimum wages in a modern award*’<sup>21</sup> (our emphasis), on the basis that the Rail Award does not currently contain rates specifically for ‘*Rail Workers*’ in a separate classification stream as proposed by the Applicant. Further, the variations sought do not propose to vary the current rate of one or more of the minimum wages contained in the Rail Award.<sup>22</sup>

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<sup>20</sup> Section 135(1) of the Act applies only to the variation of modern award minimum wages. Section 135(2) applies to the setting, varying and revoking of modern award minimum wages.

<sup>21</sup> Section 284(4) of the Act.

<sup>22</sup> Section 284(4) of the Act defines ‘*varying*’ modern award minimum wages as ‘*varying the current rate of one or more modern award minimum wages*’.

31. However, and for completeness, insofar as the work of Protection Officers may in some situations already be covered by the Rail Award and the classifications contained therein, the variations to classifications and rates sought by the Applicant would in practical terms have the effect of varying the current minimum rates of pay in the Rail Award that may be applicable to Protection Officers. To that end, s.157 of the Act may be relevant.

### **Work Value Reasons (Sections 135(1)(a) and 157)**

32. The Commission is only empowered to vary minimum wages in the Rail Award if the variation is justified by ‘*work value reasons*’.<sup>23</sup>
33. In the first major decision issued in the context of the recent Work Value Case concerning the aged care sector (***Stage 1 Aged Care Decision***), a Full Bench stated that:

‘Justified’ in the context of s.157(2)(a) means that the ‘work value reasons’ show the variation of modern award minimum wages to be just, right or warranted, or provide a satisfactory reason for the variation.<sup>24</sup>

34. Sections 157(2A) and (2B) of the Act define ‘*work value reasons*’ and the manner in which they are required to be considered by the Commission, as follows:

(2A) ***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;

the conditions under which the work is done. (2B) The FWC’s consideration of work value reasons must:

- (a) be free of assumptions based on gender; and
- (b) include consideration of whether historically the work has been undervalued because of assumptions based on gender.

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<sup>23</sup> Sections 135(1)(a) and 157(2)(a) of the Act.

<sup>24</sup> *Re. Aged Care Award 2010, Nurses Award 2010 and Socia, Community, Home Care and Disability Services Industry Award 2010* [2022] FWCFB 200 at [137].

35. The Full Bench in the *Stage 1 Aged Care Decision* set out the following useful distillation of principles in relation to s.157(2A) of the Act:

**Section 157(2A)**

1. Section 157(2A) can be said to exhaustively define 'work value reasons' in the sense that there are no other express provisions in the FW Act which inform the meaning of s.157(2A), although the objects of the FW Act will inform the interpretation and application of the concepts within s.157(2A).
2. The reasons which justify the amount employees should be paid for doing a particular kind of work must be 'related to' any one or more of the 3 matters in s.157(2A)(a) to (c). There is nothing in the statutory context to suggest that the expression 'related to' in s.157(2A) was not intended to have a wide operation or that an indirect, but relevant, connection would not be a sufficient relationship for present purposes. The expression 'related to' is one of broad import that requires a sufficient connection or association between the 2 subject matters; the connection must be relevant and not remote or accidental.
3. Section 157(2A) does not contain any requirement that the 'work value reasons' consist of identified changes in work value measured from a fixed datum point. But, in order to ensure there is no 'double counting', it is likely the Commission would adopt an appropriate datum point from which to measure work value change, where the work has previously been properly valued. The datum point would generally be the last occasion on which work value considerations have been taken into account in a proper way, that is, in a way which, according to the current assessment of the Commission, correctly valued the work. A past assessment which was not free of gender-based undervaluation or other improper considerations would not constitute a proper assessment for these purposes.
4. Where the wage rates in a modern award have not previously been the subject of a proper work value consideration, there can be no implicit assumption that at the time the award was made its wage rates were consistent with the modern awards objective or that they were properly fixed.
5. Section 157(2A) does not incorporate the test which operated under wage fixing principles of the past that the change in the nature of work should constitute 'such a significant net addition to work requirements as to warrant the creation of a new classification or upgrading to a higher classification.' There is simply no basis for introducing such an additional requirement to the exercise of the discretion in s.157(2), which might have been, but which has not been, enacted.
6. In the *Pharmacy Decision*, the Full Bench described in detail the development by the AIRC of an approach whereby the proper fixation of award minimum rates of pay required an alignment between key classifications in the relevant award and classifications with equivalent qualification and skill levels in the Metal Industry classification structure.
7. Having regard to relativities within and between awards remains an appropriate and relevant exercise in performing the Commission's statutory task in s.157(2). Aligning rates of pay in one modern award with classifications in other modern awards with similar qualification requirements supports a system of fairness, certainty and stability. The C10 Metals Framework Alignment Approach and the AQF are useful

tools in this regard. However, such an approach has its limitations, in particular:

- alignment with external relativities is not determinative of work value
  - while qualifications provide an indicator of the level of skill involved in particular work, factors other than qualifications have a bearing on the level of skill involved in doing the work, including 'invisible skills' as discussed in Chapter 7.2.6
  - the expert evidence supports the proposition that the alignment of feminised work against masculinised benchmarks (such as in the C10 Metals Framework Alignment Approach) is a barrier to the proper assessment of work value in female-dominated industries and occupations (see Chapter 7.2.5), and
  - alignment with external relativities is not a substitute for the Commission's statutory task of determining whether a variation of the relevant modern award rates of pay is justified by 'work value reasons' (being reasons related to the nature of the work, the level of skill and responsibility involved and the conditions under which the work is done).
8. In exercising the powers to vary modern award minimum wages, the Full Bench must take into account the rate of the national minimum wage as currently set in a national minimum wage order (s.135(2)).
9. Statements of principle from work value cases decided under different statutory regimes and pursuant to wage fixing principles which no longer exist are likely to be of only limited assistance in the Commission's statutory task under s.157(2). Some of those statements of principle have no relevance at all, given they are grounded in wage fixing principles which required a change in work value to constitute a significant net addition to work requirements. The adoption of the observations such as those at [190] in the *ACT Child Care Decision* runs the risk of obfuscating the Commission's statutory task of determining whether a variation of modern award minimum wages is justified by work value reasons, being reasons related to the matters in s.157(2A)(a)–(c). To adopt such an approach may also be said to be adding to the text of s.157(2A) in circumstances where it is not necessary to do so in order to achieve the legislative purpose, and may also be an unwarranted fetter on the exercise of what the legislature clearly intended would be a discretionary decision.
10. It is not helpful or appropriate to seek to delineate the metes and bounds of what constitutes 'work value reasons' divorced from a particular context. In our view the meaning of 'work value reasons' should focus on the text of s.157(2A). Any elaboration will develop over time, on a case-by-case basis as the Commission determines particular issues as and when they arise.<sup>25</sup>

## Evidentiary Threshold

36. The Commission has on many prior occasions, considered and applied the principles regarding the nature of its task when considering an application to vary an award, including the requisite level of evidence in support.

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<sup>25</sup> *Stage 1 Aged Care Decision* at [293].

37. These principles were recently set out by a Full Bench of the Commission in the context of an application made by Indigenous Education and Boarding Australia to vary the *Educational Services (Schools) General Staff Award 2020*:

[31] The following guidance as to the nature of the Commission's task in determining an application to vary an award was provided by the Full Bench in *Horticulture Award 2020*:

"[14] Variations to modern awards must be justified on their merits. The extent of the merit argument required will depend on the circumstances. Significant changes where merit is reasonably contestable should be supported by an analysis of the relevant legislative provisions and, where feasible, probative evidence.

[15] Under s.157(1) of the *Fair Work Act 2009* (Cth) (the Act), the Commission may only make the variation sought by the AWU if satisfied that the variation is 'necessary to achieve the modern awards objective'. The 'modern awards objective' is defined in s.134(1) as "provid[ing] a fair and relevant minimum safety net of terms and conditions", considering the matters at s.134(1)(a) to (h) (the s.134 considerations).

[16] Section 138 of the Act emphasises the importance of the modern awards objective:

'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.'

[17] There is a distinction between what is 'necessary' and what is merely 'desirable'. Necessary means that which 'must be done'; 'that which is desirable does not carry the same imperative for action.'

[18] Reasonable minds may differ as to whether a proposed variation is necessary (within the meaning of s.138), as opposed to merely desirable. What is 'necessary' to achieve the modern awards objective in a particular case is a value judgment, taking into account the s.134 considerations to the extent that they are relevant having regard to the context, including the circumstances of the particular modern award, the terms of any proposed variation and the submissions and evidence.

[19] Further, the matters which may be taken into account are not confined to the considerations in s.134. As the Full Court observed in *Shop, Distributive and Allied Employees Association v The Australian Industry Group*:

'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.'



[20] In 4 Yearly Review of Modern Awards – Penalty Rates (Penalty Rates Decision) the Full Bench summarised the general propositions applying to the Commission’s task in the four-yearly review of modern awards, as follows:

‘1. The Commission’s task in the Review is to determine whether a particular modern award achieves the modern awards objective. If a modern award is not achieving the modern awards objective then it is to be varied such that it only includes terms that are ‘necessary to achieve the modern awards objective’ (s.138). In such circumstances regard may be had to the terms of any proposed variation, but the focal point of the Commission’s consideration is upon the terms of the modern award, as varied.

2. Variations to modern awards must be justified on their merits. The extent of the merit argument required will depend on the circumstances. Some proposed changes are obvious as a matter of industrial merit and in such circumstances it is unnecessary to advance probative evidence in support of the proposed variation. Significant changes where merit is reasonably contestable should be supported by an analysis of the relevant legislative provisions and, where feasible, probative evidence.

3. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. For example, 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. The particular context in which those decisions were made will also need to be considered.

4. The particular context may be a cogent reason for not following a previous Full Bench decision, for example:

- the legislative context which pertained at that time may be materially different from the Fair Work Act 2009 (Cth);
- the extent to which the relevant issue was contested and, in particular, the extent of the evidence and submissions put in the previous proceeding will bear on the weight to be accorded to the previous decision; or
- the extent of the previous Full Bench’s consideration of the contested issue. The absence of detailed reasons in a previous decision may be a factor in considering the weight to be accorded to the decision.<sup>26</sup>

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<sup>26</sup> Re *Application to vary the Educational Services (Schools) General Staff Award 2020* [2023] FWCFB 138 at [31].

38. In the *Stage 1 Aged Care Decision*, the Full Bench considered the nature of its task when considering the MWO. Relevantly, the Full Bench stated:

[290] As noted by the Expert Panel in the *2019-20 Annual Wage Review decision*, there is a substantial degree of overlap in the considerations relevant to the minimum wages objective and the modern awards objective, although some are not expressed in the same terms. Both the minimum wages objective and the modern awards objective require the Commission to take into account:

- promoting social inclusion through increased workforce participation
- relative living standards and the needs of the low paid
- the principle of equal remuneration for work of equal or comparable value, and
- various economic considerations.

[291] Similarly to the modern awards objective, the Commission's task in s.284 involves an 'evaluative exercise' which is informed by the considerations in ss.284(1)(a)–(e). No particular primacy attaches to any of the s.284(1) considerations, and a degree of tension exists between some of these considerations. It is common ground that the consideration in s.284(1)(e) is not relevant in the context of the Applications.

[292] A safety net of 'fair minimum wages' includes the perspective of employers and employees, and the Commission is required to take into account all of the relevant statutory considerations, but those expressly listed in s.284(1) do not necessarily exhaust the matters which the Commission might properly consider to be relevant.<sup>27</sup>

39. In *Construction, Forestry, Mining and Energy Union v Anglo American Metallurgical Coal Pty Ltd* [2017] FCAFC 123, the Federal Court stated that:

The words 'only to the extent necessary' in s 138 emphasise the fact that it is the minimum safety net and minimum wages objective to which modern awards are directed. Other terms and conditions beyond a minimum are to be the product of enterprise bargaining, and enterprise agreements under Part 2-4.<sup>28</sup>

40. In *Re Security Industry Award* [2015] FWCFB 620, a Full Bench of the Commission said: (our emphasis)

Variations to awards have rarely been made merely on the basis of bare requests or strongly contested submissions. In order to found a case for an award variation it is usually necessary to advance detailed evidence of the operation of the award, the impact of the current provisions on employers and employees covered by it and the likely impact of the proposed changes. Such evidence should be combined with sound and balanced reasoning supporting a change.<sup>29</sup>

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<sup>27</sup> Stage 1 Aged Care Decision at [290] – [292].

<sup>28</sup> *Construction, Forestry, Mining and Energy Union v Anglo American Metallurgical Coal Pty Ltd* [2017] FCAFC 123 at [23].

<sup>29</sup> *Re Security Industry Award* [2015] FWCFB 620 at [8].

## **5. APPLICANT'S EVIDENCE CONCERNING THE WORK OF PROTECTION OFFICERS**

41. A useful starting point for the purpose of considering the variations proposed by the Applicant, is to consider the evidence in the proceeding as to the work performed by Protection Officers.
42. A description of the work of Protection Officers is set out in the:
  - (a) 28 January Document; and
  - (b) Applicant's Submissions,the contents of each we consider in turn, below.
43. Briefly stated, in our submission the Applicant's evidence comprises of:
  - (a) A series of assertions regarding his perception or opinion of the work of Protection Officers, in circumstances where his perception cannot be said to be representative of the work of Protection Officers beyond his own experience; together with
  - (b) Selected extracts of information and documents located on websites which, for the reasons we explain below, are of limited assistance.
44. The evidence falls well short of establishing, comprehensively, the work performed by Protection Officers, in all relevant contexts. In the absence of such evidence, the Commission is not in a position to properly assess various aspects of the Application; including the extant award coverage of Protection Officers and / or the minimum terms and conditions that ought to apply to them.

## The 28 January Document

45. In large part, the 28 January Document replicates information concerning Protection Officers that is publicly available from various websites, being:
- (a) A document published by RailSafe titled *NGE 238 Responsibilities of Protection Officers* (**NGE 238**);<sup>30</sup>
  - (b) Information from a page on the website maintained by the Australian Rail Track Corporation (**ARTC**) (**ARTC Safeworking Webpage**);<sup>31</sup> and
  - (c) A document published by the Office of the National Rail Safety Regulator (**ONRSR**) titled '*ONRSR Guideline – Identifying rail safety work under the RSNL*' (**ONRSR Guideline**).<sup>32</sup>
46. There are several limitations to this information (and the parts of the 28 January Document that replicate it) as follows:
- (a) *First*, the information is of a generic nature and has not been prepared in the specific context of this proceeding;
  - (b) *Second*, neither the authors of the material nor any representative from RailSafe, ARTC or ONRSR have been called by the Applicant as witnesses in the matter, so as to allow for the veracity of the information to be tested (such as through cross examination);
  - (c) *Third*, RailSafe's information is published within the context of Safeworking in the Sydney Trains Network. The Applicant has not provided any basis or otherwise articulated any argument as to whether (and if so, why) this information may be considered to describe Safeworking (including the work of Protection Officers) outside the Sydney Trains Network or indeed, in other states and territories;

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<sup>30</sup> RailSafe, [NGE 238 Responsibilities of Protection Officers v1.0](#) accessed on 28 May 2024.

<sup>31</sup> See: [Safeworking - ARTC](#), accessed on 28 May 2024.

<sup>32</sup> Office of the National Rail Safety Regulator, [ONRSR Guideline - Identifying rail safety work under the RSNL](#), accessed on 28 May 2024.

- (d) *Fourth*, when regard is had to the information on the ARTC Safeworking Webpage that appears to underpin parts of the 28 January Document, it is apparent that the information has not been copied verbatim in all places. For example, the description of ‘*Handsignaller 1 & 2*’ under the heading ‘*Role Description / Permitted Activities*’ on page 5 of the 28 January Document merges the separate descriptions for ‘*Handsignaller Level 1*’ and ‘*Handsignaller Level 2*’ that appear on the ARTC Safeworking Webpage. Further, the ARTC Safeworking Webpage contains a number of hyperlinks not all of which are replicated as active links in the 28 January Document;<sup>33</sup>
- (e) *Fifth*, headings found within the ARTC Safeworking Webpage which clearly delineate the jurisdictions to which various parts of the information on the website relate, are not as readily apparent in the 28 January Document. Importantly, the information on the ARTC Safeworking Webpage describes three separate ‘*Safeworking Competency Schemes*’, being schemes applicable to:
- (i) The Queensland and NSW ARTC Network (ARTC NSW Network Rules & Procedures);
  - (ii) Defined Interstate Network (ARTC Code of Practice) – South Australia, Western Australia (East of Kalgoorlie), Victoria (west of Dimboola Loop) and NSW (South of Broken Hill); and
  - (iii) Victoria (TA20 – East of Dimboola Loop (Inclusive) to Albury (Exclusive));
- (f) *Sixth*, the ‘*descriptions / permitted activities*’ for the roles described in the ARTC Safeworking Webpage are each set out under headings titled ‘*Safeworking Competency Scheme*’ and form part of ‘*Step 4*’ of an ARTC Safeworking process in which workers are directed to ‘*Upload Competency evidence into RIW to meet the role requirements*’.<sup>34</sup> Accordingly, the information appears to be provided as guidance to workers regarding evidence

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<sup>33</sup> See: [Safeworking - ARTC](#), accessed on 28 May 2024. Hyperlinked documents include: [RLS-PR-003.pdf \(artc.com.au\)](#), [Safeworking-Matrix.pdf \(artc.com.au\)](#); [ARTC Approved Technical Training Providers](#)

<sup>34</sup> See information under ‘Step 4’ on [Safeworking - ARTC](#), accessed on 28 May 2024.

of competencies to be uploaded to its database, as opposed to (for example) being a complete role description for the work; and

- (g) *Seventh*, the ARTC Safeworking Webpage ‘*refers to all RIW Safeworking roles*’<sup>35</sup> and does not appear to be limited to Protection Officer roles. Accordingly, it appears that not all of the information contained therein may be relevant in the context of the proceeding.

47. It follows from the above analysis that the Commission should exercise caution in relying upon the information contained in the ONRSR Guideline, ARTC Safeworking Webpage and NGE 238 (included as replicated in the 28 January Document).
48. It is also relevant to note that the ARTC Safeworking Document (including documents hyperlinked therein) highlights the variation between Safeworking (including Protection Officer) roles across different jurisdictions. This is relevant in so far as the Rail Award operates as a national safety net and must be capable of application without state differences.<sup>36</sup>
49. With respect to the balance of the content of the 28 January Document, it includes:
- (a) Information that appears to have been replicated from, but is not attributed by the Applicant to, an external source document that has not been identified;<sup>37</sup>
  - (b) A list curated from the various ‘*Tasks and Function*’ descriptors found across all three classification streams contained in Schedule A of the Rail Award;<sup>38</sup>
  - (c) A series of bullet points following ‘*in our own words*’, which appears to be a description of tasks, responsibilities and expenses associated with Protection Officer work<sup>39</sup> but which contains no attempt to explain the work environment(s) in respect of which such observations are made, an explanation of what is meant by each point, the extent to which all of the points

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<sup>35</sup> See top of page above ‘Step 1’ on [Safeworking - ARTC](#), accessed on 28 May 2024.

<sup>36</sup> See general rule in s.154(1) of the Act.

<sup>37</sup> 28 January Document at page 2.

<sup>38</sup> See 28 January Document, from approximately half-way down page 13 to approximately half-way down page 14.

<sup>39</sup> See 28 January Document, from approximately half-way down page 14 to approximately half-way down page 15.

would apply to all types and levels of Protection Officer, and the degree to which the list of bullet points may be considered broadly representative of the work of Protection Officers generally (and the basis for it being held to be so representative); and

(d) A series of bullet points under the heading '*Certification and equipment required for PO*',<sup>40</sup> which suffer from the same limitations as set out at subparagraph (c) above.

50. The contentions made by the Applicant (as described at paragraphs [4949](b) to (d)) appear to reflect mere assertions about his perceptions and opinions (and/or potentially, noting the reference to '*in our own words*', the perceptions and opinions of the other applicants who have now withdrawn from the proceedings and have not been identified).
51. Further, pages 16 – 17 of the 28 January Document set out a list of '*[c]ompanies found to be employing rail protection officers that can be publicly sourced*' but lists only the legal or trading names of twenty businesses without describing so much as the nature of the business or the basis upon which they have been identified as employing Protection Officers.
52. The 28 January Document also does not contain any information regarding the author of the document so as to enable an assessment of the Applicant's standing to make broad statements regarding the work of Protection Officers that extend beyond his own personal experience.
53. With respect, it is submitted that the evidence before the Commission ought to be afforded little weight and falls well short of the standard of evidence reasonably necessary to justify varying an award that governs the terms and conditions for an entire industry.

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<sup>40</sup> See 28 January Document on page 15.

## 6. AWARD COVERAGE OF PROTECTION OFFICERS

54. An assessment as to the existing award coverage of Protection Officers is relevant to the Commission's determination of the Application, in so far as it may have a bearing on matters such as whether the proposed variations are '*necessary*'<sup>41</sup> and an assessment of any potential flow-on effects (such as inter- and intra-award relativities), should the variations be made.
55. It is unclear from the Applicant's Submission whether the proposed classification structure and Rates Variations are sought to be included in the Rail Award because the Applicant is of the view that '*Safeworking*' employees are either:
- (a) currently not covered by the Rail Award – with the effect of the variation sought at Item 5 of Part A of the Draft Determination being to expand the coverage of the Rail Award<sup>42</sup>; or
  - (b) currently covered by the Rail Award – in which case the effect of the change is limited to the classification level and terms and conditions for those employees under the Rail Award, but not an expansion of the coverage of the Award.
56. We observe from the brief statement at Part 2.4 of the Application that '*Rail protection officers covered under the award have a safety critical role...*' (our emphasis); it appears the Applicant may have the latter view.
57. Proceeding on the basis that the work of a Protection Officer is as described by the Applicant (but without conceding that to necessarily be the case), in Ai Group's submission and for reasons we explain in more detail below, it appears Protection Officers may be covered under:

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<sup>41</sup> Section 134 of the Act.

<sup>42</sup> The inclusion of new classifications in the Rail Award may potentially have this effect, in so far as Clause 4.1 of the Rail Award states 'This industry award covers employers throughout Australia who are rail transport operators and their employees in the classifications listed in Schedule A – Classification Definitions to the exclusion of any other modern award' (our emphasis).



- (a) An industry award, and specifically this would appear to include (but not necessarily be limited to) the:
  - (i) Rail Award; and/or
  - (ii) *Building and Construction General On-site Award 2020* (**Building and Construction Award**); or
- (b) Where there is no industry award coverage, the *Miscellaneous Award 2020* (**Miscellaneous Award**).

58. In setting out our submission regarding award coverage for Protection Officers, we note the position articulated by the RTBU that Protection Officers are covered by the Rail Award.<sup>43</sup> This does not appear to be a complete assessment of potential award coverage for Protection Officers when regard is had to the limits of the industry coverage of the Rail Award and the other industry (or potentially, industries) in which Protection Officer work is performed.

## The Rail Award

59. Clause 4 of the Rail Award is titled 'Coverage'. Within this, clause 4.1 relevantly provides:

This industry award covers employers throughout Australia who are rail transport operators and their employees in the classifications listed in Schedule A —Classification Definitions to the exclusion of any other modern award.

60. '*Rail transport operator*' is defined in clause 4.2(a) of the Rail Award as meaning a '*Rail infrastructure operator*' and/or '*Rolling stock manager*'<sup>44</sup>, which in turn are defined as follows:

- (b) **rail infrastructure manager** means the person who has effective management and control of rail infrastructure, whether or not the person:
  - (i) owns the rail infrastructure; or
  - (ii) has a statutory or contractual right to use the rail infrastructure or to control, or provide access to it;<sup>45</sup>

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<sup>43</sup> RTBU Submission at paragraphs [5] – [8] inclusive.

<sup>44</sup> Clause 4.2(a) of the Rail Award.

<sup>45</sup> Clause 4.2(b) of the Rail Award.

- (c) **rolling stock manager** means a person who has effective management and control of the operation or movement of rolling stock on rail infrastructure for a particular railway.<sup>46</sup>

61. Relevant also is clause 4.4, which states:

This award covers any employer which supplies labour on an on-hire basis to a rail transport operator in respect of on-hire employees in classifications covered by this award, and those on-hire employees, while engaged in the performance of work for a business in that industry. Clause 4.4 operates subject to the exclusions from coverage in this award.

62. It follows from the above that the work of a Protection Officer may be covered by the Rail Award, if the Protection Officer is employed by either a rail transport operator (as defined) or an employer that supplies labour on an on-hire basis to a rail transport operator (as defined), and performs work within the classifications in the Rail Award. A Protection Officer who is not employed by either type of employer may instead be covered by a different industry award (for example, the Building and Construction Award) or, if there is no other applicable industry award, the Miscellaneous Award.

63. Schedule A to the Rail Award is titled '*Classification Definitions*', and contains three streams described as:

- (a) '*Clerical, Administrative and Professional Classifications*';
- (b) '*Operations Classifications*'; and
- (c) '*Technical and Civil Infrastructure Classifications*'.

64. Depending on the environment within which a Protection Officer performs their work – including in particular, the reason or event giving rise to the need for the presence of a Protection Officer – it is conceivable that the work may be undertaken in either an '*Operations*' context or in the context of '*Technical and Civil Infrastructure*'.

65. For example, the ONRSR Guideline explains that with only one exception, the list of activities in *Rail Safety National Law (RSNL)* that constitute '*rail safety work*' all '*relate to the potential risk that the activity being performed (or the sudden incapacity of the worker performing the work) could pose to the safe operations of the railway,*

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<sup>46</sup> Clause 4.2(c) of the Rail Award.

*including placing others at risk*.<sup>47</sup> The one exception, relates to risks to the worker performing the work of exposure to moving rolling stock.<sup>48</sup>

66. The need to access the rail corridor (thereby creating such types of risks) for the purpose of civil infrastructure and technical works (and as a corollary, an associated need for a Protection Officer) is self-evident – examples from the RSNL referred to in the ONRSR Guideline include activities such as constructing, maintaining, repairing etc rolling stock or rail infrastructure, and installing or maintaining telecommunications systems or electricity.<sup>49</sup> However, it is conceivable that there may be other contexts in which a Protection Worker may be called upon to discharge their role – for example, if access to the rail corridor is sought by the media or other person (so as to undertake a tour or inspection), and which is not for a purpose relevant to the undertaking of any civil infrastructure or technical works.
67. To the extent that a Protection Officer may undertake work potentially capable of falling within more than one classification stream, the correct classification would fall to be resolved against well-established principles applied by the Commission and courts in such circumstances.<sup>50</sup>
68. In this regard, we note that the RTBU Submission acknowledges potential overlap of the functions of Protection Officers with other roles and classifications,<sup>51</sup> and their '*multifaceted duties*'.<sup>52</sup> However the RTBU Submission concludes that the '*specific nature of their duties and they (sic) integral role in supporting the technical and civil infrastructure aspect of the rail industry*' brings them within the '*Technical and Civil Infrastructure*' stream.<sup>53</sup>

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<sup>47</sup> ONRSR Guideline at page 5.

<sup>48</sup> ONRSR Guideline at page 5.

<sup>49</sup> ONRSR Guideline at page 5.

<sup>50</sup> Such approaches involve an examination of the 'major and substantial employment' of the employee, or the 'principal purpose' or 'primary function' of the employee. See for example the observations of Jones J in *Davies v Carnachan Family Trust Pty Ltd* (2018) FCCA 45 at [12] – [14], which were considered are applied by a Full Bench of the Commission in *Michael Watson v Safe Places Community Services Limited T/A Safe Places for Children* [2020] FWCFB 2993.

<sup>51</sup> RTBU Submission at [11].

<sup>52</sup> RTBU Submission at [10].

<sup>53</sup> RTBU Submission at [9]; see also [11].

69. We do not disagree with the RTBU's submission as a general proposition (that is, that a Protection Officer might, depending on the circumstances, be covered under the '*Technical and Civil Infrastructure*' stream). However, in the context of this proceeding, the Applicant has not placed before the Commission sufficient evidence to permit a fulsome and conclusive understanding of the work of Protection Officers. Indeed, it is not apparent whether the material filed by the Applicant properly reflects his own position as a Protection Officer, since it purports to describe the work of all Protection Officers (a matter the Applicant cannot possibly give first-hand evidence of).
70. Ultimately, an assessment as to which classification stream covers the work of a Protection Officer would have to be determined based on the relevant facts going to the circumstances of each employee and their employer. It would appear based on the evidence before the Commission, that both the '*Operations*' and '*Technical and Civil Infrastructure*' streams may be relevant. To the extent that there may be overlap between classification streams, having regard to relevant case law, the issue of which stream the work of a particular Protection Officer falls within must be assessed based on the specific tasks and functions of the role, and the context and environment in which it is performed (which, as we note above, the Commission has not been provided with in this matter).
71. For completeness, to the extent that it may be concluded in any particular case that a Protection Officer who is employed by a rail transport operator (as defined) or an employer that supplies labour on an on-hire basis to a rail transport operator (as defined) does not fall within any of the classification streams of the Rail Award (and/or levels contained therein), Protection Officers may instead be covered by the Miscellaneous Award.

### **The Building and Construction Award**

72. A Protection Officer who is employed by an employer who is not covered by the Rail Award may instead be covered by a different industry award.
73. In this respect, it is relevant to note clause 4.3 of the Rail Award contains eleven categories of employers and employees who are *not* covered.

74. One such category of particular relevance in the context of the list of ‘*Companies found to be employing rail protection officers that can be publicly sourced*’ contained in the 28 January Document, is the exception to coverage of the Rail Award for employers and employees:

engaged in the design, construction, fabrication or maintenance of rail infrastructure or rolling stock, except where such activities are conducted by a rail transport operator<sup>54</sup>

75. Specifically, the list refers to ‘*Daracon Group*’. The homepage of Daracon Group’s website describes the business as ‘*a collective of multiple businesses that work together in providing effective and integrated civil construction services across the public and private sectors*’ (our emphasis).<sup>55</sup>

76. Elsewhere on its website, Daracon Group describes providing the following Rail Services:

Through Daracon Group’s Rail division, we are shaping efficient transportation networks through cutting-edge infrastructure and track construction, rail engineering and maintenance. Our experienced team is available to manage track and civil projects throughout the rail network, with safety and quality systems in place to ensure we deliver high-quality outcomes.

We offer a highly experienced team who have delivered rail maintenance and construction projects throughout NSW, including track construction works, track reconditioning, re-railing, re-sleeping, track welding and track maintenance works over many years.<sup>56</sup>

77. Given the aforementioned exception to coverage contained in clause 4.3(e) of the Rail Award, it would appear that rail services of this nature may instead be covered by the Building and Construction Award, which covers ‘*employers throughout Australia in the on-site building, engineering and civil construction industry and their employees in the classifications within Schedule A — Classification Definitions to the exclusion of any other modern award*’.<sup>57</sup>

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<sup>54</sup> Clause 4.3(e) of the Rail Award.

<sup>55</sup> See: [Civil Construction | Civil Contractors | Daracon Group](#), accessed on 27 May 2024.

<sup>56</sup> See: [Rail Engineering | Rail Infrastructure | Daracon Group](#), accessed on 27 May 2024.

<sup>57</sup> Clause 4.1 of the Building and Construction Award.

78. For the purpose of the above, ‘civil construction’ has a defined meaning that includes:

railways, tramways, roads, freeways, causeways, aerodromes, drains, dams, weirs, bridges, overpasses, underpasses, channels, waterworks, pipe tracks, tunnels, water and sewerage works, conduits, and all concrete work and preparation incidental thereto<sup>58</sup>

79. It follows that where a Protection Officer of an employer who is in the civil construction industry (as defined) performs work falling within the classifications contained in Schedule A of the Building and Construction Award, the Protection Officer will be covered by that award (and not the Rail Award).

80. Alternatively, should there be no appropriate classification for a Protection Officer under the Building and Construction Award, they may instead be covered by the Miscellaneous Award.

81. For the purpose of this submission, we seek only to highlight the potential for more than one industry award to cover the work of Protection Officers. It may be the case that other relevant industry awards also cover the work, however the Applicant has not led sufficient evidence as to all of the contexts in which Protection Officers perform their work so as to permit any other potentially relevant industry awards to be identified.

### **The Miscellaneous Award**

82. Protection Officers may be covered by the Miscellaneous Award if they are not covered by another industry or occupation award, and are not a managerial or professional employee. Accordingly, it does not appear that a Protection Officer could be award-free.

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<sup>58</sup> Clause 4.3(b)(x) of the Building and Construction Award.

83. Clause 4 of the Miscellaneous Award states:

**4. Coverage**

- 4.1** Subject to clauses 4.2, 4.3, 4.4 and 4.5 this award covers employers throughout Australia and their employees in the classifications listed in clause 15 — Minimum rates who are not covered by any other modern award.
- 4.2** The award does not cover managerial employees and professional employees such as accountants and finance, marketing, legal, human resources, public relations and information technology specialists.
- 4.3** The award does not cover employees excluded from award coverage by the Act.
- 4.4** The award does not cover employees who are covered by a modern enterprise award, or an enterprise instrument (within the meaning of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth)), or employers in relation to those employees.
- 4.5** The award does not cover employees who are covered by a State reference public sector modern award, or a State reference public sector transitional award (within the meaning of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth)), or employers in relation to those employees.
- 4.6** This award covers any employer which supplies on-hire employees in classifications set out in clause 12 — Classifications and those on-hire employees, if the employer is not covered by another modern award containing a classification which is more appropriate to the work performed by the employee. This subclause operates subject to the exclusions from coverage in this award.
- 4.7** This award covers employers which provide group training services for apprentices and trainees under this award and those apprentices and trainees engaged by a group training service hosted by a company to perform work at a location where the activities described herein are being performed. This subclause operates subject to the exclusions from coverage in this award.

84. As a starting point, it is relevant to consider (in the context of clause 4.1) the classifications contained in the Miscellaneous Award.

85. Clause 15.1 provides for Levels 1 – 4. Clause 12 contains a description of each of the levels, as follows:

**12.1** A description of the classifications under this award is set out below.

(a) **Level 1**

An employee at this level has been employed for a period of less than 3 months and is not carrying out the duties of a level 3 or level 4 employee.

(b) **Level 2**

An employee at this level has been employed for at least 3 months and is not carrying out the duties of a level 3 or level 4 employee.

(c) **Level 3**

An employee at this level has a trade qualification or equivalent and is carrying out duties requiring such qualifications.

(d) **Level 4**

An employee at this level has advanced trade qualifications and is carrying out duties requiring such qualifications or is a sub-professional employee.

86. In relation to the exclusion in clause 4.2, the descriptions of Protection Officer functions and duties in the 28 January Document do not appear to indicate the role is of a managerial or professional nature.

87. Section 143(7) of the Act is relevant in the context of considering the exclusion in clause 4.3 of the Miscellaneous Award. Section 143(7) relevantly provides:

(7) A modern award must not be expressed to cover classes of employees:

(a) who, because of the nature or seniority of their role, have traditionally not been covered by awards (whether made under laws of the Commonwealth or the States); or

(b) who perform work that is not of a similar nature to work that has traditionally been regulated by such awards.

Note: For example, in some industries, managerial employees have traditionally not been covered by awards.

88. The Applicant has not led any evidence or filed other material regarding the pre-modern award coverage of Protection Officers. Whilst we have not undertaken an exhaustive review of such instruments, we have identified one pre-modern award – being the *Rail Infrastructure Maintenance Award 2001* (AT811050) (to which the RTBU and John Holland Pty Ltd were parties) which was expressed as applying to employees of John Holland Pty Ltd engaged in rail infrastructure maintenance<sup>59</sup> and which contained in the classification criteria for a Maintainer Level 1 and 2 the description '*[u]ndertakes Safeworking duties ie. protection of personnel*'.<sup>60</sup> This

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<sup>59</sup> Clause 4.2 of the *Rail Infrastructure Maintenance Award 2001* (AT811050)

<sup>60</sup> Clause 12.2 of the *Rail Infrastructure Maintenance Award 2001* (AT811050)



would suggest that *'protection'* work has, at least in some contexts, been covered by awards prior to the introduction of modern awards; and further, that the exclusion in clause 4.3 of the Miscellaneous Award may therefore not apply.

## 7. RESPONSE TO THE APPLICANT'S CASE

89. The Application appears to have been brought on the basis of enterprise level frustration regarding the ability of the Applicant to obtain from his employer an understanding as to whether his employment is covered by the Rail Award and if so, at what level.
90. The making of the proposed variations to the Rail Award is not an appropriate or necessary remedy to the Applicant's underlying concern, noting in particular that it would have industry-wide ramifications. There are other more appropriate avenues available to the Applicant to deal with any dispute with his employer. To the extent that the Applicant seeks, through this proceeding, that the Commission make a finding as to whether he is covered by the Award, that would also be entirely inappropriate and would fall beyond the Commission's task in this matter.

### **The Modern Awards Objective**

91. As we set out earlier in this submission, the Commission must be satisfied that the variations proposed by the Applicant in the Draft Determination are '*necessary*' to achieve the MAO (and, in the case of a variation to award rates of pay, that making the variation outside the annual wage review process is '*necessary*' to achieve the MAO). On the basis of the material before it, the Commission simply cannot reach the requisite level of satisfaction.
92. The changes sought by the Applicant are significant. The proposed variations would make sweeping changes to the Rail Award, resulting in the introduction of a new classification stream, minimum rates of pay that are significantly higher than existing rates of pay prescribed by the Rail Award, and a raft of new allowances.
93. If the proposed variations are made, they would impact the Rail Award nationally and have the effect of creating substantial new rights and obligations in respect of a particular cohort of employees (which, on the material before the Commission, cannot properly be defined) in circumstances where there is no material that justifies the merits of the variations or deals with the impact they would have on employers. The Rates Variations also have the potential to disturb both inter and intra-award relativities.

94. The Applicant's Submission does not engage with the legislative framework relevant to the Commission's consideration of the Application. Nonetheless, we contend that:
- (a) There is no evidence that Protection Officers are low paid;<sup>61</sup>
  - (b) The proposed changes will not improve access to secure work<sup>62</sup> or address gender equality;<sup>63</sup>
  - (c) There is no evidence that the proposed changes will encourage enterprise bargaining;<sup>64</sup> and
  - (d) The variations proposed would have potentially adverse impacts on employers, especially in respect of the Rates Variations, which plainly propose the introduction of minimum wages that are well in excess of the minimum rates presently prescribed by the Rail Award.<sup>65</sup>
95. The need for the Commission to ensure a 'stable' modern award system<sup>66</sup> also weighs against the making of the determination sought.
96. Further, the 28 January Document falls well short of the standard of probative evidence necessary to support variations of such a significant nature.
97. In the context of proposed Rates Variations in particular, the Commission does not have before it appropriate evidence as to the likely consequences for both employers and employees should the variations be made. The Applicant has not made any attempt to grapple with the impact on employers of implementing the major changes proposed.

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<sup>61</sup> Section 134(1)(a) of the Act.

<sup>62</sup> Section 134(1)(aa) of the Act.

<sup>63</sup> Section 134(1)(ab) of the Act.

<sup>64</sup> Section 134(1)(b) of the Act.

<sup>65</sup> Section 134(1)(f) of the Act.

<sup>66</sup> Section 134(1)(g) of the Act.

## The Rates Variations

98. The Applicant seeks variations to the Rail Award that would result in minimum rates of pay for Protection Officers that are significantly higher than the minimum rates for all three existing classification streams in the Rail Award. Relevantly, the minimum hourly rates proposed range from \$40.09 to \$54.82.<sup>67</sup>
99. The Applicant has not advanced any probative material that might justify the proposed rates, including material that goes to the value of the work of Protection Officers. In particular, the material does not establish that the nature of the work performed, the level of skill or responsibility involved in doing the work and / or the conditions under which the work is done would justify the payment of the proposed rates.<sup>68</sup>
100. As the Full Bench recently stated in its *Stage 1 Aged Care Decision*, '[a] safety net of fair minimum wages' includes the perspective of employers and employees'.<sup>69</sup> The Commission does not, however, have before it the perspectives of any employers likely to be impacted by the variations proposed in the Draft Determination (and in particular, the Rates Variation). In the circumstances, the Commission cannot conclude that the Rates Variations are fair, necessary or appropriate.
101. Moreover, minimum rates of the magnitude proposed would have real potential to impair business competitiveness and viability.<sup>70</sup> Indeed, there may also exist a real issue as to the capacity of employers to pay at the level proposed by the Rates Variations. Further, and in so far as the Rail Award covers on-hire employees and their employers, the proposed rates may cause significant disruption in the context of existing commercial arrangements (to the point of even rendering them commercially unviable).

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<sup>67</sup> Item 2 of part A of the Draft Determination.

<sup>68</sup> Section 157(2A) of the Act.

<sup>69</sup> Stage 1 Aged Care Decision at [292].

<sup>70</sup> Section 284(1)(a) of the Act.

102. The proposed wages are of a level more appropriately considered as a claim pursued in the course of enterprise bargaining, rather than a feature of a minimum safety net.<sup>71</sup> Indeed, rates at the level proposed could potentially have a profound impact on enterprise bargaining in the context of the '*better off overall test*', together with operating as a disincentive to bargain.
103. In the *Stage 1 Aged Care Decision*, the Full Bench stated, '*[i]t seems to us that when dealing with applications to vary modern award minimum wages it is appropriate and relevant to have regard to relativities within and between awards*'.<sup>72</sup>
104. Currently under the Rail Award, the minimum hourly rates:
- (a) In the Clerical, Administrative and Professional stream range from \$23.78 to \$46.40;
  - (b) In the Operations stream range from \$22.61 to \$33.99; and
  - (c) In the Technical and Civil Infrastructure stream range from \$23.22 (to \$30.82).<sup>72</sup>
105. Under the Building and Construction Award, the minimum hourly rates range from \$23.71 to \$30.63.<sup>73</sup>
106. Plainly, the rates proposed by the Applicant are significantly higher than the above. Neither the Applicant's material, nor the proposed classification structure (on its face) would justify the proposed rates. On its face, the proposed Rates Variation would distort both internal and external wage relativities.
107. Further, the Applicant has not sought to rely on any evidence as to the work performed by employees under the aforementioned classification streams in the Rail Award or Building and Construction Award, as a basis for seeking to justify the significantly higher rates of pay proposed.

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<sup>71</sup> *Construction, Forestry, Mining and Energy Union v Anglo American Metallurgical Coal Pty Ltd* [2017] FCAFC 123 at [23].

<sup>72</sup> Clauses 15.1(a) – (c) (inclusive) of the [Rail Industry Award 2020](#).

<sup>73</sup> Clause 19.1(a) of the Building and Construction Award.